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.

BRIEF OF RESPONDENT

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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, SCRCP.[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.

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[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

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[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.

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[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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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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