

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DILLON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

APPENDIX

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Town of Latta, South Carolina, Respondent.

Appellate Case No. 2014-000208

Appeal From Dillon County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2016-UP-331
Submitted May 1, 2016 – Filed June 29, 2016

AFFIRMED

Reynolds Williams, of Willcox Buyck & Williams, PA,
of Florence, for Appellants.

Andrew F. Lindemann, Michael Brian Wren, and Daniel
Clifton Plyler, all of Davidson & Lindemann, PA, of
Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150,
153, 631 S.E.2d 533, 535 (2006) ("The granting of leave to deposit money with the

court pursuant to Rule 67, SCRCF is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion."); S.C. Code Ann. § 34-31-20(B) (Supp. 2015) ("A money decree or judgment of a court enrolled or entered must draw interest according to law."); Rule 67, SCRCF ("In an action in which any part of the relief sought is a judgment for a sum of money . . . , 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"); *Russo v. Sutton*, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (1995) ("[A] judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest."); *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

AFFIRMED.¹

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No.: 2014-000208

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JUL 13 2016

SC Court of Appeals

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

v.

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

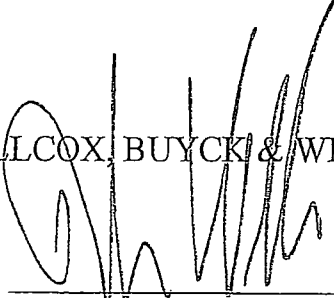
PETITION FOR REHEARING

The Appellants petition the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Court of Appeal filed June 29, 2016).

The grounds for the Appellants' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellants' petition for rehearing is based on the Court's decision in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Court of Appeal filed June 29, 2016), the supporting memorandum filed herewith, the briefs and Record on Appeal, Rule 221(a), SCACR, Rule 224, SCACR, and other rules of court.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No.: 2014-000208

RECEIVED

JUL 13 2016

SC Court of Appeals

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

v.

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

**MEMORANDUM IN SUPPORT OF
APPELLANTS' PETITION FOR REHEARING**

The Appellants have petitioned this Court for rehearing of the recent decision in *Graham v. Town of Latta*, Opinion No. 2016-UP-33 filed June 29, 2016. The Appellants respectfully submit that the following points were overlooked or misapprehended by this Court.

I. Precedent

S.C. Dep't of Transp. v First Carolina Corp. of S.C., 369 S.C. 150, 631 S.E.2d 533 was decided in 2006 based upon the resolution of a conflict between the eminent Domain Act, S.C. Code Ann. §28-2-420)(A)(2005) and Rule 67 SCRCP and has no precedential value relevant to §34-31-20(B), either before or after its 2005 amendment. The conflict in the instant case is between Rule 67 SCRCP and S.C. Code Ann. §34-31-20(B). This court misapprehends the effect of *Russo v Sutton*, 317 S.C. 441, 444, 445 S.E.2d 895, 896 (1995) when it relies upon *dicta* from that case as if it were a holding of precedential value. The holding of *Russo* is “we hold Sutton’s unilateral deposit of the funds insufficient to stop accrual of the interest mandated by §34-31-20.” And the portion quoted in the Opinion here should not be relied upon as if it were a *Russo* holding.

There is no controlling precedent resolving the inherit conflict between the currently applicable §34-31-20(B) S.C. Code Ann. (misquoted in the Opinion when it says a judgment “must draw interest according to law” instead of “MUST draw interest according to law”) and Rule 67 SCRCP which is being interpreted to make “MUST” discretionary.

II. Statutory Intent

S.C. Dep't of Transp. v First Carolina Corp. of S.C., *supra*, correctly 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 (citations omitted.). The Opinion here ignores, even misquotes, the plain language of the statute, the effect of the 2005 amendment to it, and its plain language when it relies upon a general statement that "shall and must refer to a mandatory requirement." *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.

It is a misapprehension and 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 on its face that the legislature did, in fact, change the post-judgment interest statute in 2005. If this court finds the legislature had no reason to change that statute, it should say so, since such a finding would be contrary to applicable law. So, it behooves this court to answer the questions: Why did the legislature take the action it took? What is the effect of that change? To analyze the reason for the change from “shall” to “**MUST**”, one assumes that the legislature choose with care the words it used when it enacted the statutory change, that the General Assembly intended to effect a substantive change in the law when amending the statute, 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).

As it stands, the Opinion flies in the face of controlling law when it holds the legislature acted without intent, without purpose, and without effect because it is unnecessary to draw *any distinction whatsoever* between “shall” and “**MUST**”. This court has misapprehended the importance of comparing and contrasting two statutory ways of saying similar things, particularly when the similar things are said differently after lower court rulings weakening a

mandatory requirement. From 2001 to 2005 it 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.

The plain reading of and the unambiguous fonting of the second block is that the legislature in 2005 made more emphatic the mandate for judgments to draw interest. By failing to consider the reasoning behind the content or the style of that emphasis, the court has misapprehended the legislature's plain and unambiguous intent.

By holding that a rule of civil procedure may limit the command of a subsequently enacted statute, this court has also misapprehended or misapplied the constitution of South Carolina. Article V, §4 specifically makes any such rules enacted by the Supreme Court "subject to the statutory law." Thus, the premise of §34-31-20(B)'s mandate over Rule 67 SCRPC is apparent not only from the sequence in which they were promulgated but also by the doctrine of separation of powers.

“If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by (the South Carolina Supreme Court) must give way... .” *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 401 N.4, 728 S.E.2d 477, 481 (2012).

III. Discretion

The Opinion observes that the granting of leave to deposit money with the court pursuant to Rule 67 SCRCP is a matter within the discretion of the trial court which should only be overturned if there is an abuse of that discretion. “An abuse of discretion occurs when the ruling is based on an error of law... .” *S.C. Dep’t of Transp. v First Carolina Corp. of S.C.*, *supra*, citing *Conners v Forest Acres*, 363 S.C. 460, 467 611 S.E.2d 905 (2005). This court has misapprehended the lower court’s ruling. That court “realize(d) this is a very real monetary issue to your clients” (R. p. 119, ll. 2-7) but succumbed to the Town of Latta’s argument that it had “no discretion” and declined to exercise any. The error of law which has been misapprehended here is whether or not the trial court does, or does not, have any discretion. Such an error of law is itself an abuse of discretion.

IV. Preservation of the Record

(b) Decision by the Court. In every decision rendered by an Appellate Court, 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.... (2) the Court of Appeals need not address a point which is manifestly without merit.

Rule 220, S.C.A.C.R.

The following points necessary to the decision of the appeal are neither stated in writing nor addressed in the Decision:

1. The effect of the 2005 amendment to §34-31-20(B) S.C. Code Ann.
2. How it is that a rule of court (Rule 67 SCRCP) can alter the legal duty created by a subsequent statute.
3. Is the refusal to exercise discretion an exercise of discretion?
4. Does the legislature use "shall" and "**MUST**" randomly and interchangeably, without regard to the rules of grammar, or should it be presumed to have acted with deliberation and reason?

Each of the four points described in the preceding paragraph were distinctly stated by the Appellants and argued by the Respondent, in the record of the court. "(Rule 67) does not vary, alter, or amend the statutory mandate that the Grahams' judgment must draw interest at the rate of 7 ¼%, compounded annually." (Aplnt. Br. 7-8). The Appellants' argument that

Rule 67 can not be used to alter the legal duties of the parties “lack(s) merit.” (Respt. Br. 3).

“(The Tort Reform Act of 2005) rewrote the section to change from a fixed, simple rate of interest 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.” (Aplnt. Br. 4-5). “The change from ‘shall’ ‘to’ ‘must’ (*sic*) clearly did not effect the change in the law suggested by the Grahams.” (Respt. Br. 12).

“There has never been a Supreme Court case applying Rule 67 SCRCF to the current statute governing the legal rate of interest. *S.C. Dep’t of Transp. v First Carolina Corp. of S.C.*, 369 S.C. 150, 631 S.E.2d 533 (2006)...involved the legal rate of interest as it used to read, from 2001 to 2005.” (Aplnt. Br. 8). “Moreover, the Grahams have disregarded existing South Carolina authority that treats ‘shall’ and ‘must’ (*sic*) as synonymous and interchangeable terms.” (Respt. Br. 8).

“The Court...made an error of law when he specifically declined to exercise discretion... .” (Aplnt. Br. 16). “The Supreme Court did not,

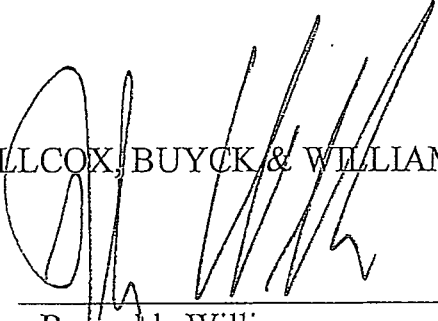
however, set forth any factors for the Circuit Court to consider in determining whether judgment debtor who complies with Rule 67 may nonetheless be denied the option of depositing funds with the court to stop the accrual of post-judgment interest.” (Respt. Br. 14).

CONCLUSION

Based on the foregoing discussion, the Appellants respectfully request that the Court rehear its decision in this case. The Appellants request this court reverse the Order of Judge J. Michael Baxley stopping the accrual of post-judgment interest.

Respectfully submitted,

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July 12, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
J. Michael Baxley, Circuit Court Judge

Case Nos. 2008-CP-17-0376
2008-CP-17-0377

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

v.

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

RETURN TO APPELLANTS'
PETITION FOR REHEARING

The Appellants Claude W. Graham and Vickie B. Graham ("Grahams") have petitioned this Court for a rehearing of its recent unpublished opinion in *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Ct. App. filed June 29, 2016). In response, the Respondent Town of Latta ("Town") submits that this Court properly ruled on the issues challenged by the Grahams in their petition for rehearing.

I.

In their petition for rehearing, the Grahams continue to focus on the amendment of Section 34-31-20(B) in 2005 by which the term "shall" was changed to "must." The Grahams, however, now add a new argument.¹ They now cite to what they term "unambiguous fonting" and insist that the 2005 amendment used the term "MUST" in all capitals. They, in fact, accuse the Court of "misquoting" the "plain language" of the statute. It is unknown from where the Grahams got this notion that the statute emphasizes the word "must" by stating it in all capitals. A review of 2005 Act No. 27 does not show the word "must" as written in all capitals. *See*, 2005 Act No. 27, § 7. Likewise, the codification of Section 34-31-20(B), as adopted by the Code Commissioner, does not show the word "must" as written in all capitals. *See*, S.C. Code Ann. § 34-31-20(B). In short, there is no "unambiguous fonting" as claimed by the Grahams, and the word "must" is not entitled to any extraordinary emphasis.

Instead, as previously argued by the Town, South Carolina consistently holds that "shall" and "must" are synonymous and interchangeable terms. For example, in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), the Supreme

¹ In *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), the Supreme Court explained that "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." 564 S.E.2d at 322. *See also*, *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (same).

Court explained that "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." 574 S.E.2d at 743. *See also, Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) (same). That is also the holding of many cases from other jurisdictions, including the United States Supreme Court.²

In addition, if the General Assembly had intended to effect some substantive change by using a different mandatory term, i.e., changing "shall" to "must," that would have been clearly stated in the title of 2005 Act No. 27. As for the amendment to Section 34-31-20(B), the title to 2005 Act No. 27 only states as follows: "To amend Section 34-31-20, as amended, relating to the legal rate of interest, so as to change the rate from twelve percent 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." *See*, 2005 Act No. 27.

In sum, the Court ruled correctly in finding that the 2005 amendment to Section 34-31-20(B) in changing "shall" to "must" did not change the meaning of the statute and that such a change should not be construed as the General Assembly's express or implied intent to overturn *Russo* and other precedent that allows for a judgment debtor to deposit the judgment amount with the court under Rule 67 so as to stop the accrual of post-judgment interest. The change from

²

The Court is referred to the Town's Respondent's Brief for these additional cites.

"shall" to "must" clearly did not effect the change in the law suggested by the Grahams.

II.

As this Court quoted, in *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), the Supreme Court explained that "a judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest." 454 S.E.2d at 896. The Grahams now argue that that this Court's quotation from *Russo* is mere dicta and not precedential.

In *Nash v. Tindall*, 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007), this Court explained that dicta "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 650 S.E.2d at 83. The rule of law from *Russo*, as this Court cited, is not dicta. The Supreme Court explained the rule of law and then concluded that "Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest mandated by § 34-31-20." *Russo*, 454 S.E.2d at 897. The rule of law was not unnecessary to the decision. In fact, the Supreme Court wrote: "Accordingly, we **hold** that to stop accrual of interest, a debtor must comply with the plain language of Rule 67." *Id.* (Emphasis added). Certainly, this Court has not relied on mere dicta from *Russo*.

III.

The Grahams also argue that the Circuit Court erred in failing to exercise its discretion to decide whether it was appropriate to allow the Town of Latta to pay the judgment amount into court. This argument fails for several reasons.

First, the rule of law recognized in *Russo* does not state that a court may choose not to follow the rule. Instead, in *Russo*, the Supreme Court indicated that "to stop accrual of interest, a debtor must comply with the plain language of Rule 67." *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895, 897 (1995). Thus, contrary to the Grahams' assertion, a circuit court is tasked within its discretion to make certain that the party has fully complied with Rule 67.³ In a footnote in *Russo*, the Supreme Court did explain that a court may also exercise discretion once the deposit is made in determining whether "the fund [should] be placed in an interest bearing account." *Id.*, n.3. The Supreme Court did not, however, set forth any factors for a circuit court to consider in determining whether a judgment debtor who complies with Rule 67 may nonetheless be denied the option of depositing funds with the court to stop the accrual of post-judgment interest.

Yet, even if the decision is entirely discretionary with the court, the Grahams have not offered any discussion of the factors that a circuit court is required to

³ The Grahams do not argue that the Town failed to properly comply with Rule 67.

consider nor have the Grahams shown that this was not an appropriate case under such factors for allowing the Town to pay the amount of the judgments into court.

Finally, in its order, the Circuit Court found "no basis for the Court to disallow the use of Rule 67 in this case." (R. 14). To the extent that the Grahams contend that that is not a proper ruling or that the lower court failed to properly exercise discretion, that issue is not addressed in the Circuit Court's orders. Furthermore, while the Grahams did file a Rule 59(e) motion, this issue was not raised therein and should be deemed waived for appellate review.

IV.

Lastly, the Grahams appear to argue that there is a conflict between Rule 67 and Section 34-31-20(B). They argue that this Court "has also misapprehended or misapplied the constitution of South Carolina," citing the separation of powers doctrine. That doctrine was never raised in the Court below, nor in briefs filed with this Court. It is clearly an issue raised for the first time on rehearing, which is not permissible. *See, Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review). In addition, the argument is presented only in a conclusory fashion.⁴

⁴ It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also, Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

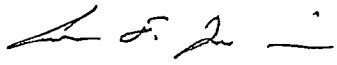
Nonetheless, even if properly preserved and presented, the argument lacks merit. Section 34-31-20(B), as amended in 2005, retained the qualifying language "according to law." By retaining that language, the General Assembly recognized that the requirement that a judgment accrue interest must be "according to law," which is obviously inclusive of the rule of law as identified in *Russo* and applied since. If Section 34-31-20(B) is to be construed as making the accrual of post-judgment interest mandatory without any exceptions previously recognized by the courts, then the phrase "according to law" is surplusage. There would have been no need to include "according to law"; it would add nothing to the statute. It is well settled, however, "that statutes should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Abraham v. Palmetto Unified School District No. 1*, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), citing *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462, 463 (1995). In short, there is no conflict between Section 34-31-20(B) and Rule 67 as applied by the appellate courts.

CONCLUSION

Based on the foregoing discussion, the Respondent Town of Latta respectfully requests that this Court deny the Appellants' petition for rehearing.

Respectfully submitted,

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July 25, 2016

The South Carolina Court of Appeals

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

v.

Town of Latta, South Carolina, Respondent.

Appellate Case No. 2014-000208

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

Paul A. Turner J.

Alfred T. McDonald J.

Columbia, South Carolina

cc:

Reynolds Williams, Esquire
Andrew F. Lindemann, Esquire
Michael Brian Wren, Esquire
Daniel Clifton Plyler, Esquire

FILED

August 18, 2016 27

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

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v.

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RECORD ON APPEAL

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

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RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF DILLON

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IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Claude W. Graham and Vickie B. Graham

Civil Action No.: 2008-CP-17-0376
2008-CP-17-0377

Plaintiff,

v.

Town of Latta, South Carolina,

Defendant.

CLERK OF COURT
DILLON COUNTY

A CERTIFIED
TRUE COPY ORDER

CLERK OF COURT
DILLON COUNTY

This matter comes before the Court by way of Defendant Town of Latta's Motion for Judgment Notwithstanding Verdict (JNOV) pursuant to Rule 50(b), SCRCPP, or in the alternative, for New Trial Absolute pursuant to Rule 59, SCRCPP. Plaintiffs, Claude W. Graham ("Mr. Graham") and Vickie B. Graham ("Mrs. Graham"), are represented by Reynolds Williams, Esquire, and Defendant is represented by Michael Wren, Esquire, and Daniel Plyler, Esquire.

Plaintiffs filed separate Complaints against Defendant on November 19, 2008. Mr. Graham's Complaint contained a cause action for negligence, and Mrs. Graham's Complaint alleged negligence, inverse condemnation, and trespass. A jury trial was held the week of October 8, 2012. Before the matter was submitted to the jury, this Court granted Defendant's Motion for Directed Verdict as to the trespass and inverse condemnation claims. The jury returned with a verdict of \$100,000 for Mr. Graham and \$225,000 for Mrs. Graham on their negligence claims. Defendant filed post-trial motions on October 26, 2012. Plaintiffs and Defendant submitted memoranda on the post-trial motions.

1. JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

Defendant contends that the evidence adduced at trial does not justify the jury's verdict and that the Court should grant Defendant's motion for JNOV. "A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50(b), SCRCPP. In ruling on JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom, in the light most favorable to the non-moving party. *See Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). "The trial judge cannot disturb the factual findings when ruling on a motion for judgment notwithstanding

the verdict unless a review of the record discloses no evidence that reasonably supports them.” *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-32, 603 S.E.2d 605, 611 (Ct. App. 2004). “The trial court must deny the motions when evidence yields more than one inference or its inference is in doubt.” *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002).

A. Tort Claims Act

Defendant moved for a Directed Verdict at the conclusion of Plaintiffs’ case and renewed its arguments as to Plaintiffs’ negligence claims at the conclusion of the evidence. Defendant contends that it is entitled to JNOV because it is immune from Plaintiffs’ negligence claim for failure to properly maintain the sanitary sewer and drainage system based upon exceptions to the waiver of sovereign immunity under the South Carolina Tort Claims Act, specifically S.C. Code Ann. Sections 15-78-60(1), (2), and (5) (1976). “The governmental entity asserting the Act as an affirmative defense bears the burden of establishing a limitation upon liability or an exception to the waiver of immunity.” *Hawkins v. City of Greenville*, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004). “The Plaintiff must present evidence of the governmental entity’s duty to act in order to recover under the Act.” *Id.* at 293, 594 S.E.2d at 564.

Section 15-78-60(1) provides that a “governmental entity is not liable for a loss resulting from . . . legislative, judicial, or quasi-judicial action or inaction,” and Section 15-78-60(2) provides immunity for “administrative action or inaction of a legislative, judicial, or quasi-judicial nature.” There is no evidence of any legislative, judicial, or quasi-judicial action or inaction or any administrative action or inaction. Plaintiff presented testimony that Defendant had a duty to operate and maintain the sewer system and that the Mayor of the Town of Latta was aware of a problem on Plaintiffs’ property after the September 5 - 6, 2008 flooding events. The evidence presented at trial was that the Defendant’s governing body did nothing consciously or unconsciously regarding the sanitary sewer and drainage matter on Plaintiffs’ property. There was no testimony that any ordinance was enacted in relation to Plaintiff’s property or the flooding or that there was any action or inaction of a legislative, judicial, or quasi-judicial nature by the Town of Latta’s governing body. In addition, there was no evidence presented that any administrative action or inaction took place. Accordingly, Sections 15-78-60(1) and (2) do not apply. ad
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Section 15-78-60(5) provides a governmental entity immunity for "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." "A finding of immunity under the Act 'is contingent on proof that the governmental entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.'" *Sabb*, 350 S.C. at 428, 567 S.E.2d at 237 (quoting *Wooten ex rel. Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999)). The South Carolina Court of Appeals has held that a city exercises discretion in "the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system," and therefore, "is immune from liability for negligence claims arising out of the design and maintenance of the drainage system." *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564.

The burden was on Defendant to show that it not only actually weighed competing considerations and alternatives regarding the action or inaction taken to remedy the problems with its sanitary sewer and drainage system on Plaintiffs' property, but that, in doing so, it utilized accepted professional standards appropriate to resolve the issue. The standard to prove discretionary immunity is inherently factual. *See Pike v. South Carolina Dept. of Transp.*, 343 S.C. 224, 232, 540 S.E.2d 87, 91 (2000). A government entity "should not be entitled to discretionary immunity as a matter of law by creating an issue of fact." *Id.* "It is not enough to say the defect was noted and a decision was made not to repair it." *Id.* Defendant claims that the testimony of Mike Hanna established that Defendant considered and weighed competing alternatives, and then used accepted professional standards in deciding that there was nothing needed to be done regarding the portion of its sanitary sewer and drainage system at issue. Testimony was given at trial that Defendant was presented with several choices to remedy the drainage problem: move the pipe on Plaintiffs' residence, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing. Testimony was also presented that Defendant conducted smoke tests to determine whether there was a defect, and attempted to snake a camera through the line, then made a decision not to repair the pipe. Roger Davis, Plaintiffs' expert in mechanical engineering and environmental engineering in the field of waste disposal, testified that DHEC reports indicated that the Defendant was warned to take action or investigate an inflow problem in the Town's water system. Mr. Davis further testified that this

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type of problem may get worse if not remedied. Thus, testimony was presented that Defendant was on notice of defects in the Town's water system and also at Plaintiff's residence in particular, yet made a decision not to repair the defects.

Furthermore, a duty arose on Defendant's part once Defendant was placed on notice of the problem at Plaintiffs' residence after the flooding events on September 5 - 6, 2008. *See Sabb*, 350 S.C. at 429, 567 S.E.2d at 237. Danielle Watson of the South Carolina Department of Health & Environmental Control (DHEC) testified that Defendant had a duty to operate and maintain the sewer system. Roger Davis provided testimony that there was a breach in the system and that Defendant failed to properly maintain the system. Whether Defendant breached its duty to maintain its drainage system by failing to exercise one of the options available to fix the flooding at Plaintiffs' residence was a question for the jury. *See Steinke v. South Carolina Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). The jury considered the evidence of whether Defendant's inaction constituted maintenance and rejected the discretionary immunity provision of the Tort Claims Act. Because there is evidence to support the jury's verdict, Defendant's Motion for JNOV on the grounds that Plaintiffs' negligence claim is barred by application of the South Carolina Tort Claims Act is **DENIED**.

B. Standard of Care and Proximate Cause

Defendant maintains that Plaintiffs failed to produce evidence at trial regarding the applicable standard of care for proper maintenance of the portion of Defendant's sanitary sewer and drainage system at issue. Defendant also asserts that the matters at issue were not within common knowledge, and that design, operation, and maintenance of a municipal drainage system requires specialized training and knowledge.

There was evidence presented at trial relating to duty and Defendant's breach of that duty. Testimony was presented by Danielle Watson that Defendant had a duty to operate and maintain the sewer system. Roger Davis provided testimony that there was a breach in the system and that Defendant failed to properly maintain the system. If the duty to maintain a municipal drainage system is outside the realm of common knowledge, Plaintiff provided expert witness testimony on that duty.

Defendant also claims that Plaintiffs failed to present evidence establishing that their damages were proximately caused by Defendant's acts or omissions. Taking the evidence in the light most favorable to Plaintiffs, there was evidence to establish that there was a problem with

Defendant's sewer line on Plaintiffs' property. There was also evidence that Defendant took no steps to correct the problem to stop the damage to Plaintiffs after it became aware of the problem. Davis' testimony was that Defendant's sewer and drainage system maintenance records showed infiltration and/or inflow problems. Evidence was also presented as to the location of Defendant's sewer line in relation to Plaintiffs' house. Mr. Graham testified that he discovered the location of Defendant's sewer line, which he identified as running directly running under his house, when he hired a plumber and the line was revealed. From these facts, competing inferences might be reasonably drawn as to Defendant's failure to exercise due care in the maintenance of its sewer and drainage system on the Graham's property and the issue of proximate cause. *See Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). The jury weighed the evidence and concluded that the Defendant was liable. Defendant's Motion for JNOV on these grounds is **DENIED**.

C. Damages

Defendant argues that Plaintiffs failed to present any evidence establishing that their damages were proximately caused by events subsequent to September 5 - 6, 2008. Defendant claims that Plaintiffs only pled damages caused by two events, one occurring on September 5 - 6, 2008, and the other occurring September 13, 2008. This Court determined, as a matter of law, that Defendant is not responsible for damages stemming from the September 5 - 6 event. Specifically, Defendant claims that Plaintiff Claude Graham failed to present any evidence that his alleged damages relating to personal property were caused by an event subsequent to September 5 - 6.

Evidence was presented at trial that Mr. Graham's claim for damages to personal property may be related to the flooding event on September 13, 2008. The personal property included hand tools, golf equipment, two lawn mowers, and other equipment stored in a shed on the Plaintiff's property. The shed containing the personal property was not evaluated for damage until after the September 13, 2008 flooding event and subsequent flooding events. Therefore, there is evidence to support that the damage to personal property may not be solely related to the September 5 - 6 flooding events.

Additionally, Defendant argues that Plaintiffs failed to present evidence establishing diminution in fair market value to the property at issue. Generally, "[t]he measure of damages for permanent injury to real property by pollution, whether by nuisance, trespass, negligence, or

inverse condemnation is the diminution in market value of the property," or the difference between value of the land before injury and value after injury. *Ravan v. Greenville County*, 315 S.C. 447, 465, 434 S.E.2d 296, 307 (Ct. App. 1993). In this case, Plaintiffs pled damages for the cost to rebuild their house, not the value of the land itself. "[T]he cost of repair or restoration is a valid measure of damages for injury to a building." *Roland v. Palmetto Hills*, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992). Plaintiffs presented evidence through John Benton of the cost to repair or rebuild the Plaintiff's house. Mr. Benton provided an itemization of the costs of the materials needed to rebuild Plaintiff's house, including electrical wiring, plumbing, appliances, and painting. Thus, Plaintiffs presented evidence to support their damages as the cost to rebuild or repair the house. Defendant's Motion for JNOV on these grounds is **DENIED**.

2. NEW TRIAL ABSOLUTE

Defendant also contends that it is entitled to a new trial absolute. The trial court's decision to grant or deny a motion for a new trial absolute is within its discretion. *See Cock-N-Bull Steak House, Inc. v. General Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). A trial court may grant a new trial pursuant to Rule 59(a) when there is prejudicial error in the admission of evidence or if the "the verdict is excessive or inadequate." *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). For a trial court to order a new trial based on erroneous admission of testimony, "the record must show not only error but also prejudice." *Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976). When deciding a motion to grant a new trial, "this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000).

A. The Witnesses

Defendant moves for a new trial absolute on the grounds that the Court erred in allowing the testimony of Plaintiffs' expert witness, John Benton. Defendant claims that during voir dire it was elicited from Mr. Benton that he only performed an estimate of what it would cost to completely rebuild the house owned by Plaintiffs, and that Plaintiffs failed to produce evidence that the house needed to be completely rebuilt.

"A competent estimate of the cost of repair to a building creates a factual issue regarding damages." *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989). Mr. Benton testified as to an estimate to rebuild the house as it was prior to the damage

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sustained. Mr. Benton's estimate did not include the land upon which the house is built, Plaintiffs' swimming pool, carport, or driveway. While Mr. Benton did not testify as to the nature and extent of the damages or whether the house needed to be completely rebuilt or partially repaired, there was sufficient evidence for the jury to infer that the Plaintiffs' house had become a total loss. Ms. Graham testified that she was unable to enter the house due to health concerns. Thomas Manning Robertson presented evidence that testing inside the Plaintiffs' house indicated that a quantity of mold was present. Dr. David Culpepper presented evidence that Plaintiffs had respiratory problems that may have been related to the presence of mold in their house after the flooding events. Therefore, there was evidence for the jury to infer that the house needed to be rebuilt, and because Plaintiffs only asked for damages in the form of the building itself, the correct measure of damages was used. Because the admission of Mr. Benton's testimony was not an error, Defendant is not entitled to a new trial absolute on this basis.

Defendant also claims that the court erred in allowing Plaintiffs' witness, William Benton Henry, to review, in front of the jury, photographs that had been excluded by the court during the pre-trial conference. Defendant further claims that the photographs were not needed to "refresh" Mr. Henry's memory, as it was not established through proper questioning whether his memory needed to be refreshed. The photographs were not introduced into evidence or given to the jury. This Court allowed the photographs to refresh Mr. Henry's recollection as to the dates of the events at issue. Defendant made no objection to the foundational questions used to establish that Mr. Henry needed to refresh his recollection as using the photographs. Mr. Henry testified that he witnessed several significant flooding events at Plaintiffs' house, and had taken pictures of these events on various occasions. Thus, Defendant is not afforded a new trial absolute on these grounds.

In addition, Defendant argues it is entitled to a new trial absolute because the court erred in failing to exclude Plaintiffs' Exhibit 1 after the Court granted a directed verdict as to Plaintiffs' claims associated with the September 5 - 6 events. Plaintiffs' Exhibit 1 consisted of photographs taken on September 6, 2008 by Plaintiffs. These photographs purported to show resulting debris that collected on Plaintiffs' property following the September 5 - 6 flooding events. This Court determined at trial that the photos were allowed to go to the jury not to support Plaintiffs' claim for damages, but to show conditions that led to Defendant having notice

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of the alleged sewer flooding. The Court is accorded broad discretion in ruling on the admissibility of testimony and exhibits. See *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000); *State v. Von Dohlem*, 322 S.C. 234, 471 S.E.2d 689 (1996). Because Defendant has not shown prejudice, Defendant is not afforded a new trial on this basis.

Furthermore, Defendant claims that the Court failed to instruct the jury that Defendant was not responsible for claims associated with the alleged damages stemming from the September 5 - 6 events and that Defendant was not liable for the mere presence of a portion of its sanitary sewer and drainage system on Plaintiffs' real property. The Court provided an instruction to the jury on the September 5 - 6 events as it deemed appropriate. Defendant did not request that the Court charge the jury as to Defendant's liability for the mere presence of the sanitary sewer and drainage system on Plaintiff's property. Thus, Defendant is not afforded a new trial on this basis.

Defendant also claims that the Court erred in allowing the rebuttal testimony of Claude Graham and Danielle Watson, as they did not provide testimony that rebutted any of the testimony or evidence presented by Defendant. The admission of reply testimony is within the sound discretion of the court and should only result in a new trial if the admission of such testimony is prejudicial. See *State v. Farrow*, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998). The two witnesses called in reply, Claude Graham and Danielle Watson, placed in issue two additional facts: (1) the location of the sewer line; and (2) the nature of the testing done by Defendant to determine the location and integrity of the line. Mr. Graham's testimony contradicted Defendant's witness, Will Brown, who also testified about the location of the sewer line. Ms. Watson testified, contrary to Mr. Brown and Plaintiffs' witness Mike Hanna, that Defendant attempted to run a camera through the line on Plaintiffs' property, but was unable to do so because of an obstruction. Thus, the admission of rebuttal testimony was proper and Defendant was not prejudiced.

Defendant further argues that the Court erred in allowing Danielle Watson to testify as to information told to her by James Bailey, the Water/Sewer Department Supervisor of the Town of Latta, which Mr. Bailey obtained from a third party. This testimony dealt specifically with an alleged effort to snake a camera through a portion of Defendant's sewer system. Defendant contends that this testimony was hearsay within hearsay and should have been excluded. Plaintiffs argue that the statement was not hearsay within hearsay pursuant to Rule 801(d)(2) of

the South Carolina Rules of Evidence, because it was "a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment during the existence of the relationship." Unless the error by the court in admitting the testimony affected the substantial rights of Defendant, a motion for new trial absolute must be denied. *See* Rule 61, SCRPC. Danielle Watson's statement did not affect the substantial rights of Defendant and thus Defendant's Motion for New Trial Absolute on these grounds is **DENIED**.

B. Charges to the Jury

Defendant claims that the Court erred in failing to charge S.C. Code Ann. Sections 15-78-60(1), (2), (4), (9), and (13). Defendant also contends that the Court failed to charge language that Defendant requested regarding Plaintiffs' burden to establish proximate cause, and therefore Defendant was prejudiced.

This Court determined at the Directed Verdict stage that Sections 15-78-60(1), (2) do not apply in this case. Section 15-78-60(4) does not apply because there is no claim that there is a violation of a specific regulation or ordinance. Section 15-78-60(9) simply had no applicability relating to the sole surviving cause of action for negligence. Section 15-78-60(13) does not apply because DHEC was exercising its authority and performing inspections in conjunction with DHEC authority, rather than the Town of Latta exercising its authority over businesses and other entities.

In regard to Defendant's proximate cause charge, the Court charged an equivalent proximate cause charge and the Court's charge was neither erroneous nor prejudicial, both of which are required for post-verdict reversal. Thus, Defendant's Motion for New Trial on these grounds is **DENIED**.

C. Inappropriate Verdict

Defendant moves for a new trial absolute based upon the Thirteenth Juror Doctrine. Defendant also claims that the verdict returned by the jury was grossly excessive in light of the evidence presented at trial regarding alleged damages suffered.

Based on a thorough review of the record, the jury's verdict was not grossly excessive in light of evidence presented at trial. Mr. Graham presented evidence that he had been damaged by several hundred dollars in medical bills, \$7,500 in equipment, and by \$70,000.00 in rent paid or due for substitute housing from November 2008 to April 15, 2012. Ms. Graham testified and evidence was presented that that she sustained several hundred dollars in medical bills, the loss

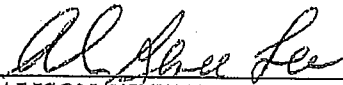
of a house that would cost at least \$457,000.00 to replace, and pain and suffering. A verdict of \$100,000 for Mr. Graham and \$225,000 for Mrs. Graham is well within the range reasonably inferred by the evidence.

In regard to the Thirteenth Juror Doctrine, this Court finds that there was sufficient evidence in the record to support the jury's verdict and the verdict should not be overturned or disregarded. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when [it] finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "This ruling has also been termed granting a new trial upon the facts." *Id.* "A trial judge may also set aside a verdict and grant a new trial based solely on the judge's view of the evidence." *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 5, 426 S.E.2d 327, 329 (Ct. App. 1992). Because the evidence justifies the jury's verdict, the verdict should not be overturned.

ORDER

For the reasons stated above, Defendant Town of Latta's Motion for Judgment Notwithstanding Verdict, or in the alternative, for New Trial Absolute is **DENIED**.

AND IT IS SO ORDERED.



ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
February 28, 2013

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FILED
STATE OF SOUTH CAROLINA GWEN T. HYATT IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON 2013 JUL 26 PM 12:38
FOURTH JUDICIAL CIRCUIT

Claude W. Graham,
Plaintiff,

v.

Town of Latta,
Defendant.

Vickie B. Graham,
Plaintiff,

v.

Town of Latta,
Defendant.

Civil Action No. 2008-CP-17-376
2008-CP-17-377

**ORDER GRANTING LEAVE TO
DEPOSIT FUNDS INTO COURT**

CERTIFIED
TRUE COPY

Dawn T. Hyatt

CLERK OF COURT
DILLON COUNTY

JMB
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This matter is before the Court on the motion of the Defendant Town of Latta pursuant to Rule 67, SCRCP, seeking leave of the Court to allow the Defendant to deposit a sum equal to the judgments plus accrued interest with the Court during the pendency of its appeal. The Plaintiffs oppose the Town's motion. A hearing was held on May 7, 2013. W. Reynolds Williams, Esquire, appeared for the Plaintiffs, and Andrew F. Lindemann, Esquire, appeared for the Defendant. After a review of the Defendant's motion, the written submissions by the parties, and the oral arguments of counsel, this Court grants the Defendant's motion in accordance with Rule 67, SCRCP.

On October 11, 2013, the Court entered judgment in Civil Action Number 2008-CP-17-376 in favor of the Plaintiff Claude Graham in the amount of \$100,000.00. On the same date, the

Court entered judgment in Civil Action Number 2008-CP-17-377 in favor of the Plaintiff Vickie Graham in the amount of \$225,000.00. The Defendant filed post-trial motions which have been denied by Circuit Court Judge Alison Renee Lee, who was the trial judge. The Defendant has now filed a Notice of Appeal with the South Carolina Court of Appeals, and the Plaintiffs have filed a cross-appeal. The Defendant seeks to deposit the sum of \$325,000.00, plus accrued interest, with the Court in accordance with Rule 67, SCRCP, during the pendency of that appeal.

Rule 67, SCRCP, authorizes a party to deposit the sum of a judgment into the court with leave of court. The South Carolina appellate courts have upheld the application of Rule 67, SCRCP, and have concluded that Rule 67 serves a beneficial purpose. See *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000). Specifically, in *Russo, supra*, the Supreme Court reasoned that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 317 S.C. at 444, 454 S.E.2d at 896.

The Plaintiffs have raised several objections to the Town's motion. First, the Plaintiffs contend that a motion pursuant to Rule 67 must be heard by the trial judge because Rule 67 states that the money paid into the court "shall be deposited as directed by the court." This Court finds, however, that nothing in this language limits a decision under Rule 67 to the specific trial judge. Furthermore, what the Plaintiffs suggest is contrary to established law and practice. It is well established that a trial judge loses jurisdiction after post-trial motions are heard and likewise "must exercise his judicial powers in [a] circuit while within the territorial boundaries of the circuit." *Cox v. Fleetwood Homes of Georgia*, 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999). In addition, the filing of a motion under Rule 67 typically occurs after an appeal is filed at which time the lower

court judgment is final. The Supreme Court in *Russo* recognized that a Rule 67 motion could be considered during the pendency of an appeal, and the lower court retains jurisdiction over such a motion. 317 S.C. at 444, 454 S.E.2d at 896, n.2. Therefore, this Court concludes that a Rule 67 motion may be heard after an appeal is commenced and may be heard by the Chief Administrative Judge who has jurisdiction over matters pending within the circuit.

The Plaintiffs also argue that the amendments by the South Carolina General Assembly in 2000 and 2005 to Section 34-31-20 altered the reasoning of such cases as *Russo*. The Plaintiffs cite to language in Section 34-31-20(B) that provides that judgments "must draw interest according to law" as being determinative. However, prior to the 2000 and 2005 amendments, during the time that such cases as *Russo* were decided, Section 34-31-20 provided that judgments "shall draw interest according to law." The change from "shall" to "must" is insignificant; both terms are mandatory in nature and are interchangeable. *See Hicks v. Miranda*, 422 U.S. 332, 352 (1975) (Burger, C.J., concurring) ("[i]t is well settled that 'shall' means 'must'"); *Johnson v. Burnley*, 887 F.2d 471, 476 (4th Cir. 1989) ("'must' and 'shall' are virtually synonymous under traditional principles of statutory construction"). This Court, therefore, concludes that the amendments to Section 34-31-20 have no effect on Rule 67 or how it is to be construed and applied.

Finally, the Plaintiffs argue that Rule 67 cannot be used to alter the "legal duties" of the parties. The Plaintiffs rely on the Supreme Court case of *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), wherein the Court ruled that a contractual interest rate would apply instead of the statutory interest rate. The Court held that "the post-judgment statutory rate applied only where there was no contractual interest rate." *Id.* at 326, 513 S.E.2d at 618. "[A] deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract." *Id.* The present case, however, does not involve a contractual interest rate

nor any other agreement governing the amount of post-judgment interest. The Plaintiffs' recovery was limited to a Tort Claims Act award on a negligence claim. As a result, this Court concludes that the post-judgment statutory interest rate applies. Where the statutory interest rate applies, South Carolina law clearly provides that the accrual of such interest may be stopped by the deposit of funds into court.

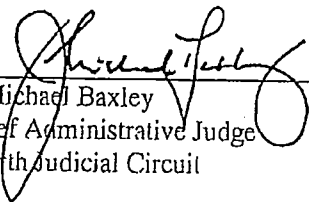
Based on the foregoing, this Court finds that a deposit of \$325,000.00, plus accrued interest, pursuant to Rule 67, SCRPC, is appropriate. As the Supreme Court has held, public policy favors having the judgment debtor pay the judgment sum into court which ensures that funds are available to pay the existing judgment once the appeal process is complete. *Russo*, 317 S.C. at 444, 454 S.E.2d at 896. The Court finds that there is no basis for the Court to disallow the use of Rule 67 in this case. As a result, the Court grants the Defendant's motion.

 At the May 7, 2013 hearing, Plaintiffs' counsel requested the ability to direct how the funds are invested by the Clerk of Court in order to obtain a favorable rate of return. The Court allowed the parties time to discuss the manner of investment in order to determine whether an agreement could be reached on the issue. Because the statutory interest would continue to accrue during the negotiations between the parties' counsel, the Court ruled that the statutory interest would stop accruing either on May 14, 2013 (seven days from the date of the hearing) or the date an agreement on the manner of investment was reached, whichever occurred first. The Court is advised that the parties were unable to reach an agreement on the manner of investment, and as a result, based on the Court's ruling at the hearing, the statutory interest stopped accruing on May 14, 2013.

IT IS, THEREFORE, ORDERED that the Defendant Town of Latta may deposit with the Court the sum of \$325,000.00, plus accrued interest as of May 14, 2013. Any deposit pursuant to this Order shall be made to the Clerk of Court for Dillon County.

IT IS FURTHER ORDERED that the Clerk of Court for Dillon County shall deposit the funds with any bank or financial institution authorized to receive public funds, in an interest bearing account, and the funds, including interest earned thereon, shall be withdrawn only upon further order of this Court after notice to all parties.

IT IS SO ORDERED.



J. Michael Baxley
Chief Administrative Judge
Fourth Judicial Circuit

Hartsville, South Carolina

July 17, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DILLON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-17-376; 377

Claude W. Graham

Town of Latta

Vicke B. Graham
PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Reynolds Williams, Esq.

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, PROBATION
ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment
by the Court: See Page 2 for the text of the Order.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

FILED
CLERK OF COURT
DILLON COUNTY
2013 DEC 10 PM 2:35

INFORMATION FOR THE JUDGMENT INDEX

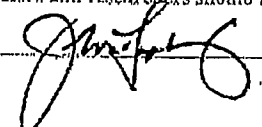
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A Denial of Motion to Reconsider	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



2121
Judge Code

12/06/13
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Reynolds Williams, Esquire
Willcox, Buyck & Williams, P.A.
P.O. Box 1909
Florence, SC 29503

Andrew P. Lindemann, Esquire
Davidson & Lindemann, P.A.
P.O. Box 8568
Columbia, SC 29202

ATTORNEY FOR THE PLAINTIFFS

ATTORNEY FOR THE DEFENDANT

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This matter comes before the Court on Plaintiffs' Motion to Reconsider the Court's Order of July 17, 2013, which directed that the amount awarded by the jury in this case be placed on deposit with the Clerk of Court during the pendency of the appeal, pursuant to SCRCF 67. A hearing was previously held on Defendant's motion to deposit the judgment awarded by the jury in this case on May 7, 2013 in Dillon County, South Carolina. At that hearing, counsel for Plaintiffs requested that the Court permit Plaintiffs to pursue other investment options that may produce a more favorable rate of return. The Court allowed the parties time to confer on this issue, but further ruled that the statutory interest would stop accruing either on May 14, 2013 (seven days from the date of the hearing) or the date on which an agreement was reached between the parties as to the manner of investment, whichever occurred first. Subsequent to the hearing, the Court was advised the parties were unable to come to an agreement on the manner of investment, and accordingly, the statutory interest stopped accruing on May 14, 2013, based on the Court's ruling.

In their Motion to Reconsider, Plaintiffs contend that defense counsel failed to negotiate in good faith concerning other options for investment. Specifically, Plaintiffs state that defense counsel did not respond to correspondence sent by the Plaintiff on May 13, 2013 until May 30, 2013. Plaintiffs also assert that the Defendant has failed to deposit any sum of money with the Clerk's office. Plaintiffs ask that the Court withdraw its Order, dated July 17, 2013, or in the alternative, withdraw the portion of the Order which requires statutory interest to stop accruing on May 14, 2013 if the parties were unable to come to an agreement as to an alternative manner of investment. The Court declines to withdraw or amend its prior Order, dated July 17, 2013. The Court permitted the parties to negotiate as to an alternate manner of investment, but it does not have the authority to require that the parties agree on some other form of investment. Consequently, Plaintiffs' Motion to Reconsider is DENIED.

IT IS SO ORDERED.

Circuit Court Judge

2121

Judge Code

12/06/13

Date

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Dillon
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 - CP - 17 - 376

Claude Graham

John J. Latta

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:



JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.



DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 40, SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____



ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____



DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:



See attached order. (Formal order to follow)



Statement of Judgment by the Court:

Jury verdict for \$100,000 for Plaintiff. Post trial motion to be supplemented within 10 days

Dated at Dillon, South Carolina, this 11th day of October, 2012.

Al. Lee Lee
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

JR# 2008 - CP - 17 - 00 376

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

Claude W. Graham,

Plaintiff,

v.

Town of Latta, South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

Civil Action No.: 2008-CP-17-00376

VERDICT

WE, THE JURY, UNANIMOUSLY FIND FOR:

☒ The PLAINTIFF,

One hundred thousand dollars (\$ 100,000.00)
Actual damages

☐ The DEFENDANT.

Foreperson

Date:

Army Plowden

10/11/12

A CERTIFIED
TRUE COPY

[Signature]
CLERK OF COURT
DILLON COUNTY

FILED
GWENTHYAIT
2012 OCT 11 PM 6:15
CLERK OF COURT
DILLON COUNTY

JR# 2008-CP-17-00376

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BILLION
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 -CP-17 - 377

Vicki Graham

Marjorie Latta

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:



JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.



DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 4 SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other



ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other



DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BELOW): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:



See attached order. (Formal order to follow)



Statement of Judgment by the Court:

Jury Verdict for \$225,000 for Plaintiff. Post trial motions were
supplemented within 10 days.

Dated at Billton, South Carolina, this 11th day of October, 2012.

Alfred Lee
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

TRUE COPY
Attorney for Plaintiff
Attorney for Defendant
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

IR# 2008-CP-17-00377

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

Vickie B. Graham

Plaintiff,

v.

Town of Latta, South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

Civil Action No.: 2008-CP-17-00377

VERDICT

WE, THE JURY, UNANIMOUSLY FIND FOR:

☒ The PLAINTIFF,

Two hundred twenty five thousand dollars (\$ 225,000.00)
Actual damages

☐ The DEFENDANT.

Foreperson

Date:

10/11/12

ACERTIFIED
TRUE COPY

CLERK OF COURT
DILLON COUNTY

CLERK OF COURT
DILLON COUNTY

2012 OCT 11 PM 6:15

FILED
GMENTHAIT

TO ALL 2008-CP-17-00377

FILED
STATE OF SOUTH CAROLINA GWEN T. HYATT
COUNTY OF DILLON 2013 APR 16 AM 8:41 IN THE COURT OF COMMON PLEAS

CLERK OF COURT
DILLON COUNTY

Claude W. Graham,
Plaintiff,

Civil Action No. 2008-CP-17-376
2008-CP-17-377

v.

Town of Latta,
Defendant.

**NOTICE OF MOTION AND
MOTION FOR LEAVE OF COURT
TO DEPOSIT FUNDS INTO COURT**

Vickie B. Graham,
Plaintiff,

v.

Town of Latta,
Defendant.

A CERTIFIED
TRUE COPY
Dated: 4/16/13
CLERK OF COURT
DILLON COUNTY

TO: WM. REYNOLDS WILLIAMS, ESQUIRE, ATTORNEY FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendant Town of Latta will move before the Presiding Judge of the Fourth Judicial Circuit at the Dillon County Courthouse, Dillon, South Carolina, at such time and place as may be set by the Court, for an Order, pursuant to Rule 67, SCRCF, granting leave of court for the Defendant Town of Latta to deposit a sum equal to the jury's verdicts plus accrued interest with the Court during the pendency of the appeal which has been filed by the Defendant with the South Carolina Court of Appeals.

The Defendant's motion is based on the following:

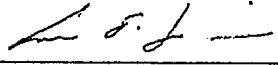
1. On October 11, 2012, the Court entered judgment in Civil Action Number 2008-CP-17-376 in favor of the Plaintiff Claude Graham in the amount of \$100,000.00. On the same date, the Court entered judgment in Civil Action Number 2008-CP-17-377 in favor of the Plaintiff Vicki Graham in the amount of \$225,000.00. The Defendant Town of Latta filed post-trial motions which have been denied by Circuit Court Judge Alison Renee Lee. The Defendant has now filed a Notice of Appeal with the South Carolina Court of Appeals. The Defendant seeks to deposit the sum of \$325,000.00, plus accrued interest, with the Court in accordance with Rule 67, SCRCP, during the pendency of that appeal.

2. Rule 67, SCRCP, authorizes a party to deposit the sum of a judgment into the Court upon notice to the other parties and with leave of court. The Supreme Court has held that "a judgment debtor may stop the running of interest by paying the amount of the judgment into court during the pendency of an appeal." *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895, 896 (1995). The South Carolina appellate courts have also concluded that Rule 67 serves a beneficial purpose. See, *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998). Specifically, in *Russo, supra*, the Supreme Court reasoned that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 454 S.E.2d at 896.

The Defendant's motion is based upon the judgments entered on October 11, 2012; rules of court; and such other matters as may be properly presented to the Court at or prior to the time of the hearing.

Counsel for the Defendant Town of Latta has consulted with the Plaintiffs' counsel prior to the filing of this motion, but no resolution of this matter was attained.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Defendant Town of Latta

Columbia, South Carolina

April 10, 2013

RULE 67, SCRPC 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.

NOTES

This Rule is substantially the federal rule (Emphasis supp).

On October 11, 2012, the Plaintiffs obtained a judgment, following a jury verdict, for a sum of money. This action is *no longer* an action in which any part of the relief sought is a judgment, because the judgment has already been awarded. This action is now an action for the reversal of a previous order of this court.

The plain language of the Rule “upon notice to every other party, and by leave of court, may deposit” under circumstances “as directed by the court” make it clear that the court must exercise its discretion whether to order the deposit and the terms to place upon that deposit. If the Defendant had desired to make a deposit of this kind prior to a trial, the request to any judge sitting in the circuit would have been unexceptional and unremarkable. Following a trial, however, it would be an abuse of discretion for a judge who heard no evidence to try to fashion an order which does justice to the parties. Only the trial judge has the knowledge, gained from four days of trial, to apply the required discretion. In the absence of the factual basis upon which to exercise its discretion, this court should deny the order as sought by Latta.

The granting of leave to deposit money with the court pursuant to Rule 67, SCRPC is a matter within the discretion of the *trial* court. An abuse of such discretion occurs when a ruling is made without evidentiary support. SCDOT v. First Carolina Corp., 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006). The Plaintiffs have consented to a deposit of funds in the court, but not under circumstances which would deprive them of their legal right to interest. 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). A question of whether to grant a Rule 67 motion is a matter committed to the court's discretion. AT&T Communications of California v. Pac-W Telecomm., Inc., 2007 WL 1114037 (N.D. Cal. Apr. 13, 2007); see Gulf States Util. Co. v. Alabama Power Co., 824 F.2d 1465, 1475 (CA. 5 1987), (modified on other grounds 831 F.2d 557 5th Cir. 1987).

Rule 67 was a part of the *South Carolina Rules of Civil Procedure* adopted July 1, 1985, but it was last amended in 1986. Russo v. Sutton, 317 S.C. at 441 was decided by the South Carolina Supreme Court in 1995 and the other cases relied upon by the Defendant, Small v. Pioneer Machinery and Duval v. Heritage Life Ins. Co. 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. On October 11, 2012, it read, and it now reads:

(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 4 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. ... (Emphasis supp.).¹

Section 34-31-20(B) is a law duly enacted by the Legislature and signed by the Governor. 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.

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. Prior to its adoption, 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 Defendant 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

¹By orders issued in January 2012 and January 2013, the Supreme Court set the rate of interest at 7 1/4 %.

(a party)". AT&T v. Pac-W, *supra*. Employing virtually the identical reasoning, the Supreme Court of South Carolina in 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*, Emphasis 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 this court has no authority to do.

It is clear that Rule 67, SCRCP, has been narrowly construed from halting interest by the South Carolina Supreme Court since Russo v. Sutton, *supra*, was decided in 1995, substantially motivated by the legislative changes after that case. SCDOT v. First Carolina Corp., 369 S.C. 150, 631 S.E.2d 533 (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, we are not in Family Court, and there is no contract calling for interest so theses case are not 100 % controlling. The next logical expression of the Supreme Court's disfavor, however, is manifested by its

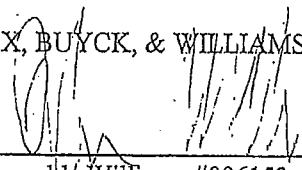
Renaissance and Bakala decisions wherein it approvingly cites the Uniform Rule of other court that Rule 67 "can not be used as a means of altering ... the legal duties of the parties."

CONCLUSION

Plaintiffs pray the court deny the Defendant Latta's motion to the extent any such deposit would alter the Town's legal duty to pay interest to the Plaintiffs.

Respectfully submitted,

WILLCOX, BUYCK, & WILLIAMS, P.A.

By: 

Reynolds Williams #006153
PO Box 1909
Florence, S C 29503-1909
(843) 662-3258 - Tel.
(843) 662-1342 - Fax
Email: Reynolds@WillcoxLaw.com
Attorney for Plaintiffs

April 25, 2013

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

IN THE COURT OF COMMON PLEAS

Claude W. Graham,
Plaintiff,

Civil Action No. 2008-CP-17-376
2008-CP-17-377

v.

Town of Latta,
Defendant.

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE OF COURT
TO DEPOSIT FUNDS INTO COURT

Vickie B. Graham,
Plaintiff,

v.

Town of Latta,
Defendant.

This matter is before this Court on the motion of the Defendant Town of Latta pursuant to Rule 67, SCRCF, seeking leave of court to allow the Defendant to deposit a sum equal to the judgments plus accrued interest with the Court during the pendency of its appeal.

On October 11, 2013, the Court entered judgment in Civil Action Number 2008-CP-17-376 in favor of the Plaintiff Claude Graham in the amount of \$100,000.00. On the same date, the Court entered judgment in Civil Action Number 2008-CP-17-377 in favor of the Plaintiff Vicki Graham in the amount of \$225,000.00. The Defendant filed post-trial motions which have been denied by Circuit Court Judge Alison Renee Lee. The Defendant has now filed a Notice of Appeal with the South Carolina Court of Appeals, and the Plaintiffs have filed a cross-appeal.

The Defendant also seeks to deposit the sum of \$325,000.00, plus accrued interest with the Court in accordance with Rule 67, SCRPC, during the pendency of that appeal.

Rule 67, SCRPC, authorizes a party to deposit the sum of a judgment into the court with leave of court. The South Carolina appellate courts have upheld the application of Rule 67, SCRPC, and have concluded that Rule 67 serves a beneficial purpose. See, *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995); *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000). Specifically, in *Russo, supra*, the Supreme Court reasoned that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Russo*, 454 S.E.2d at 896.

The Plaintiffs have raised several objections to the Town's motion. First, the Plaintiffs contend that a motion pursuant to Rule 67 must be heard by the trial judge because Rule 67 states that the money paid into the court "shall be deposited as directed by the court." That language, however, does not limit a decision under Rule 67 to the trial judge. Furthermore, what the Plaintiffs suggest is contrary to established law and practice. It is well established that a trial judge loses jurisdiction after post-trial motions are heard and likewise "must exercise his judicial powers in [a] circuit while within the territorial boundaries of the circuit." *Cox v. Fleetwood Homes of Georgia*, 334 S.C. 55, 512 S.E.2d 498, 500 (1999). In addition, the filing of a motion under Rule 67 typically occurs after an appeal is filed at which time the lower court judgment is final. The Supreme Court in *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), recognized that a Rule 67 motion could be considered during the pendency of an appeal, and the lower court retains jurisdiction over such a motion. 454 S.E.2d at 896, n.2. Therefore, it is appropriate for a Rule 67 motion to be filed after

the appeal is commenced and may be heard by the Chief Administrative Judge who has jurisdiction over matters pending within the circuit.

The Plaintiffs also argue that the amendments by the General Assembly in 2000 and 2005 to Section 34-31-20 somehow alter the reasoning of such cases as *Russo*. The Plaintiff cite to language in Section 34-31-20(B) that provides that judgments "*must* draw interest according to law" as being determinative. However, prior to the 2000 and 2005 amendments, during the time that such cases as *Russo* were decided, Section 34-31-20 provided that judgments "*shall* draw interest according to law." The change from "shall" to "must" is insignificant; both terms are mandatory in nature and are interchangeable. See, *Hicks v. Miranda*, 422 U.S. 332, 352 (1975) (Burger, C.J., concurring) ("[i]t is well settled that 'shall' means 'must'"); *Johnson v. Burnley*, 887 F.2d 471, 476 (4th Cir. 1989) ("'must' and 'shall' are virtually synonymous under traditional principles of statutory construction"). Therefore, the amendments to Section 34-31-20 have no effect on Rule 67 and how it is to be construed and applied.

Finally, the Plaintiffs argue that Rule 67 cannot be used to alter the "legal duties" of the parties. The Plaintiffs rely on the Supreme Court case of *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), wherein the Court ruled that a contractual interest rate would apply instead of the statutory interest rate. The Court held that "the post-judgment statutory rate applied *only where there was no contractual interest rate*," 513 S.E.2d at 618. (Emphasis added). "[A] deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract." *Id.*

The present case, however, does not involve a contractual interest rate nor any other agreement governing the amount of post-judgment interest. The Plaintiffs' recovery was limited to a Tort Claims Act award on a negligence claim. As a result, the post-judgment statutory interest

rate would apply. Where the statutory interest rate applies, South Carolina law clearly provides that the accrual of such interest may be stopped by the deposit of funds into court.

For the foregoing reasons, the Town of Latta submits that it is entitled under Rule 67, SCRPC, and applicable law to deposit the sum of the verdicts, together with accrued interest, into the court in order to stop the accrual of statutory post-judgment interest.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
MICHAEL B. WREN
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Defendant Town of Latta

Columbia, South Carolina

May 7, 2013

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Claude W. Graham,

Plaintiff,

vs.

Town of Latta, South Carolina,

Defendant,

AND

Vickie B. Graham,

Plaintiff,

vs.

Town of Latta, South Carolina,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
) C/A # 2008-CP-17-376 & 377

59(e) MOTION TO ALTER
OR AMEND JUDGMENT

ACERTIFIED
TRUE COPY
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

CLERK OF COURT
DILLON COUNTY

2013 JUL 29 AM 10:45

FILED
GWEN T. HYATT

The Plaintiffs hereby move the court pursuant to 59(e) SCRCP, to reconsider, alter, and/or amend its judgment as set forth in its Order dated July 17, 2013 and filed and served on the undersigned by letter dated July 23, 2013, received July 25, 2013.

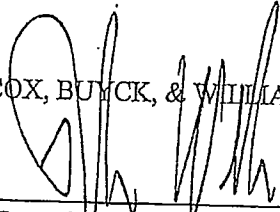
When this matter came before the court on May 7, 2013, the court inquired of Plaintiffs' counsel the interest rate the funds would be drawing through a deposit with the Clerk of Court as opposed to the 7 1/4% statutory rate of interest, to which he responded "almost nothing." The court then orally allowed the parties time to discuss a better manner of investment and ruled "that the statutory interest would stop accruing on May 14, 2013 or the date an agreement on the matter of investment was reached, whichever occurred first."

Plaintiffs' counsel immediately undertook an investigation to determine a better rate of interest and informed defense counsel of a manner of investment on May 13, 2013. The defense counsel waited until May 30th to acknowledge receipt and expressed a concern about the recommended investment but only after Plaintiffs' counsel and the court inquired on May 28th about the status of the decision-making process. Immediately upon receipt, Plaintiffs' counsel asked for a counterproposal and a week later the defense counsel responded that his client insisted that the instruments invested in must comply with §6-5-10 S.C. Code Ann., which provides an interest rate of almost nothing. Nevertheless and in good faith, on that same date, the Plaintiffs' counsel inquired of Merrill Lynch what portfolio it could construct drawing interest in investments defined in §6-5-10 S.C. Code Ann. The answer was 15 bases points (0.15%) - almost nothing.

The defense counsel's client has been sitting on \$325,000.00 plus accrued interest since May 14, 2013 and has still not deposited any sum of money with the Dillon County Clerk of Court or elsewhere. The Plaintiffs pray the court inquire into these matters, consider the Affidavit of the Plaintiffs' counsel, and withdraw its Order of July 17, 2013, and enter an Order denying the Rule 67 relief previously requested by the Defendant. In the alternative, the court should withdraw that portion of its July 17 Order which calls for interest to stop accruing on May 14, 2013, a date by which no agreement had been reached and the Defendant knew that it could sit on its own money without any necessity to negotiate in good faith from that date forward.

Respectfully submitted,

WILLCOX, BUNCK, & WILLIAMS, P.A.

By: 

Reynolds Williams #006153

PO Box 1909

Florence, S C 29503-1909

(843) 662-3258 - Tel.

(843) 662-1342 - Fax

Email: Reynolds@WillcoxLaw.com

Attorney for Plaintiffs

July 26, 2013

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
) C/A # 2008-CP-17-376 & 377

Claude W. Graham,

Plaintiff,

vs.

Town of Latta, South Carolina,

Defendant,

AND

Vickie B. Graham,

Plaintiff,

vs.

Town of Latta, South Carolina,

Defendant.

**AFFIDAVIT OF
REYNOLDS WILLIAMS**

A CERTIFIED
TRUE COPY
[Signature]
CLERK OF COURT
DILLON COUNTY

FILED
GWEN T. HYATT
2013 JUL 29 AM 10:45
CLERK OF COURT
DILLON COUNTY

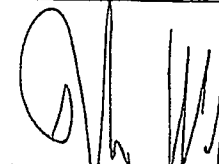
PERSONALLY APPEARED BEFORE ME, Reynolds Williams, who being first duly sworn,
deposes and says as follows:

Attached hereto are the following emails, each of which is a true and accurate copy of the
correspondence actually engaged in electronically between the indicated parties on the indicated
dates:

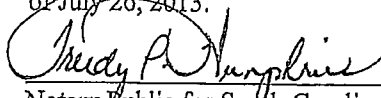
	Date/Time	Sender	Recipient
1.	May 13, 2013 @ 10:31 AM	Scott Jordan of Merrill Lynch	Reynolds Williams
2.	May 13, 2013 @ 10:45 AM	Reynolds Williams	Andrew Lindemann

3.	May 28, 2013 @ 3:24 PM	Judge Baxley	Andrew Lindemann & Reynolds Williams
	May 28, 2013 @ 3:24 PM	Reynolds Williams	Andrew Lindemann
	May 29, 2013 @ 12:31 PM	Andrew Lindemann	Reynolds Williams
4.	May 30, 2013 @ 10:14 AM	Reynolds Williams	Andrew Lindemann
5.	June 6, 2013 @ 1:02PM	Andrew Lindemann	Reynolds Williams
6.	June 6, 2013 @ 1:18 PM	Reynolds Williams	Andrew Lindemann
7.	June 6, 2013 @ 1:29 PM	Andrew Lindemann	Reynolds Williams
8.	June 6, 2013 @ 2:44 PM	Reynolds Williams	Scott Jordan
	June 6, 2013 @ 5:25 PM	Scott Jordan	Reynolds Williams
	June 6, 2013 @ 6:53 PM	Reynolds Williams	Scott Jordan
	June 7, 2013 @ 6:26 PM	Scott Jordan	Reynolds Williams

FURTHER AFFIANT SAYETH NOT.


Reynolds Williams

Sworn to before me this 26th day
of July 26, 2013.


Notary Public for South Carolina
My Commission Expires: 10/17/17

Trudy P. Humphries

From: Jordan, Scott S - MYRTLE BEA SC <scott_jordan@ml.com>
Sent: Monday, May 13, 2013 10:31 AM
To: Reynolds Williams
Subject: Conservative Allocation Portfolio
Attachments: Managed Solutions.pdf; Reynolds Williams Conservative Allocation 051313.pdf

Reynolds,

This is the proposal for a conservative allocation managed portfolio. The fixed income portion in this proposal is in municipal bonds, but we can provide it with taxable bonds if you wish. There are no loads, commissions, or contingent deferred sales charges for the investments used in this proposal. The annual portfolio management fee included in the proposal is 1.2% and it is assessed quarterly.

I am sending you 2 copies via federal express.

Sincerely,

Scott Jordan, CFM, CFP®

Vice President

Wealth Management Advisor

Merrill Lynch, Pierce, Fenner & Smith Incorporated

2024 Corporate Centre Dr. * Suite 301 * Myrtle Beach, SC 29577

843.946.2030 * 866.946.2030 Toll Free

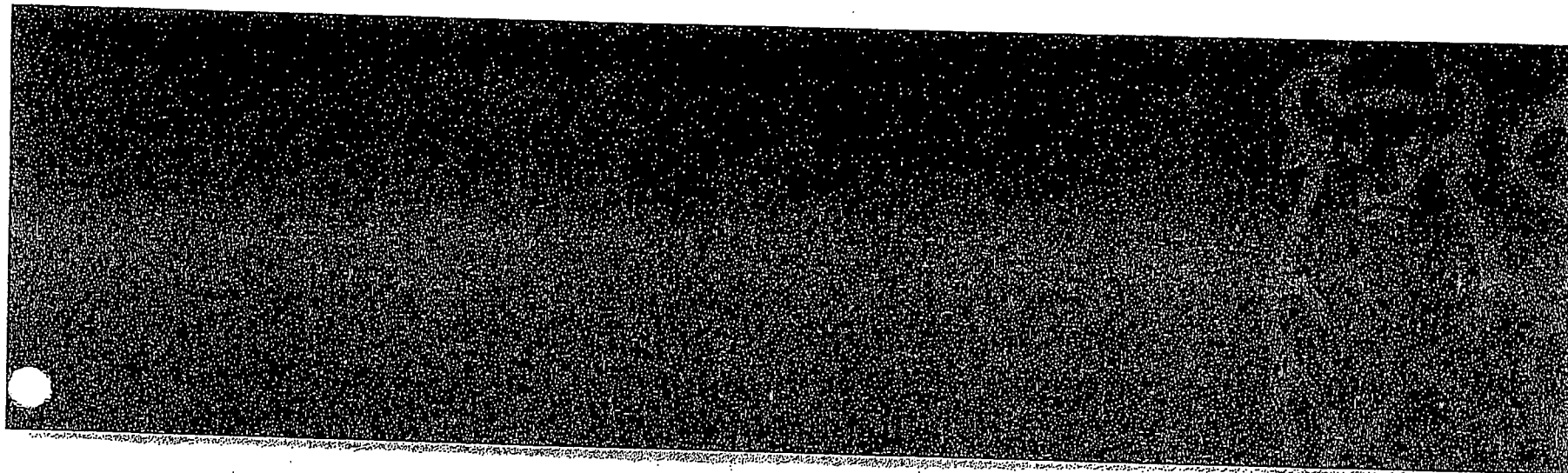
Email: scott_jordan@ml.com

Website: www.fa.ml.com/JordanGroup

NMLS#151593

This message, and any attachments, is for the intended recipient(s) only, may contain information that is privileged, confidential and/or proprietary and subject to important terms and conditions available at <http://www.bankofamerica.com/emaildisclaimer>. If you are not the intended recipient, please delete this message.





Helping Create the Appropriate Investment

41

Presented To: CONSERVATIVE ALLOCA

Presented By: JORDAN GROUP

Date: 5/13/2013



Investment products, insurance and annuity products:

Are Not FDIC Insured	Are Not Bank Guaranteed	May Lose Value
Are Not Deposits	Are Not Insured by Any Federal Government Agency	Are Not a Condition to Any Banking Service or Activity

Portfolio Construction and Due Diligence

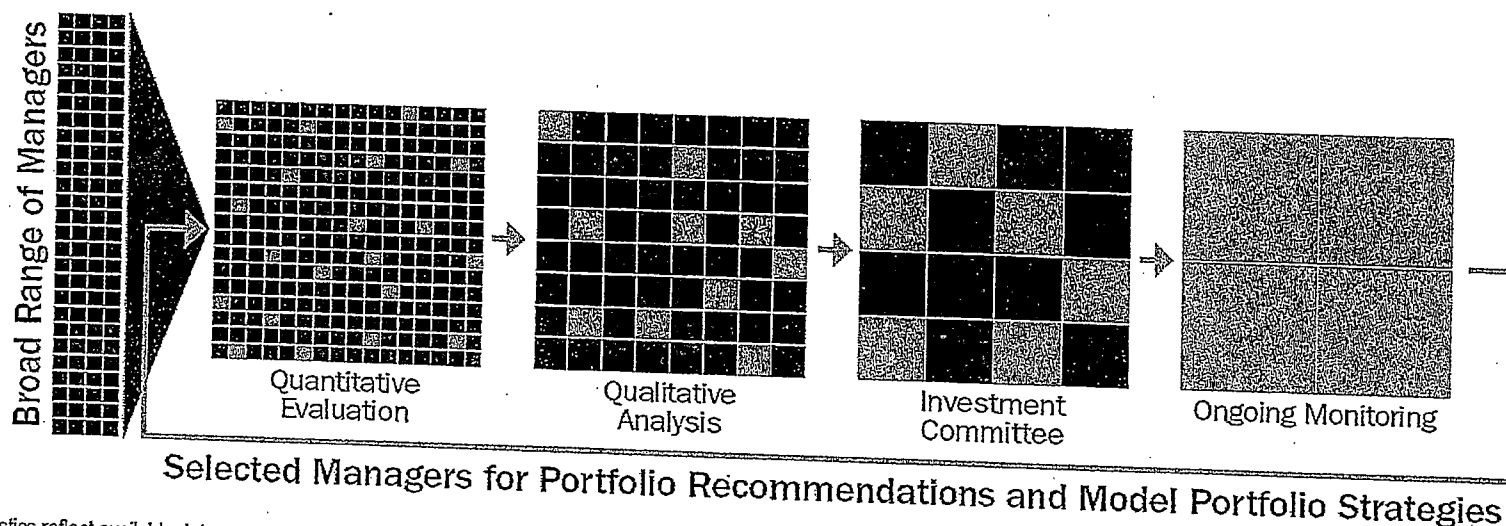
Merrill Lynch Value Proposition

Due Diligence Resources

The research, selection and monitoring of investment managers and products are performed by a team of seasoned industry professionals located in several countries.

Our team's analysts average 13 years of financial services industry experience.* The majority also hold advanced securities and investment analysis designations, such as Chartered Financial Analyst (CFA) or Chartered Investment Management Analyst (CIMA), or hold MBAs and other advanced degrees.

We undertake a rigorous and continual process of selecting and monitoring managers and products to help offset risk—providing you the potential to build a more efficient and better-performing portfolio.



* The statistics reflect available data as of October 1, 2012, and are subject to change.

Key Resources¹ . . .

Portfolio Construction and Due Diligence Analysts: 38	Portfolio Managers: 9	Quantitative Analysts: 3	Portfolio Analysts: 4	Alternative Investment Research Analysts: 42
Investment Banking Advisory and Capital Raising Services	Institutional Sales and Trading Services	Retirement & Benefit Administration Professionals: 1,400	Philanthropy & Nonprofit Management Professionals: 150	
Global Macro Research Analysts: 88	Global Credit Research Analysts: 129	Global Equity Research Analysts: 522		

45

. . . Offering Value-Added Services

- ▶ Security Analysis
- ▶ Active Security Search and Replacement
- ▶ Actionable Investment Insights
- ▶ Investment Manager Due Diligence
- ▶ Multi-Product Portfolio Construction and Management
- ▶ Fiduciary Responsibility
- ▶ Periodic Rebalancing
- ▶ Scaled and Customized Investment Solutions

¹As of March 2011.

Rebalancing does not assure a profit or protect against loss in declining markets.

What Is Merrill Lynch Unified Managed Account (UMA)?

The Offering

- ▶ The Merrill Lynch Unified Managed Account is a discretionary, fee based investment advisory service that offers you access to portfolios designed to match your investment goals, time horizons and risk tolerance
- ▶ Financial Advisors provide personalized investment advice and assist you in selecting turnkey solutions aligned with your investment objectives
- ▶ Merrill Lynch identifies and monitors quality investment solutions and performs ongoing investment manager due diligence and review

How UMA Meets Your Needs

- ▶ Investment portfolios include a broad array of approved style managers, mutual funds and ETFs
- ▶ Total Portfolios with fully diversified asset allocations and Completion Portfolios with single asset class portfolios
- ▶ Diversification of your overall portfolio
- ▶ Actively managed portfolios
- ▶ Array of portfolios with different levels of risk and returns based on BofA Merrill Lynch Global Research
- ▶ Ongoing performance monitoring

UMA Benefits



Asset allocation	Access to an array of portfolios developed by BofA Merrill Lynch Global Research and Merrill Lynch Investment Management and Guidance (IMG) that are designed to help meet your investing needs
Diversification	Portfolios that include a broad selection of investments, including style managers, mutual funds and ETFs
Access to expert advice	Access to diversified portfolio models designed to meet both short- and long-term investment objectives
Tax selling*	Can accommodate tax-selling requests
Consolidation	A single, professionally managed account to meet a variety of your needs
Periodic performance review	To keep track of progress over time
Overlay management and portfolio rebalancing	Portfolio implementation and administration by Merrill Lynch Managed Account Advisors (MAA®), which includes a rules-based rebalancing process
Investment minimum	Begin with \$25,000 for ETF/mutual fund portfolios Begin with \$100,000 for style managers
Simple fees	Quarterly fee based on assets in account, covering all advisory, management and transaction costs

*Merrill Lynch and its representatives do not provide tax, accounting or legal advice.

UMA offers a wide range of stand-alone style managers to complement a client's existing investment strategy on an account-level basis. IMG performs rigorous ongoing manager due diligence. All style managers undergo a thorough approval process before they are added to the platform.

A wide range of style managers are available across asset class to meet your needs.

Stand-Alone Style Managers Available on UMA

- ▶ All Cap
- ▶ Large Cap
- ▶ Mid Cap
- ▶ Small Cap
- ▶ Preferreds
- ▶ Convertibles
- ▶ Balanced
- ▶ International
- ▶ Fixed Income
- ▶ REIT
- ▶ Global

Important Information



Any tax statements contained herein were not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties. Neither Merrill Lynch, Bank of America nor its Financial Advisors provide tax, accounting or legal advice. Clients should review any planned financial transactions or arrangements that may have tax, accounting or legal implications with their personal professional advisors.

Merrill Lynch Wealth Management offers a broad range of brokerage, investment advisory and other services. There are important differences between brokerage and investment advisory services, including the type of advice and assistance provided, the fees charged, and the rights and obligations of the parties. It is important to understand the differences, particularly when determining which service or services to select. For more information about these services and their differences, speak with your Financial Advisor.

Merrill Lynch Wealth Management makes available products and services offered by Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPF&S) and other subsidiaries of Bank of America Corporation.

Trust and fiduciary services are provided by Merrill Lynch Trust Company, a division of Bank of America, N.A., Member FDIC. Insurance and annuity products are offered through Merrill Lynch Life Agency Inc., a licensed insurance agency.

Banking products are provided by Bank of America, N.A. and affiliated banks, Members FDIC and wholly owned subsidiaries of Bank of America Corporation.

Bank of America, N.A., Merrill Lynch Life Agency Inc. and MLPF&S, a registered broker-dealer and Member SIPC, are wholly owned subsidiaries of Bank of America Corporation.

MLPF&S and Bank of America, N.A. make available investment products sponsored, managed, distributed or provided by companies that are affiliates of Bank of America Corporation or in which Bank of America Corporation has a substantial economic interest, including BofA™ Global Capital Management.

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Investment Proposal

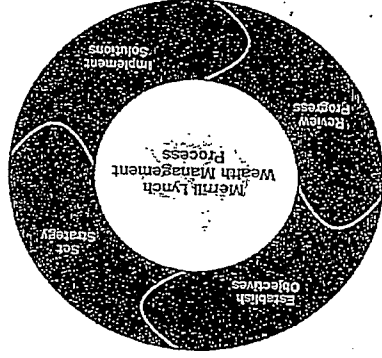
Merrill Lynch
Wealth Management
 Bank of America Corporation

Confidential-Prepared exclusively for:
 Mr. Reynolds Williams
 May 2013

J. Scott Jordan, CFM, CFP
 Vice President
 Wealth Management Advisor

The Merrill Lynch Wealth Management Process

This analysis is one of the brokerage reports available through the Wealth Management Process. It provides you with detailed information concerning potential investments. In conjunction with your Financial Advisor's advice, Merrill Lynch offers brokerage, investment advisory and other services. For more information about any of these services and their differences, including the type of advice and assistance offered, see your Financial Advisor.



CHOOSING THE APPROPRIATE MIX OF INVESTMENTS

One of the many challenges faced by investors today is choosing an appropriate mix of investments for their portfolios. The Wealth Management Process offers brokerage advice that begins with identifying your goals and objectives and then continues with the structuring of an overall asset allocation strategy - what percentage of stocks, bonds and cash to hold. The proposed asset allocation strategy identified in this report is based on the information you provided about your financial situation, including your goals, timeframe and risk tolerance.

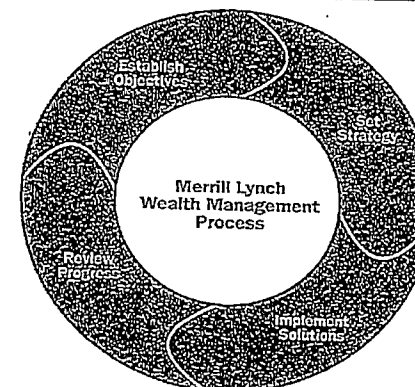
Once you've identified an asset allocation strategy, your next step is to determine how you would like to implement that strategy. There are several factors to consider when making this decision - everything from ensuring diversification within asset classes to understanding how potential investments work alone and in combination with one another. This is where your Financial Advisor's advice and support is key - not only in helping you choose an appropriate mix of investment products, but also in helping you implement transactions in a tax-efficient manner.

Selecting investments for your portfolio is the third step of the Wealth Management Process - Implement Solutions. It is your responsibility to determine if, and how, the suggestions made in conjunction with this report should be implemented. You should carefully consider all relevant factors in making these decisions and are encouraged to consult with any of your professional advisors. Merrill Lynch is both a broker-dealer and an investment advisor and it offers both brokerage and investment advisory services. There are important differences between these services, including the type of advice and assistance provided, the fees charged, and the rights and obligations of the parties. Brokerage services are also regulated under different laws and rules than advisory services. It is important for you to understand these differences, particularly when determining which service or services you might select.

You are not required to transact business with Merrill Lynch or to implement any of the suggestions made in connection with this report. If you choose to do so, Merrill Lynch will be acting solely as broker-dealer, not as investment advisor (unless otherwise agreed in writing) and may execute transactions for your account as agent or principal.

It is important for you to understand that this report proposes an investment strategy, and it is not a comprehensive financial plan. If you are interested in a formal analysis of your entire financial situation, ask your Financial Advisor about Merrill Lynch's financial planning services, including the fees that may be applicable.

THE MERRILL LYNCH WEALTH MANAGEMENT PROCESS



IN THIS REPORT

- A VIEW OF YOUR TOTAL INVESTMENT ASSETS
- EQUITY INVESTMENTS: SIZE/STYLE DIVERSIFICATION
- EQUITY INVESTMENTS: SECTOR DIVERSIFICATION
- REVIEWING YOUR INVESTMENT PROPOSAL
- HISTORICAL PRODUCT PERFORMANCE
- HYPOTHETICAL PORTFOLIO PERFORMANCE
- APPENDIX A: GLOSSARY
- APPENDIX B: ADDITIONAL INFORMATION
- APPENDIX C: PROFILE

IMPORTANT INFORMATION

Merrill Lynch Wealth Management, Merrill Edge, and The Private Banking and Investment Group offer products and services made available through Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPF&S) and other subsidiaries of Bank of America Corporation.

Banking products are provided by Bank of America, N.A. and affiliated banks, Members FDIC and wholly owned subsidiaries of Bank of America Corporation.

Unless otherwise indicated, investment accounts are held at Merrill Lynch, Pierce, Fenner & Smith Incorporated, Member SIPC. Bank deposits are held at the Bank of America, N.A. and affiliated banks or other depository institutions and are covered by FDIC insurance up to applicable limits. Bank deposits are not protected by SIPC. See the Additional Information section at the end of this report for more information. These summary reports are provided for informational purposes only and contain accounts you requested by for review. The underlying accounts may have different owners and the use of "you" or "your" in these reports refers to all owners. Your account statements are the official records for each account.

MLPF&S makes available investment products sponsored, managed, distributed or provided by companies that are affiliates of Bank of America Corporation or in which Bank of America Corporation has a substantial economic interest, including BofA™ Global Capital Management, BlackRock and Nuveen Investments.

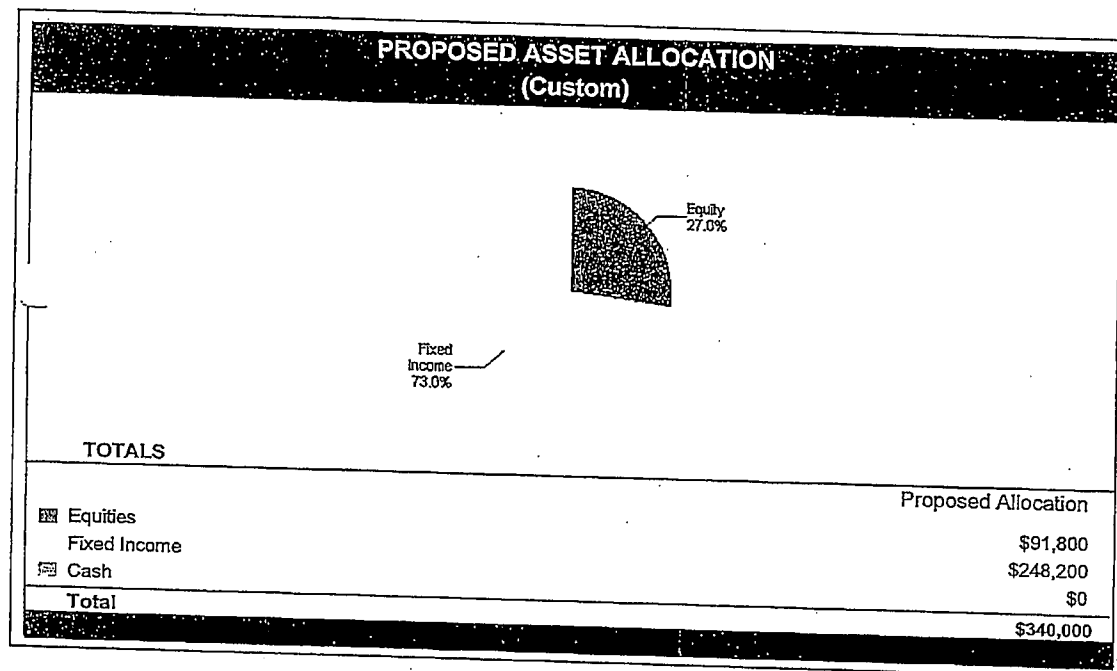
Investment products offered through MLPF&S and insurance and annuity products offered through Merrill Lynch Life Agency Inc.:

Are Not FDIC Insured	Are Not State, Federal and Bank Guaranteed	May Lose Value
Are Not Deposits	Are Not Insured by Any Federal Government Agency	Are Not a Condition to Any Banking Service or Activity

MLPF&S is a registered broker-dealer, Member SIPC and a wholly owned subsidiary of Bank of America Corporation. Merrill Lynch Life Agency Inc. is a licensed insurance agency and a wholly owned subsidiary of Bank of America Corporation.

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A VIEW OF YOUR TOTAL INVESTMENT ASSETS



KEY POINTS

- > The proposed asset allocation is a customized allocation model developed by your Financial Advisor for your specific situation.

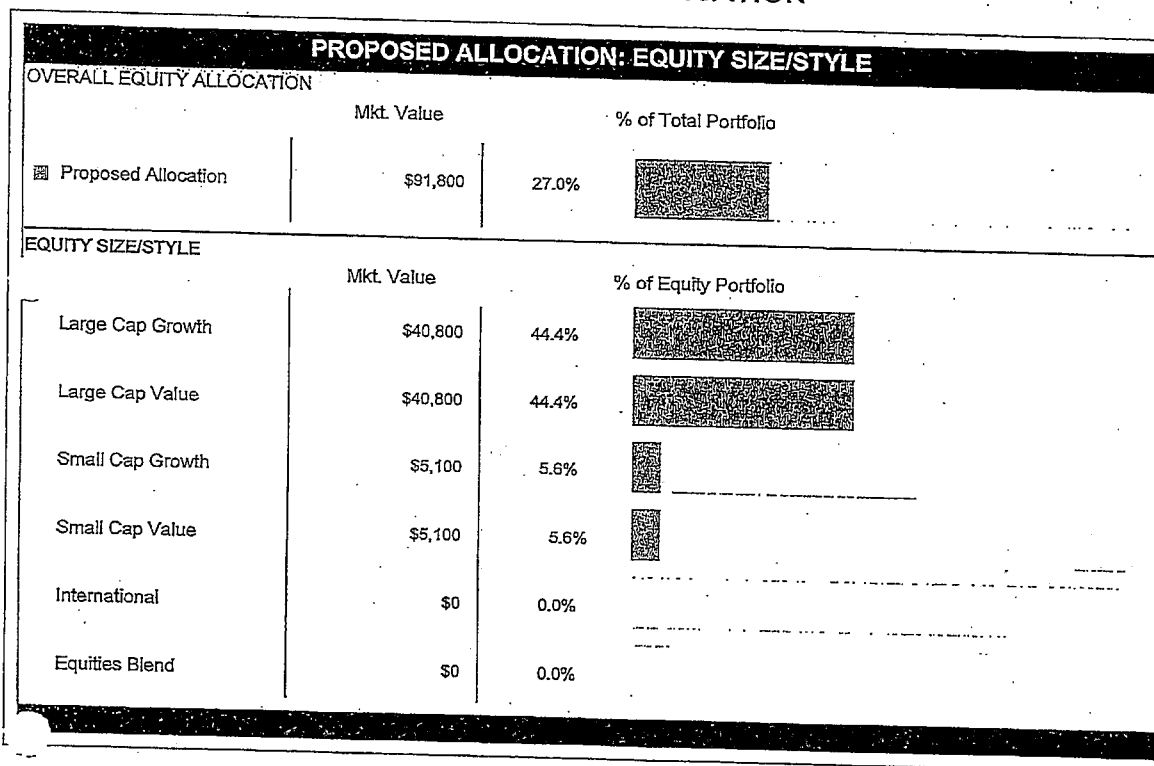
REVIEW OF ASSET ALLOCATION

The graph above illustrates your proposed portfolio's asset allocation. The investment assets included in this analysis are identified in Appendix C.

The following pages offer a closer look at your proposed allocation, as well as identify specific investments that you may want to consider in order to implement the proposed allocation.

Note that if you choose to re-allocate your assets to the proposed asset allocation, you may incur transaction charges and taxes. Your advisors, including tax advisors, can help you develop strategies to manage the tax impact of these changes.

EQUITY INVESTMENTS: SIZE/STYLE DIVERSIFICATION



KEY POINTS

- The proposed asset allocation is a customized allocation model developed by your Financial Advisor for your specific situation.

UNDERSTANDING SIZE/STYLE DIVERSIFICATION

It may be possible to further manage the risk associated with your portfolio by allocating your assets within each of the equities, fixed income, and cash classes.

Equities, for example, can be grouped in terms of size (e.g., large cap, small cap) and style (e.g., value, growth) classifications, each carrying its own risk and return characteristics.

The proposed size/style strategy above may offer a better balance between risk and return for your situation. Your Financial Advisor can help you tailor your

investment selections so that your portfolio can be appropriately diversified among these size/style categories.

Note that if you choose to re-allocate your assets to the proposed asset allocation, you may incur transaction charges and taxes. Your advisors, including tax advisors, can help you develop strategies to manage the tax impact of these changes.

EQUITY INVESTMENTS: SECTOR DIVERSIFICATION

PROPOSED ALLOCATION: EQUITY SECTORS			
OVERALL EQUITY ALLOCATION			
	Mkt. Value	% of Total Portfolio	
☒ Proposed Allocation	\$91,800	27.0%	
EQUITY SECTOR			
SECTOR	MARKET VALUE		PERCENTAGE
		Proposed Allocation	Proposed Allocation
Health Care		\$6,404	7.0%
Consumer Staples		\$13,356	14.6%
Information Technology		\$10,047	10.9%
Consumer Discretionary		\$5,079	5.5%
Industrials		\$307	0.3%
Materials		\$6,378	7.0%
Financials		\$13,187	14.4%
Telecommunication Services		\$1,723	1.9%
Utilities		\$2,748	3.0%
Energy		\$6,051	6.6%
Equities Blend		\$26,520	28.9%
TOTAL EQUITIES		\$91,800	

KEY POINTS

- > The proposed asset allocation is a customized allocation model developed by your Financial Advisor for your specific situation.

UNDERSTANDING SECTOR DIVERSIFICATION

Diversifying across several industry sectors is another way to help manage the risk associated with the equity portion of your portfolio. Sector diversification is based on the premise that groups of equities representing each sector can perform in tandem or independently of one another at any given time, depending on the state of the economy and prevailing market forces. For example, while certain sectors, like technology, performed particularly well in the late 1990s when the economy was growing rapidly, defensive sectors, like utilities, have offered better returns during the early 2000s when economic growth slowed. Asset allocation and diversification do not ensure a profit or protect against a loss in declining markets.

The table above illustrates the proposed sector allocation. Note that if you

choose to re-allocate your assets to the proposed asset allocation, you may incur transaction charges and taxes. Your advisors, including tax advisors, can help you develop strategies to manage the tax impact of these changes.

REVIEWING YOUR INVESTMENT PROPOSAL

The proposal below is based upon your discussions with your Financial Advisor. A portfolio comprising these investments is designed to illustrate an appropriate balance of risk and return for your situation.

Please keep in mind that the proposal represents only a selection among the many investments and products available for your consideration. Your Financial Advisor can provide the basis for his or her presentation of these particular investments/products and can also discuss alternatives.

For more complete information about any of the funds or variable annuities identified in this proposal, including investment objectives, risks, charges and expenses, obtain a prospectus from your Financial Advisor. Read and consider it carefully before you invest.

For managed account (investment advisory) programs (including UMA, Consults, MFA and PI/WDP), client agreements, disclosure statements, and profiles (if applicable) can provide additional information about these programs, including applicable fees, restrictions and other terms.

YOUR INVESTMENT PROPOSAL						
Action	Security	Description	Account	Quantity	Price (\$)	Value % of Total Portfolio
United Diversified Portfolios Selects - Total Portfolios Selects**						
Consider		4 MF/ETF/MGR UDPS CONSERV TE	New Account			
		Selected Managers/Funds for Consideration:				\$340,000 100.0%
		3% SMALL CAP CORE: GLENMEDE SMALL CAP FUND				
		4.8% LARGE CAP CORE: ISHARES RUSSELL 1000 INDEX				
		19.2% LARGE CAP CORE: LONDON COMPANY DIV FOCUSED				
		73% FIXED INCOME - TAX EXEMPT: T. ROWE PRICE INT MUNI FD				
TOTAL					Subtotal	\$340,000 100.0%
						\$340,000 100.0%

**Profiles that contain additional information regarding these investment advisory services are attached, where applicable.

Note: Please refer to Appendix C for as of date information. This report is for informational purposes only. Your Merrill Lynch account statement is your official record of holdings, balances and security values in Merrill Lynch accounts. Where assets held outside of Merrill Lynch are identified, the holdings and values are based upon information you provided. You should advise your Financial Advisor if there have been any changes to your holdings or their value. Any annuities shown are not held in your account but are listed here for your convenience. These values are one day prior to the as of date shown above. Also note that holdings such as short positions, negative cash and margin balances that may impact your overall portfolio value are not listed here.

INTRODUCTION TO PAST PERFORMANCE

To assist you in evaluating the proposed portfolio, the past performance of the specific investment or index is presented in the next pages. Unless otherwise noted, performance reflects realized and unrealized gains and losses, the reinvestment of income and no transaction costs or taxes. Past performance does not guarantee future results. Please note that careful consideration should be given to securities that have short term historic performance records (i.e., less than 5 years) as there is limited information as to how these investments performed during various market conditions. If performance is shown for an investment that held and/or held, this performance may differ from the results you actually achieved for reasons including timing of investment, holding period, and performance calculation methodology.

For Consults (CIM), including Consults Diversified Portfolios (CDP), performance is shown both before (gross) and after (net) the deduction of a proposed annual Consults fee, which generally covers Merrill Lynch transaction and custody services and the Consults manager's services. Similarly, for Unified Managed Account (UMA) portfolios (IM, DP, DPS, CMP, CPS), performance is shown both before (gross) and after (net) the deduction of a proposed UMA fee, which generally covers, among other things, Merrill Lynch transaction and custody services and the services of Managed Account Advisors LLC (MAA), the portfolio overlay manager, and the Portfolio's style manager(s), if any. Where individual mutual funds comprise an investment style within a UMA portfolio, gross performance shown does not reflect the deduction of the sales charge that may apply if the fund were held outside of the UMA program. If this sales charge is deducted, performance would be lower. Similarly, net performance shown does not reflect the deduction of the sales charge that may apply if the fund were held outside of the UMA program, but instead reflects the deduction of the proposed UMA fee. If the sales charge was deducted instead of the proposed UMA fee, performance would differ. In addition, performance information after the deduction of the maximum Consults or UMA fee for each of the portfolios included is also shown in this report, and, where applicable, is also indicated on its profile, which is attached (profiles for UMA DPS and CPS do not reflect the maximum fee, however the profiles for the investment styles comprising each DPS or CPS do indicate the maximum fee. Also note that some styles containing solely mutual funds or ETFs do not have corresponding profiles).

If the proposed fee for any of these portfolios is less than the maximum fee indicated on the profile, the performance shown in this report for each Consults or UMA portfolio and the total portfolio performance would be

reduced if the maximum fee were applied.

Some or all of the performance shown in the Consults profiles and included in the portfolio performance may be based on the management of non-Consults accounts. Most of the performance shown on UMA profiles and included in the portfolio performance is based on the management of non-UMA accounts, as UMA is a new investment advisory program that was introduced in April 2007. Also, most or all of the performance information that is included in this report for certain UMA and Consults portfolios is hypothetical performance. Hypothetical performance is created when two or more style managers or funds each manage or provide recommendations for a component of a broader investment style, and the actual past composite performance of each of the style managers or funds is combined according to the allocation of the managers or funds within that style. While Merrill Lynch, and, in connection with the Consults CDPs and certain Balanced Styles, the investment style manager indicated on the profile, cannot assure that the performance of actual accounts will be similar to the hypothetical performance, each believes that it is reasonably representative of the investment approach for the particular investment style, and is sufficiently relevant for consideration by potential or existing clients. You should review the attached profile(s) for more information. For a full description of the Consults and UMA services and the associated fees, see the respective Client Agreement and Disclosure Statement.

If individual securities shown in this proposal were to be held in a brokerage account, performance would be reduced by any transaction costs, including brokerage commissions. Similarly, if individual securities were to be held in an investment advisory program, such as Merrill Lynch Personal Advisor, Personal Investment Advisor Program, MFA Selects or Strategic Portfolio Advisor, performance would be reduced by the respective program's fees. In this report, a hypothetical fee of 0% has been applied to these holdings in order to reflect the costs of ownership of these securities. If the actual transaction costs or fees charged in any of the advisory programs is higher than the hypothetical fee, resulting performance would be reduced.

Indices included in Proposed Portfolio Holdings are used to represent certain portions of the portfolio for which specific security selections have not yet been made. Securities actually chosen for this portion of the portfolio may have performance that is different than the indices shown. Direct investment cannot be made in an index. See Appendix B for additional information regarding the indices shown.

The compound impact on performance of the deduction of fees is determined by the size of portfolio, the amount of the fee, the time period, and the gross investment performance.

In addition, Reference Indices may be included as a general source of information regarding the performance of certain categories of investments (e.g. US equities, international equities, fixed income, cash, etc.) provided for benchmarking. See Appendix B for additional information regarding the indices shown.

PAST PERFORMANCE ANALYSIS

ANNUALIZED PAST PERFORMANCE OF PROPOSED PORTFOLIO HOLDINGS AND INDICES: AS OF DECEMBER 2012*												
	Product Type	% of Proposed Portfolio	Last Qtr.	YTD	1 YR.	3 YR.	5 YR.	7 YR.	10 YR.	Since Inception	Inception Date	7-Day Yield
PROPOSED PORTFOLIO HOLDINGS:												
4 MF/ETF/MGR UDPS CONSERV/TE	DPS	100.00%	0.36%	7.45%	7.45%	8.02%	6.19%	6.01%	—	—	N/A	—
Net of 1.20% Fee Performance:			0.06%	6.16%	6.16%	6.72%	4.92%	4.74%	—	—	N/A	—
Selected Managers/Funds for Consideration:												
SMALL CAP CORE: GLENMEDE SMALL CAP FUND (3%)		3.00%	2.35%	16.72%	16.72%	14.12%	4.18%	5.81%	—	—	N/A	—
Net of 1.15% Fee Performance:			2.05%	15.39%	15.39%	12.81%	2.99%	4.60%	—	—	N/A	—
Net of Maximum Fee Performance:			2.35%	16.72%	16.72%	14.12%	4.18%	5.81%	—	—	N/A	—
LARGE CAP CORE: ISHARES RUSSELL 1000 INDEX (4.8%)		4.80%	0.08%	16.27%	16.27%	10.96%	1.82%	4.20%	—	—	N/A	—
Net of 1.15% Fee Performance:			(0.20%)	14.94%	14.94%	9.69%	0.66%	3.01%	—	—	N/A	—
Net of Maximum Fee Performance:			0.08%	16.27%	16.27%	10.96%	1.82%	4.20%	—	—	N/A	—
LARGE CAP CORE: LONDON COMPANY DIV FOCUSED (19.2%)		19.20%	0.10%	11.87%	11.87%	15.13%	8.71%	8.95%	—	—	N/A	—
Net of 1.43% Fee Performance:			(0.26%)	10.28%	10.28%	13.49%	7.17%	7.40%	—	—	N/A	—
Net of Maximum Fee Performance:			(0.58%)	8.88%	8.88%	12.05%	5.81%	6.03%	—	—	N/A	—
FIXED INCOME - TAX EXEMPT: T. ROWE PRICE INT MUNI FD (73%)		73.00%	0.37%	5.29%	5.29%	5.45%	5.40%	4.98%	—	—	N/A	—
Net of 1.15% Fee Performance:			0.08%	4.08%	4.08%	4.24%	4.20%	3.78%	—	—	N/A	—
Net of Maximum Fee Performance:			0.37%	5.29%	5.29%	5.45%	5.40%	4.98%	—	—	N/A	—
Total		100.0%										
REFERENCE INDICES:												
CONSUMER PRICE INDEX			(0.78%)	1.74%	1.74%	2.06%	1.80%	2.23%	—	—		—

* Last Quarter and Year-to-Date returns are not annualized.

Performance is shown for the specific investment proposed. Where indices are shown within Proposed Portfolio Holdings, they are used to represent certain portions of the portfolio for which specific security selections have not been made. Past performance does not guarantee future results. Direct investment cannot be made in an index. Unless otherwise noted, performance assumes the reinvestment of income and no transaction costs or taxes. See Appendix B for more information.

PAST PERFORMANCE ANALYSIS

CALENDAR YEAR PAST PERFORMANCE OF PROPOSED PORTFOLIO HOLDINGS AND INDICES: JANUARY 2003 - DECEMBER 2012												
	Product Type	% of Proposed Portfolio	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
PROPOSED PORTFOLIO HOLDINGS:												
4 MF/ETF/MGR UDPS CONSERV TE	DPS	100.00%	9.32%	5.89%	2.83%	8.09%	3.07%	(7.63%)	15.99%	6.63%	10.01%	7.45%
Net of 1.20% Fee Performance:			8.01%	4.62%	1.60%	6.79%	1.84%	(8.74%)	14.60%	5.35%	8.69%	6.16%
<i>Selected Managers/Funds for Consideration:</i>												
SMALL CAP CORE: GLENMEDE SMALL CAP FUND (3%)		3.00%	34.54%	21.33%	4.50%	15.70%	4.59%	(36.72%)	30.50%	27.20%	0.10%	16.72%
Net of 1.15% Fee Performance:			33.00%	19.94%	3.31%	14.37%	3.40%	(37.45%)	29.01%	25.75%	(1.05%)	15.39%
Net of Maximum Fee Performance:			34.54%	21.33%	4.50%	15.70%	4.59%	(36.72%)	30.50%	27.20%	0.10%	16.72%
LARGE CAP CORE: ISHARES RUSSELL 1000 INDEX (4.8%)		4.80%	29.64%	11.27%	6.15%	15.29%	5.68%	(37.58%)	28.33%	15.94%	1.36%	16.27%
Net of 1.15% Fee Performance:			28.16%	10.00%	4.93%	13.97%	4.47%	(38.29%)	26.86%	14.61%	0.20%	14.94%
Net of Maximum Fee Performance:			29.64%	11.27%	6.15%	15.29%	5.68%	(37.58%)	28.33%	15.94%	1.36%	16.27%
LARGE CAP CORE: LONDON COMPANY DIV FOCUSED (19.2%)		19.20%	19.33%	13.21%	3.90%	20.53%	(0.46%)	(22.66%)	28.65%	17.33%	16.26%	11.87%
Net of 1.43% Fee Performance:			17.64%	11.60%	2.43%	18.81%	(1.88%)	(23.76%)	26.82%	15.66%	14.61%	10.28%
Net of Maximum Fee Performance:			16.14%	10.18%	1.13%	17.31%	(3.12%)	(24.72%)	25.21%	14.19%	13.15%	8.88%
FIXED INCOME - TAX EXEMPT: T. ROWE PRICE INT MUNI FD (73%)		73.00%	4.47%	3.00%	2.25%	4.16%	3.72%	0.16%	10.77%	2.23%	8.94%	5.29%
Net of 1.15% Fee Performance:			3.28%	1.82%	1.08%	2.97%	2.53%	(0.99%)	9.50%	1.06%	7.69%	4.08%
Net of Maximum Fee Performance:			4.47%	3.00%	2.25%	4.16%	3.72%	0.16%	10.77%	2.23%	8.94%	5.29%
Total		100.0%										
REFERENCE INDICES:												
CONSUMER PRICE INDEX			1.88%	3.26%	3.42%	2.54%	4.08%	0.09%	2.72%	1.50%	2.96%	1.74%

Performance is shown for the specific investment proposed. Where indices are shown within Proposed Portfolio Holdings, they are used to represent certain portions of the portfolio for which specific security selections have not been made. Past performance does not guarantee future results. Direct investment cannot be made in an index. Unless otherwise noted, performance assumes the reinvestment of income and no transaction costs or taxes. See Appendix B for more information.

INTRODUCTION TO HYPOTHETICAL PORTFOLIO PERFORMANCE

To assist you in evaluating the proposed portfolio, hypothetical risk and return information is presented in the next pages. This illustration does not reflect actual results of a portfolio but, rather, hypothetical results of the proposed portfolio presented by your Financial Advisor. Because the proposed portfolio was structured with the benefit of hindsight, the hypothetical returns shown may be higher than the returns of a portfolio that would have actually been recommended during the time period shown. The analysis assumes that the portfolio began on the first day of the period identified and that the portfolio was systematically rebalanced every fourth quarter based on the anniversary date of the initial investment. This systematic financing typically will not reflect how an actual portfolio would have been managed by an investor or investment adviser. Also, this illustration does not reflect the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the analysis. In addition, hypothetical performance is shown for the longest common time period that all investments included have performance (e.g., if 5 investments have 10 years of performance and 1 investment has 5 years of performance, the longest period of hypothetical performance is 5 years).

Basis for Performance Calculation

Hypothetical risk and return is calculated based on the indices and individual investment performance presented on the prior page(s) entitled "Past Performance Analysis". Each product/investment's performance is allocated based on its respective allocation in the portfolio, which is also shown on the referenced pages. You should refer to these pages and reference notes, as well as any attached fact sheet, to understand the basis for the composite performance shown below and on the following pages. All results reflect realized and unrealized gains and losses, the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee future results. The proposed portfolio may experience losses.

After Fee Hypothetical Portfolio Performance

Hypothetical portfolio performance is shown both before ("gross") and after ("net") the deduction of fees. When net performance is shown, the page will be labeled "After Proposed Fee", and will reflect the results of deducting the proposed fees indicated on the prior pages for each investment advisory account and other investments in the portfolio and then aggregating the results to calculate net performance for the portfolio as a whole.

Based on the fees applied to each investment and their relative weighting in the portfolio, the aggregate, or weighted average, fee for the portfolio is 1.2%.

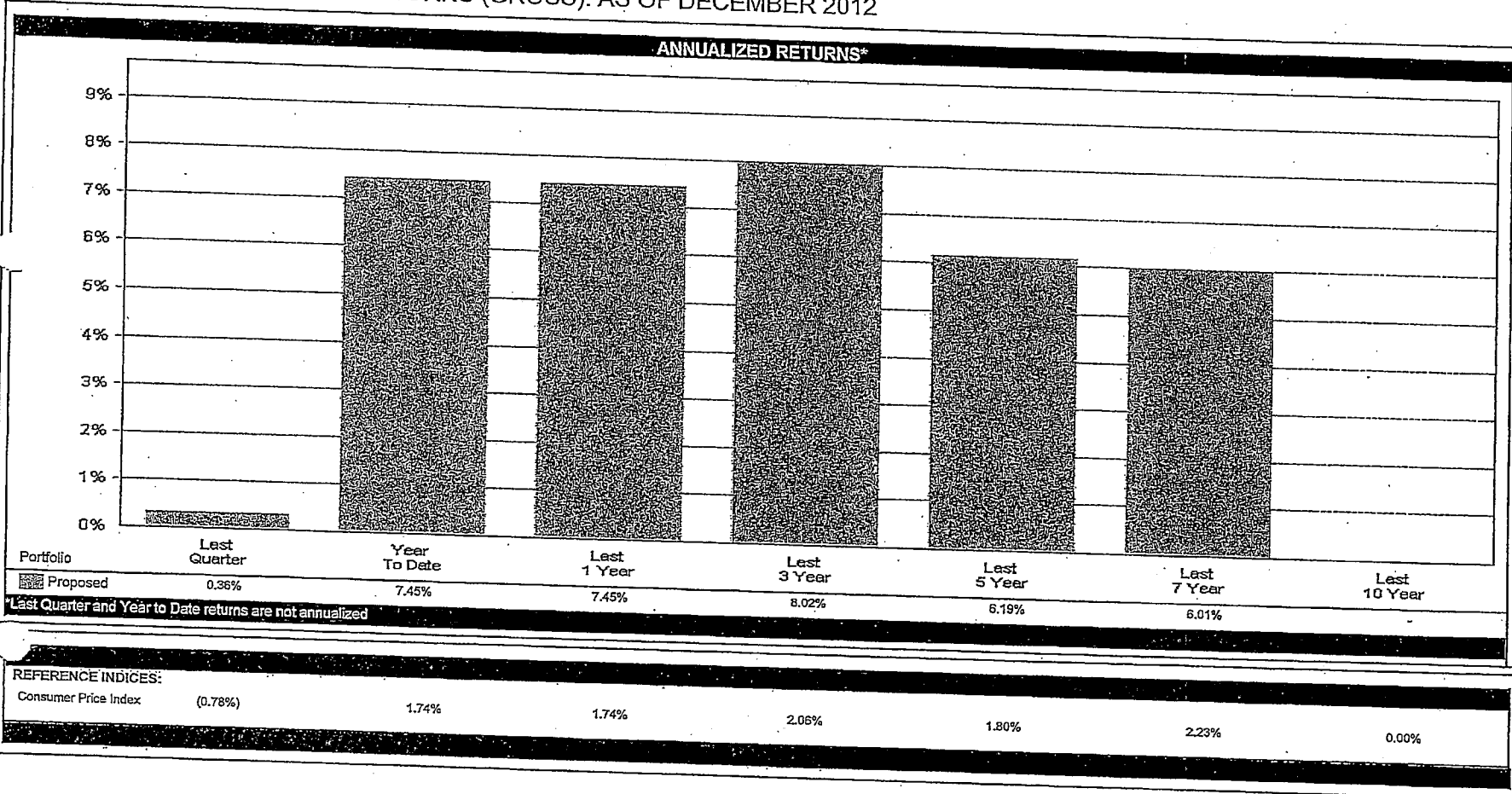
This aggregate fee is derived by multiplying the proposed fee for each of the holdings included in this report by the percentage of the portfolio that the holding constitutes at the beginning of the analysis period, and then adding the resulting fees. However, this aggregate fee will fluctuate during each year shown, due to the effect of investment gains or losses of each of the holdings throughout each year, and in actuality could be different than the aggregate fee indicated above.

The aggregate fee does not necessarily reflect the actual, aggregate fees that would be paid if the portfolio were to be implemented. The aggregate fee is provided for illustrative purposes only, in order for you to more fully evaluate the impact that fees would have on the portfolio's hypothetical performance. The hypothetical performance shown in this report would be overstated if the actual fees applicable to your holdings exceed the proposed fees that were used. You also should review the profiles and other similar information attached to this report to determine the maximum fees applicable to some of the investments included in the hypothetical portfolio, where applicable.

Indices

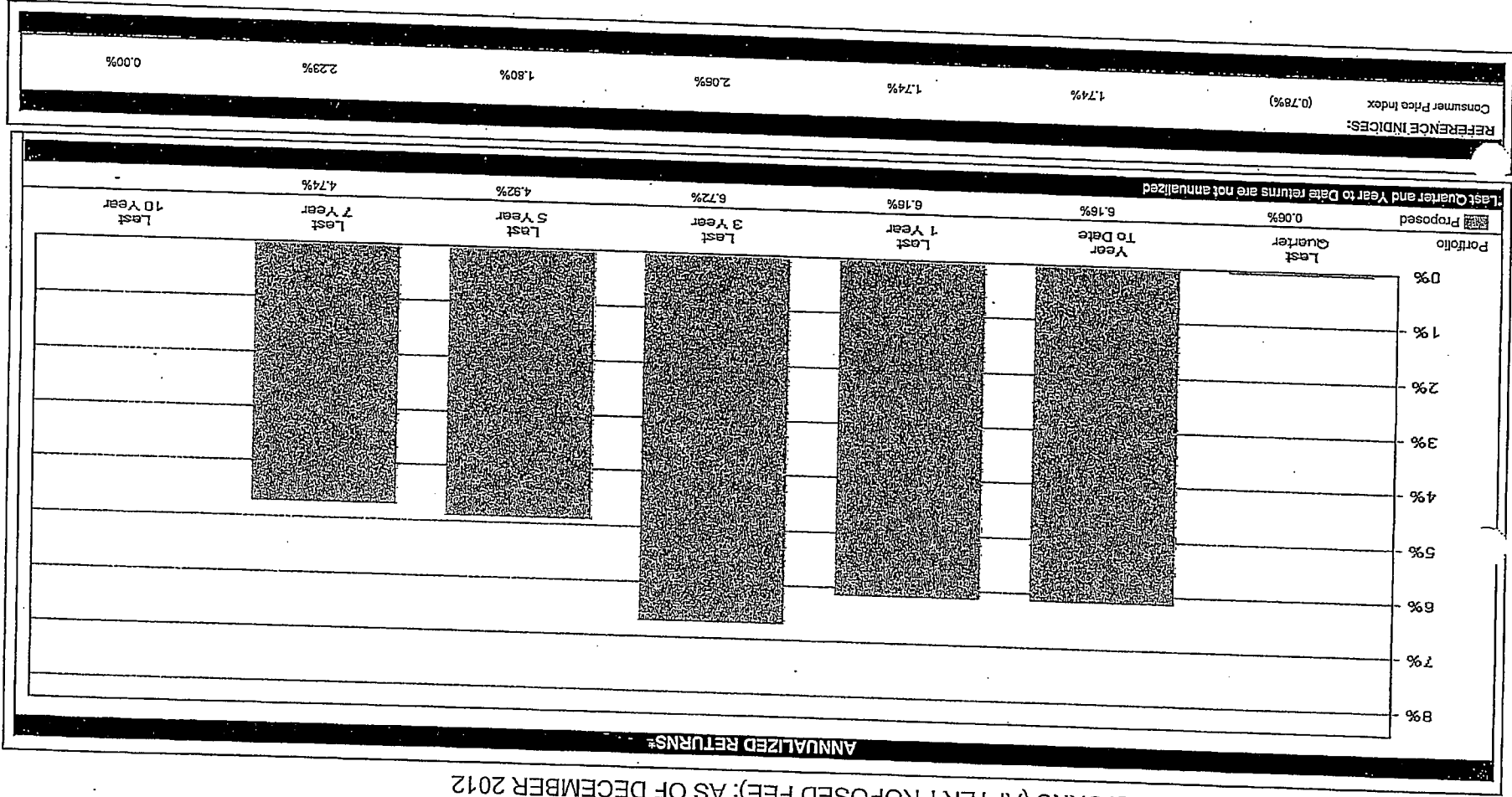
Reference Indices are included in this report as a general source of information regarding the performance of various categories of investments (e.g., US equities, international equities, fixed income, cash and alternative investments). See Appendix B for additional information regarding the indices shown.

HYPOTHETICAL ANNUALIZED RETURNS (GROSS): AS OF DECEMBER 2012



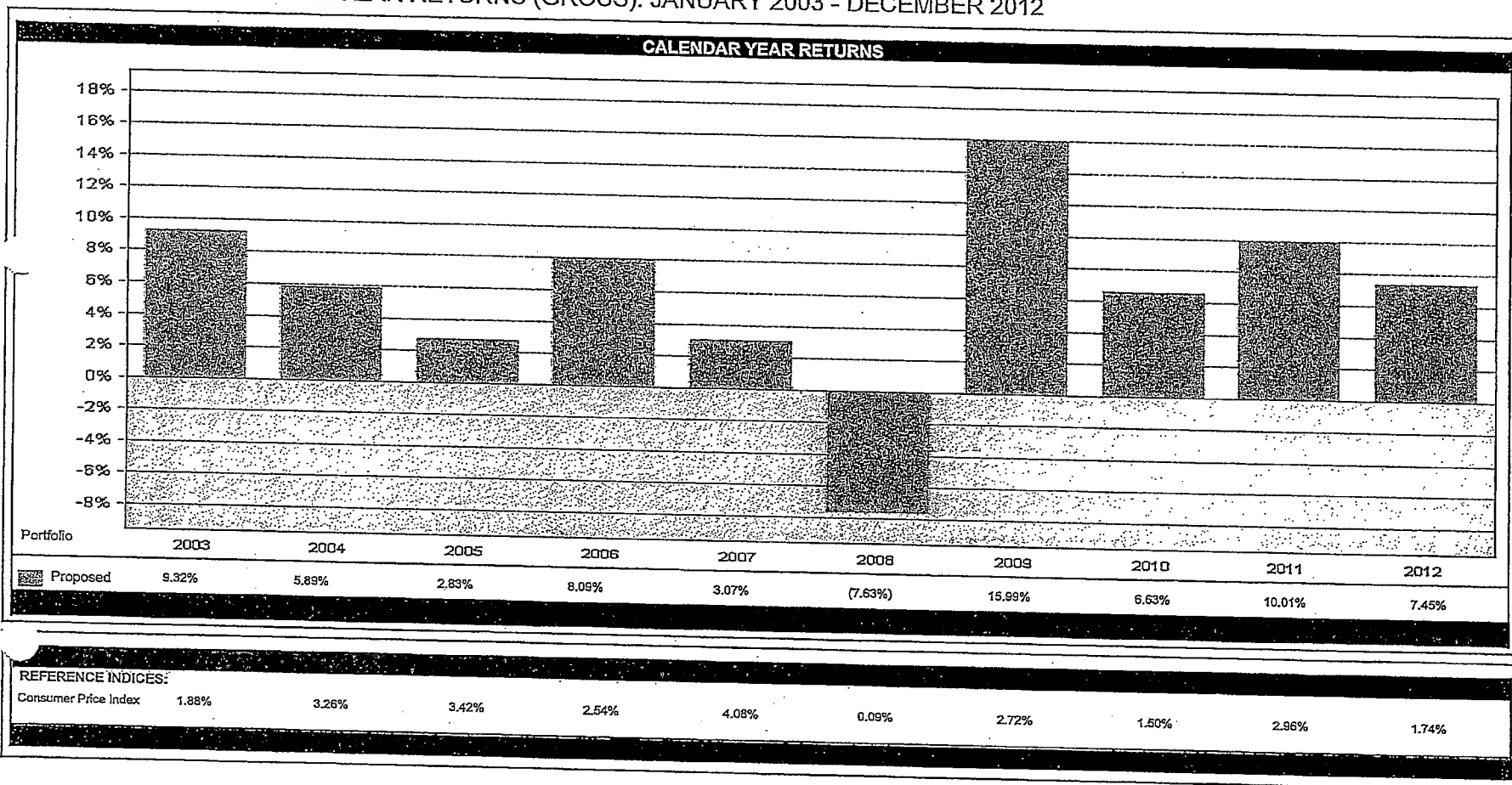
Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL ANNUALIZED RETURNS (AFTER PROPOSED FEE): AS OF DECEMBER 2012



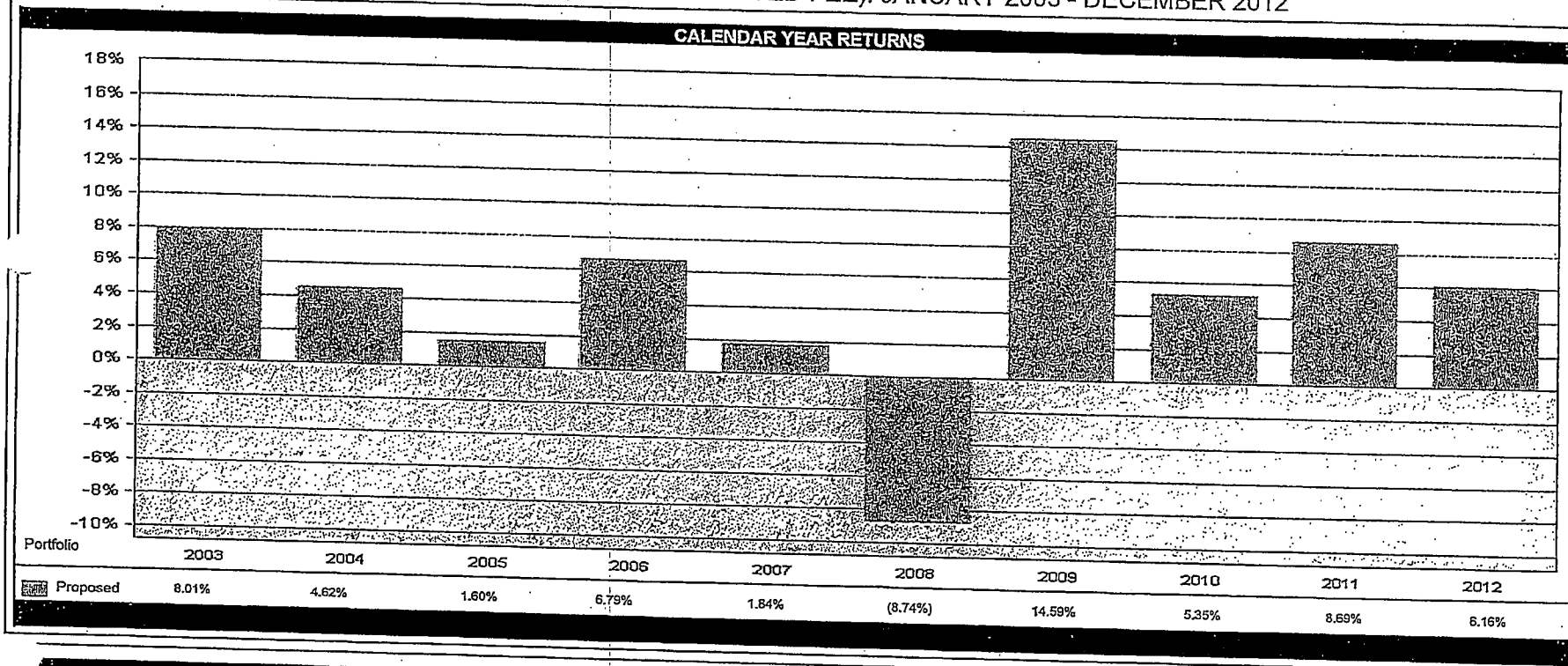
Results shown for the current and proposed portfolios are hypothetical, reflect the deduction of a hypothetical portfolio fee where noted and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL CALENDAR YEAR RETURNS (GROSS): JANUARY 2003 - DECEMBER 2012



Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL CALENDAR YEAR RETURNS (AFTER PROPOSED FEE): JANUARY 2003 - DECEMBER 2012

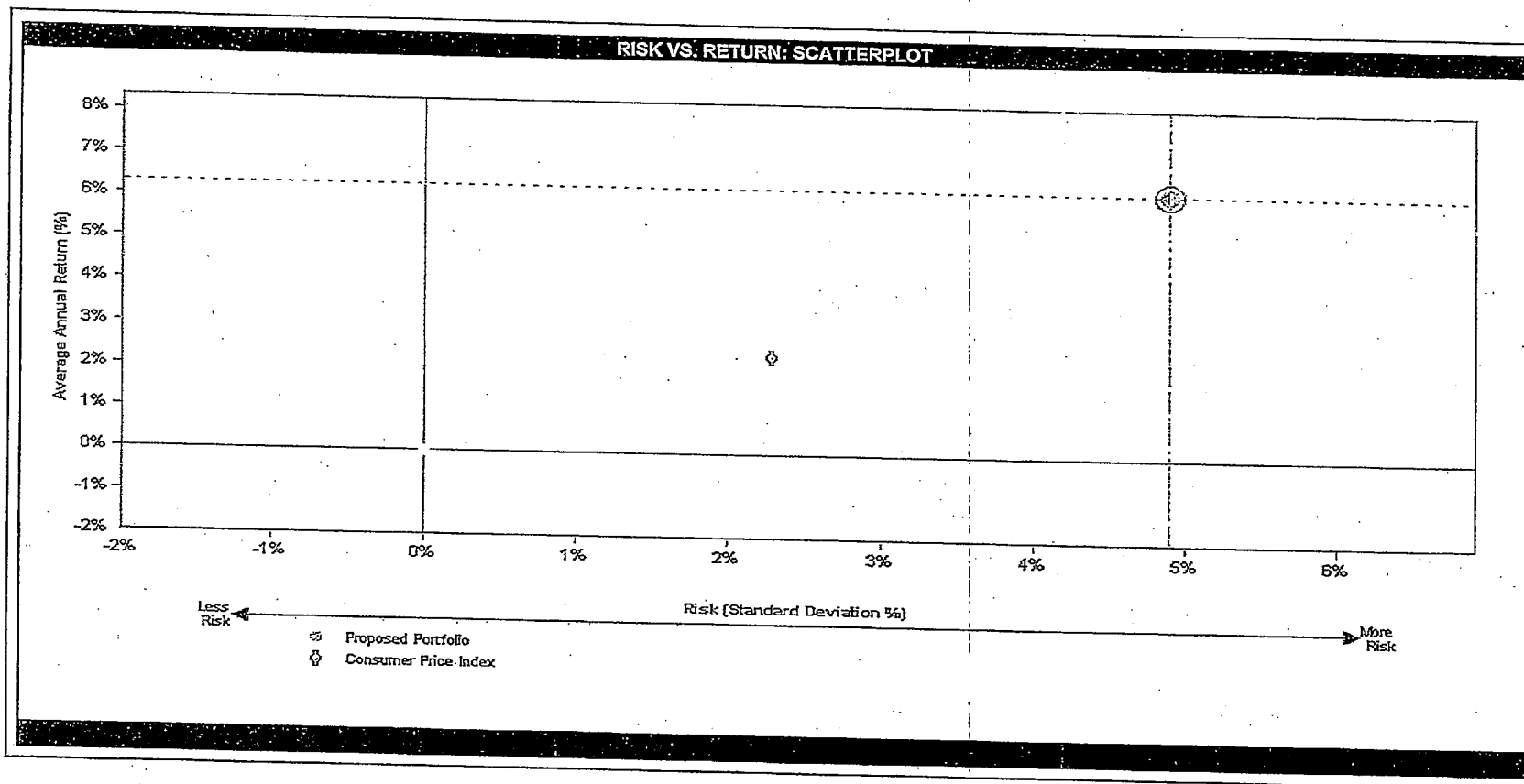


REFERENCE INDICES:

Consumer Price Index	1.88%	3.26%	3.42%	2.54%	4.08%	0.09%	2.72%	1.50%	2.96%	1.74%
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Results shown for the current and proposed portfolios are hypothetical, reflect the deduction of a hypothetical portfolio fee where noted and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL RISK VS. RETURN SCATTERPLOT (GROSS): APRIL 2003 - DECEMBER 2012

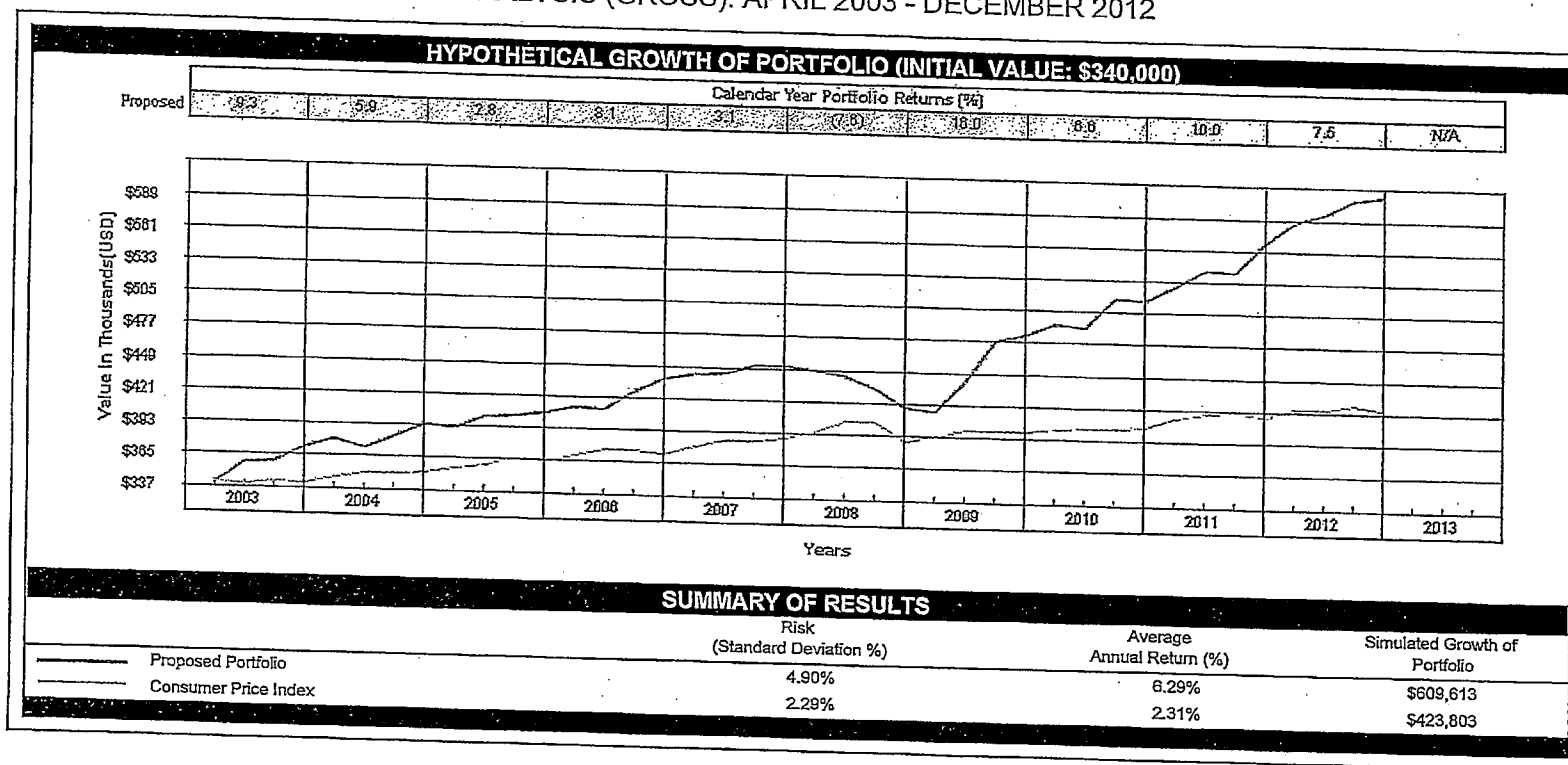


Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. Where indices are shown within Proposed Portfolio Top 10 Holdings, they are used to represent certain portions of the portfolio for which specific security selections have not been made. Direct investment cannot be made in an index. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

PORTFOLIO:	% of Proposed Portfolio	Average Annual Return	Risk (Standard Deviation %)
Proposed			
REFERENCE INDICES:		6.29%	4.90%
Consumer Price Index			
PROPOSED PORTFOLIO TOP 10 HOLDINGS:		2.31%	2.29%
① 4 MF/ETF/MGR UDPS CONSERV TE	100.00%	6.29%	4.90%

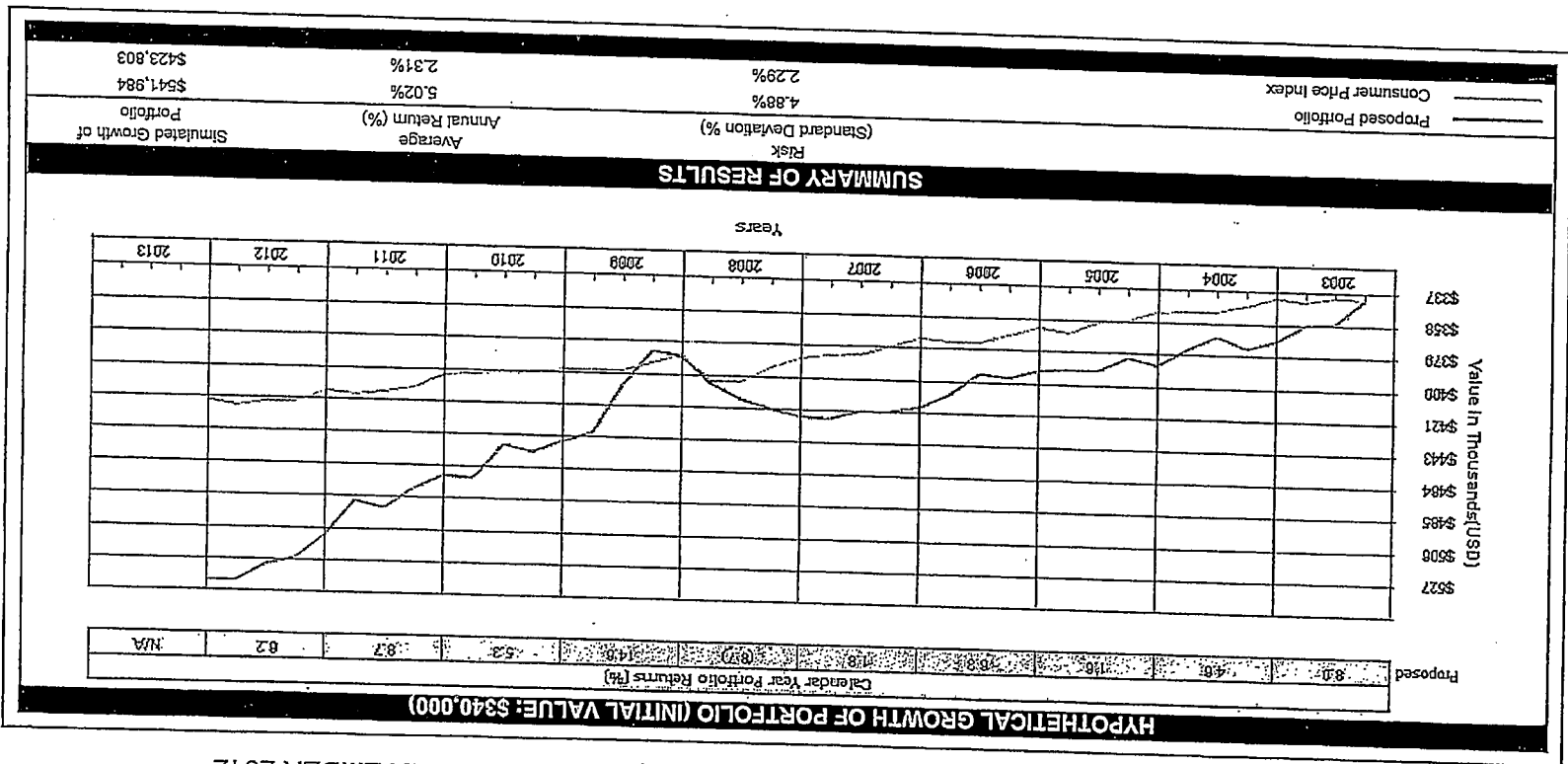
Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. Where indices are shown within Proposed Portfolio Top 10 Holdings, they are used to represent certain portions of the portfolio for which specific security selections have not been made. Direct investment cannot be made in an index. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL GROWTH OF PORTFOLIO ANALYSIS (GROSS): APRIL 2003 - DECEMBER 2012



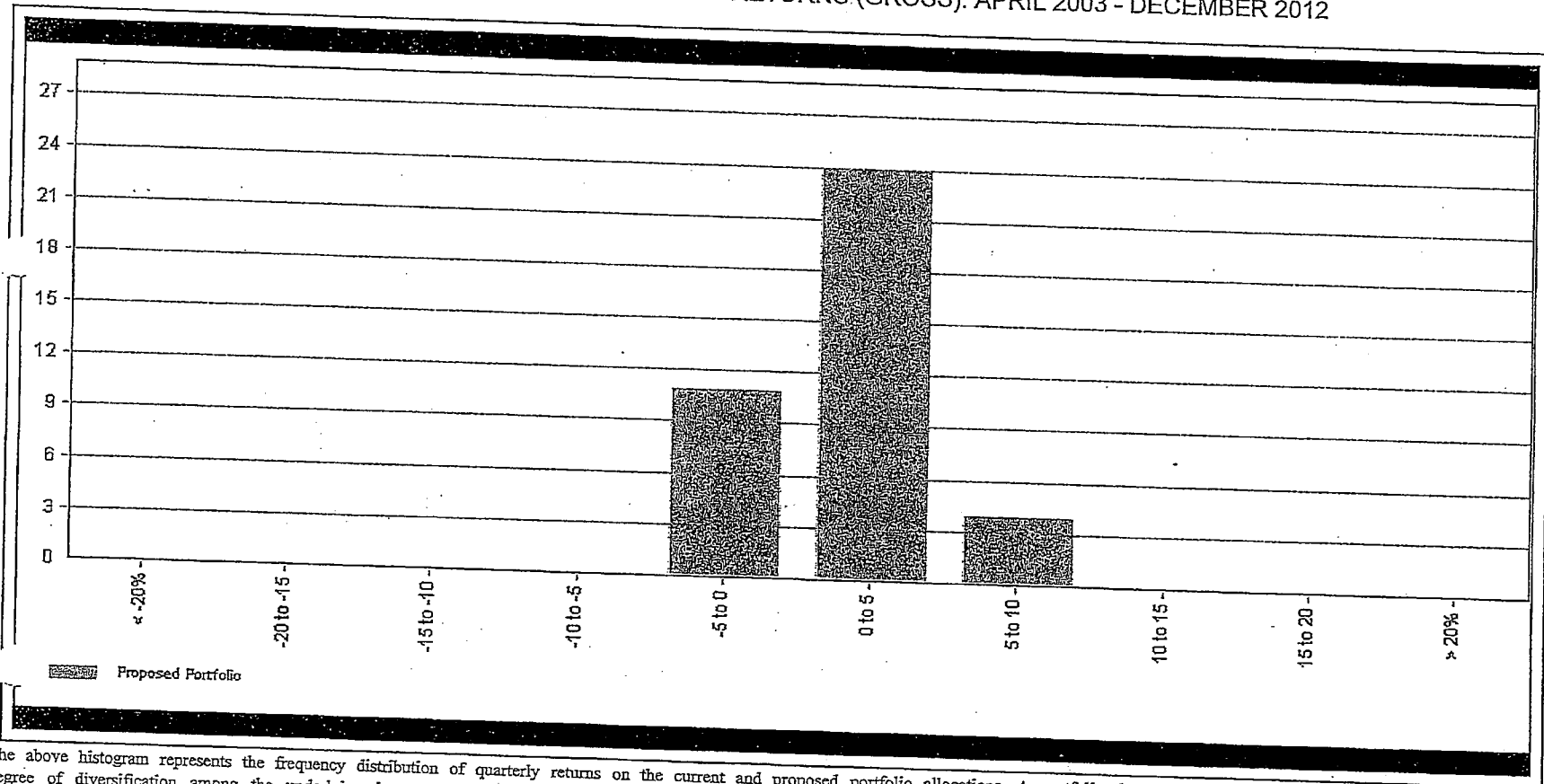
Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B. Simulated Growth of Portfolio Chart compares the growth of a hypothetical investment made in the proposed portfolio, the current portfolio and general market indices. For illustrative purposes only. Past performance does not guarantee future results.

HYPOTHETICAL GROWTH OF PORTFOLIO ANALYSIS (AFTER PROPOSED FEE): APRIL 2003 - DECEMBER 2012



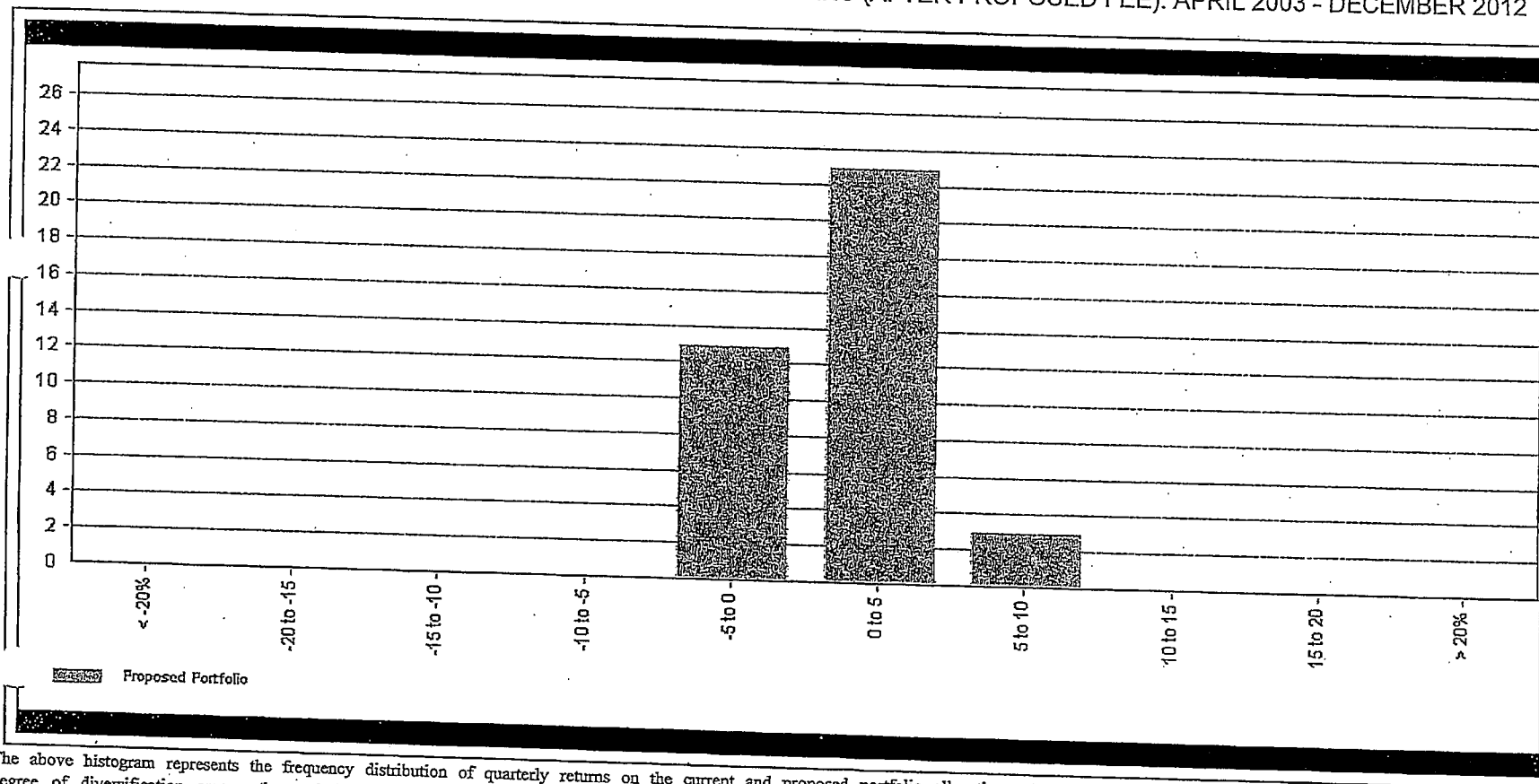
Results shown for the current and proposed portfolios are hypothetical, reflect the deduction of a hypothetical portfolio fee and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B. Simulated Growth of Portfolio Chart compares the growth of a hypothetical investment made in the proposed portfolio, the current portfolio and general market indices. For illustrative purposes only. Past performance does not guarantee future results.

HYPOTHETICAL DISTRIBUTION OF QUARTERLY PORTFOLIO RETURNS (GROSS): APRIL 2003 - DECEMBER 2012



The above histogram represents the frequency distribution of quarterly returns on the current and proposed portfolio allocations. A portfolio that displays a normal distribution of returns shows a high degree of diversification among the underlying investments and reflects a risk/return profile that is centered around the statistical mean return value. Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

HYPOTHETICAL DISTRIBUTION OF QUARTERLY PORTFOLIO RETURNS (AFTER PROPOSED FEE): APRIL 2003 - DECEMBER 2012



The above histogram represents the frequency distribution of quarterly returns on the current and proposed portfolio allocations. A portfolio that displays a normal distribution of returns shows a high degree of diversification among the underlying investments and reflects a risk/return profile that is centered around the statistical mean return value. Results shown for the current and proposed portfolios are hypothetical and do not reflect actual results or the impact of past economic and market conditions that would have presumably caused an investor to make investment decisions not reflected in the simulation. All results shown above assume the reinvestment of income, no transaction costs or taxes, and, for the allocation results, that the asset allocation(s) remained consistent throughout the time period indicated. Past performance does not guarantee or indicate future results. For important information regarding this hypothetical analysis, including modeling assumptions and inherent limitations, see the beginning of this section and Appendix B.

APPENDIX A: GLOSSARY

Annuities

Annuities are long-term investments designed for retirement purposes. Annuities provide tax-deferral, the potential for an income stream that you cannot outlive and a death benefit. Fixed annuities provide a guaranteed interest rate over a certain period of time. Variable annuities invest in underlying funds and contract values will fluctuate and may be worth more or less than originally invested. You should consult with your Financial Advisor concerning your investment objectives, age, risk tolerance and liquidity needs as well as the features, benefits, fees and limitations of an annuity. Variable annuities are sold by prospectus only. The prospectus contains details on the variable annuity, the subaccounts, contract features, the investment company, fees, charges, expenses and other pertinent information. You should read the prospectus carefully before investing or sending money.

Asset Allocation

The mix of investment classes — equities, fixed income, cash, and, where appropriate, alternative investments — for an investor's portfolio. The appropriate balance is based on the anticipated return and relative risk of each asset category as well as the investor's personal factors such as risk tolerance, age, current asset allocation and asset level.

BlackRock Private Investors Service

TA discretionary portfolio management service for institutional and high net worth investors offered by BlackRock Investment Management, LLC.

Cash

Refers to the positive number resulting from the aggregation of each account's Cash, short positions and margin balance. Where multiple accounts are included in the analysis, both Cash and Net Debit Balance may be reflected.

Consults® Service

A discretionary, fee based investment advisory program in which assets are managed in separate accounts by professional money managers.

Diversification

Investing in multiple investments to help limit risk. The concept of "not putting all your eggs into one basket."

Equities

Investments representing ownership in a corporation. As a part owner or shareholder, an investor could profit from the company's successes in the form of increased share prices, dividends or both. On the other hand, equities have no fixed set value and are only worth what another investor is willing to pay at any given moment.

Fixed Income

Debt investments representing money investors lend to a government or corporation (the issuer). The issuer, in return, promises to pay the investor a fixed or floating rate (coupon rate) at stated intervals over a predetermined period of time. At the end of this time (maturity date), the principal is returned to the investor. Prior to maturity, the value of the security fluctuates as current interest rates rise or fall.

Investment Companies ("Funds")

An investment company is an entity registered under the Investment Company Act that has assets consisting of a pool of securities and that issues shares or units representing interests in that pool. There are different types of investment companies or "funds", the main categories of which include mutual funds, closed-end funds, exchange traded funds and unit investment trusts. Each of these funds is defined below.

Closed-end fund: A closed-end fund or "closed-end investment company" is a professionally managed fund, the shares of which typically are listed on a stock-exchange or are traded in the over-the-counter market. (Certain closed-end funds may repurchase their shares, however). The market price of closed-end fund shares therefore is determined by the marketplace and may be more or, more typically, less than the closed-end fund's net asset value (meaning generally the total value of the fund's net assets divided by the total shares outstanding).

Exchanged Traded Fund (ETFs): ETFs technically are open-end investment companies or unit investment trusts, but are functionally different from mutual funds or such trusts. Among other things, ETF shares are not individually redeemable and may only be acquired from or redeemed (sold back to) by the issuing fund only in specified large aggregate amounts known generally as "creation units." More generally, shares of ETFs are traded intraday on stock exchanges at market-determined prices. ETF offerings typically are indexed to selected benchmarks including broad, style, sector, industry, country and regional benchmarks.

Mutual Fund: A mutual fund or "open-end investment company" is a professionally managed fund, the shares of which are "redeemable". Redeemable shares are shares that, absent unusual circumstances, may be sold back to the issuing fund at their net asset value (or nav) next-determined after the order is placed (computed generally by dividing the total value of the fund's net assets by the amount of shares outstanding). The purchase price for shares sold to investors also is at the next-determined nav.

Unit Investment Trust (UITs): UITs generally are static, rather than managed, pools of securities. While units issued by UITs must be redeemable (that is, available to be sold back to the issuer as described above in the case of mutual funds), more typically they are sold back to the UIT sponsor or its affiliates in a secondary market transaction. UIT pools consist of various types of equity or fixed income securities and may be diversified or may consist of more narrow industries or geographic sectors.

Investor Profile

A description of overall investment objectives, risk range and time horizon based on how investors characterize themselves. Each investor profile - conservative, moderately conservative, moderate, moderately aggressive, and aggressive - serves as the foundation for an appropriate asset allocation strategy.

Managed Asset Short Allocation

When a managed asset has a negative allocation in one or more of its asset categories.

Margin Balance

A balance represents either a debit balance (the

amount owed to Merrill Lynch as a result of such transactions as trade commitments or Visa charges) or a credit balance (the amount held in your account after all trade commitments or Visa charges have been paid in full).

Mutual Fund Advisor (MFA®) Program

A discretionary, fee based mutual fund asset allocation program.

Net Debit Balance

Refers to the negative number resulting from the aggregation of each account's Cash, short positions and margin balance. Where multiple accounts are included in the analysis, both Cash and Net Debit Balance may be reflected.

Short Position

When an investor sells a borrowed security in anticipation of a price decline [or to protect profit in a long position]. This activity involves risk because an increase in the price of the stock will result the investor having to cover the position by, among other things, selling securities or depositing additional funds. Investors should fully understand these risks. Note that short positions are included as part of the cash calculation. Where a Net Debit Balance exists, the Short Position value is shown. Your Financial Advisor can provide additional detail regarding short positions in your account.

Unified Managed Account (UMA) Service

An investment advisory service that offers diversified portfolios from professional investment managers, and portfolio management, oversight, and operational logistics directly from Merrill Lynch.

APPENDIX B: ADDITIONAL INFORMATION

THIS REPORT IS FURNISHED ON A CONFIDENTIAL BASIS ONLY FOR THE IMMEDIATE USE OF THE RECIPIENT AND ONLY FOR DISCUSSION PURPOSES AND IS SUBJECT TO COMPLETION OR AMENDMENT.

The information contained in this report does not constitute an offer to buy or sell any securities or investment products. It is important for you to understand that it is your responsibility to determine if, and how, the suggestions made in connection with this report should be implemented. You should carefully consider all relevant factors in making these decisions and you are encouraged to consult with any of your outside professional advisors. In particular, Merrill Lynch does not provide legal or tax advice. We recommend that you consult with your lawyer, accountant or other advisor about questions affecting your individual circumstances.

You are not required to transact business with Merrill Lynch or to implement any of the suggestions made in connection with this report. If you choose to implement through Merrill Lynch any or all of the suggestions made in connection with the report, Merrill Lynch will be acting solely as broker-dealer, not as an investment advisor (unless otherwise agreed in writing) and may execute transactions for your account as agent or principal.

Explanation of Analyses and Assumptions

Classification of Securities

For Asset Class, Sector or Size/ Style analyses, securities are generally classified by asset class, sector, size and style and, for Fixed Income, maturity.

- For Size/ Style, security classification is as follows: a capitalization breakpoint of \$12.91 billion defines the size (Large Cap or Small/Mid Cap) classification for domestic equity securities. The style (Growth or Value) for these securities is defined by a proprietary procedure which utilizes a series of quantitative and qualitative metrics (e.g. expected earnings growth, analyst coverage, etc.)
- For Sector, security classifications are based on the Global Industry Classification Standard ("GICS"). Source: Morgan Stanley Capital International ("MSCI") and Standard & Poor's ("S&P"), a division of the McGraw Hill Companies, Inc.
- For Fixed Income, maturity breakpoints are as follows: Short-Term: Less

than 5 years, Intermediate-Term: 5-15 years, Long-Term: greater than 15 years.

- Convertible securities and options are classified as Equities.
- Preferred stock is classified as Fixed Income.
- For Market Linked Investments, classification by asset class, sector, size and style or maturity is determined by the reference security associated with that Market Linked Investment. The reference security may either be an individual security, index or other investment such as a mutual fund or exchange traded fund.
- For mutual funds, exchange traded funds, closed end funds and the investment options of underlying annuities, the fund may be shown by holdings or, optionally, by profile (fund objective). When shown by holdings, the fund is classified by the asset class, sector, size and style or maturity breakdown of those holdings. When shown by profile, the fund is classified by the asset class, sector, or size and style provided by vendors and mapped to Merrill Lynch's RIC (Research Investment Committee) allocation schema in order to report the industry's or Merrill Lynch's interpretation of the objective of the fund/pooled investment vehicle. Note that the data used for this classification is obtained from a variety of sources and may not be current. Mutual funds, exchange traded funds, closed end funds and the investment options of underlying annuities may change their portfolio holdings on a regular (often daily) basis. Accordingly, any analysis that includes mutual funds, exchange traded funds, closed end funds, and the investment options of underlying annuities may not accurately reflect the current composition of these funds. The classification of these securities may differ from other sources due to differing methods of classification (e.g. shown and classified by holdings versus by profile). As such, this report may differ from other reports (e.g., your Merrill Lynch account statement, in which these funds are always shown by profile) depending on whether the funds are shown by holdings or by profile in this report. In particular, Non-Traditional Funds (NTFs), mutual funds and exchange traded funds that pursue alternative strategies or provide alternative asset exposure, may be classified as alternative investments when shown by profile, but when shown by holdings, the NTF will be classified by the asset class, sector, size and style or maturity breakdown of its holdings, which may reflect no allocation to alternative investments. If a fund's holdings or profile data is not

available, fixed annuities and market value adjusted annuities are classified as Fixed Income and variable annuities are classified as Equities. Note that annuities and life insurance products are not held in your account but are included here for your information. If a fund's holdings or profile data is not available, the fund is classified by its predominant asset class ("Data as of" date shown as "N/A" in the Details Section).

- If a fund's holdings or profile data is not available, fixed annuities and market value adjusted annuities are classified as Fixed Income and variable annuities are classified as Equities. Note that annuities and life insurance products are not held in your account but are included here for your information. If a fund's holdings or profile data is not available, the fund is classified by its predominant asset class ("Data as of" date shown as "N/A" in the Details Section).
- For managed account programs such as UMA, Consults, PI/WDP and MFA, asset allocation information may be based on your actual holdings, model portfolio holdings or the mandated style. Your Financial Advisor can provide additional information.
- For Alternative Investments, Exchange Funds, Hedge Funds, Private Equity, Managed Futures, Precious Metals and select Market Linked Investments may be included.
- For "Other" and "Hard" assets, items that are not easily classified into the asset classes above (such as business interests, investment real estate, options, and life insurance) are shown for informational purposes only and are not part of this analysis.

Investment Risk and Tax Disclosure

You should understand that all investments involve risk (the amount of which may vary significantly), that investment performance can never be predicted or guaranteed and that the values of their portfolios will fluctuate due to market conditions and other factors. You should also understand that if you sell securities, you will be responsible for the tax liabilities arising from such transaction. You are encouraged to seek the advice of a qualified tax professional.

Investment Company Risks

The following describes general risks associated with investing in funds. Please see fund prospectuses for the applicable risks associated with any specific fund.

Emerging Market Funds: The investor should note that funds that invest in

foreign securities involve special additional risks. These risks include, but are not limited to, currency risk, political risk, and risk associated with varying accounting standards. Investing in emerging markets may accentuate these risks.

Foreign Securities Funds: The investor should note that funds that invest in foreign securities involve special additional risks. These risks include, but are not limited to, currency risk, political risk, and risk associated with varying accounting standards.

High-Yield Bond Funds: The investor should note that funds that invest in lower-rated debt securities (commonly referred to as junk bonds) involve additional risks because of the lower credit quality of the securities in the portfolio. The investor should be aware of the possible higher level of volatility, and increased risk of default.

Mid Cap Funds: The investor should note that funds that invest in companies with smaller market capitalizations involve additional risks. The securities of these companies may be more volatile and less liquid than the securities of larger companies.

Money Market Funds: An investment in a money market fund is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although these funds seek to preserve the value of an investment at \$1.00 per share, it is possible to lose money by investing in these funds.

Non-Diversified Funds: The investor should note that funds that invest most of their assets in a small number of issuers involve additional risks, including share price fluctuations, because of the increased concentration of investments.

Sector Funds: The investor should note that funds that invest exclusively in one sector or industry involve additional risks. The lack of industry diversification subjects investor to increased industry-specific risks.

Small Company Stock Funds: The investor should note that funds that invest in stocks of small companies involve additional risks. Smaller companies typically have a higher risk of failure, and are not as well established as larger blue-chip companies. Historically, smaller-company stocks have experienced a greater degree of market volatility than the overall market average.

Tax-Free Municipal Bond Funds: The investor should note that the income from tax-free municipal bond funds may be subject to state and local taxation and the Alternative Minimum Tax. Certain of such funds may also have risks related to concentration in a particular state.

Hypothetical Performance Charts

Hypothetical performance is presented for informational purposes only and does not reflect the performance of an actual portfolio.

Among the inherent material limitations associated with the use of hypothetical performance results are the following:

The hypothetical results were not achieved from the actual investment of assets. These results are simulations generated by the retroactive application of a proposed portfolio. Accordingly, the hypothetical portfolios depict a subjective selection of investments that may demonstrate greater returns than an actual portfolio, chosen during the represented time frame, actually had during the same period. Moreover, such results do not reflect the impact that material economic and market factors might have had on these asset allocation recommendations had your Financial Advisor actually been making these recommendations during the time represented. For example, even if these recommendations had been applied in actual trading during the represented time period (which they were not), no assurance can be given that your Financial Advisor would have adhered to these recommendations in all cases during the represented time frame, especially in cases where strict adherence would have resulted in significant realized losses. In that regard, the recommendations are not an investment product and actual results can vary based upon such factors as the size of an account, the timing of investments, and your decision on whether or not to implement a recommendation.

One of the chief limitations of applying an investment strategy to past market data is that the strategy is developed with the benefit of hindsight and cannot necessarily account for future market factors and developments. Even if the strategy had been employed in actual trading during the represented time period, its simulated results would not necessarily be indicative of results that would have been achieved, much less of those which might be achieved through future adherence to these recommendations.

Index Information

The following index descriptions provide further details regarding the indices used throughout this report

Standard & Poor's 500 Common Stock Index (S&P 500)®

A market-value-weighted index of industrial, public utility, financial and transportation stocks with income reinvested. It is a generally used performance benchmark for domestic equity portfolios, although it reflects the performance

of very large-capitalization stocks.

Merrill Lynch Domestic Master Bond Index

A market-value-weighted index composed of U.S. Treasury, Agency, Mortgage-backed securities and domestic Corporate (BBB/Baa rated or better) debt issues. This index can be used as a proxy for the domestic fixed income market, and as a performance benchmark for fixed income portfolios.

Merrill Lynch US Broad Market Bond Index

A market-value-weighted index composed of U.S. Treasury, Agency, Mortgage-backed securities and domestic Corporate (BBB/Baa rated or better) debt issues. This index can be used as a proxy for the domestic fixed income market, and as a performance benchmark for fixed income portfolios.

U.S. Treasury Bills (T-Bills)

Direct obligations of the United States Treasury. The returns shown are compiled from the yields available from the weekly auction of Treasury Bills with a maturity of 30 days. These returns can be used as a proxy for "cash and cash equivalents".

Russell 1000®

The Russell 1000® is a market-weighted mid- to large-capitalization stock index. Growth and Value versions of the index are utilized to differentiate stocks by the "price-to-book" and "price-to-earnings" ratios.

Russell 2000®

The Russell 2000® is a market-weighted small-capitalization stock index. It is composed of the smaller 2000 stocks, ranked by market capitalization, of the Russell 3000® index. Growth and Value versions of the index are utilized to differentiate stocks by the "price-to-book" and "price-to-earnings" ratios.

Morgan Stanley Capital International Europe, Australasia and Far East Index (MSCI EAFE®)

The Morgan Stanley EAFE Index is a market-weighted equity index, shown here on a net of dividend basis, which is a proxy for the performance of the international stock markets.

Pricing of Securities

Pricing of securities is provided for your information. Your Account Statement is your official record of holdings, balances and security values. Unless otherwise indicated, values reflect current information as of the "Close of

"Business" date shown. Please review the holdings and values with your Financial Advisor on a regular basis. Annuities and life insurance products are not held in your account. Their values are listed in the report for your convenience. Life Insurance Cash Values and Annuity Contract Values are used to calculate Total Portfolio Value. These values are as of close of business one day prior to the "Close of Business Date" shown. Cash Values may not reflect immediately available funds due to loan balances and/or policy changes. Annuity Contract Values may not reflect immediately available funds due to contract changes. Prices specified may fluctuate and the price at the time of purchase or sale may be more or less than that shown. Prices may also change subsequent to purchase, and the value of your investment may decrease.

Asset Allocation Models

Where a Merrill Lynch asset allocation model is presented, it is an allocation model developed by the investment strategy group in Bank of America-Merrill Lynch Research and the GWM Investment Management Group for Merrill Lynch Global Wealth Management use with clients. These models represent asset allocation approaches based on a client's profile and investment objectives and are subject to change as market conditions change in the future. In addition, Merrill Lynch asset allocation models including alternative investments consider liquidity needs as an important factor in the formation of an asset allocation strategy. Liquidity refers to the ability or timeliness with which assets can be converted into cash. Depending on your personal financial needs and objectives, it is important to consider whether you may need to sell investments to raise cash over varying time horizons. If the Merrill Lynch asset allocation model used in this report includes alternative investments, it is designed for clients with higher liquidity needs, which means that the client could only have up to 10% of the portfolio's assets invested in assets that may be illiquid for 3-5 years.

Alternatively, your Financial Advisor may have customized an asset allocation for your specific situation. Regularly review your asset allocation with your Financial Advisor. Asset Allocation does not assure a profit or protect against a loss in declining markets. Asset allocation cannot eliminate the risk of fluctuating prices and uncertain returns.

Additional Information

The analyses, suggested asset allocations and proposed portfolio contained in this report are based on:

- Information you provided

- Appropriate financial concepts

- Investment assumptions pertaining to your current and proposed portfolios and individual asset classes

The assets identified in Appendix C are the basis for all analyses in this report. The validity of the recommendations and analyses contained in this report is dependent upon the accuracy and thoroughness of the data provided by you.

Note that not all mutual funds, variable annuities or classes of shares are available for every investor to purchase through Merrill Lynch. Certain limitations may apply and, therefore, you may not be eligible to purchase some funds or classes of shares identified in this report.

APPENDIX C: PROFILE

PERSONAL INFORMATION

Name: Mr. Reynolds Williams

FINANCIAL ADVISOR INFORMATION

Name: J. Scott Jordan, CFM, CFP Vice President

Title: Wealth Management Advisor

ASSET ALLOCATION VIEW

View Equities As: ☒ Equity ☐ Size/Style ☐ Sector

View Fixed Income As: ☒ Fixed Income ☐ Maturity

☐ Include Alternative Investments?

☐ Client Profile Used:

SUMMARY ACCOUNT OVERVIEW

Accounts Held at Merrill Lynch, Pierce, Fenner & Smith Incorporated (Prices are as of Close of Business 05/10/2013)*

Account #	Account Type	Account Value*	Investment Assets used in Analysis	Asset Not Included in Analysis	Value of Locked Assets Used in Analysis	Value of Locked Assets Not Used in Analysis
NEW ACCOUNT		\$340,000	\$340,000	\$0	\$0	\$0
TOTAL		\$340,000	\$340,000	\$0	\$0	\$0

*Unless otherwise indicated, investment accounts are held at Merrill Lynch, Pierce, Fenner & Smith Incorporated, Member SIPC. Bank deposits are held at the Bank of America, N.A. and affiliated banks or other depository institutions and are covered by FDIC insurance up to applicable limits. Bank deposits are not protected by SIPC. Banking products are provided by Bank of America, N.A. and affiliated banks. Members FDIC and wholly owned subsidiaries of Bank of America Corporation. The assets and liabilities identified in the Accounts section of the Appendix Profile are the basis for all analyses in this report. They may include deposit balances at Bank of America, N.A. and investment balances at MLPF&S.

The value of your portfolio is provided for your information. Your Account Statement is your official record of holdings, balances and security values. Unless otherwise indicated, values reflect current information as of the "Close of Business Date" shown. Please review the holdings and values with your Financial Advisor on a regular basis. When assets held in non-Merrill Lynch accounts are recognized, the price is as of the "Close of Business Date" shown. Annuities and life insurance products are not held in your account. Their values are listed in the report for your convenience. Life Insurance Cash Values and Annuity Contract values are used to calculate Total Portfolio Value. These values are as of 'Close of One Business' day prior to the 'as of' date shown. Cash Values may not reflect immediately available funds due to loan balances and/or policy changes. Annuity Contract Values may not reflect immediately available funds due to contract changes.

The London Company

Investment Process

The London Company's (London, the style manager) objective is to provide a conservative, high-income-with-growth equity investment style focused on capital preservation and total return. The investment style typically holds securities that generate above average dividend yield and enhance stability - such as low beta stocks of profitable, financially stable companies, and investment grade equity preferreds and convertibles. This style has provided a higher yield, with less downside and lower volatility, than other income equity products. Our income equity accounts are designed to generate above-average, absolute returns over full market cycles and to have less participation in down markets. Adherence to its Style Index, the S&P 500 Index, is low. However, past performance does not guarantee or indicate future results. Merrill Lynch, through its affiliate, Managed Account Advisors (MAA), is the overlay portfolio manager for this investment style. The style manager will provide investment advice to Merrill Lynch which includes the specific securities and the percentage allocation to each security to be held in client accounts. This investment advice is updated by the style manager whenever its recommendations change. Merrill Lynch generally implements the investment advice of the style manager without change, subject to any reasonable client-imposed restrictions and, to the extent possible, tax considerations. The style manager can, after consultation with Merrill Lynch, place orders for certain block trades with Merrill Lynch or another broker-dealer.

Equity Selection

The style manager seeks securities that are trading at a 40% discount to intrinsic value. The investment style will hold common and preferred stock as well as convertible bonds with an allocation that is opportunistic and based on current market conditions.

The style manager seeks to identify companies with sustainable high cash returns on capital, above average free cash flow yield, and cash interest coverage more than 4 to 1. The preferreds and convertibles are generally investment grade or better, with stable fundamentals, and the holdings are broadly diversified across sectors and industries.

The investment style seeks to produce approximately half of its returns through dividend income while at the same time providing more downside protection and yield than most other styles in this category. The style manager's goal is to generate annual total returns over a full market cycle while participating in 50-75% of market upside and less than 30%-40% of downside versus its Style Index.

The style manager's sell recommendation criteria are based on: having a soft "stop loss" on any one position that affects the investment style more than 1% on the downside; a soft stop loss at 10% of cost (all preferred positions or just the 1%); a deterioration of fundamentals; significant insider selling; equity preferreds-yield to worst (minimum yield obtainable) ratio of less than 4%; interest coverage ratio less than 2; or the emergence of a higher yielding, same quality alternative.

Additional Portfolio Information

- Equity allocation, including preferreds & convertibles, generally represents 95-100%. Cash ranges from 0-5%.
- Accounts typically hold 30-50 securities.
- Portfolio turnover is typically 25%.
- Accounts are typically invested within 15 business days.
- The style manager may recommend the purchase of Exchange Traded Funds (ETFs) consistent with its style on a temporary basis under certain circumstances (e.g., for tax planning or liquidity reasons).
- The style manager can, after consultation with Merrill Lynch, place orders for certain block trades with Merrill Lynch or another broker-dealer.

Important Note

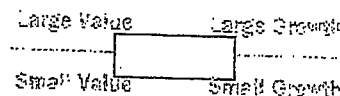
- This investment style is available as an individual strategy with a minimum investment of \$100,000 through Merrill Lynch.

Benchmark Adherence: Low
Equity: Bottom-Up, Mid/Large Cap, Dividend Focused



Composite Common Stock Portfolio Analysis As of March 31, 2013

Style/Capitalization



Calendar Year Returns (%)

Year	Mgr (Gross)	Mgr (Net)	Style Index*
2012	11.9	8.4	16.0
2011	16.3	12.7	2.1
2010	17.3	13.7	15.1
2009	28.7	24.7	25.5
2008	-22.7	-25.0	-37.0
2007	-0.5	-3.5	5.5
2006	20.5	16.8	15.8
2005	9.9	0.7	4.9
2004	13.2	9.7	10.9
2003	19.3	15.7	28.7

*Style Index: 100% S&P 500 with Dividends

Sector Weights (%)

	The London Company	S&P 500
Financials	13.6	13.6
Cons Staples	26.9	26.9
Info Technology	0.0	0.0
Materials	18.2	18.2
Energy	28.6	28.6
Health Care	1.0	1.0
Cons Discretionary	0.0	0.0
Utilities	0.0	0.0
Industrials	0.0	0.0
Telecommunications	0.0	0.0
Other	0.0	0.0

Top 10 Equity Holdings

Company	% of Equity
Kinder Morgan	4.34
Albemarle	4.33
Pfizer Inc	4.14
Hasbro Inc.	4.00
Dominion Resources	3.87
Wells Fargo & Co.	3.77
NewMarket Corp	3.68
Bristol Myers Squibb Co	3.61
Altria	3.60
Lorillard	3.49

Best and Worst Performing Stocks

Best 5

Kinder Morgan
Hasbro Inc.
BlackRock Inc
Bristol Myers Squibb Co
Cincinnati Fnl.

Worst 5

Albemarle
NewMarket Corp
ConocoPhillips
Reynolds American Inc.
General Dynamics

Equity Quality Weightings (%)

	A+	A	A-
The London Company	13.6	10.5	25.6
	B+	12.7	4.2
	C	0.0	6.5
S&P 500	18.2	8.8	12.3
	B+	15.8	6.3
	C	0.0	9.0

Performance information included in this Profile is as of current quarter-end and subject to change. Prior period returns may have been restated to conform to this presentation. All other information is as of the most recent quarter end. Prior to selecting a UMA Investment Manager, you should review the entire Profile and the User's Guide to Investment Manager Profiles. This style may not be available to non-U.S. resident clients. Please ask your Financial Advisor for more information. Past performance does not guarantee future results. The securities identified in this Profile do not represent all of the securities purchased, sold or recommended for advisory clients. See disclosure at the end of the Profile regarding how Best and Worst Performing Stocks were determined.

The London Company

Benchmark Adherence: Low
Equity: Bottom-Up, Mid/Large Cap, Dividend Focused

Performance is shown before the deduction of investment advisory fees (Gross) unless otherwise noted. Approximate percentage returns are provided below. Please review the User's Guide to the Profiles for important information regarding performance and definition of terms used below.

Strategy Performance Long-Term Commentary

This Style returned 11.733% on an annualized basis over the last 5 years versus 5.811% for the Style Index (100% S&P 500 with Dividends).

Strategy Performance Update Q1 2013

The composite returned 12.37% outperforming the Style Index (100% S&P 500 with Dividends) by 1.76%.

Sector Positioning (Overall)

The sector positioning detracted 0.1% from the relative performance.

Contributors	Relative Performance Impact
Financials (3.30% Overweight)	1.04%
Information Technology (5.64% Underweight)	0.86%
Health Care (3.37% Underweight)	0.23%

Detractors	Relative Performance Impact
Materials (7.41% Overweight)	-0.55%
Consumer Staples (7.78% Overweight)	-0.28%

Stock Selection (Overall)

Stock selection contributed 1.7% to relative performance. See page 1 for best/worst performers.

Market Cap Positioning (Overall)

The market cap positioning detracted 0% from the relative performance.

Contributors	Relative Performance Impact
\$1 - \$10 bn (19.2% Overweight)	0.5%
> \$100 bn (4.2% Underweight)	0.1%

Detractors	Relative Performance Impact
\$10 - \$100 bn (19.0% Underweight)	-0.3%
\$0 - \$1 bn (1.9% Overweight)	-0.1%

Strategy Performance Update Year-To-Date

The composite returned 12.37% outperforming the Style Index (100% S&P 500 with Dividends) by 1.76%.

Sector Positioning (Overall)

The sector positioning detracted 0.1% from the relative performance.

Contributors	Relative Performance Impact
Financials (3.30% Overweight)	1.04%
Information Technology (5.64% Underweight)	0.86%
Health Care (3.37% Underweight)	0.23%

Detractors	Relative Performance Impact
Materials (7.41% Overweight)	-0.55%
Consumer Staples (7.78% Overweight)	-0.28%

Stock Selection (Overall)

Stock selection contributed 1.7% to relative performance. See page 1 for best/worst performers.

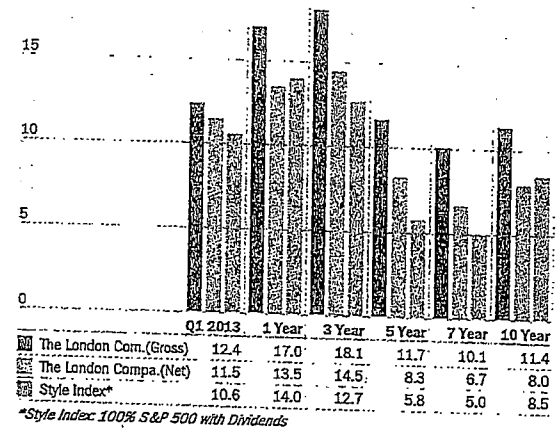
Market Cap Positioning (Overall)

The market cap positioning detracted 0% from the relative performance.

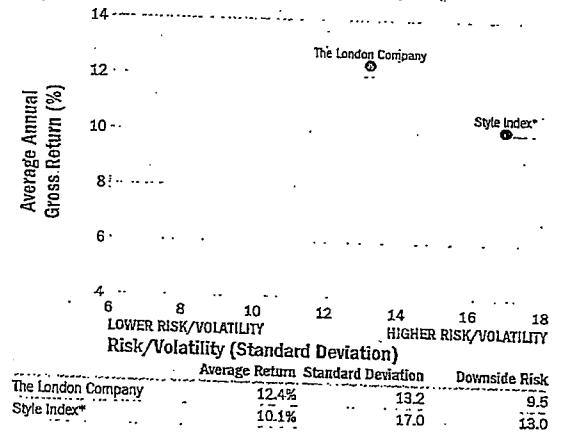
Contributors	Relative Performance Impact
\$1 - \$10 bn (19.2% Overweight)	0.5%
> \$100 bn (4.2% Underweight)	0.1%

Detractors	Relative Performance Impact
\$10 - \$100 bn (19.0% Underweight)	-0.3%
\$0 - \$1 bn (1.9% Overweight)	-0.1%

Annualized Performance (%) Ended March 31, 2013



Risk/Return Analysis April 2003 - March 2013



Performance information included in this Profile is as of current quarter-end and subject to change. Prior period returns may have been restated to conform to this presentation. Prior to selecting an Investment Manager, you should review the entire Profile and the User's Guide to Investment Manager Profiles. Please ask your Financial Advisor for more information. In addition, please review important disclosure on the following page(s) of this Profile. Past performance does not guarantee future results.

The London Company

Benchmark Adherence: Low
Equity: Bottom-Up, Mid/Large Cap, Dividend Focused



This investment style was launched in June 2007 in UMA.

From January 31, 2009 through the quarter end date indicated above, the London Company's composite results shown represent the actual performance of all MAA managed accounts managed in accordance with this investment style for at least one month.

From December 1, 1999 through January 30, 2009, the London Company's composite results represent the performance of all fully discretionary accounts managed in accordance with this investment style for at least one calendar quarter.

The composite results shown are affected by the methodology used to select accounts and the size and number of accounts in the composite, which can vary among managers. In addition, these results include investments in Master Limited Partnerships which represent between 5 and 10% of this style and are not available to Consults clients. All results reflect realized and unrealized appreciation and the reinvestment of dividend and interest income. Taxes have not been deducted.

Results are shown "gross" before the deduction of UMA or investment management fees or other fees (including Rule12b-1 or custodial fees associated with any mutual fund included in the composite performance, if applicable) and "net" (gross results reduced by the maximum UMA fee, which is 3.1%). Market index results shown on this Profile are not reduced by any fees as an index is unmanaged. Further, securities contained in an index will vary from those in a UMA account.

The prior performance results were achieved by the style manager implementing its investment decisions directly. In UMA, the style manager's investment directions will be implemented by Managed Account Advisors (MAA), unless otherwise noted on page 1 of this profile. MAA's implementation of this advice could result in performance that is materially different than the results that the style manager would achieve if it managed clients' accounts directly. UMA account performance also may differ from the prior results for a variety of other reasons, including differences in the types, availability and diversity of securities that can be purchased, economies of scale and other factors applicable to investment in large accounts, and gains or losses caused by currency transactions. Accordingly, Merrill Lynch cannot assure that the performance of actual UMA accounts will be similar to the style manager's past performance. However, after considering, among other factors, information and representations provided by the style manager, Merrill Lynch believes that the style manager's past performance is reasonably representative of the investment style as it will be implemented in UMA by Merrill Lynch and is sufficiently relevant for consideration by a potential or existing UMA client.

Best and Worst Performing Stocks were determined based on their contribution to overall results. Securities shown should not be considered recommendations or solicitations and may not have been, or in the future, be profitable.

Portfolio Information and performance results for individual accounts will vary from the information generally summarized here due to timing of enrollment in UMA, market conditions, account objectives and restrictions, including restrictions related to investing in equity, fixed income or other securities issued, sponsored, or underwritten by Bank of America, Merrill Lynch, and other affiliates of Bank of America or Merrill Lynch and other factors, some of which are identified above. A complete list of holdings for the preceding year is available, if any, upon request.

Foreign investments, including ADRs, may be exposed to certain risks not typically involved in domestic investments such as exchange rate fluctuations, adverse political and economic developments, imposition of exchange controls, or other foreign laws or restrictions.

A UMA account's investment performance will be reduced by the deduction of the UMA fee, which covers, among other things, Merrill Lynch transaction and other account-related services, Merrill Lynch's investment management services and the style manager's services. The compound impact on performance of the deduction of fees is determined by the account size, the amount of the fee, the time period and the gross investment performance. This compounding effect is generally reflected in the Annualized Performance chart. Investment management and related fees associated with ETFs are generally paid by the ETF from its assets and are in addition to the UMA fee.

Certain data and other information shown on the Profile have been supplied by outside sources, including the UMA manager, and are believed to be reliable as of the date indicated. For a variety of reasons, Merrill Lynch may put a manager "on hold" and restrict its ability to manage new accounts. To determine if this manager is currently on hold, please speak with your Financial Advisor. For a full description of the UMA Service and its fees, see the Client Agreement and the Merrill Lynch UMA Disclosure Statement. Your Financial Advisor and User's Guide to UMA Profiles can provide additional information about the data and terms contained in this Profile.

Certain investments may be classified as alternative investments. Alternative investments are intended to generate returns that are not highly correlated to traditional, long-only stock and bond funds. These may include investments in asset classes such as commodities and real estate, as well as investments in non-traditional funds (NTFs). NTFs are investments such as mutual funds and exchange-traded funds (ETFs) that we classify as alternative investments because of the investment strategies used and/or the alternative asset exposure they provide. Though stocks and bonds may be held in NTFs, they may also hold other asset classes and may use short selling, leverage and derivatives. The strategies employed by NTFs are often used by hedge funds and other alternative investment vehicles. In addition, Merrill Lynch believes that these investment vehicles can provide diversification benefits to a traditional stock and bond portfolio.

Merrill Lynch may classify these investments, including NTFs, as Alternative Investments on your asset allocation reporting because we believe that may be a more accurate characterization of the risk/return attributes of these investments than classifying them as equity and/or debt. It is important to note that because [NTFs] are registered under the Investment Company Act of 1940 (the "40 Act"), they are subject to certain strategy and portfolio restrictions imposed by the 40 Act, which cause them to be an imperfect alternative investment fund substitute.

Cash alternatives are not federally guaranteed and it is possible to lose money with the investment.

Portfolio Information and performance results for individual accounts will vary from the information generally summarized here due to timing of enrollment in UMA, market conditions, account objectives and restrictions, including restrictions related to investing in equity, fixed income or other securities issued, sponsored, or underwritten by Bank of America, Merrill Lynch and other affiliates of Bank of America or Merrill Lynch and other factors, some of which are identified above. A complete list of holdings for the preceding year is available, if any, upon request.

Certain investments may be classified as alternative investments. Alternative investments are intended to generate returns that are not highly correlated to traditional, long-only stock and bond funds. These may include investments in asset classes such as commodities and real estate, as well as investments in non-traditional funds ("NTFs"). NTFs are investments such as mutual funds and exchange-traded funds ("ETFs") that we classify as alternative investments because of the investment strategies used and/or the alternative asset exposure they provide. Though stocks and bonds may be held in NTFs, they may also hold other asset classes and may use short selling, leverage and derivatives. The strategies employed by NTFs are often used by hedge funds and other alternative investment vehicles. In addition, Merrill Lynch believes that these investment vehicles can provide diversification benefits to a traditional stock and bond portfolio.

Merrill Lynch may classify these investments, including NTFs, as 'Alternative Investments' on your asset allocation reporting because we believe that may be a more accurate characterization of the risk/return attributes of these investments than classifying them as equity and/or debt. It is important to note that because [NTFs] are registered under the Investment Company Act of 1940 (the "40 Act"), they are subject to certain strategy and portfolio restrictions imposed by the '40 Act, which cause them to be an imperfect alternative investment fund substitute.

Merrill Lynch, Pierce, Fenner & Smith Incorporated is a registered broker-dealer and a wholly-owned subsidiary of Bank of America Corporation.

Investment Products: ☐ Are Not FDIC Insured ☐ May Lose Value ☐ Am Not Bank Guaranteed

This concludes your Investment Proposal report. Any pages that may follow are not part of your Investment Proposal report and are provided for informational purposes only.

Trudy P. Humphries

From: Reynolds Williams
Sent: Monday, May 13, 2013 10:45 AM
To: Andrew Lindemann (alindemann@DML-LAW.com)
Subject: FW: Conservative Allocation Portfolio
Attachments: Managed Solutions.pdf; Reynolds Williams Conservative Allocation 051313.pdf

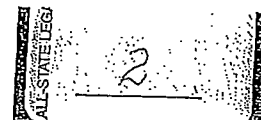
Take a look at this from Merrill Lynch. My folks are game, if your' s are.
We would have a slight preference for taxable bonds.
Should the account be titled in the Dillon CofC name or in mine & yours, "as Escrow Agents." ?

From: Jordan, Scott S - MYRTLE BEA SC [mailto:scott_jordan@ml.com]
Sent: Monday, May 13, 2013 10:31 AM
To: Reynolds Williams
Subject: Conservative Allocation Portfolio

Reynolds,
This is the proposal for a conservative allocation managed portfolio. The fixed income portion in this proposal is in municipal bonds, but we can provide it with taxable bonds if you wish. There are no loads, commissions, or contingent deferred sales charges for the investments used in this proposal. The annual portfolio management fee included in the proposal is 1.2% and it is assessed quarterly.
I am sending you 2 copies via federal express.
Sincerely,

Scott Jordan, CFM, CFP®
Vice President
Wealth Management Advisor
Merrill Lynch, Pierce, Fenner & Smith Incorporated
2024 Corporate Centre Dr. * Suite 301 * Myrtle Beach, SC 29577
843.946.2030 * 866.946.2030 Toll Free
Email: scott_jordan@ml.com
Website: www.fa.ml.com/JordanGroup
NMLS#515593

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**THE ATTACHMENTS TO THIS EMAIL ARE THE
SAME AS ATTACHED TO THE EMAIL UNDER TAB #1**

— *Reginald Williams*

-Trudy P. Humphries

From: Andrew Lindemann <alindemann@DML-LAW.com>
Sent: Wednesday, May 29, 2013 12:31 PM
To: Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Reynolds:

I am sorry I have not gotten back to you sooner. My client is concerned with the fact that the money will not be FDIC Insured and also since equities are part of the mix there is some risk of losing some of the principal amount.

Andrew

From: Reynolds Williams [mailto:Reynolds@willcoxlaw.com]
Sent: Tuesday, May 28, 2013 3:24 PM
To: Andrew Lindemann
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Did you get my proposed account designation ?
If not, I shall re-send.

From: Baxley, J. Michael Law Clerk (James H. Scruggs, III) [mailto:JBaxleyLC@sccourts.org]
Sent: Tuesday, May 28, 2013 3:24 PM
To: Andrew Lindemann; Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

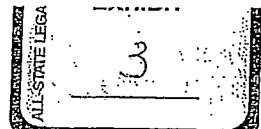
Counsel,

I wanted to inquire as to the status of the proposed Order in this case following the hearing on May 7, 2013 in Dillon. My records do not indicate that I have received it.

Best regards,
Jamie Scruggs

James H. Scruggs, III
Law Clerk to the Honorable J. Michael Baxley
Circuit Court of the Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550
Telephone: 843.383.4114
Fax: 843.383.4116
jbaxleylc@sccourts.org

From: Andrew Lindemann [mailto:alindemann@DML-LAW.com]
Sent: Tuesday, May 07, 2013 1:42 PM
To: Baxley, J. Michael Law Clerk (James H. Scruggs, III); Baxley, J. Michael
Cc: Reynolds@willcoxlaw.com
Subject: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)



- Judge Baxley:

Attached is a memorandum of law replying to the Plaintiffs' memorandum previously submitted by Reynolds Williams. This is for the hearing you are scheduled to hold later today in Dillon.

Thanks.

Andrew Lindemann

Trudy P. Humphries

From: Reynolds Williams
Sent: Thursday, May 30, 2013 10:14 AM
To: 'Andrew Lindemann'
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

What do they suggest ?

From: Andrew Lindemann [<mailto:alindemann@DML-LAW.com>]
Sent: Wednesday, May 29, 2013 12:31 PM
To: Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Reynolds:

I am sorry I have not gotten back to you sooner. My client is concerned with the fact that the money will not be FDIC insured and also since equities are part of the mix there is some risk of losing some of the principal amount.

Andrew

From: Reynolds Williams [<mailto:Reynolds@willcoxlaw.com>]
Sent: Tuesday, May 28, 2013 3:24 PM
To: Andrew Lindemann
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Did you get my proposed account designation ?
If not, I shall re-send.

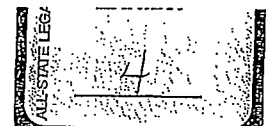
From: Baxley, J. Michael Law Clerk (James H. Scruggs, III) [<mailto:JBaxleyLC@sccourts.org>]
Sent: Tuesday, May 28, 2013 3:24 PM
To: Andrew Lindemann; Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Counsel,

I wanted to inquire as to the status of the proposed Order in this case following the hearing on May 7, 2013 in Dillon. My records do not indicate that I have received it.

Best regards,
Jamie Scruggs

James H. Scruggs, III
Law Clerk to the Honorable J. Michael Baxley
Circuit Court of the Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550
Telephone: 843.383.4114
Fax: 843.383.4116
jbaxleylc@sccourts.org



From: Andrew Lindemann [<mailto:allindemann@DML-LAW.com>]
Sent: Tuesday, May 07, 2013 1:42 PM
To: Baxley, J. Michael Law Clerk (James H. Scruggs, III); Baxley, J. Michael
Cc: Reynolds@willcoxlaw.com
Subject: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Judge Baxley:

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Thanks.

Andrew Lindemann

Trudy P. Humphries

From: Andrew Lindemann <allndemann@DML-LAW.com>
Sent: Thursday, June 06, 2013 1:02 PM
To: Reynolds Williams
Subject: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Reynolds:

I have now had the opportunity to review the applicable statutes that restrict the manner by which my client's funds may be invested. In particular, Section 6-5-10 sets out the different ways or instruments in which political subdivisions are authorized by state law to invest their funds. The investment policy of SCMRFF is likewise controlled by this and related statutes. My reading of the applicable statutory law does not appear to allow that public funds (even if held in trust by the court under Rule 68) can be invested as you and Merrill Lynch have proposed. In particular, I do not think any portion of the funds may be invested in equities.

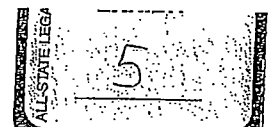
Perhaps, you may want to go back to Merrill Lynch and see if they can propose a portfolio that includes only instruments identified in Section 6-5-10.

Frankly, based on my reading of Section 6-5-10 and related statutes, I do not think the Clerk of Court is statutorily authorized to invest any funds as Merrill Lynch had proposed and I don't think an order of a Circuit Court Judge can override the statutory constraints.

Let me know your thoughts so we can get this taken care of.

Thanks.

Andrew



Trudy P. Humphries.

From: Reynolds Williams
Sent: Thursday, June 06, 2013 1:18 PM
To: 'Andrew Lindemann'
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

The Clerk of Court is not a "local entity" as defined in that statute.
Please let me see the statute that SCMIFF says governs its investments. I'd also like to see how it invests its own portfolio; I'm perfectly happy to mirror that, or even co-invest. The vibes I'm getting from them now, however, is that they're taking advantage of Judge Baxley's ruling by playing games.

From: Andrew Lindemann [<mailto:alindemann@DML-LAW.com>]
Sent: Thursday, June 06, 2013 1:02 PM
To: Reynolds Williams
Subject: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

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Thanks.

Andrew



Trudy P. Humphries

From: Andrew Lindemann <alindemann@DML-LAW.com>
Sent: Thursday, June 06, 2013 1:29 PM
To: Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)
Attachments: Section 6-5-10 (00503111).pdf

Attached is a copy of Section 6-5-10. Nobody is playing games – we only want the money invested in accordance with statutory law. I frankly do not see how our insistence on complying with 6-5-10 is giving SCMIRFF any advantages.

From: Reynolds Williams [<mailto:Reynolds@willcoxlaw.com>]
Sent: Thursday, June 06, 2013 1:18 PM
To: Andrew Lindemann
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

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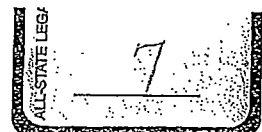
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Let me know your thoughts so we can get this taken care of.

Thanks.

Andrew



Code 1976 § 6-5-10

Code of Laws of South Carolina 1976 Annotated CurrentnessTitle 6. Local Government--Provisions Applicable to Special Purpose Districts and Other Political Subdivisions
(Refs & Annos)Chapter 5. Investment of Funds by Political Subdivisions

→ § 6-5-10. Authorized investments by political subdivisions.

(a) The governing body of any municipality, county, school district, or other local government unit or political subdivision and county treasurers may invest money subject to their control and jurisdiction in:

- (1) Obligations of the United States and its agencies, the principal and interest of which is fully guaranteed by the United States.
- (2) Obligations issued by the Federal Financing Bank, Federal Farm Credit Bank, the Bank of Cooperatives, the Federal Intermediate Credit Bank, the Federal Land Banks, the Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Housing Administration, and the Farmers Home Administration, if, at the time of investment, the obligor has a long-term, unenhanced, unsecured debt rating in one of the top two ratings categories, without regard to a refinement or gradation of rating category by numerical modifier or otherwise, issued by at least two nationally recognized credit rating organizations.
- (3)(i) General obligations of the State of South Carolina or any of its political units; or (ii) revenue obligations of the State of South Carolina or its political units, if at the time of investment, the obligor has a long-term, unenhanced, unsecured debt rating in one of the top two ratings categories, without regard to a refinement or gradation of rating category by numerical modifier or otherwise, issued by at least two nationally recognized credit rating organizations.
- (4) Savings and Loan Associations to the extent that the same are insured by an agency of the federal government.
- (5) Certificates of deposit where the certificates are collaterally secured by securities of the type described in (1) and (2) above held by a third party as escrow agent or custodian, of a market value not less than the amount of the certificates of deposit so secured, including interest; provided, however, such collateral shall not be required to the extent the same are insured by an agency of the federal government.
- (6) Repurchase agreements when collateralized by securities as set forth in this section.

Code 1976 § 6-5-10

(7) No load open-end or closed-end management type investment companies or investment trusts registered under the Investment Company Act of 1940, as amended, where the investment is made by a bank or trust company or savings and loan association or other financial institution when acting as trustee or agent for a bond or other debt issue of that local government unit, political subdivision, or county treasurer if the particular portfolio of the investment company or investment trust in which the investment is made (i) is limited to obligations described in items (1), (2), (3), and (6) of this subsection, and (ii) has among its objectives the attempt to maintain a constant net asset value of one dollar a share and to that end, value its assets by the amortized cost method.

(8) A political subdivision receiving Medicaid funds appropriated by the General Assembly in the annual general appropriations act may utilize appropriated funds and other monies generated by hospital operations to participate in principal protected investments in the form of notes, bonds, guaranteed investment contracts, debentures, or other contracts issued by a bank chartered in the United States or agency of a bank if chartered in the United States, financial institution, insurance company, or other entity which provides for full principal payment at the end of a contract term not to exceed twelve years if the issuer has received a rating in one of three highest general rating categories issued by no fewer than two nationally recognized credit rating organizations. No more than forty percent of the appropriated funds and other monies generated by hospital operations may be invested in the manner provided in this item. Revenue realized pursuant to these investments must be expended on health care services.

(b) The provisions of this chapter shall not impair the power of a municipality, county, school district or other local governmental unit or political subdivision or county treasurer to hold funds in deposit accounts with banking institutions as otherwise authorized by law.

(c) Such investments shall have maturities consistent with the time or times when the invested moneys will be needed in cash.

(d) For purposes of subsection (a), in the case of a defeased obligation, an obligation shall be treated as the obligation of the issuer of the obligation included in the qualifying defeasance escrow for the defeased obligation. A "defeased obligation" means any obligation the payment of which is secured and payable solely from a qualifying defeasance escrow and the terms of which may not be amended or modified without the consent of each of the holders of the defeased obligation. A "qualifying defeasance escrow" means a deposit of securities, including defeasance obligations, with a trustee or similar fiduciary under the terms of an agreement that requires the trustee or fiduciary to apply the proceeds of any interest payments or maturity of the defeasance obligation to the payment of the defeased obligation and when the trustee or fiduciary has received verification from a certified public accountant that the payments will be sufficient to pay the defeased obligation timely. A defeasance obligation must not be callable or subject to prepayment by the issuer and it must be a direct general obligation of the United States and its agencies, or an obligation the payment of principal and interest on which is fully and unconditionally guaranteed by the United States.

CREDIT(S)

HISTORY: 1962 Code § 1-67; 1967 (55) 625; 1977 Act No. 222; 1988 Act No. 518; 1990 Act No. 326, § 1; 2000 Act No. 387, Part II, § 50; 2007 Act No. 110, § 56, eff June 21, 2007; 2007 Act No. 116, § 61, eff June 28, 2007, applicable for tax years beginning after 2007; 2008 Act No. 231, § 3, eff upon approval (became law without the Governor's

Code 1976 § 6-5-10

signature on May 22, 2008).

EFFECT OF AMENDMENT

The first 2007 amendment, in subsection (a), in paragraph (1) substituted ", the principal and interest of which is fully guaranteed by the United States" for "thereof", added paragraph (2), redesignated paragraph (2) as paragraph (3) designating (i) and adding (ii), and redesignated paragraphs (3) to (7) as paragraphs (4) to (8).

The second 2007 amendment made the same changes as the first.

The 2008 amendment added subsection (d) regarding defeased obligations.

Code 1976 § 6-5-10, SC ST § 6-5-10

Current through End of 2012 Reg. Sess

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END OF DOCUMENT

Trudy P. Humphries

From: Jordan, Scott S - MYRTLE BEA SC <scott_jordan@ml.com>
Sent: Friday, June 07, 2013 6:26 PM
To: Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)
Attachments: Williams 6 5 10.pdf; Preferred Deposit Fact Sheet.pdf

Reynolds,

This is a short ladder using the 6-5-10 buckets.

We could also reduce the amount in the ladder and put some of the money into our Preferred Deposit Money Market Fund which will be FDIC insured up to \$250,000. It is currently paying 0.15% APY and has daily liquidity. To maximize the FDIC insurance for this account, I would have to confirm that the official custodian did not have other deposits with Bank of America NA. If the custodian has other deposits at Bank of America NA, we have other money market solutions available.

As you know, rates are extremely low on short term government bonds and these prices and yields are subject to change with market conditions. In this proposal, we will not charge an advisory fee and I will refund the annual account fee for the one year. I appreciate you considering us and I wish the rates were more attractive.

Sincerely,

Scott Jordan, CFM, CFP®
Vice President
Wealth Management Advisor
Merrill Lynch, Pierce, Fenner & Smith Incorporated
2024 Corporate Centre Dr. * Suite 301 * Myrtle Beach, SC 29577
843.946.2030 * 866.946.2030 Toll Free
Email: scott_jordan@ml.com
Website: www.fa.ml.com/JordanGroup
NMLS#515593

From: Reynolds Williams [mailto:Reynolds@willcoxlaw.com]
Sent: Thursday, June 06, 2013 6:53 PM
To: Jordan; Scott S - MYRTLE BEA SC
Subject: Re: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Do one year

Reynolds Williams

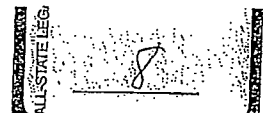
On Jun 6, 2013, at 5:25 PM, "Jordan, Scott S - MYRTLE BEA SC" <scott_jordan@ml.com> wrote:

Reynolds,

We could invest in a laddered portfolio of treasuries/agencies and money market funds. What is the longest maturity that would comply with section C?

I would be glad to put something together for you.

Sincerely,



Scott Jordan, CFM, CFP®
Vice President
Wealth Management Advisor
Merrill Lynch, Pierce, Fenner & Smith Incorporated
2024 Corporate Centre Dr. * Suite 301 * Myrtle Beach, SC 29577
843.946.2030 * 866.946.2030 Toll Free
Email: scott_jordan@ml.com
Website: www.fa.ml.com/JordanGroup
NMLS#515593

From: Reynolds Williams [<mailto:Reynolds@willcoxlaw.com>]
Sent: Thursday, June 06, 2013 2:44 PM
To: Jordan, Scott S - MYRTLE BEA SC
Subject: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

Take a look at the attached. I am not ready to concede he is right, but just in case he is what do you have that fits the § 6-5-10 buckets ?

<image001.jpg>

From: Andrew Lindemann [<mailto:alindemann@DML-LAW.com>]
Sent: Thursday, June 06, 2013 1:29 PM
To: Reynolds Williams
Subject: RE: Graham v. Town of Latta (C/A Nos. 2008-CP-17-0376 & 2008-CP-17-0377)

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Thanks.

Andrew

This message, and any attachments, is for the intended recipient(s) only, may contain information that is privileged, confidential and/or proprietary and subject to important terms and conditions available at <http://www.bankofamerica.com/emaildisclaimer>. If you are not the intended recipient, please delete this message.

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PROPOSAL AND INCOME SCHEDULES

Prepared for R. Williams | Prepared by J. Scott Jordan

ANALYSIS

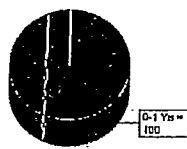
PORTFOLIO SUMMARY

Par Value	338,000.00 USD	Average Offer Price	100.39495
Principal Amount	339,317.63 USD	Average Coupon	0.678
Accrued Interest	442.21 USD	Average Yield	0.073
Portfolio Value	339,759.84 USD	Average Modified Duration	0.514
First 12 Months Income	1,930.00 USD	Average Maturity	0.612 yr
		Average Moody's / S&P Rating	AAA / AAA
		Minimum	Maximum
Offer Price	99.89039	102.19160	100.39495
Coupon	0.000	3.000	0.678
Yield	0.033	0.112	0.073
Modified Duration	0.300	0.679	0.614

PRINCIPAL DUE SCHEDULE

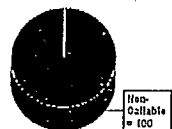
Year	# of Issues	Par Value	% of Portfolio	Year	# of Issues	Par Value	% of Portfolio
2013	4	162,000	44.97	2024	0	0	0.00
2014	5	188,000	55.03	2025	0	0	0.00
2015	0	0	0.00	2026	0	0	0.00
2016	0	0	0.00	2027	0	0	0.00
2017	0	0	0.00	2028	0	0	0.00
2018	0	0	0.00	2029	0	0	0.00
2019	0	0	0.00	2030	0	0	0.00
2020	0	0	0.00	2031	0	0	0.00
2021	0	0	0.00	2032	0	0	0.00
2022	0	0	0.00	2033	0	0	0.00
2023	0	0	0.00	2034+	0	0	0.00
				Total	9	338,000	100.00

MATURITY SCHEDULE



Years	Par Value	% of Portfolio
0-1	338,000	100.00
1-3	0	0.00
3-5	0	0.00
5-10	0	0.00
10-15	0	0.00
15+	0	0.00
Total	338,000	100.00
Short	0-4.99 Yrs	100.00%
Intermediate	5-14.99 Yrs	0.00%
Long	15+ Yrs	0.00%

OPTIONAL CALL SCHEDULE



Call Range	# of Issues	Par Value	% of Portfolio
Non-Callable	9	338,000	100.00
2013	0	0	0.00
2014-2019	0	0	0.00
2017-2019	0	0	0.00
2020-2022	0	0	0.00
2023+	0	0	0.00
Total	9	338,000	100.00

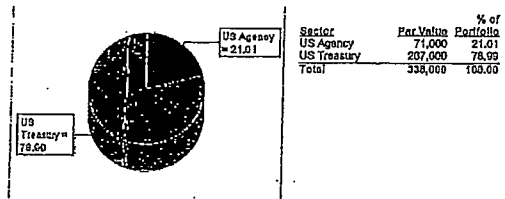


PROPOSAL AND INCOME SCHEDULES

Prepared for R. Williams | Prepared by J. Scott Jordan

ANALYSIS

SECTOR ALLOCATION SCHEDULE



1 (Whereupon, this hearing began at 4:28 p.m.
2 on May 7, 2013.)

3 MR. WILLIAMS: Good afternoon, Your Honor?

4 THE COURT: Good afternoon, Mr. Williams, how are
5 you? Mr. Lindemann, how are you?

6 MR. LINDEMANN: Doing fine. How are you, Your
7 Honor?

8 THE COURT: Good, good, thank you. All right.
9 Gentlemen, we are in the matter of Claude and Vicky Graham
10 versus The Town of Latta. This case was already tried by
11 The Honorable Allison Lee. The Court now has a motion
12 before it as to whether or not the defendant can, Under Rule
13 67, place funds on deposit with the Clerk of Court to stop
14 the running of post judgment interest. I have been briefed
15 on this by both sides. The court has had the opportunity to
16 read both sides' briefs. So, you are the moving party, Mr.
17 Lindemann, by asking to do this. So, let me hear from you,
18 sir, please.

19 MR. LINDEMANN: Thank you, Your Honor. And, did Your
20 Honor receive my Brief earlier today? There was no Brief
21 filed with the motion, but I did file a reply to address.

22 THE COURT: Let me look at your reply. No, sir. I
23 have not reviewed your reply.

24 MR. LINDEMANN: Thank you, Your Honor.

25 THE COURT: Thank you. And, I will be glad to hear

1 from you.

2 MR. LINDEMANN: Thank you, Your Honor. May it,
3 please the Court. Andrew Lindemann for the Town of Latta.
4 As Your Honor has already described the introductory or
5 background situation perfectly. This case has --- these
6 cases that were consolidated, they have been tried before
7 Judge Allison Lee. She directed a verdict on two causes of
8 action. The negligence claims went to the jury, and the
9 jury returned a verdict in favor of both Mr. and Mrs.
10 Graham. Subsequently, post trial motions were filed and
11 heard, and decided by Judge Lee. She denied those motions.
12 Subsequently an appeal has been filed by the Town of Latta,
13 and a cross appeal has been filed by the Grahams. So, the
14 case is currently on appeal. Of course, the Russo versus
15 Sutton case makes it clear that matters such as this,
16 pursuant to Rule 67, are not precluded from being heard in
17 the lower court. That the lower court still retains
18 jurisdiction over that. So, we have filed a motion pursuant
19 to Rule 67, requesting Leave of Court in order to pay the
20 amount of the judgment plus accrued interest into the court.

21 Typically, my experience has been with this, that it is
22 granted as a matter of course typically by consent order.
23 In this particular case the Grahams have objected. I know
24 that Mr. Williams has submitted a memorandum about a week or
25 ten days ago, raising certain objections. Our reply

1 memorandum addresses those particular objections.

2 Number one. His first objection appears to be that he
3 questioned whether or not this Court could actually hear a
4 Rule 67 Motion, since you were not the trial judge. As we
5 discussed in our Memorandum, absolutely this is not a matter
6 that is quote, unquote, a post trial motion that has to be
7 heard by the trial judge. It is not pursuant to Rule 50 or
8 52, or 59. It is not even part of the judgment section of
9 the rules of civil procedure.

10 Rule 67 is designed, as Your Honor well knows, to
11 actually be heard after appeals are filed. That is
12 typically where you see them. And, in a case such as this,
13 where there was the trial judge who was outside of the
14 circuit, Judge Lee couldn't even hear this Motion, I would
15 submit, because she is no longer within the circuit. So, I
16 believe it is an appropriate Motion pursuant to the rationale
17 of the Russo versus Sutton case for the Chief Administrative
18 Judge of the circuit to hear, and that is why this Motion
19 was filed in this Court, and asking Your Honor to hear it.
20 So, we believe that is absolutely appropriate.

21 Second of all, Your Honor, they have taken the position
22 that the amendments in 2000 and 2005 to the interest
23 statute, and by that I am specifically referring to --- Let
24 me get the number right. To 34-31-20, and as Your Honor is
25 aware, those were amended in 2000, and eventually in 2005 to

1 actually provide for a different method of calculating
2 interest. However, the first sentence is what Mr. Williams'
3 clients argue somehow affects the decisions that came
4 before; specifically the Russo case that we're relying on.
5 And, our position is that clearly can't be settled. What we
6 have pointed out in our Memorandum, and I can hand up to
7 Your Honor, the exact language, how it changed. But, prior
8 to the 2000 amendments, as the Russo case provides, it
9 actually has it within that opinion. And give me one second
10 and I will read it to Your Honor directly. The first
11 sentence, which is the operative sentence that the
12 Plaintiffs' are relying on stated. All money decrees and
13 judgments of courts enrolled or entered shall draw interest
14 according to law. Used the word shall, a mandatory term.
15 In 2000 it got changed. The exact same language, except
16 for whatever reason,
17 "shall," was changed to "must". And again in 2005, they
18 continued to use that exact same sentence, using the word
19 must. Frankly, and we have submitted the United States
20 Supreme Court case as well as a Fourth Circuit case, I think
21 we really don't need case law to cite this. But, must and
22 shall, both are mandatory terms. They are synonymous terms,
23 and they can be used interchangeably. We cited a concurring
24 opinion from Chief Justice Warren Burger that said, it is
25 well settled that shall means must. So, to the extent that

1 I frankly don't follow the reasoning how that really impacts
2 this issue before Your Honor. As I indicated, the way that
3 I understand Mr. Williams' argument is, he is contending the
4 Russo case is in the pre-2000 cases that I relied on
5 somehow, are not good law anymore, because the money
6 judgment statute was changed. And now says, interest must
7 be paid previous to that. When the Russo case was decided,
8 the statute said, shall be paid. I would submit, there is
9 no reasonable difference, and as a result, the amendments to
10 34-31-20 have no effect whatsoever on Rule 67 and how it
11 should be construed or applied.

12 The last argument, Mr. Williams' clients argue that
13 there is one recognized exception to the requirement to
14 allow a party to pay interest into the court. And, that is
15 in a situation where parties have contractually agreed to a
16 specific interest rate. And that is the case that held,
17 that is a case called Renaissance Enterprises versus Ocean
18 Resorts, Inc., and frankly it make sense. If the parties
19 have actually agreed to a certain interest rate, then the
20 use of Rule 67 should not override that. That is what the
21 Supreme Court held in that particular case. We don't have
22 that situation here. There is no --- Obviously there is no
23 contractual agreement between the Grahams and the Town of
24 Latta as to any type of interest rate. This case did not
25 involve a contract. The Plaintiffs' prevailed on a

1 negligence theory under the Tort Claims Act, to the extent
2 that there is an argument, that there is some sort of legal
3 duty that existed. There is no evidence of any such illegal
4 duty that give rise to overriding the statutory rate of
5 interest. And, in fact, as I point out in my memorandum
6 what cases such as the Renaissance Enterprises case
7 essentially holds is, that if there is a contractual
8 agreement as to the rate of interest that governs. If there
9 isn't a statutory rate --- I mean, a contractual rate of
10 interest, then you use the statutory rate of interest. And,
11 if the statutory rate of interest applies to a case, and I
12 don't think there is any dispute that the statutory rate
13 applies to this case, then clearly that falls within Rule
14 67, and as a result, it is absolutely permissible. And, I
15 would submit that the court doesn't have discretion in this.
16 I know that there is one case out there that talks about
17 this being a discretionary decision. I just want the record
18 to be clear, and I don't think you actually need to decide
19 this issue. But, I don't think it is actually a
20 discretionary decision absent a factual basis, such as what
21 was occurring in Renaissance Enterprises case, where you had
22 a contractual agreement to the contrary.

23 So, in this particular case, we would ask the court to
24 allow the Town of Latta's lease of court in order to pay the
25 interest plus --- I mean, the judgment amounts and accrued

1 interest into the court. Thank you.

2 THE COURT: Thank you. And, Mr. Williams.

3 MR. WILLIAMS: May it, please the Court. Obviously,
4 Your Honor has read our Brief. We believe that the rule of
5 court, the statutes, and the case law, commit to this
6 Court's discretion, whether to enter an order stopping the
7 Plaintiffs' right to have interest accrued to their benefit.
8 The rule itself is not by its very words designed to be one
9 that is used always, and only when there is a verdict and an
10 appeal has been filed. It is the old interpleader rule.
11 It's very words say, in an action in which any part of the
12 relief sought is a judgment for a sum of money. Here this
13 use to be a case where the relief sought was a judgment, but
14 my class has a judgment. They are no longer seeking a
15 judgment, they've got it. Once they acquired that judgment,
16 then the statutory rate of interest creates a legal duty on
17 the part of the defendants to pay interest on that judgment.
18 So, that --- if this is an interpleader rule of court rather
19 than a post-verdict rule, the case law in South Carolina and
20 around the country clearly places that decision in the
21 discretion of the court. I submit that it is the trial
22 court, and the reason I say that, Mr. Lindemann didn't give
23 Your Honor one single solitary fact on which you could be --
24 - this Court could be exercising its discretion. The only
25 fact he has stated is, we have a judgment and therefore

1 interest automatically stops when we deposit the money.
2 But, that is not what Rule 67 says. The case law in South
3 Carolina, in the Federal Courts, and around the country
4 says, this matter is committed to the sound discretion of
5 the trial court.

6 THE COURT: Well, Mr. Williams, let me ask you this.
7 Can you show me a South Carolina precedent where a court has
8 declined the deposit of a judgment money amount in the
9 court, and that issue went up on appeal?

10 MR. WILLIAMS: Yes, Your Honor. In my Brief I cited
11 three such cases. Bakala and South Carolina Department of
12 Transportation versus First Carolina, and Renaissance
13 Enterprises v Ocean Resorts Inc. And, I will cite now to
14 you, Russo v Sutton. Russo declined post-judgment interest.
15 The holding in that case --- the precise holding in the
16 Russo case was post-judgment interest will not be stopped by
17 a deposit into court without an order of the court directing
18 the deposit. That is the holding in Russo, everything else
19 Mr. Lindemann said about Russo is *dicta*. It was speculating
20 on rather interest does or does not stop in the other
21 circumstances. But, the actual holding in Russo was this
22 deposit into that court at that time did not stop the
23 running of interest.

24 And, you know the talk about shall and must, he put
25 five lines in there about shall and must. And, I could

1 write hundreds --- Well, I couldn't write hundreds, I could
2 copy and pass up to Your Honor hundreds of pages where legal
3 scholars, professors, and courts, and commentators, have
4 said --- debated whether in certain context, rather shall
5 means must or whether it means can. Whether it means must
6 or it means could. Whether it means must or whether it
7 means will. Whether it means must or does it mean should.
8 But, nobody has ever questioned whether must means must or
9 not. So, when the South Carolina Legislature changed shall
10 to must, they changed a debatable term into an ironclad
11 term. They increased the command of the drawing of the
12 interest. There is not a single case --- a single debate
13 about what must means. But, there is rampant debate about
14 what shall means, depending on the context in which it was
15 used. Now, my mother was an English teacher, and I know you
16 use shall to be a command when you are talking in the second
17 and third person, but not when you are in the first person,
18 and all of that. There have been volumes of English papers,
19 volumes of master thesis, and all the legal commentators
20 that advise Legislatures and drafters of Legislation in the
21 twenty-first century have encouraged the Legislators to
22 abandon the word --- the ambagious word, and use must when
23 they mean must. And, South Carolina one, presumes that
24 South Carolina Legislature was familiar with state of the
25 law and the commentary in that regard. And when they

1 changed shall to must, they meant to say --- they meant to
2 give my clients, Mr. and Mrs. Graham, a legal right to the
3 interest. Now, the rational that Russo cited in their *dicta*
4 was, that it gives people assurance that their money is
5 going to get paid, because it is deposited in the Clerk of
6 Court's Office.

7 Well, the defendants in this case are the Town of
8 Latta, a subdivision of the State of South Carolina. And,
9 they are covered by an insurance company, a well capitalized
10 insurance company. The Clerk of Court of Dillon County is a
11 agent of the subdivision of the State of South Carolina.
12 There is no difference between the current state of affairs
13 and a deposit into this Court, other than it deprives my
14 clients of their right to the legal rate of interest.

15 THE COURT: And, counsel, let me ask you, since it is
16 the well funded insurance company. Is this the insurance
17 reserve fund?

18 MR. WILLIAMS: It is the Municipal Association of
19 South Carolina, which is the city version of the insurance
20 reserve.

21 THE COURT: All right. Anything further?

22 MR. WILLIAMS: Just one other thing. The recent
23 cases by the Supreme Court that I cited in my Brief, the
24 Renaissance case and the SCDOT versus the capital case that
25 I cited. They are moving towards --- they are moving away

1 from it being an automatic stopping of interest that the
 2 Russo dicta would suggest. And, in doing so, they always
 3 phrase it --- they phrase it by saying whether it is a
 4 contract rate of interest, or a legal duty, or a legal right
 5 to interest. Now, if this statute --- if a statute passed
 6 by the State of South Carolina, and part of its code of laws
 7 does not create such a legal right, I don't know how a legal
 8 right gets more clearly created than by statutorily created
 9 with clear and specific words that the judgment must draw
 10 interest at the specified rate. Thank you.

11 THE COURT: All right. Thank you. And, help me
 12 before you sit down, help me appreciate the dollar figures
 13 that we are talking about here. As opposed to zero percent
 14 at the prevailing rate of interest for appeals when this
 15 case was decided, what would the amount of interest be that
 16 would be accruing?

17 MR. WILLIAMS: Seven and a quarter percent (7.25),
 18 Your Honor.

19 THE COURT: On three hundred and fifty thousand
 20 dollars?

21 MR. WILLIAMS: Yes, Your Honor.

22 THE COURT: All right.

23 MR. WILLIAMS: Three twenty-five. It is a
 24 significant amount of money.

25 THE COURT: Three twenty-five.

1 MR. WILLIAMS: It is roughly. And, they didn't put
2 up any facts on which the court could exercise its
3 discretion, but if I may take the liberty of doing so. If
4 you had heard the evidence in this case, what you have here
5 is people who, The Town of Latta decided to not fix the
6 sewer line that runs underneath their house. And, their
7 home place is uninhabitable. They have no where to live.
8 And, they are paying rent at the present time. So, if you
9 are thinking about the merits of the facts, these people
10 have been deprived of the use of their home for low these
11 many years. And, now to be deprived of the use of the money
12 for which they could get another home, in another place,
13 that didn't have feces funning into the house to this very
14 day. That is the equities of it, Your Honor, in which I
15 urge you to take into account with your discretion. If you
16 had heard the evidence, that is what you would know
17 happened. And, it is in Judge Lee's Order, that that is in
18 essence what happened.

19 THE COURT: Thank you.

20 MR. WILLIAMS: Thank you.

21 THE COURT: Do you want to reply Mr. Lindemann?

22 MR. LINDEMANN: Just real quickly, Your Honor. You
23 asked the question of Mr. Williams, are there any cases that
24 where the appellate courts have actually allowed the circuit
25 court judge to exercise discretion, and he pointed out

1 three. And, I will submit that I just through his reading
 2 of those, because each of those cases is based on an issue
 3 of law, not an issue of fact. We have already talked about
 4 the Renaissance Enterprises case. The Supreme Court in that
 5 case made a distinction, because there was a contract where
 6 the parties agreed to a contractual rate of interest. That
 7 is not a factual basis on which the Supreme Court ruled in
 8 that particular case. And, that is the only case where they
 9 actually used the words discretion. And, I would submit
 10 that that is incorrect. There really is no discretion. If
 11 there is a contractual rate of interest, then there is no
 12 discretion; and you would not have discretion to disregard
 13 that.

14 The two other cases have absolutely nothing to do with
 15 discretion, and in fact, don't even cite discretion, I don't
 16 believe. One of the cases is The South Carolina Department
 17 of Transportation versus First Carolina Corporation of South
 18 Carolina, and that is at 631 S.E.2d 533. And in that
 19 particular case the Supreme Court found that the interest
 20 rate that --- the statutory interest rate conflicted with
 21 what was permitted under the Imminent Domain Act. And, so,
 22 the court was actually addressing again a purely legal
 23 issue, when you have a conflict between two different
 24 statutes, which one prevails. So, in that particular case
 25 the court ruled that the Imminent Domain Act statute that

1 requires interest to run from the twenty days after the
2 judgment is entered, actually trumps the other provisions.
3 So, again, in this particular case the Supreme Court didn't
4 overturn the circuit court because of any type of exercise
5 discretion. They overturned based upon a matter of law, an
6 issue of law, statutory construction.

7 And then lastly. The Bakala case, which is B-A-K-A-L-
8 A, Bakala v Bakala, another Supreme Court case from 2003,
9 which is 576 S.E.2d 156. A totally different case
10 whatsoever. In that particular case it came out of the
11 family court. A family court judge had ordered the husband
12 and ordered to pay a certain amount to his exwife. The time
13 --- This is key. The time to run --- the time to appeal had
14 run, and it had become a final order. It could no longer be
15 appealed. The husband did not pay. Based upon a Rule to
16 Show Cause, the family court judge then held the husband in
17 contempt, and allowed him to purge the contempt by paying
18 the money that was owed. Instead of paying the money that
19 was owed to his wife, he paid the money that was owed into
20 the court, and he was allowed to do so by a different family
21 court judge. In that particular case the Supreme Court
22 said, no, you can't purge contempt under these circumstances
23 by paying the money into court. That was an improper use of
24 Rule 67. So, even finding abuse of discretion they found an
25 error of law. And, again, it is not a circumstance such as

1 what we have here, where the Plaintiff is making some
2 argument, and this wasn't made in their Memorandum, but made
3 now to you, that based upon some sort of equities provision
4 that the court has discretion in order not to allow the
5 money to be paid into the court.

6 I would submit to Your Honor, that I am not aware of
7 any decision by our Court of Appeals or Supreme Court that
8 allows a circuit court judge to exercise discretion based
9 upon the facts of the case, or based upon the equities,
10 whether or not to allow the judgment to be paid into the
11 court or not. In fact, the Russo case talks about, that
12 there are favorable reasons, and good public policy reasons
13 to have Rule 67, and to allow the judgment of debtor to pay
14 the money into court. And, I don't believe the basis of the
15 Russo decision, even though it may be argued as *dicta* in
16 Russo, I would submit to the court that that same language
17 from Russo has been cited numerous times by the Supreme
18 Court and the Court of Appeals since. So, I don't believe
19 that it would be *dicta* in every case.

20 Again, with all due respect, Your Honor, I don't
21 believe this is a situation where the court has any type of
22 discretion based upon equities. You can rule as a matter of
23 law if there is a contractual rate, or if there is some
24 legal provision that requires the Town of Latta to pay the
25 statutory rate. And, we would submit that there is no such

1 provision, certainly no contracting of other arguments such
2 as you have in those on their faces. Thank you.

3 THE COURT: All right. Thank you. Just a moment,
4 please.

5 MR. WILLIAMS: Your Honor, may I be heard briefly?

6 THE COURT: Yes, sir.

7 MR. WILLIAMS: Mr. Lindemann glossed over The South
8 Carolina Department of Transportation v First Carolina case,
9 saying just one case. If I may, this is a case from the
10 Supreme Court of South Carolina in 2006. And, the issue
11 there was a trial court had allowed a party to deposit ---
12 to make a deposit and stop the accrual of interest. The
13 Supreme Court reversed the decision of the trial court as an
14 abuse of discretion. And, here is the standard of review
15 the Supreme Court set. I quote now from head notes two,
16 three, and four. This is 631 S.E.2d 533, South Carolina
17 Department of Transportation versus First Carolina. The
18 standard of review. I quote. "The granting of leave to
19 deposit money with the court pursuant to Rule 67 SCRCP is a
20 matter within the discretion of the trial court, and will
21 not be overturned absent an abuse of that discretion." And,
22 then it cites a Fifth Circuit Federal case. An abuse of
23 discretion occurs when the ruling is based on an error of
24 law or a factual conclusion without evidentiary support.
25 And, then it cites Conner v City of Forrest Acres, a South

1 Carolina Supreme Court case. And then it goes on, and the
2 actual holding of this case therefore, we find that the
3 trial court abused its discretion by allowing SCDOT to
4 deposit the judgment funds and stop the accrual of post
5 judgement interest. That is the holding of that case. And,
6 I don't see how one could reasonably conclude that you don't
7 have discretion in this matter, Your Honor. And that should
8 be exercised as a fact based discretion. Thank you.

9 THE COURT: Thank you. Just a moment.

10 (PAUSE.)

11 THE COURT: All right. Mr. Williams, your argument
12 is an interesting one. I will just say from now, almost
13 thirty years of being in the court system as a lawyer, or as
14 a judge, it has always been this Court's impression that the
15 party against whom a judgment is rendered may pay that money
16 into the court to stop the running of the prejudgment
17 interest. So, that is done pursuant to Rule 67. The public
18 policy reasons that mitigate in favor of that are many. One
19 is that it brings some certainty to the process that the
20 party for whom the judgment is granted, will be able to
21 recover that money should the appeal be unsuccessful. And
22 while we sit today and think well, gosh, you know, this is a
23 well funded insurance company. Well, tomorrow, who knows.
24 I have not looked at the financials for the Municipal
25 Association Insurance Trust. It may tomorrow declare

1 bankruptcy for all we know.

2 The court agrees with Mr. Lindemann in that it is a
3 sound rule and an appropriate one. I do not believe there
4 is any reason that this Court should make a determination
5 that --- or should even be arguing it from your point of
6 view, that I should use my discretion and not permit it. I
7 realize it is a very real monetary issue to your clients.
8 But, nevertheless, it is the rules that permit this process,
9 and the court would grant the request that Mr. Lindemann has
10 made, to deposit the funds in court.

11 Now, having made that decision, I will hear from you as
12 to where you want these funds deposited, and how you wish to
13 do it. If you have a particular institution in which you --
14 - or a particular account which may maximize the interest,
15 well that therein is some discretion for the court to permit
16 it that way, or simply pay it into the clerk. My
17 understanding of the way this process works is, the Clerk
18 would open an account in some institution, if you prefer a
19 particular form of investment, and the money is under the
20 control of the Clerk. But, typically what we do is, we pay
21 it directly into the clerk's accounts, and, of course, there
22 is really not any interest that would accrue. Do you want
23 to be heard on a particular institution, or a particular
24 place where you ask for the funds to be deposited?

25 MR. WILLIAMS: Your Honor, I would like to be heard.

1 I don't know that I can state today. My inclination would
2 be to ask if Your Honor would allow Mr. Lindemann and me to
3 discuss that and come to an agreement on a particular
4 institution. In the absence of that, if I need to say it
5 right now, this second, I would say, you know, a Merrill
6 Lynch account.

7 THE COURT: I don't require that it be decided now.
8 I will leave that for you all to decide among yourselves.
9 If you wish to bring Mr. Lindemann into that decision. I am
10 not aware of any requirement that it simply be placed in the
11 Clerk's funds, Mr. Lindemann. So, we will attempt to give
12 Mr. Williams' clients the benefit of whatever interest might
13 be accrued at whatever institution that you all agree upon.
14 So, let's just leave that matter open for ten days, and let
15 you all make that decision. Please advise us what it is.
16 If you wish to do this by order, you may advise us by simply
17 forwarding an order to jbaxley1c@sccourts.org, Mr.
18 Lindemann, which, of course, that will come to my law clerk,
19 and we would download it, review it, sign it, and return it
20 to you.

21 MR. LINDEMANN: And, Your Honor, we actually talked
22 about this before the hearing. I don't have a problem
23 discussing that with Mr. Williams, and actually seeing if my
24 client will agree to it. Obviously, we win the appeal that
25 interest is ours, so there is some benefit obviously to the

1 defendant as well.

2 What I would ask though, since this is going to take a
3 little bit of time, can we have an agreement that the post
4 judgment interest stops accruing as of today in this
5 hearing, while this information is worked out. I don't want
6 this to continue to be something that is debated, and at the
7 same time we are accruing interest at seven and a quarter
8 percent.

9 THE COURT: All right. Let's do it this way. Today
10 is Tuesday May the 7th. We will stop the accrual of
11 interest on the sooner of these two events. Either an
12 agreement reached and the money deposited, or seven days
13 from today's date, which is May the 14th. And that will
14 stop on that date. All right. It is just simply a choice
15 of trying to be fair to the parties, we will just give a
16 seven-day window.

17 MR. LINDEMANN: That will be fine.

18 MR. WILLIAMS: Your Honor, I certainly respect that.
19 He doesn't have a check with him today, so there are no
20 circumstances under which he could have stopped interest
21 today.

22 THE COURT: He may. He has his briefcase with him.

23 MR. LINDEMANN: That is a valid point. I do not have
24 a check today.

25 THE COURT: I didn't stop it today, so we will give

1 you seven days to do that. Clearly you could have gotten it
2 within seven days. So, I think that is fair enough. We
3 will give you seven days for that. Mr. Lindemann is known
4 to carry large sums of cash with him. He may have it in his
5 briefcase.

6 All right. Gentlemen, congratulations to both sides as
7 you fight this issue still, and perhaps you can resolve this
8 matter even while it is on appeal and just be done with the
9 entire thing. I wish you well to that end.

10 MR. WILLIAMS: Thank you, Your Honor.

11 MR. LINDEMANN: Thank you, very much.

12 THE COURT: Have a good day.

13 MR. LINDEMANN: Thank you for working us in.

14 THE COURT: Yeah, I'm glad to.

15 (Whereupon, this hearing was concluded at
16 4:59 p.m on May 7, 2013.)

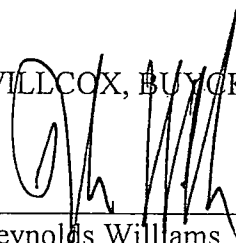
17 -- END OF TRANSCRIPT --

CERTIFICATE OF COMPLIANCE

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SC Court of Appeals

The undersigned counsel for the Appellants, Claude W. Graham and Vickie B. Graham, hereby certifies that the Record on Appeal complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

WILLCOX, BUYCK & WILLIAMS, P.A.



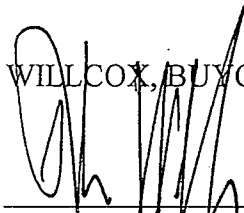
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CERTIFICATE OF COUNSEL

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The undersigned counsel hereby certifies that the Record on Appeal contains all material proposed to be included by all parties and not any other.


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June 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

RECEIVED
JUL 09 2014
SC Court of Appeals

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

v.

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

**FINAL BRIEF
OF APPELLANTS**

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STATEMENT OF ISSUES ON APPEAL

1. DOES RULE 67 SCRCF NEGATE SC CODE ANN. SECTION 34-31-20(B)'S MANDATE THAT A TORTFEASOR MUST PAY THE LEGAL RATE OF INTEREST AFTER JUDGMENT?

STATEMENT OF THE CASE

On October 11, 2012 the jury awarded Vickie B. Graham \$225,000 damages and Claude W. Graham \$100,000 for their negligence causes of action. On October 22, 2012 the Respondent Town of Latta filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, to which the Appellants responded on October 30, 2012. By Order of February 28, 2013 Judge Alison R. Lee denied the motion.

On April 10, 2013, Respondent filed a Rule 67 SCRCF Motion for Leave of Court to Deposit Funds with the Clerk of Court of Dillon County seeking to stop the accrual of post-judgment interest, to which the Appellants objected on April 26, 2013. A hearing was held on May 7, 2013, following which the Administrative Law Judge for the Fourth Judicial Circuit, Michael J. Baxley, issued his Order permitting the Respondent to deposit funds with the Clerk of Court, but not requiring it, and declaring that post-judgment interest would stop accruing as of May 14, 2013.

On August 2, 2013 the Respondent deposited \$325,000 plus interest accrued up to May 14, 2013 with the Clerk of Court of Dillon County: \$338,878.25. On July 29, 2013 the Appellants filed a Motion to Reconsider and that the July 17, 2013 Order be amended. The Appellants' motion was denied on December 6, 2013. The Appellants received the Order on January 31, 2014, from which this appeal followed that day.

FACTS

Vickie and Claude Graham owned a desirable home in Latta, South Carolina. While the Town of Latta has no written record, recorded or otherwise, of an easement across their property, the Grahams discovered many years after purchase of the home and making substantial improvements to it that the main sewer line of the Town runs beneath the house. That sewer line was laid in approximately 1924 and made of *terra cotta* pipe, which has a useful life of 30 to 50 years.

As the result of a heavy, though not unprecedented, rain on the nights of September 5/6, 2008 the main sewer line was no longer able to contain The Town's sewage, probably from cracking or a root invasion, and the Grahams' yard, swimming pool, and crawl space under their house was inundated with sewage, offal, sewage-related paper and cloth products, and filth.

Claude Graham immediately informed the relevant Town officials of the events of that night and the Town accepted responsibility for the maintenance of the sewer line, but it did not undertake any repairs, movement of, or any other correction to the malfunctioning sewer line at any point from then to now. The Grahams expended substantial sums to clean up their home after the events of that first heavy rain, but substantially the same type of sewage overflow occurred a week or so after the Town had actual knowledge of the malfunctioning system. The distasteful, disgusting overflow repeated many times thereafter. The Grahams' home had become a health hazard, so their doctor advised them not to return to it, which they did not, and they reasonably concluded that it made no sense to keep fixing up after each invasion by the Town's sewage, so their home has remained uninhabitable. (R. pp. 1-10).

The jury awarded a total of \$325,000 to the Grahams for damages caused by the Town's negligence. Interest began to accrue on that sum October 11, 2012. Following the Respondents

noticing an appeal, it moved for and was granted permission to deposit the judgment plus accrued interest with the Dillon County Clerk of Court. Following the granting of its motion and the court's order that interest stop accruing as of May 14, 2013, the Town deposited \$338,878.25 on August 2, 2013. (R. pp. 11-21).

ARGUMENTS

RULE 67 SCRPC DOES NOT NEGATE SC CODE ANN. SECTION 34-31-20(B)'S MANDATE THAT A TORTFEASOR MUST PAY THE LEGAL RATE OF INTEREST AFTER JUDGMENT.

I. POST JUDGMENT INTEREST IS A LEGAL RIGHT OF THE JUDGMENT CREDITOR AND A LEGAL DUTY OF THE JUDGMENT DEBTOR.

(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(B). [Emphasis in original 2005 Act 27].

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.*, 369 S.C. 150, 153-54, 631 S.E.2d 533, 535 (2006); *Shuler v. Tri-City 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*. (*Endnote 1*). 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. (*Endnote 2*).

The meaning of the second to final sentences of this Code Section are not at issue in this appeal. The legal rate of post-judgment interest at all pertinent times has been 7 ¼ %. Nor is there any dispute that the issue at hand involves a properly enrolled or entered judgment.

Such a 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 plain, ordinary meaning of this sentence is that the Graham judgments are required by law to draw interest; the clarity of the meaning is reinforced by the emphasis used in 2005 Act No. 27, Section 7, eff. March 21, 2005 (Tort Reform Act of 2005). That Act 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”. *Virginia American Water Co. v. Prince William Cnty. Srv. Auth.*, 436 S.E.2d 618, 622-23 (Va. 1993), “... there is a presumption that the General Assembly, in amending a statute, intended to effect a substantive change in the law.” *West Louisville Heights Citizens Association, et al v. Board of Supervisors of Fairfax Cnty.*, 618 S.E.2d 311 (Va. 2005), “We assume that the General Assembly’s amendments to a statute are purposeful, rather than unnecessary.” See *Cannon*, 371 S.C. at 384, *infra*; *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)). The point is even more pertinent here for the Grahams Since the amendment arose from a Tort Reform initiative, see discussion *infra* at III.

II. RULE 67 DOES NOT VARY, AMEND, OR REPEAL S.C. CODE ANN. 34-31-20(B).

Rule 67 SCRPC took effect July 1, 1985 and was last amended May 1, 1986. It is substantially the Federal Rule adopted in 1937 and theretofore last amended in 1983.

RULE 67, SCRPC 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.

(Emphasis supplied).

“Sought” is the past tense of the verb “to seek”. Each of its five (5) definitions in modern usage (trying to locate or discover; search for, to endeavor to obtain or reach; to go to or toward; to inquire for, request; to endeavor) states or implies a striving for something which has not yet been obtained. *The American Heritage Dictionary of the English Language*, 4th Ed. Houghton Mifflin Company, 1576 (2000).

This brief need not address the court’s understanding of what a judgment means, but does remind it that as of April 2013 the Grahams already had one. Leave of court means permission of the court, and permission is a thing that maybe granted or declined. Only if leave is granted “may” a party deposit its requested sum of money. “May”, of course, expresses potential or a possibility, not a certainty.

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.

Assuming for the sake of argument, that Rule 67, a rule of court, is of equal force as Section 34-31-20(B) S.C. Ann., a statute, (*Endnote 3*) 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 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).

Leges posteriores priores contrarias abrogant (a later law takes priority over a contrary earlier one). "It will be presumed that 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*, Thonson/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.).

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 SCRPC. "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 rate of 7 ¼ %, compounded annually.

III. APPELLANTS ARE NOT ARGUING AGAINST PRECEDENT.

There has never been a Supreme Court case applying Rule 67 SCRPC to the current statute governing the legal rate of interest. There has never been a South Carolina Court of Appeals case applying Rule 67 SCRPC to the current statute governing the legal rate of interest. Of all the South Carolina Appellate Court cases considering the interplay between the statute and the rule, only *SCDOT v. First Carolina Corp.*, 369 S.C. 150, 631 S.E.2d 533 (2006) was *decided* after July 2005, but it involved The Legal Rate of Interest statute as it used to read, from 2001 to 2005.

The South Carolina Supreme Court has never *held*, or rendered an opinion that had the effect of actually stopping the accrual of the interest for any particular judgment debtor. The holding of *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995) is "We hold Sutton's unilateral deposit of the funds insufficient to stop accrual of the interest mandated by §34-31-20." 317 S.C. at 445. The holding of the *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 167 (2003) 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." Persuasive to the Supreme Court's *Renaissance* decision was the uniform holding in the federal courts that Rule 67 "cannot be used as a means of altering the contractual relationships *and legal duties* of the parties." *LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050, 1063 (D.C. Cir. 1992); *In re Dept. of Energy Stripper Well Exemption*

Litigation, 124 F.R.D. 217, 218-19 (D.Kan. 1989); *Prudential Ins. Co. v. BMC Indus.*, 630 F.Supp. 1298, 1300 (S.D.N.Y. 1986). (Emphasis supplied). The holding of *S.C. Dep't. of Transp. v. First Carolina Corp. of South Carolina*, 369 S.C. 150, 631 S.E.2d 533 (2006) 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 South Carolina Supreme Court decision 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.

This court has twice considered the interplay between Rule 67 and the Legal Rate of Interest statute as it stood two revisions ago, prior to 2001. *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 620 529 S.E.2d 566 (Ct. App. 2000) 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.*, 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998) 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 this court's cases relied heavily on the *dicta* from *Russo*, but even so the Legal Rate of Interest statute has been twice amended since these decisions, 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, Title. 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 SE2d 131,134 (2008) and *Stardancer Casino, Inc. v Stewart*, 347 S.C. 377,385, 556 SE2d 357,361 (2001). The Tort Reform Act of 2005 was of great public interest, particularly to the business community and the Tort Bar, the State Chamber of Commerce particularly desiring a reduction in post-judgment interest. (*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. Throughout that Act "shall" is *never* used as an intransitive verb, one which has no direct object. "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.*, 371 S.C. 581, 584, 641 S.E.2d 429 (2007). 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). The next few paragraphs of this brief will examine the state of the common law, the usage of “shall”, and “must”, and the practice of legislative drafting as they had evolved in the decades leading up to the March 2005 Act.

In the 1970’s, Chief Justice Burger articulated the respondent’s argument, accepted by the court below, that “it is well settled that ‘shall’ means ‘must’”, but he was speaking *dicta* over a procedural defect, not raised at any court, in a one-paragraph concurring opinion joined by not one other justice. *Hicks v. Miranda*, 422 U.S. 332, 352 (1975). By 1995, however, a *majority* of 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).

In the twenty years since *Gutierrez de Martinez* “shall” has now been purged, with one exception, from all four major sets of Federal Rules, including Evidence. The lone exception is F.R.C.P. 56, the Summary Judgment Rule, the redrafting of which had generated disagreement between the permissive (*Liberty Lobby*) or mandatory (*Celotex*) factions of the Advisory Committee. Bryan Garner (*Endnote 5*) characterized the Advisory Committee’s Rule 56 retention of “shall,” and their explanatory note, as “We’re not sure whether this rule is mandatory or permissive, so we’re reverting to the ambiguous *shall*. Let the courts figure it out.” *Journal of the American Bar Association*, August 2012, “Shall We Abandon Shall?”

During this same 30-year period, there was a growing recognition in the legislative drafting community that “shall” has never been in common usage in the United States, that it has other means than “is required to”, and that “must” fixes meaning more tightly with no room for ambiguity. See *Statutory Interpretation: General Principles and Recent Trends*, C.R.S. Report for Congress. Updated August 31, 2008. Garner, B.A. *Guidelines For Drafting and Editing Court Rules* (1996: 29) Chapter 4.2 “Words Of Authority”. National Conference of State Legislatures, *Bill Drafting Manual*, at <http://www.ncsl.org/default.aspx?tabid=15672> (accessed Feb 16, 2014). P.K. Cooper, “Is there a case for the abolition of ‘shall’ from EU legislation?” *Research Papers No. 1*, Riga Graduate School of Law (2011); *The American Heritage Dictionary of the English Language*,^{4th} Ed. Houghton-Mifflin (2010), see the usage note at “should.”.

It was amidst this flurry (*Endnote 6*) of scholarly, intellectual, judicial, and professional debate that the National Conference of State Legislatures began encouraging legislatures and their staffs to consider abandoning the use of “shall” when it imposes the duty on the wrong actor. The point the Conference makes is that if a sentence forbids, authorizes, or requires, the

sentence should name the person who is being forbidden, authorized, or required. Stark, Jack. "Legislative Sentences," *Statute Law Review* 16, No. 3, 187 (1995). The consensus among the Conference of State Legislatures is exemplified and expressed by its Drafting Manual, pages 5-15 through 5-19 and its "Guidelines For When To Update Statutes Regarding The Present Tense, Active Voice, And Authority Verbs"; it has also conducted webinars (See Endnote 7 at pp. 22-24) on the distinctions surrounding the various meanings and usages of shall, endorsing the concepts set forth in the Wisconsin, Utah, and Colorado *Bill Drafting Manuals*: Identify the actor in the sentence and use the active voice to cause that actor to take the action specified in the sentence, principally to keep "shall" from directing the wrong entity. (*Endnote 7*). Stark, *supra*.

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 though forgivably, as an intransitive verb with an actor that could not act and with no direct object.

The apparent compromise in 2005 was to trade off a reduction in the post-judgment rate of interest for compounding that interest and strengthening the certainty of its entitlement. Regardless how pedantic and arcane my foregoing survey, there is no question that what South Carolina did in 2005 was to make the post-judgment legal rate of interest *more* clearly and indubitably mandatory than it had ever been before.

IV. THE COURT BELOW ABUSED ITS DISCRETION BY MISAPPLYING THE LAW, FAILING TO EXERCISE DISCRETION.

Rule 67 SCRPC is substantially the same as the Federal Rule allowing a deposit into court. See Rule 67, FRCP. In recognition of our rule's origin and that similarity, our Supreme Court noted in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999) that "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'", citing *LTV Corp. v. Gulf States Steel, Inc.*, 969 F.2d 1050, 1063 (D.C. Cir. 1992); *In re: Dept. of Energy Stripper Well Exemption Litigation*, 124 F.R.D. 217, 218-19 (D. Kan. 1989); *Prudential Ins. Co. v. BMC Indus.*, 630 F.Supp. 1298, 1300 (S.D.N.Y. 1986). (Emphasis supplied). *Renaissance* involved a contract rate of interest, but four years later the Supreme 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.

The plain language of Rule 67 is that it does not, in and of itself, either stop interest from accruing or even allow a party to deposit contested funds with the court. The other parties must have notice; leave of court must be granted; the permission or the deposit "may" (or may not) happen. Since Rule 67 is substantially the Federal Rule, it is helpful to note that the federal courts have uniformly held that the question whether to grant a Rule 67 motion is a matter committed to the court's discretion. *AT&T Comm. of Cal. v. Pac-W. Telecom, Inc.*, 651 F.3d 980 (N.D.Cal. 2007); *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050 (D.C. Cir. 1992); *Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp.*, 901 F.2d 441 (CA. 5 1990) ("whether Rule 67 relief should be available in any particular case is a matter committed to the sound discretion of the district court."); accord, *Russo*, fn. 3, *supra*; *Small*, 496 S.E.2d at 886.

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 South Carolina Supreme 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).

Neither at the May 7th hearing on the Respondent's motion nor in the briefs or supporting documentation did the Respondent offer any *facts* upon which a court could exercise its discretion. Indeed, it resisted the Appellants' urging that facts needed to be available for leave of court to be judiciously considered. Respondent also opposed the suggestion that the most efficient way for discretion to be exercised was for the court which tried the case to also make the Rule 67 decision.

The Respondent argued that in considering its motion to deposit funds, the court had *no discretion*:

- Typically, my experience has been with this, that it is granted as a matter of course.... (R., p. 103, ll. 21-22).
- And, I would submit that the court doesn't have discretion in this. (R. p. 107, ll. 14-15)
- I just want the record to be clear, and I don't think you actually need to decide this issue. But, I don't think it is actually a discretionary decision absent a factual basis, such as what was occurring in *Renaissance Enterprises* case, where you had a contractual agreement to the contrary. (R. p. 107, ll. 19-22).

- There really is no discretion. If there is a contractual rate of interest, then there is no discretion; and you would not have discretion to disregard that. (R. p. 114, ll. 10-13).
- Again, with all due respect, your Honor, I don't believe this is a situation where the court has any type of discretion based upon equities. (R. p. 116, ll. 20-22).

The Court, who had not tried the case, heard the witnesses, seen the exhibits, or read the transcripts, made an error of law when he specifically declined to exercise discretion:

- I will just say this from now, almost thirty years of being in the court system as a lawyer, or as a judge, it has always been this Court's impression that the party against whom a judgment is rendered may pay that money into the court to stop the running of the prejudgment interest. So, that is done pursuant to Rule 67. (R. p. 118, ll. 12-17).
- The court agrees with Mr. Lindemann in that (Rule 67) is a sound rule and an appropriate one. I do not believe there is any reason that this Court... should use my discretion and not permit it. I realize it is a very real monetary issue to your clients. (R. p. 119, ll. 2-7).
- All right. Let's do it this way. Today is Tuesday, May the 7th. We will stop the accrual of interest on the sooner of these two events. Either an agreement reached (in Merrill Lynch or some other place of deposit) and the money deposited, or seven days from today's date, which is May the 14th. And that will stop on that date. (R. p. 121, ll. 9-14).

As stated above nothing in Rule 67 permits interest to stop before a deposit even occurs. *Small, supra.*

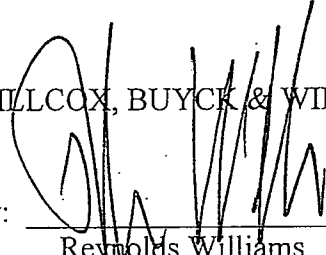
CONCLUSION

The public policy of South Carolina, as declared in its statutory law, is that a judgment creditor is entitled to post-judgment interest. The Grahams were deprived of the use of their home. The tortfeasor desires to deprive them of the use of their money. It is an error for a court to decline to exercise discretion, instead summarily altering the Grahams' legal right to interest.

The order below should be reversed and Respondent compelled to pay post-judgment interest at the legal rate.

Respectfully submitted,

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By: 

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July 8, 2014

ENDNOTES

1. See also *MCI Tele-Com Corp. v. AT&T*, 512 U.S. 218, 228 (1994) (using ordinary usage canon to hold that the FCC's authority to "modify" tower sites does not allow it to waive them because "'modify' in the court's view, connotes moderate change" and stating that while "it might be proper English to say that the French Revolution 'modified' the status of the French nobility – but only because there is a figure of speech called understatement and a literary device known as sarcasm.")
2. See *Muscarello v. United States*, 524 U.S. 125, 128 (1990) (consulting the *Oxford English Dictionary*, *Webster's Third New National Dictionary*, and *Random House Dictionary of the English Language Unabridged* for the meaning of the word "carry". Antomincella, *Common Law Courts in a Civil Law System: the Role of United States Federal Courts Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 23 (Amy Gutmann Ed. 1997).
3. 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* (Emphasis supplied).

"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).
4. "About South Carolina's Civil Justice Coalition", www.scjc.org/about/, "the Coalition had victories on... a reduction in the post-judgment interest rate.... **Victories for the Business Community: H.3008** In 2005, the General Assembly passed H.3008 that reformed South Carolina's tort laws including... post-judgment Interest rates. " (Accessed February 21, 2014).
5. Editor-in-chief of *Black's Law Dictionary* and author of *Garner's Dictionary of Legal Usage*, *Garner's Modern American Usage*, and *Making Your Case, The Art of Persuading Judges* (with Justice Scalia).

"Eliminating 'shall' created an unacceptable risk of changing the summary-judgment standard. Restoring 'shall' avoids the unintended consequences of any other word." Advisory Committee Notes on Rule 67, 2010 Amendment.

6. Bibliography:

Asprey, Michelle. "Shall Must Go." *Scribes Journal of Legal Writing* 3 (1992): 79-84.

Butt, Peter, and Richard Castle. *Modern Legal Drafting: A guide to Using Clearer Language*. Cambridge University Press, 2001.

Kimble, Joseph. "Choosing between Shall and Must in Legal Drafting." *Scribes Journal of Legal Writing* 1 (1990): 144-146.

Duckworth, Mark, and Arthur Spyrou, eds. *Law Words: 30 Essays on Legal Words and Phrases*. Sydney: Centre for Plain Legal Language, 1995.

Garner, B. *Legal Writing in Plain English*. The University of Chicago Press, 2001.

Kimble, Joseph. "The Many Mis-Uses of Shall." *Scribes Journal of Legal Writing* 3 (1992): 61-78.

Mellinkoff, David. *Legal Writing: Sense and Nonsense*. West Publishing Co., 1982.

Russell, Ben. "Shall, Must, May: The Logic of Legal Obligation and Permission." *Alberta Law Review* 32, no. 1, 93-115 (1994).

7. Sentence Guideline 3: **Use "Shall" Only For Legal Entities.**

Shall is frequently and inappropriately used to command inanimate objects or to indicate that the object has a legal obligation. If you develop the habit of writing in the present tense, you are less likely to draft these "false imperatives"... . Erika J. Abner B.A., LL.B., LL.M., PhD., of the Ontario Bar, former Chief of the Legislative Drafting Division of the Canadian Parliament; Stark, *supra*.

What's the only word that means mandatory? Here's what law and policy say about "shall, will, may and must."

We call "must" and "must not" words of obligation. "Must" is the only word that imposes a legal obligation on your readers to tell them something is mandatory. Also, "must not" are the only words you can use to say something is prohibited. Who says so and why?

Nearly every jurisdiction has held that the word "shall" is confusing because it can also mean "may, will or must." Legal reference books like the *Federal Rules of Civil Procedure* no longer use the word "shall." Even the Supreme Court ruled that when the word "shall" appears in statutes, it means "may."

Bryan Garner, the legal writing scholar and editor of *Black's Law Dictionary* wrote that "In most legal instruments, *shall* violates the presumption of consistency... which is why *shall* is among the most heavily litigated words in the English language."

Those are some of the reasons why these documents compel us to use the word "must" when we mean "mandatory:"

The Federal Register Document Drafting Handbook (Section 3) (<http://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>) states "Use 'must' instead of 'shall' to impose a legal obligation on your reader."

The Federal Plain Language Guidelines (page 25) (<http://www.plainlanguage.gov/howto/guidelines/bigdoc/fuilbigdoc.pdf>) (PDF) referred to in the Federal Plain Writing Act of 2010, compel the FAA and every federal department to "use 'must,' not 'shall'" to indicate requirements.

FAA Plain Language Writing Order 1000.36, (http://www.faa.gov/documentlibrary/media/order/branding_writing/order1000_36.pdf) (PDF) says avoid the word "shall" and use "must" to impose requirements, including contracts.

Until recently, law schools taught attorneys that "shall" means "must." That's why many attorneys and executives think "shall" means "must." It's not their fault. The *Federal Plain Writing Act* and the *Federal Plain Language Guidelines* only appeared in 2010. And the fact is, even though "must" has come to be the only clear, valid way to express "mandatory," most parts of the Code of Federal Regulations (CFRs) that govern federal departments still use the word "shall" for that purpose.

With time, laws evolve to reflect new knowledge and standards. During this transition, "must" remains the safe, enlightened choice not only because it imposes clarity on the concept of obligation, but also because it does not contradict any instance of "shall" in the CFRs." Right now, federal departments go through their documents to replace all the "shalls" with "must." It's a big hassle. If you look at page A-2, section q (<http://www.faa.gov/documentlibrary/media/order/nd/1000.37.pdf>) (PDF) of this link, it shows a sample of how a typical federal order describes this shift from "shall" to "must." Don't go through this tedious process. If you mean mandatory, write "must." If you mean prohibited, write "must not."

What should you say if someone tells you "shall is a perfectly good word?" Always *agree* with them because they're correct! But in your next breath, be sure to say "yes, shall is a perfectly good word, but it's *not* a perfectly good word of obligation."

If you've got comments or questions about this, please contact:

Dr. Bruce V. Corsino
FAA Plain Language Program Manager
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Page Last Modified: 09/05/13 10:36 EDT

This page can be viewed online at:

http://www.faa.gov/about/initiatives/plain_language/articles/mandatory/

Using Shall Carefully for Clearer Laws, Becky Tradewell, November 21, 2013

Food shall be pure

Using "shall" carefully for clearer laws

I. Introduction

- a. Why do we have difficulties using shall?
- b. Why should we care?
- c. Issues:
 - i. The false imperative
 - ii. The "wrong actor" problem
 - iii. "Shall have been"
 - iv. Passive voice

II. The false imperative

- a. Definitions from Merriam-Webster online (www.merriam-webster.com)
 - i. **Shall** (verbal auxiliary) ...2 a—used to express a command or exhortation b— used in laws, regulations, or directives to express what is mandatory,
 - ii. **Auxiliary** 2 of a verb; accompanying another verb and typically expressing person, number, mood, or tense,
 - iii. **Mood** 2 distinction of form... of a verb to express whether the action or state it denotes is conceived as fact or in some other manner (as command, possibility, or wish),
- b. The **imperative** mood expresses a command or requirement. The imperative mood is often the correct mood for a statute. When you want to impose a duty, the imperative is the appropriate mood and "shall" is the word to use.
- c. The **false imperative** appears to impose a duty, but does not. A sentence with a false imperative is meant to state a fact or declare a legal result,
- d. The **indicative mood** is used to state a fact or declare something,
- e. Occurrences of the false imperative may not be obvious. To tell whether a sentence contains the false imperative, you might try substituting "has a duty to" for "shall" and ask whether the resulting sentence makes sense,
- f. *Wisconsin Bill Drafting Manual*: The indicative mood expresses a fact or declaration. The imperative mood expresses a command... Draft in the indicative mood whenever possible. Avoid false imperatives, which are expressions that seem to direct behavior but do not. Do not say "The authority shall be a body corporate," Say "The authority is a body corporate,"

- g. *Utah Legislative Drafting Style Manual*: A common mistake in drafting legislation "is the use of 'shall' or 'shall not' to declare a legal result rather than to give a command. For example, ... *The record for judicial review shall consist exclusive of... 'A Government employee shall have a right of action against the Government...'* This usage is known as a *false imperative* because it does not give a command to someone to do something but rather declares a legal result, [Legislation] is self executing. If it says something 'is,' it is. Thus, if in a [statute] a word has a certain meaning, it is only necessary to say that the word 'means...' This usage is the indicative mood ...in addition to the use of *shall* in these circumstances being technically incorrect, the use of the indicative mood has two other advantages. Most important, it allows the use of *shall* only in those instances when the imperative mood is appropriate, this is when a command is given...Elimination of the unnecessary *shall*, of course, also reduces the number of words in the provision" (Martineau and Salerno 2005, pp. 47-48).

III. The wrong actor

- a. Many statutory provisions that correctly use the imperative mood (that is, they use "shall" and are meant to impose a duty) actually impose the duty on the wrong actor.
- b. The "has a duty to" test may also help to spot the wrong actor problem.
- c. *Wisconsin Bill Drafting Manual*: Do not use "shall" to direct the wrong entity. For example, "the clerk shall receive a salary of \$30,000 per year" is incorrect because it makes no sense to direct someone to receive a salary. It would be better to write something like "the board shall pay the clerk a salary of \$30,000 per year."
- d. "The most basic point about the subject of a legislative sentence is obvious but not always remembered. That point is that if a sentence forbids, authorizes or requires, the sentence should name the person who is being forbidden, authorized or require" (Stark 1995, p. 187).

IV. "Shall have been"

- a. "Will have been" expresses the future perfect tense in the passive voice or the future perfect continuous (or future perfect progressive) tense. It describes something that is expected to have been done before a future time or event or something that is expected to continue until a time or event in the future. "Shall have been" is sometimes used in the same way.
- b. "Shall have been" was widely used in legal documents at one time and it still appears in statutes, but it seems unlikely that it would be necessary to use the phrase. If it is necessary to use the future perfect passive or the future perfect continuous in a law, it would be better to use "will" and reserve "shall" for making commands.
- c. Sometimes the intent seems to simply be to describe something that happens or has happened,

- d. Sometimes "shall have been" seems to be intended to state a condition (for receiving a grant, for example), but it does not clearly do that,
- e. When you are asked to draft "shall have been," find yourself writing that phrase, or are asked to amend a statute that uses it, consider whether the language is intended to impose a duty on someone. If so, reword the language so that it imposes the duty. If not, determine what is intended and reword the language without using "shall."

V. Passive Voice

- a. In the active voice, the subject does the acting. In the passive voice, the subject is acted upon.
- b. The passive voice doesn't necessarily involve "shall," but in statutes it often does.
- c. The active voice is usually preferable, if only because it involves fewer words and a more familiar word order. There are situations in which the passive voice is preferable or even necessary, for example, when the actors are numerous or unknown.
- d. The danger with the passive voice related to the use of "shall" is ambiguity about who has a duty.
- e. *Wisconsin Bill Drafting Manual*: It is usually better to use an active rather than a passive verb. For example, state "the clerk of the circuit court shall appoint one or more deputies" rather than "one or more deputies shall be appointed." Use of the passive voice frequently makes it unclear who has the responsibility to carry out a law.
- f. *Colorado Bill Drafting Manual*: Whenever possible, write sentences that clearly identify the actor of the sentence, and use the active voice to make that actor take the action specified in the sentence.
 - i. *Passive voice (actor absent)*: A notice *shall be mailed* to the parties within fifteen days after issuance of an order.
 - ii. *Active voice (actor present)*: The commission shall mail a notice to the parties within fifteen days after issuance of an order.

VI. Suggestions for drafting

- a. Consider whether a sentence containing "shall" is meant to impose a duty and, if so, whether it imposes the duty on the right person.
- b. Consider rewording a sentence that includes "shall be," "shall have," or "shall have been."

VII. References

- Martineau, Robert and Michael Salerno, *Legal, Legislative, and Rule Drafting in Plain English*. St. Paul: West Law School, 2005.
- Stark, Jack, "Legislative Sentences," *Statute Law/Review* 16, no. 3, (1995): 187.

GUIDELINES FOR WHEN TO UPDATE STATUTES REGARDING THE PRESENT TENSE, ACTIVE VOICE, AND AUTHORITY VERBS

1. The determination of whether to update existing statutory language is primarily one for the attorney drafting the bill to make. If updating seems advisable under section 4 but the drafter has not updated a statute, a revisor should raise the issue with the drafter and should consider whether to include the updates in the current version of the bill or the next draft of the bill.
 - a. LAs do not need to suggest updates to bills.
 - b. LAs should raise a concern if they notice conflicting updates between bills or within a bill.
2. The attorney should comply with the drafting manual concerning the use of the present tense, active voice, and authority verbs (unless doing so is likely to create ambiguity) when a bill adds:
 - a. An entirely new subdivision of law; or
 - b. An entirely new sentence within an existing subdivision of law. In doing so, the attorney should consider whether the rest of the subdivision should be updated - see section 4.
3. Do not update a subdivision of law that is not already in a bill for other, substantive reasons. This does not prevent:
 - a. Updating an introductory portion of law that is not otherwise being amended and therefore wouldn't otherwise be in the amending clause.
 - b. Updating an entire section or other multi-part subdivision of law if doing so is helpful for other reasons, for example, most of the subdivisions of the section or subdivision are already being amended or it's important to show the context of the section or subdivision.
4. In determining whether to update existing statutory language, an attorney should consider:
 - a. Whether updating the language is likely to create ambiguity or have any substantive effect,
 - b. Whether the existing language has been construed by case law. If so, the attorney should not update the language unless doing so would clearly not affect the reasoning or result of the case,
 - c. Whether the existing language relates to a particularly sensitive issue. If so, the language should probably be left alone,
 - d. Whether the sponsor of the bill or the committee where it will probably be heard are likely to be concerned with each and every statutory change.
 - e. The resulting work load on the publication and bill production processes, including on LAs, revisers, and the pub team. Updating in a 5- or 10-page bill has a very different impact than doing so in a 50-page bill. Updating sections of law that are in the bill only as conforming amendments may be unduly burdensome if there are many conforming amendments:

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GUIDELINES FOR THE USE OF "SHALL" AND "MUST"

The easiest way to approach this word choice is to first try following the drafting manual regarding the use of "shall". If using the phrase "has a duty to" doesn't make sense (considering the exception for the use of the passive voice), then don't use "shall". "Must" is a possibility, but you should consider whether you really need to use an authority verb.

Excerpt from Drafting Manual

If the words in quotes from the right-hand column below convey your intended meaning, then use the word or words from the left-hand column.

- | | |
|---------|---|
| shall = | a person "has a duty to" (<i>but see</i> paragraph (a) (I) (C) below regarding the passive voice) |
| must = | a thing or person "is required to" meet a condition for a consequence to apply.
"Must" does not mean that a person has a duty. |

(a) (I) (C) In the passive voice. . . . If you use the passive voice (because the actors are unknown, unmistakable; or too numerous to list) and the context indicates a legislative intent that a person has a duty, use "shall", not "must", even though the subject of the sentence is a thing. . . .

Step-by-step Analysis

1. Figure out whether the **subject** of your sentence is a **person** or a **thing** (remember that the statutory definition of "person", §2-4-401 (8), C.R.S., includes entities),
2. Figure out whether there is or should be a **duty** or only a **condition**.
 - a. Things can't have duties, only people can.
 - b. A duty is something that a court will enforce, for instance, by applying a penalty or entering an injunction.
 - c. A condition is simply a prerequisite for a consequence to apply. A court will not apply a penalty or enter an injunction to require a person or thing to meet the condition, but may determine that a consequence does or doesn't apply.
3. If the subject is a person and:
 - a. There is a duty, use "shall".
 - b. There is not a duty, use "must" or another present-tense verb. Think outside the box: is this even an authority verb issue? Can I express this better with another present-tense verb?
4. If the subject is a thing:
 - a. First, figure out whether your sentence is **active** or **passive** voice (try to use active voice).
 - b. In the active voice, "shall" is not an option because a thing can't have a duty. Use "must" or another present-tense verb.
 - c. In the passive voice, if the **object** of the sentence is a person who has a duty, use "shall".

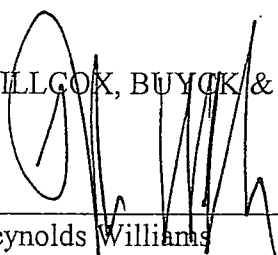
[http://www.state.co.us/gov_dir/leg_dir/olls/LDM/11.0 Grammar and Style.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/LDM/11.0_Grammar_and_Style.pdf) (accessed March 3, 2014)

Person		Thing		
Is There a Duty?		Is There a Duty?		
No	Yes	No	Yes	Voice
Don't use "shall" Maybe use "must"	Use "shall"	Don't use "shall" Maybe use "must"	Use "shall"	Passive
			(Can't be a duty) Don't use "shall" Maybe use "must"	Active

[http://www.state.co.us/gov_dir/leg_dir/olls/LDM/11.0 Grammar and Style.pdf](http://www.state.co.us/gov_dir/leg_dir/olls/LDM/11.0_Grammar_and_Style.pdf) (accessed March 3, 2014)

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.


WILLGOK, BUYCK & WILLIAMS, P.A.

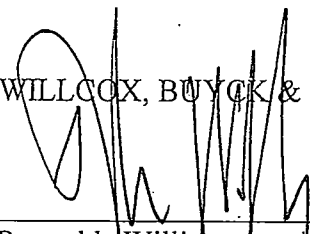
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July 8, 2014

CERTIFICATE OF COMPLIANCE

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JUL 09 2014
SC Court of Appeals

The undersigned counsel hereby certifies that the Final Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014. .


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CERTIFICATE OF SERVICE

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SC Court of Appeals

The undersigned employee of Willcox, Buyck & Williams, P.A., attorneys for the Appellants, does hereby certify that on the 8th day of July, 2014, service of the Final Brief of Appellants was made upon all counsel of record by placing three (3) copies in the United States Mail, first class postage prepaid to:

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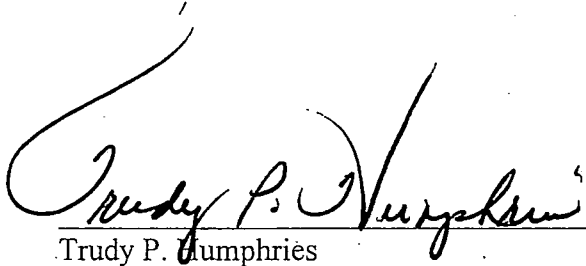

Trudy P. Humphries

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STATEMENT OF THE CASE

This is an appeal from an inverse condemnation, trespass, and negligence action arising from a sewer overflow occurring in the Town of Latta on September 5-6, 2008. The Appellants Claude Graham and Vickie Graham (hereafter referred to collectively as the "Grahams") filed companion civil actions on November 19, 2008. Those actions were later consolidated for discovery and trial.

After completion of discovery, the consolidated cases were tried beginning on October 8, 2012, before Circuit Court Judge Alison Renee Lee and a jury. The trial concluded on October 11, 2012. After Judge Lee granted a partial directed verdict, the remaining negligence claims were submitted to the jury. The jury ultimately returned a verdict in favor of Vickie Graham in the amount of \$225,000.00 and a verdict in favor of Claude Graham in the amount of \$100,000.00.

On October 11, 2013, the Circuit Court entered judgment in Civil Action Number 2008-CP-17-376 in favor of Claude Graham in the amount of \$100,000.00. (R. 18). On the same date, the Circuit Court entered judgment in Civil Action Number 2008-CP-17-377 in favor of Vicki Graham in the amount of \$225,000.00. (R. 20). The Town filed post-trial motions which were denied by Judge Lee. (R. 1-10).

The Town thereafter filed a Notice of Appeal with this Court, and the Grahams filed a cross-appeal. Those appeals are currently pending. The Town also filed a motion seeking to deposit the sum of \$325,000.00, plus accrued interest, with the Circuit Court in accordance with Rule 67, SCRCP, during the pendency of those appeals. (R. 22-24). That motion was heard and granted by then Circuit Court Judge J. Michael Baxley. Judge Baxley allowed the Town of Latta to deposit the sum of the judgments with the court. (R. 11-15). The Grahams later filed a Rule 59(e) motion to alter or amend, which was denied by Form Order filed December 10, 2013. (R. 16-17).

The Grahams thereafter filed this appeal.

ARGUMENTS

The Appellants Claude Graham and Vickie Graham argue on appeal that they are entitled to receive the legal rate of interest as established by Section 34-31-20(B) despite the payment of the judgment amounts into court in accordance with Rule 67, SCRCF.¹ The Grahams make two primary arguments. First, they argue that the amendment to Section 34-31-20(B) in 2005 changed the law and made an award of the legal rate of interest mandatory. Second, they argue that a judgment debtor has a "legal duty" to pay the legal rate of interest on a judgment and that Rule 67 cannot be used to alter the "legal duties" of the parties. Both of these positions lack merit.

¹ Arguably, the Grahams' entitlement to a legal rate of interest is premature because the judgments that they received are subject to a companion appeal filed by the Town of Latta. If the Town prevails on its appeal, the case will be remanded either for the entry of judgment in the Town's favor or for a new trial absolute, and that will clearly moot the issues raised by the present appeal. In addition, the Town is not the only appealing party. The Grahams have also filed an appeal which is pending. The filing of an appeal by the Grahams may likewise have an effect on the accrual of post-judgment interest during the appeal. *See, Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987). Consequently, the Grahams' entitlement to 7.25% interest on the judgments is not an issue necessarily ripe for adjudication at this time.

- I. The Circuit Court correctly ruled that the 2005 amendment to Section 34-31-20(B) did not overturn the rule of law from *Russo v. Sutton* and did not make an award of the legal rate of interest mandatory where a judgment debtor pays the judgment amount into court to stop the accrual of post-judgment interest.

South Carolina law recognizes that a judgment debtor's payment into court of the amount of the judgment stops the accrual of post-judgment interest. In *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), the South Carolina Supreme Court held that "a judgment debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest." 454 S.E.2d at 896. The Supreme Court recognized that "[s]uch a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." *Id.* The Supreme Court in *Russo* cited favorably to an earlier decision in *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987), where the Court noted that "a judgment debtor may stop the running of interest by paying the amount of the judgment into court during the pendency of an appeal." 358 S.E.2d at 574, n.1. Referring to Section 34-31-20(B), the Supreme Court in *Sears* also explained that "[d]espite the mandatory tenor of the statutory language, the statute does not automatically apply in every case." 358 S.E.2d at 575.

The rule of law recognized by the Supreme Court in *Russo* has been upheld and applied in numerous cases since that decision. See e.g., *Small v. Pioneer Machinery, Inc.*, 330 S.C. 62, 496 S.E.2d 884, 885 (Ct. App. 1998) ("[a] judgment

debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest on the judgment"); *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617, 618 (1999) ("a judgment debtor's deposit of funds into court pursuant to Rule 67 pending his own appeal stops the accrual of interest on the judgment"); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000) (same). Likewise, in 1999, this Court explained that the "[p]ayment of a judgment into court is deemed to be a payment of money for the use of the person entitled thereto and stops the running of judgment interest." *South Carolina Department of Transportation v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822, 828-829 (Ct. App. 1999).

At the time that *Russo* was decided in 1995, Section 34-31-20(B) provided that "[a]ll money decrees and judgments of courts enrolled or entered *shall* draw interest according to law." S.C. Code Ann. § 34-31-20(B) (1987), as cited in *Russo*, 454 S.E.2d at 896. (Emphasis added). At that time, Section 34-31-20(B) was written in mandatory terms using the term "shall." The Supreme Court had previously noted the "the mandatory tenor" of Section 34-31-20(B) in *Sears*. *Sears*, 358 S.E.2d at 575. Despite recognizing the mandatory tenor of Section 34-31-20(B), the Supreme Court in *Russo* confirmed the rule of law from earlier precedent that allows a judgment debtor to deposit into court the amount of the judgment and thereby stop the accrual of post-judgment interest. Based on its

previous decision in *Sears*, the Supreme Court recognized that Section 34-31-20(B) "does not automatically apply in every case." In sum, the rule of law from *Russo* which stops the accrual of post-judgment interest was adopted despite the mandatory language in Section 34-31-20(B).

On appeal, the Grahams submit that they are not arguing against the precedent established by *Russo* and its progeny. Instead, the Grahams argue that the amendment of Section 34-31-20(B) in 2005 requires a different result and that no existing appellate case has determined whether the rule of law from *Russo* applies under the current version of Section 34-31-20(B). The Grahams point out that the term "shall" was changed to "must" in Section 34-31-20(B), which now reads in pertinent part: "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." S.C. Code Ann. § 34-31-20(B) (2005). (Emphasis added).

The Circuit Court ruled that "[t]he change from 'shall' to 'must' is insignificant; both terms are mandatory in nature and are interchangeable." (R. 13). Accordingly, the Circuit Court concluded that "the amendments to Section 34-31-20 have no effect on Rule 67 or how it is to be construed and applied." (R. 13). That ruling is correct and should be affirmed. The change from "shall" to "must" in Section 34-31-20(B) does not overturn the rule of law recognized in *Russo* and applied in countless cases since.

In attempting to argue to the contrary, the Grahams employ a lengthy and pedantic grammatical and definitional analysis of the terms "shall" and "must." They further cite materials not presented to the lower court that address various trends in legislative drafting. The Grahams suggest that prior to the 2005 amendment, when Section 34-31-20(B) used the term "shall," the requirement that a judgment accrue interest was not mandated by law, and that the change of "shall" to "must" in 2005 made that requirement mandatory for the first time.

However, in engaging in such an analysis, the Grahams disregard the previously cited language from *Sears*, where in addressing the entitlement to post-judgment interest during the pendency of an appeal, the Supreme Court already recognized that the prior use of "shall" in Section 34-31-20(B) was "mandatory" in "tenor." *Sears*, 358 S.E.2d at 575. Similarly, in *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000), where the Supreme Court addressed the pre-2005 version of Section 34-31-20(B), the Court found that "[u]se of the word 'shall' in a statutory provision indicates the provision is mandatory." 529 S.E.2d at 18. Thus, even prior to the 2005 amendment, Section 34-31-20(B) was already construed as a mandatory statute. The amendment to "must" in 2005 effected no change.

The Grahams also overlook that Section 34-31-20(B), as amended in 2005, retained the qualifying language "according to law." By retaining that language, the General Assembly recognized that the requirement that a

judgment accrue interest must be "according to law," which is obviously inclusive of the rule of law as identified in *Russo* and applied since. If Section 34-31-20(B) is to be construed as making the accrual of post-judgment interest mandatory without any exceptions previously recognized by the courts, then the phrase "according to law" is surplusage. There would have been no need to include "according to law"; it would add nothing to the statute. It is well settled, however, "that statutes should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *Abraham v. Palmetto Unified School District No. 1*, 343 S.C. 36, 538 S.E.2d 656, 662 (Ct. App. 2000), citing *Matter of Decker*, 322 S.C. 215, 471 S.E.2d 462, 463 (1995).

Moreover, the Grahams have disregarded existing South Carolina authority that treats "shall" and "must" as synonymous and interchangeable terms. For example, in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), the Supreme Court explained that "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." 574 S.E.2d at 743. See also, *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) (same).

The Grahams have likewise disregarded the literally hundreds of cases from other jurisdictions that have treated "must" and "shall" as synonymous, mandatory

terms. In its order, the Circuit Court cited to *Hicks v. Miranda*, 422 U.S. 332, 352 (1975) (Burger, C.J., concurring) ("[i]t is well settled that 'shall' means 'must'"), and *Johnson v. Burnley*, 887 F.2d 471, 476 (4th Cir. 1989) ("'must' and 'shall' are virtually synonymous under traditional principles of statutory construction"). There are many other cases that could be cited for the same well-settled proposition. See e.g., *Shepherd v. Carlin*, 813 N.E.2d 1200, 1203 (Ind. Ct. App. 2004) ("shall" and "must" have the same meaning); *Ewing v. Kaplan*, 474 So. 2d 302, 304 (Fl. App. 1985) ("the words 'shall' and 'must' are interchangeable"); *Comerford v. Pryor Foundry*, 987 P.2d 434, 436 (Okl. App. 1999) ("[u]se of the word 'shall' by the Legislature is normally considered a legislative mandate equivalent to the term 'must'"); *Maryland State Highway Administration v. Engineering Management Services*, 147 Md. App. 132, 807 A.2d 1131, 1140 (2002) ("'shall' and 'must' will be construed synonymously").

Courts in other jurisdictions have likewise found no legal significance where the legislature changes "shall" to "must" or vice versa. For example, in *Member of Board of Education of Pearce Union High School District v. Leslie*, 112 Ariz. 463, 543 P.2d 775 (1975), the Arizona Supreme Court explained: "The word 'must' was changed to 'shall.' The change of the word 'must' to 'shall' did not alter the mandatory nature of the statute's language so unequivocally expressed in the original enactment." 543 P.2d at 777. In *Tesauro v. Baird*, 232 Pa. Super. 185,

335 A.2d 792 (1975), the Pennsylvania Superior Court discussed a change from "shall" to "must" in a statute and concluded as follows:

This unexplained change of words does not show sufficient legislative intent to do away with such a well-established doctrine, particularly when 'shall' and 'must' have both been construed to be mandatory in nature. If the legislature had intended to abolish the doctrine under Section 502 of the Mechanic's Lien Law it should have done so by stating, directly and specifically, that the doctrine of substantial compliance will no longer be available to correct inadvertent errors or omissions in form.

335 A.2d at 796. Similarly, in *T.R.B. v. State of Wisconsin*, 109 Wis.2d 179, 325 N.W.2d 329 (1982), the Wisconsin Supreme Court noted a change from "must" to "shall" but found that "[t]he changes are not significant." 325 N.W.2d at 337, n.17.

The South Carolina appellate courts have previously been called upon to construe a legislative change from "may" to "shall" and vice versa. See, *Robertson v. State*, 276 S.C. 356, 278 S.E.2d 770 (1981); *T.W. Morton Builders, Inc. v. Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994). In both instances, the courts looked for the legislative intent in making the change and ultimately found no explanation for the change in terminology and thus did not interpret any change in the statutory meaning. These cases show that the courts will focus on whether the legislature intended a change in prior meaning even with a change from "may" to "shall." While admittedly a change from "may" to "shall" often does imply a change from a discretionary to a mandatory duty, a change from "shall" to "must"

is much different and has been found to have intended no change in meaning. In fact, the Grahams have cited to no South Carolina decision (nor a case from any jurisdiction) that found a change in meaning when "shall" is changed to "must" or vice versa.

Yet interestingly, in their brief, the Grahams do point out that as part of the same 2005 tort reform legislation, specifically 2005 Act No. 27, the General Assembly did change "shall" to "must" in several instances other than in Section 34-31-20(B). The Grahams do not identify the other such instances. However, it is instructive to review those. In none of those instances did the General Assembly intend any change in the mandatory meaning that the previous use of "shall" connoted. For example, in Section 15-7-100, "shall" was changed to "must" in two places, but there was no change in the meaning. Similarly, in Section 15-7-30, "the action shall be tried" was changed to "the action must be tried," but again there was no change in the meaning.² Furthermore, in Section 15-3-640, "shall" was changed to "must," but there was no change in the meaning.

As was the case in the *Robertson* and *T.W. Morton Builders* cases, the legislative intent for the change in the first sentence of Section 34-31-20(B) cannot

² The legislative history for Section 15-7-30 shows that in 2005, the original text of the statute was designated as subsection (B), and then other new sections were added to the statute. The change from "the action shall be tried" to "the action must be tried" is now found in Section 15-7-30(B).

be ascertained from the legislative history. However, a change cannot be blindly inferred or assumed. Given the number of inconsequential changes from "shall" to "must" in the same legislation, that would seem to suggest only a different style of legislative drafting was at play – in essence, a grammatical or syntax clarification but not a change in meaning. Certainly, with regard to each of the changes from "shall" to "must," if the General Assembly had intended to effect some substantive change by using a different mandatory term, that would have been clearly stated in the title of 2005 Act No. 27 or otherwise in the legislative history.

In sum, the Circuit Court ruled correctly in finding that the 2005 amendment to Section 34-31-20(B) in changing "shall" to "must" did not change the meaning of the statute and certainly cannot be construed as overturning *Russo* and other precedent that allows for a judgment debtor to deposit the judgment amount with the court under Rule 67 so as to stop the accrual of post-judgment interest. The change from "shall" to "must" clearly did not effect the change in the law suggested by the *Grahams*.

II. The Appellants have not shown that any "legal duty" to pay post-judgment interest at the legal rate was breached or that the Circuit Court erred in allowing the Town to deposit the funds with the court.

The *Grahams* also argue that Rule 67 cannot be used to alter the "legal duties" of the parties. They rely on the Supreme Court case of *Renaissance Enterprises, Inc.*

v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999), wherein the Court ruled that a contractual interest rate would apply instead of the statutory interest rate. The Court held that "the post-judgment statutory rate applied *only where there was no contractual interest rate.*" 513 S.E.2d at 618. (Emphasis added). "[A] deposit into court pursuant to Rule 67 does not stop the accrual of interest provided by contract." *Id.*

As the Circuit Court correctly found, this case does not involve a contractual interest rate nor any other agreement governing the amount of post-judgment interest. The Grahams' recovery was limited to a Tort Claims Act award on a negligence claim. As a result, the post-judgment statutory interest rate would apply. Where the statutory interest rate applies, South Carolina law per *Russo* and its progeny clearly provides that the accrual of such interest may be stopped by the deposit of funds into court. As discussed above, Section 34-31-20(B) does not create any "legal duty" to pay post-judgment interest. As the Supreme Court recognized in *Sears*, "[d]espite the mandatory tenor of the statutory language, the statute does not automatically apply in every case." *Sears*, 358 S.E.2d at 575. In short, there was not any "legal duty" among the parties that was altered or abridged by the Circuit Court's decision.

The Grahams now appear to also argue on appeal that the Circuit Court erred in failing to exercise its discretion to decide whether it was appropriate to allow the

Town of Latta to pay the judgment amount into court. This argument fails for several reasons.

First, the rule of law recognized in *Russo* does not state that a court may choose not to follow the rule. Instead, in *Russo*, the Supreme Court indicated that "to stop accrual of interest, a debtor must comply with the plain language of Rule 67." *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895, 897 (1995). Thus, contrary to the Grahams' assertion, a circuit court is not acting as a "rubber stamp" but rather is tasked with ensuring compliance with Rule 67.³ In a footnote in *Russo*, the Supreme Court did explain that a court may exercise discretion once the deposit is made in determining whether "the fund [should] be placed in an interest bearing account." *Id.*, n.3. The Supreme Court did not, however, set forth any factors for a circuit court to consider in determining whether a judgment debtor who complies with Rule 67 may nonetheless be denied the option of depositing funds with the court to stop the accrual of post-judgment interest.

Yet, even if the decision is discretionary with the court, the Grahams have not offered any discussion of the factors that a circuit court is required to consider nor have the Grahams shown that this was not an appropriate case under such factors for allowing the Town to pay the amount of the judgments into court.

³ The Grahams do not argue that the Town failed to properly comply with Rule 67.

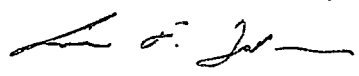
Finally, in its order, the Circuit Court found "no basis for the Court to disallow the use of Rule 67 in this case." (R. 14). To the extent that the Grahams contend that that is not a proper ruling or that the lower court failed to properly exercise discretion, that issue is not addressed in the Circuit Court's orders. Furthermore, while the Grahams did file a Rule 59(e) motion, this issue was not raised therein and should be deemed waived for appellate review.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Town of Latta respectfully requests that this Court affirm the written order of Circuit Court J. Michael Baxley allowing the Town of Latta to deposit the sum of the judgments with the court to stop the accrual of post-judgment interest during the pendency of the appeals.

Respectfully submitted,

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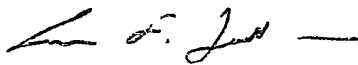
Columbia, South Carolina

September 19, 2014

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Town of Latta certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Town of Latta, does hereby certify that service of **Final Brief of Respondent** was made upon all counsel of record by a placing copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 19th day of September 2014:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case Nos.: 2008-CP-17-0376
2008-CP-17-0377

RECEIVED
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SC Court of Appeals

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

v.

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

**REPLY BRIEF
OF APPELLANTS**

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ARGUMENTS

I. THE TOWN OF LATTA MISREADS THE LEGAL RATE OF INTEREST STATUTE.

At pages 7 and 8 of its Brief, the Respondent argues 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*, 454 S.E. 895 (S.C. 1995) upon which it so heavily relies. Its 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. 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. S.C. Code Ann. 34-31-20(B). [Emph. in original Tort Reform Act of 2005].

“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 4. 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, 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); *Alger v. Commonwealth*, 267 Va. 255, 590 S.E.2d 563 (2004). Applying the last antecedent doctrine to S.C. Code. Ann. 15-41-30(A)(9), the United States Bankruptcy Court for the District of South Carolina found that “payable to a beneficiary” modified the word “insurance” instead of the more distant word “proceeds and cash surrender values” in the phrase: “proceeds and cash surrender values of life insurance payable to a beneficiary.” The Bankruptcy Court cited *U.S. v. Hayes*, 555 U.S. 415 (2009) for the rule of grammatical construction which provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. In re *Patel*, 431 B.R. 682, 689-90 (2010). Accord, *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987).

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 exists at common law. Thus modified the interest is made clear by the second sentence of 20(B).

II. A JUDGMENT CREDITOR HAS A LEGAL RIGHT TO THE LEGAL RATE OF POST JUDGMENT INTEREST.

Respondent argues that Section 34-31-20(B) “does not create any legal duty to pay post-judgment interest,” at page 13 of its Brief. The South Carolina Supreme Court disagrees.

At common law, judgments did not bear interest, so the statute at issue *creates something*; the pertinent analysis is whether the something it created is a legal duty. In *Calhoun v. Calhoun*, S.C. 96, 529 S.E.2d 14, 339 (2000), the Supreme 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, and one so imperative that it cannot be waived by inattentive lawyering.

III. THE RESPONDENT’S BRIEF MISSTATES THE HOLDINGS OF *SEARS AND RUSSO*.

The Respondent compounds its misstatement of the *Russo v. Sutton* holding with an equally egregious mischaracterization of the holding in *Sears v. Fowler*. “We hold *Sutton’s* unilateral deposit of the funds insufficient to stop accrual of the interest mandated by Section 34-31-20” from *Russo*, became, in Respondent’s hands, a rule of law that a judgment debtor’s deposit of funds into the court pending on appeal prevents further accrual of interest.

The Respondent quotes *dicta* from *Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) artfully as if it were held there that a judgment debtor “may stop the running of interest by paying the amount of the judgment into court” while an appeal is pending. *Sears* not only addressed an earlier version of the Legal Rate of Interest statute not applicable here and did not refer to or consider Rule 67, but also definitively rebuts the reliance upon it by Respondent.

The *sole question* presented in this appeal is whether or not a judgment creditor, who unsuccessfully appeals a money judgment on the ground of inadequacy after having received a judgment in his favor, is entitled to interest under the general interest statute during the pendency of his appeal. We hold that he is not. *Sears v. Fowler*, 293S.C. at 45. (emph. supp.).

In a footnote not part of the reasoning which led to its holding, the court addressed a hypothetical neither argued nor briefed, but upon which the Respondent relies for support to its argument that Rule 67 trumps the statute.

More crucial to the issue pending before this Court, however, is the reasoning upon which *Sears* relied to come to its holding. The statute at issue in *Sears* read “shall draw interest according to law”. *Sears* noted the “mandatory tenor of the language” but was careful to recognize that the usage of “shall” in the sentence was not a command: “Despite the mandatory tenor of the statutory language, the statute does not automatically apply in every case.” *Sears* went on to recognize that it does not apply when the parties have contracted for a different rate and characterizes that observation as “for example.” A contract calling for a different rate is an *example*, not the exclusive circumstance where “shall” found its mandatory tenor diluted.

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 III 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*, *Russo*, and any other case upon which Respondent relies were decided. In support of our argument, Appellants noted that the Tort Reform Act of 2005 uses “shall” correctly only to issue a command to an entity or to describe a future condition and that it always used “must” as a transitive verb to mandate, order, or command a thing in a manner descriptive of the end result of the command. Respondent does not accord the statutory law of South Carolina the respect it, or this court, should when it argues that the Tort

Reform Act of 2005 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 of which they are incapable and entities described in ways to which they may not conform in the absence of a command.

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. (emph. sup.) 82 *C.J.S. Statutes* §388.

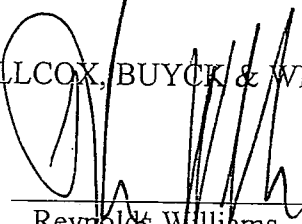
When the legislature uses certain language in one part of the statute and different language in another, the usual rule is that the court assumes different meanings were intended. *DePierre v. U.S.*, 131 S.Ct. 2225 (2011). *Wine v. Commonwealth*, 301 Mass. 451, 457, 17 N.E.2d 545, 548 (1938); *Forst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

CONCLUSION

The public policy of South Carolina, as expressed in its statute law, is that a judgment debtor has a legal duty to pay post-judgment interest at the legal rate. The order below should be reversed.

Respectfully submitted,

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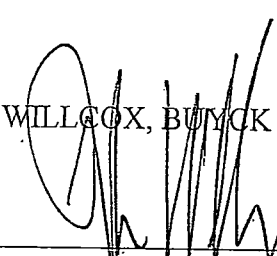
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The undersigned counsel hereby certifies that the Reply Brief of Appellants complies
with Rule 211(b), SCACR.

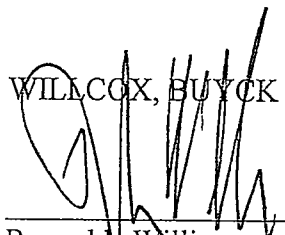
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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Reply Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.


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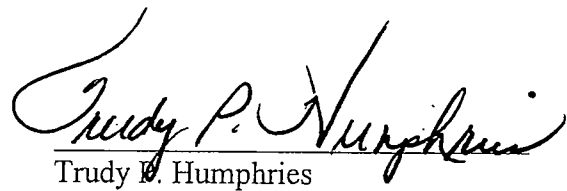
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The undersigned employee of Willcox, Buyck & Williams, P.A., attorneys for the Appellants, does hereby certify that on the 8th day of July, 2014, service of the Reply Brief of Appellants was made upon all counsel of record by placing three (3) copies in the United States Mail, first class postage prepaid to:

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