THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 2016-UP-331
(S.C. Court App. filed June 29, 2016)

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent
Town of Latta

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 Petitioners 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 the Court of Appeals, and the Grahams filed a cross-appeal. 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 the appeal. (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The Grahams then filed an appeal to the South Carolina Court of Appeals which issued an unpublished opinion on June 29, 2016, affirming the order of Judge Baxley. *See*, *Graham v. Town of Latta*, Op. No. 2016-UP-331 (S.C. Ct. App. filed June 29, 2016). A subsequent petition for rehearing was denied by the three-judge panel.

ARGUMENTS

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The Respondent Town of Latta submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is entirely unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion.

Second, the opinion of the Court of Appeals was unpublished and a *per curiam* opinion issued in accordance with Rule 220(b)(1), SCACR, and thus the opinion has no precedential value.

Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court.

Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. The *per curiam* opinion has no precedential value, and as a result, the Court of Appeals' decision will have no application to other cases.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The Petitioners have improperly raised new or at least different issues in their Petition for Writ of Certiorari than what was raised in the Petition for Rehearing in the Court of Appeals.

Rule 226(d)(2), SCACR, governs the issues that may properly be raised in a petition for writ of certiorari. Rule 226(d)(2) provides that "[o]nly those questions raised in the Court of Appeals

and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 226(d)(2), SCACR. Moreover, it is well settled that "[a]n issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari." *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218, 221 (2000).

A comparison of the Grahams' petition for rehearing with what they have now filed as a petition for writ of certiorari reflects that the Grahams are raising new and significantly different arguments in the current petition to this Court. On this additional basis, the Court is urged to deny a writ of certiorari.

III. The Court of Appeals did not err in affirming the decision of the Circuit Court and allowing the Town of Latta to pay the judgment amount into court pursuant to Rule 37, SCRCP, consistent with this Court's longstanding holding in *Russo*.

The Grahams 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, SCRCP. 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.

A. The Circuit Court, as affirmed by the Court of Appeals, 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), this 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. This 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.* This 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), this Court in *Sears* had 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.

Strangely, the Grahams insist that *Russo* is mere dicta and not precedential. They go as far as to claim that "[n]o decision of this Court has ever *held* that the deposit of money pursuant to Rule 67 stops the accrual of post-judgment interest or otherwise alters the legal duties of the parties." *See*, Petition for Writ of Certiorari, p. 14. (Emphasis in original). Yet, as quoted above, this Court in *Russo* wrote 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. Then, actually using the word "hold," this Court stated: "Accordingly, we ***hold*** that to stop accrual of interest, a debtor must comply with the plain language of Rule 67." 454 S.E.2d at 897. (Emphasis added).

That is, by any definition, a holding and not mere dicta.

Moreover, this rule of law as recognized by this 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).

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), this 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.

In addition to claiming the rule in *Russo* is dicta, Grahams also insist 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).[1]

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 was affirmed by the Court of Appeals, which cited the case of *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), in which this 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. In short, the Circuit Court and the Court of Appeals correctly determined that 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 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.

---

[1] Strangely, in their petition for rehearing filed in the Court of Appeals, the Grahams described what they called "unambiguous fonting" and insisted that the 2005 amendment used the term "MUST" in all capitals. They, in fact, accused the Court of Appeals 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. The Grahams have apparently now backed off of that bizarre argument because it has not been reiterated in their current petition for writ of certiorari.

In engaging in such an analysis, the Grahams acknowledge 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 which sets a statute of repose in construction-related cases, "shall" was changed to "must," but there was no change in the meaning.

While the legislative intent for the change in the first sentence of Section 34-31-20(B) cannot be ascertained from the legislative history, 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.

The Grahams also place no significance on the fact that Section 34-31-20(B), as amended in 2005, retained the qualifying language "according to law." By retaining that language, the

---

[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).

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 both before and 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).

Yet, in engaging in further grammatical analysis, the Grahams now insist that the Town's reliance on the phrase "according to law" "depends on a grammatical and legal misreading of the sentence." *See*, Petition for Writ of Certiorari, p. 18. The Grahams claim that "according to law" is a "prepositional phrase which modifies the word 'interest'" and that the next sentence "defines 'according to law'" by describing the interest that is recoverable. *Id.* The Grahams are wrong in their grammatical analysis in two respects. First, the phrase "according to law" is actually an adverbial phrase which modifies the verb "draw." Second, if the Grahams' reasoning was correct, the phrase "according to law" would be reduced to mere surplusage because the amount of interest is described in the very next sentence. What then would be the need for the phrase "according to law"?

In sum, this grammatical analysis is actually much ado about nothing. So too is the insistence that the change from "shall" to "must" was intended by the General Assembly to change the law and overrule this Court's decision in *Russo*. Instead, the Circuit Court and the Court of Appeals 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 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.

B. The Petitioners 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 post-judgment interest is somehow a "legal duty" owed by a judgment debtor and that Rule 67 cannot be used to alter the "legal duties" of the parties. They rely on this Court's decision in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), wherein this Court ruled that a contractual interest rate would apply instead of the statutory interest rate. This 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.* This Court's decision in *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003), is also not controlling. In *Bakala*, this Court found that a spouse's payment into court under Rule 67 did not constitute a purge of a contempt order directing the payment of money by the spouse where the debt was ordered and uncontested.[3]

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. Moreover, this case does not involve a court order directing payment of an uncontested sum. The Grahams' recovery was limited to a Tort Claims Act award on a negligence claim which is being contested on appeal. As a

[3] Note that this issue was not addressed in the Graham's petition for rehearing in the Court of Appeals. The *Renaissance Enterprises* and *Bakala* cases are not addressed nor even cited in that petition for rehearing. This issue is, therefore, not preserved for consideration on certiorari. *See*, Section II above.

result, the post-judgment statutory interest rate applies. 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. In fact, as this 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. Consequently, there has been no "legal duty" among the parties that was altered or abridged by the Circuit Court's decision.

CONCLUSION

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

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Town of Latta

Columbia, South Carolina

October 17, 2016

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Town of Latta, does hereby certify that service of the **Return to Petition for Writ of Certiorari** was made upon opposing counsel by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 17th day of October 2016:

Reynolds Williams, Esquire
Willcox, Buyck & Williams
Post Office Box 1909
Florence, South Carolina 29503-1909