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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Opinion No. 2016-UP-331 (S.C. Ct. App. Filed June 29, 2016)

Claude W. Graham and Vickie B. Graham, ... Petitioners,

v.

Town of Latta, South Carolina,.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 18, 2016.

QUESTIONS PRESENTED

1. **Is post-judgment interest a legal right of the judgment creditor and a legal duty of the judgment debtor?**

2. **Did the Court of Appeals err when it held that an amendment to a statute's substantive language effects no change to its meaning?**

STATEMENT OF THE CASE

On October 11, 2012, a jury awarded Vickie B. Graham $225,000 damages and Claude W. Graham $100,000 for negligence causes of action arising from multiple sewage discharges on their homesite. (R.pp. 4-5, 18-21). Respondent made a Rule 67 SCRCP motion for leave of court to deposit funds with the Clerk of Court seeking to stop the accrual of post-judgment interest. (R.pp. 22-23). Appellants objected on the basis that the 2005 statute amendment prohibited the deposit from stopping such accrual. (R.pp. 27-30).

A hearing was held on the Appellant's objection and the Administrative Law Judge for the 4th Judicial Circuit issued his Order permitting such deposit, declaring that post-judgment interest would stop accruing as of May 14, 2013. (R.pp. 11-15). Not until August 2, 2013 did the Respondent deposit $325,000 plus interest accrued up to May 14, 2013 and by written Order dated December 6, 2013, Appellants' Motion to Reconsider was denied. (R.pp. 16-17). This appeal followed.

The Court of Appeals affirmed the judgment of the circuit court. *Claude W. Graham and Vickie B. Graham v. Town of Latta, South Carolina*, Op. No. 2016-UP-331 (S.C. Ct. App. Filed June 29, 2016). Petitioners seek a Writ of Certiorari to review that decision.

ARGUMENTS

Prologue

Rule 220(b) SCACR is a mandate to the Court of Appeals that "every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with a reason for the court's decision, be preserved in the record of the case (unless frivolous)." The following points that arose below are necessary to the decision of the appeal but are neither stated in writing nor addressed in its decision:

1. How it is that a rule of court can alter a legal duty created by a subsequent statute?
2. What was the effect of the 2005 amendment to §34-31-20(B) S.C. Code Ann.?
3. Does the legislature use "shall" and "must" randomly and interchangeably, without regard to the rules of grammar, or did it act with deliberation and reason?

1. POST JUDGMENT INTEREST IS A LEGAL RIGHT OF A JUDGMENT CREDITOR AND A LEGAL DUTY OWED BY THE JUDGMENT DEBTOR.

A) In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, ***shall*** draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

B) A money decree or judgment of a court enrolled or entered ***must*** draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the *Wall Street Journal* published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

S.C. Code Ann. §34-31-20 (emph. supp.)

RULE 67, SCRCP DEPOSIT IN COURT

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

Rule 67 SCRCP took effect July 1, 1985 and was last amended May 1, 1986. Nothing in the plain language of Rule 67 addresses interest, pre- or post-judgment, nor whether, when, or if it runs, its rate, or its termination. There is no controlling precedent

resolving the inherent conflict between the current and applicable §34-31-20(B) S.C. Code Ann. and Rule 67 SCRCP, which was interpreted below to make "must" discretionary, nor has there been a Supreme Court case applying Rule 67 SCRCP to the *current statute* governing the legal rate of interest. *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999) noted, "Further, Rule 67 is substantially the same as the federal rule allowing a deposit into court. ... Federal courts have uniformly held that Rule 67 'cannot be used as a means of altering the contractual relationships and legal duties of the parties' *(citations omitted)*." *Renaissance* involved a contract rate of interest, but four years later the Court followed *Renaissance* in *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 167 (2003) where "the legal duties of the parties" did not involve a contract rate of interest, rather the duty to pay and the right to receive funds compelled by an Order.

If Rule 67 requires the Court of Common Pleas to stop the accrual of interest whenever a tortfeasor desires to deposit funds into the court, seeking permission that cannot be denied, then the rules will have only assigned to the court rubber-stamp work at a tortfeasor's bidding. Upon request in a case such as this one, the request would automatically be granted and just as automatically the interest would cease. Surely a legislature which says that post-judgment interest must be paid did not also intend to forbid a judge, for whose wisdom it also chose, to exercise judgment - to be powerless when a victim's legal right to that interest is to be altered by the perpetrator. "(The Court) will not construe a statute in a way which leads to an absurd result or renders it

meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C.124, 128, 727 S.E.2d 418, 420 (2012).

The Rules of Civil Procedure are a creation of the Supreme Court, authorized by virtue of Article V, Section 4 of the South Carolina Constitution in 1972, under procedures mandated by Section 4a in 1985. "*Subject to the statutory law,* the Supreme Court shall make rules governing the practice and procedure in all such courts." *S.C. Constitution Article V, Section 4* (emph. supp.). "If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way... ." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n. 4, 728 S.E.2d 477, 481 (2012).

Even if one assumes, for the sake of argument, that Rule 67 is of equal force to a statute, there is nothing about that rule which operates to vary, alter, or amend the statute. Rule 67 is a general rule; it covers all actions where a tangible property is at issue, whether a sum of money or otherwise, whether the party making the request claims or does not claim an interest in the property, and at all stages of the proceeding. The Legal Rate of Interest statute, however, is quite specific; it only applies to "a money decree or judgment" that has been "enrolled or entered." Rule 67 dates from 1986; the Legal Rate of Interest statute's "must" dates from July 1, 2005.

Generalia specialibus non derogant (the general does not detract from the specific). Where there are general words in one Act capable of reasonable and sensible application without extending those words to a subject dealt with specifically or specially in different legislation, a court should not hold that either repeals, alters, or derogates the

other merely by force of general words without any evidence of a particular intention to do so. *Denman v. City of Columbia,* 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). If two laws are potentially, but not necessarily, in conflict, a court should adopt the reading that does not result in an implied conflict with the other law. *The "Vera Cruz",* 10 App. Cas. 59, LR 9 PD 96 (1884); *Rice v. Goodwin*, 2 Colo. App. 267 (1892), citing; *Berke v. Jeffries*, 20 Ia. 145; *Crane v. Reeders*, 22 Mich. 322 (1857). Rule 67 is a rule of court of general application, covering any stage of actions seeking any sort of relief that relates to money or property capable of delivery. Section 34-31-20(B), however, is quite specific: it applies only to a money judgment that has been enrolled and it "*must* draw interest" according to law. The legal rate of interest is established by statute. The portion of the statute at issue here is specific to post-judgment interest on a money judgment. It was enacted *after* the adoption of Rule 67 SCRCP. "Nothing in this rule [FRCP 67] provides for the stopping of interest accrual upon deposit with the court." Wright & Miller, 12 *Fed. Prac. & Proc. Civ.* §2991 (2 Ed.), citing *Blasini-Stern v. Beech-Nut*, 429 F.Supp. 533 (P.R. 1975). The Rule does not vary, alter, or amend the statutory mandate that the Grahams' judgment must draw interest at the current rate of 7¼ %, compounded annually.

Leges posteriors priores contrarias abrogant (a later law takes priority over a contrary earlier one). "It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law. 82 *C.J.S.* Statutes §384b(2), page 904." *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964). A significant change in language is presumed to entail a change in meaning.

Scalia, Antonin & Garner, Bryan *Reading Law*, Thomson/West (2010); *Duvall v. South Carolina Budget & Control Board*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). See, *Stewart v. The Land-Lake Heaven Special Board and Bridge District in Volusia Cnty.*, 71 La. 158, 71 So. 42 (1916); *State v. Plunkett*, 8 Harrison 5 (N.J. 1840), citing *Dr. Foster's Case*, 77 Eng. Rep. 1222, 1232 (1614 K.B.).

Rule 67 may not be used as a means of altering the legal duties of the parties. *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 167 (2003), citing *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.,* 334 S.C. 324, 513 S.E.2d 617 (1999). It was a part of the *South Carolina Rules of Civil Procedure* adopted July 1, 1985, last amended in 1986. *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995) was decided by this Court in 1995 and the lower court cases relied upon by the Respondent, *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998) and *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000) were decided in 1998 and 2000, respectively. S.C. Code Ann. §34-31-20(B) was amended effective January 1, 2001 and again March 21, 2005, so on October 11, 2012, it read: "(B) A money decree or judgment of a court enrolled or entered must draw interest according to law."

Section 34-31-20(B) is a law; Rule 67 is a rule of court. To the extent they are in conflict, the statutory law prevails. To the extent they are in conflict, the one passed later should prevail. To the extent that one is of general application and the other is specific, the specific should prevail. Under all three tests, 34-31-20(B) is to prevail over Rule 67.

Prior to the current law, all money judgments carried interest at a specified rate, but none compounded. The South Carolina Legislature made a deliberate decision to

change the law as it relates to interest rates and in doing so it must have had in mind the existence of Rule 67 and the cases cited by the Town of Latta. In so doing that statute creates a legal right in the Grahams to the interest which "must" be drawn according to law and a legal duty of Latta to pay that interest.

In the *AT&T v. Pac-W* case, *supra,* Pac-West argued that if the court granted AT&T's motion to deposit the judgment amount, that court would be in the business of altering the legal obligations between the parties. Citing, *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050 (D.C. Cir. 1992), the court ruled that it is an abuse of discretion for a court to "alter the legal obligations to the parties if it allowed (a defendant) to avoid an interest rate that it would be otherwise required to pay ... simply because it wishes to make payments to the court, rather than to (a party)". *AT&T v. Pac-W, supra.* Employing virtually identical reasoning, *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., supra*, noted that "there is nothing in Rule 67 indicating a deposit into court will affect the parties' contract regarding interest" and that "Rule 67 is substantially the same as the federal rule." The holding in *Renaissance* was that "a deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract"; the *Renaissance* case dealt with interest accrued by virtue of a contract. Its reasoning, however, would apply here to an entitlement to interest accruing by statute. This is so because Rule 67 "can not be used as a means of altering the contractual relationships **and legal duties** of the parties". (*Renaissance, supra,* emph. supp.). Stopping the contractual accrual of interest would in effect substitute the interest rate of

the clerk of court's deposit account for the interest rate provided by law, which a court has no authority to do.

It is clear that Rule 67's ability has been limited from halting interest by this Court after *Russo, supra,* was decided in 1995, perhaps in light of the legislative changes after that case. *S.C. Dep't of Transp. v. First Carolina Corp.,* 369 S.C. 150, 153-54, 631 S.E.2d 533, 535 (2006) held that the court had abused its Rule 67 discretion by allowing SCDOT to deposit judgment funds to stop the accrual of interest. *Renaissance v. Ocean Resorts, supra,* reversed the trial court's exercise of discretion to stop the accrual of the interest provided by contract. *Bakala* was a 2003 Family Court case based on the post-judgment rate statutes now in effect, but in the instant case, the Town of Latta had not availed itself of the Eminent Domain Act, this case has never been in Family Court, and there is no contract calling for interest; theses case are not 100 % controlling. The next logical expression of this Court's scrutiny is manifested by the *Renaissance* and *Bakala* decisions wherein it approvingly cites the uniform rule of other courts that Rule 67 "can not be used as a means of altering ... the legal duties of the parties."

Respondent argues that Section 34-31-20(B) "does not create any legal duty to pay post-judgment interest". (R.Br.p. 13). We believe this Court disagrees. At common law judgments did not bear interest, so the statute at issue *creates something*; the pertinent analysis is whether the something created is a legal duty. In *Calhoun v. Calhoun*, S.C. 96, 529 S.E.2d 14, 339 (2000), this Court agreed with the judgment creditor that she is "automatically entitled to interest on the money judgment" without regard to whether her Rule 59(e) motion was the first time she requested post-judgment

interest and to whether that motion itself was timely. "Where the law allows interest is a matter of course, it is unnecessary to make demand for it in the pleadings" and "a complainant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course."

Calhoun clearly described an obligation to pay interest which is a *legal duty*, one so manifest that it need not be asked for, one so imperative that even inattentive lawyering will not waive it.

2. THE COURTS MUST GIVE DUE CREDIT TO LEGISLATIVE ACTION BY HOLDING THAT AN AMENDMENT TO A STATUTE'S SUBSTANTIVE LANGUAGE EFFCTS A CHANGE TO ITS MEANING.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *S.C.Dep't. of Transp. v. First Carolina Corp.*, *supra*, 369 S.C. at 153-54; *Shuler v. Tri-Cty Elec. Co-op.*, 374 S.C. 516, 522, 649 S.E.2d 98, 101 (Ct. App. 2007) *aff'd.* 358 S.C. 470, 684 S.E.2d 765 (2009). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Sloan v. S.C. Bd. of Physical Therapy Examr's*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006); *Anderson v. South Carolina Election Commission,* 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012); *Shuler*, *supra.* (See Endnote 1, A.Br.p. 18). A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. Because dictionaries report common usage, it is appropriate to consult widely used dictionary definitions of terms the legislature has not defined. (See Endnote 2, *ibid).*

S.C. Dep't of Transp. v First Carolina Corp. of S.C. further observes that all rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used; whenever possible it should be found in the plain language; where the statute's language is plain and unambiguous and conveys the clear and definite meaning of the rules of statutory construction are not needed, thus the Court has no right to impose another meaning. The Opinion below glosses over the plain language of the statute and the effect of the 2005 amendment to it when it relies upon a general statement that "shall and must refer to a mandatory requirement", overlooking that *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) did not need to consider the effect of an amending statute *replacing* the former with the latter word.

It is a misapprehension, a misinterpretation of the law and the English language, to hold that "shall" and "must" are interchangeable commands of equal force. *Sears v Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) noted the "mandatory tenor of the language" in "shall draw interest according to the law" but even so held that "the statute does not automatically apply in every case."

It is manifest that the legislature *did change* the post-judgment interest statute in 2005, so, it behooves the Court to answer the questions: (a) Why did the legislature take the action it took? (b) What is the effect of that change? To analyze the reason for the change from "shall" to "must", one assumes that the legislature chose with care the words it used, that it intended to effect a substantive change in the law, and that such

amendment is "purposeful rather than unnecessary". *Cannon v S.C. Dep't of Probation, Parole, and Pardon Serv.*, 371 S.C. 581, 584, 641 S.E.2d 429 (2007).

The rulings below fly in the face of controlling law when they held the legislature acted without intent, without purpose, and without effect because it is unnecessary to draw *any distinction whatsoever* between "shall" and "must". Those courts have misapprehended the importance of comparing and contrasting two statutory ways of saying similar things, particularly when the legislature says the similar things differently *after* courts lower than this have weakened a mandatory requirement. From 2001 to 2005 the sentence read:

> All money decrees and judgments of courts enrolled or entered shall draw interest according to law.

Now it reads:

> A money decree or judgment of a court enrolled or entered must draw interest according to law.

A plain reading of the second block is that the legislature in 2005 made more emphatic the mandate for judgments to draw interest. This becomes strikingly noticeable when compared to Section A's treatment of accounts stated and amounts due; such pre-judgment sums "shall draw interest." But judgments "must." A failure to *consider* the reasoning behind the content or the style of that contrast ignores the legislature's plain, unambiguous intent. Only one reading of the statute is respectful of separated powers:

"shall", which "does not automatically apply in every case", *Sears*, *supra*, was retained in 20(A) for pre-judgment interest; 20(B) was changed to distinguish it, thus "must" will automatically apply interest after judgment.

An entered judgment "must draw interest according to law." Must is an intransitive verb in all tenses and all persons, a verbal auxiliary. Each of its eight (8) meanings is infused with an air of command or certitude from which there can be no variance:

1. a: is commanded or requested to
   b: is urged to: ought by all means to
2. is compelled by physical necessity to
3. is obliged to: is compelled by social considerations
4. is required by law, custom, or moral conscience to ("we must obey the rules")
5. a: is compelled by resolve to: is determined to
   b: is unreasonably or perversely compelled to
6. is logically inferred or supposed to
7. is compelled by fate or natural law to
8. was presumably certain to: would surely or necessarily: was bound to.

Webster's Third International Dictionary, unabridged, 1492 (1993).

The Tort Reform Act of 2005 rewrote the section to change from a fixed, simple interest rate of 12% to an annually compounding rate which varies in accordance with market conditions and replaced the "shall" in the first sentence with "must." When a legislature reenacts an existing statute, it is presumed to have been aware of the cases interpreting that statute and is reenacting the case law. Conversely, when it amends an existing statute, it is presumed to have a reason for choosing the words it uses. *2B Sutherland on Statutes and Statutory Construction*, Singer & Singer, §49:9, (7th Ed.

2008) "universally the rule". There is a presumption that the General Assembly, in amending a statute, intended to effect a substantive change in the law. See *Cannon v S.C. Dep't of Probation, Parole, and Pardon Serv.*, 371 S.C. at 584; *16 Jade Street, LLC v. R.Design Const. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). "As recently noted, we must 'presume the legislature did not intend a futile act' when construing a statutory amendment." *State v. Leopard*, 563 S.E.2d 342, 349 S.C. 467 (2002) (citing *State v. Knuckles*, 348 S.C. 593, 560 S.E.2d 426 (2002).

This Court has never *held* that the rule actually stopped the accrual of the interest from any particular judgment debtor. The holding of *Russo v. Sutton,* 317 S.C. at 454 is "We hold Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest mandated by §34-31-20." The holding of *Bakala v. Bakala*, 352 S.C. at 632 is that Rule 67 may not be used as a means of altering the legal duties of the parties. The holding of *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999) is that since "there is nothing in Rule 67 indicating a deposit into court will affect the parties' contract regarding interest... a deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract." The holding of *S.C.Dep't. of Transp. v. First Carolina Corp. of South Carolina, supra,* is that in a condemnation action the deposit of the judgment funds into court by SCDOT does not stop the accrual of post-judgment interest. No decision of this Court has ever *held* that the deposit of money pursuant to Rule 67 stops the accrual of post-judgment interest or otherwise alters the legal duties of the parties.

Yes, the SC Court of Appeals has twice considered the interplay between Rule 67 and a version of the Legal Rate of Interest statute as it once read, two revisions ago, prior to 2001. *Duval v. Heritage Life Ins. Co.*, 339 S.C. at 620 held that a plaintiff with a breach of contract judgment is entitled to interest until the funds are deposited with the clerk of court and the judgment debtor should be allowed to avoid post-judgment interest by its deposit. *Small v. Pioneer Machinery, Inc.*, *supra*, held, in a product liability suit, that the lower court's order stopping 14% interest and reducing it to 8% before the deposit was in error because "it is the final tender of the money to the court, not the filing of the motion for permission" that stops interest. Both cases relied heavily on the *dicta* from *Russo*, but even so the Legal Rate of Interest statute has been twice amended since, the final time substantially and materially.

In its 2005 legislative session, South Carolina enacted a comprehensive tort reform, Act 27, including among its fifteen (15) sections an amendment to S.C. Code Ann. §34-31-20 so as to change the Legal Rate of Post-Judgment Interest from 12% a year to "equal the prime rate as listed in the first edition of the *Wall Street Journal* published for each calendar year plus four percentage points." 2005 Act 27. The Act found "that each change and each topic relates directly to or in conjunction with other sections to the subject of tort and other civil action reform... ." *ibid.* §1.

Extrinsic circumstances surrounding the passage of legislation may serve as an aid to its interpretation. For a striking example, see Chief Justice Rehnquist's panoramic, epic, historic view, including wagon trains, Indians, and the gold rush, that influenced the court's statutory interpretation in *Leo Sheep Co. v. US*, 440 U.S. 668, 669-677 (1979);

accord, *In Re Hospital Pricing Litig.*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008) and *Stardancer Casino, Inc. v Stewart*, 347 S.C. 377, 385, 556 S.E.2d 357, 361 (2001). This Court is aware of the extrinsic circumstances of the Tort Reform Act. (See also Ap.Br.p. 16, Endnote 4).

The Act uses "**shall**" some thirty-three (33) times; it uses "**must**" some twenty-one (21) times. Approximately half the time "**shall**" is used to issue a command to an entity, whether a person or an institution, and the other half of the time it is used as a statement of a future condition. "**Must**" is used uniformly and exclusively to mandate, order, or command a thing (not an entity) in a manner descriptive of the end result of the command. In each case "**must**" is an intransitive verb. The legislature's "phrases and sentences are to be construed according to the rules of grammar... ." *Poole v. Saxon Mills,* 192 S.C. 339, 6 S.E.2d 761, 764 (1940).

In several instances, "**must**" was substituted for the Code's former "**shall**", including in the sentence at issue: "All money decrees and judgments of courts enrolled or entered shall draw interest according to law" became "A money decree or judgment of a court enrolled or entered must draw interest according to law."

To analyze the reason for the change, one assumes that the Legislature chose with care the words it used when it enacted the statute, that the General Assembly intended to effect a substantive change in the law when amending a statute, and that such amendment is purposeful rather than unnecessary. *Cannon v. S.C. Dept. of Probation Parole and Pardon Serv., supra.* The General Assembly is also presumed to be aware of the common law. *State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1997).

In 1995 the Supreme Court of the United States stated:

> Though "shall" generally means "must," legal writers sometimes use or misuse, "shall" to mean "should," "will," or even "may." See D. Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 402-403 (1992) ("shall" and "may" are "frequently treated as synonyms" and their meaning depends on context); B. Garner, *Dictionary of Modern Legal Usage* 939 (2d ed, 1995) ([C]ourts in virtually every English-speaking jurisdiction have held - by necessity - that *shall* means *may* in some contexts, and vice versa."). For example, certain of the Federal Rules use the word "shall" to authorize, but not to require, judicial action. See, *e.g.*, Fed. Rule Civ. Proc. 16(e) ("The order following a final pretrial conference *shall* be modified only to prevent manifest injustice."); Fed. Rule Crim. Proc. 11(b) (A *nolo contendere* plea "*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.") (Emphasis added by Supreme Court).

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434, fn. 9 (1995).

Appellants' Brief engages in an extensive, alas pedantic and arcane, discussion of concurrent events in the legal drafting and writing community following the US Supreme Court's mortal strike at "shall." "Shall" was purged from all four major sets of Federal Rules, including Evidence. Careful drafters recognized the rarity of "shall" in common discourse. A flurry of literature motivated professionals and legislators to take care with "shall" and "must." Examples of the academic and intellectual climate in which our legislature made its shift are set forth in Appellant's Brief, (R.pp.10-13), and Endnotes 4-7, (R. pp. 18-27).

With this background of common law, presumably within the knowledge of the South Carolina legislature at the time of the 2005 amendments to the Act, the drafter was able to identify the defect in the former language: "All money decrees and judgments of courts enrolled or entered shall draw interest according to law." A money decree or

judgment is not an entity, thus it can be commanded to do nothing; "shall" was being used, inelegantly albeit commonly, as an intransitive verb to a thing incapable of either acting or refraining.

Respondent has argued that the last phrase of S.C. Code Ann. §34-31-20(B), "according to law," is an incorporation of the *dicta* from *Russo v. Sutton*, *supra*, upon which it so heavily relies. That argument depends upon a grammatical and legal misreading of the sentence, "(B) A money decree or judgment of a court enrolled or entered must draw interest according to law."

"According to law" is a prepositional phrase which modifies the word "interest." Respondent's argument depends upon that prepositional phrase modifying some unspecified earlier words in the sentence; one infers "must draw." The next sentence, however, defines "according to law": the legal rate of interest = prime plus four. At common law, judgments did not bear interest, Annot., 15 *A.L.R* (*3d*) 411, 414 (1967), so interest is generally allowable only pursuant to statutory enactments. "(I)nterest according to law" means the statutory enactment of the ensuing sentence, which creates the legal rate of interest.

The doctrine of the last antecedent provides that a "limited or restrictive clause contained in a statute is generally construed to refer to and limit and restrict an immediately preceding clause, or the last antecedent." *Black's Law Dictionary* 1390 (9th Ed. 2009). Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

Thus, a proviso usually is construed to apply to the provision or clause immediately preceding it. 2A Norman J. Singer, *Sutherland on Statutory Construction* 4733 (6th Rev. Ed. 2000). See also *Barnhart v. Thomas*, 124 S.Ct. 376, 380 (2003); *U.S. v. Hayes*, 555 U.S. 415 (2009). Accord, *Sears v. Fowler*, *supra*, in re *Patel*, 431 B.R. 682, 689-90 (S.C. 2010). In the absence of the phrase "according to law", the first sentence of the statute would leave the rate of interest undefined, since no such rate existed at common law. Thus modified, the interest is made clear by the second sentence of 20(B).

The legislature's recognition that "shall", despite its mandatory tenor, did not automatically result in a command in every case no doubt led it to clarify and change the law by saying a judgment "must draw interest according to law." The central point of Appellants' Argument is that South Carolina in 2005 made the post-judgment legal rate of interest more clearly and indubitably mandatory than it had been when *Sears and Russo* were decided. The Tort Reform Act of 2005 uses "shall", correctly so, only to issue a command to an entity or to describe a future condition; it always uses "must" as an intransitive verb to mandate, order, or describe a condition which it requires to exist. Respondent does not accord the statutory law of South Carolina the respect it, or this Court, should when it argues that the Act uses shall and must willy-nilly: "interchangeably." To interchange those words in this statute results in a hodgepodge of grammatically incorrect, logically impossible law: things commanded to perform acts as if they had free will and entities described with properties they cannot have.

> There is a presumption that equivalent words have an equivalent meaning when repeated in the same statute unless a contrary legislative intent is

> clearly expressed. Conversely, where different language is used in the same connection in different parts of the statute, it is presumed that the legislature intended a different meaning. Thus, where a legislature uses similar but different terms in a statute, particularly within the same section, it is presumed that the legislature intended such terms to have different meanings.
>
> 82 *C.J.S.* Statutes §388.

When the legislature uses certain language in one part of the statute and different language in another, the usual rule is that the court assumes different meanings were intended. *DePierre v. U.S.*, 131 S.Ct. 2225 (2011). *Wine v. Commonwealth*, 301 Mass. 451, 457, 17 N.E.2d 545, 548 (1938); *Forst v. Rockingham Poultry Mktg. Co-op., Inc.*, 222 Va. 270, 27-78, 29 S.E.2d 400, 404 (1981). When South Carolina chose to improve the grammar, logic, and clarity of the post-judgment interest statute it wisely left no room for doubt about its mandate: *post-judgment interest must be paid.*

CONCLUSION

For the reasons stated, the Petitioners ask the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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September 9, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Opinion No.2016-UP-331 (S.C. Ct. App. Filed June 29, 2016)

Claude W. Graham and Vickie B. Graham, ...Petitioners,

v.

Town of Latta, South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that I have served the *Petition for Writ of Certiorari* on Counsel for the Respondent by depositing copies of the same in the United States Mail, sufficient postage prepaid, on September 9, 2016, addressed as follows: ANDREW F. LINDEMANN, ESQ., MICHAEL B. WREN, ESQ., and DANIEL C. PLYLER, ESQ., POST OFFICE BOX 8568, COLUMBIA, SOUTH CAROLINA 29202.

I further certify that I have served a copy of the *Petition for Writ of Certiorari* on the Clerk of Court for the South Carolina Court of Appeals by depositing a copy of the same in the United States Mail, sufficient postage prepaid, on September 9, 2016, addressed as follows: THE HON JENNY ABBOTT KITCHINGS, CLERK SC COURT OF APPEALS, POST OFFICE BOX 11629, COLUMBIA SC 29211.

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