THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. **DOES RULE 67 SCRCP 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 SCRCP 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 SCRCP 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-Cty Elec. Co-op.*, 374 S.C. 516, 522, 649 S.E.2d 98, 101 (Ct. App. 2007) *aff'd.* 358 S.C. 470, 684 S.E.2d 765 (2009). The court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute's operation. *Sloan v. S.C. Bd. of Physical Therapy Examr's*, 370 S.C. 452, 469, 636 S.E.2d 598,

607 (2006); *Anderson v. South Carolina Election Commission,* 397 S.C. 551,556, 725 S.E. 2d 704,707 (2012); *Shuler, supra.* (***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 SCRCP 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, SCRCP DEPOSIT IN COURT

> In an action in which any part of the relief **sought** is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, **and by *leave* of court, *may* deposit** with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the

> court under this rule shall be deposited **as directed by the court** in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.
>
> (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 posteriors 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 SCRCP. "Nothing in this rule [FRCP 67] provides for the stopping of interest accrual upon deposit with the court." Wright & Miller, 12 *Fed. Prac. & Proc. Civ.* §2991 (2 Ed.), citing *Blasini-Stern v. Beech-Nut*, 429 F.Supp. 533 (P.R. 1975). The Rule does not vary, alter, or

amend the statutory mandate that the Grahams' judgment must draw interest at the rate of 7 ¼ %, compounded annually.

III. APPELLANTS ARE NOT ARGUING AGAINST PRECEDENT.

There has never been a Supreme Court case applying Rule 67 SCRCP to the current statute governing the legal rate of interest. There has never been a South Carolina Court of Appeals case applying Rule 67 SCRCP 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, a*t 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 SCRCP 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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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:

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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).

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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/iegal-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.plainianguage.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:

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This page can be viewed online at:
http://www.faa.gov/about/initiatives/plain_langiage/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 *siiail 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 other-wise 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.

S:\LLS\Committees\Procedures\shall\updating existing language guidelines.wpd

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" (*but see* 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 (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 (accessed March 3, 2014)

CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

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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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