

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

RECEIVED

NOV 21 2014

S.C. Supreme Court

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

Shirley Hammer,

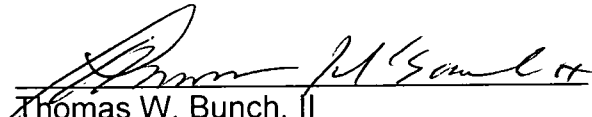
Respondent

APPELLANTS' PETITION FOR REHEARING

Thomas W. Bunch, II
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Arthur K. Aiken
Aiken & Hightower, P.A.
2231 Devine Street, Suite 201
Columbia, SC 29205
(803) 779-5205
Attorneys for Appellants

Pursuant to Rules 221 and 240, SCACR, Appellants 1634 Main, L.P. and Howard Hammer petition this court for rehearing of Memorandum Opinion No. 2014-MO-045 filed November 6, 2014. The Court failed to apply the applicable law, and relied upon inapplicable law, when it affirmed the lower court's decision to transfer real and personal property to Respondent in satisfaction of judgments entered against Appellants in favor of Respondent. A memorandum with citation of authorities in support of this Petition is filed herewith.



Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
tbunch@robinsonlaw.com

Arthur K. Aiken
AIKEN & HIGHTOWER, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
(803) 779-5205
art@aikenandhightower.com

ATTORNEYS FOR APPELLANTS

November 21st, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

Shirley Hammer,

Respondent

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

Thomas W. Bunch, II
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Arthur K. Aiken
Aiken & Hightower, P.A.
2231 Devine Street, Suite 201
Columbia, SC 29205
(803) 779-5205
Attorneys for Appellants

Appellants 1634 Main, L.P. and Howard Hammer submit this memorandum of law in support of their Petition for Rehearing as to Memorandum Opinion No. 2014-MO-045 filed November 6, 2014 (the "Decision"). Appellants petition the Court to rehear the portion of the Decision affirming the lower court's order deeding to Respondent fee simple ownership of Appellants' real property (R. 19 (January 21 Order), 381-383 (Master's Deed)), and transferring ownership of their limited partnership and limited liability company interests (R. 19) (collectively the "Property").

Although this Court cited a statute, a case, and a treatise in support of its Decision, and all will be addressed below, this Petition for Rehearing could be decided on one significant issue of first impression for this Court, to wit: that S.C. Code Ann. § 15-39-10 (2005) does not authorize a court to make a transfer of the types of property directly conveyed by the lower court to the judgment creditor (Respondent). This Petition is submitted by the undersigned not only as advocates for their clients, but on the firm conviction as "officers of the court" that the Decision misinterprets the unambiguous language of the cited statute and the statutory scheme for collection of judgments. The Decision will not only cause Appellants damage over and above their judgment obligations, but it is submitted that it will have a deleterious effect on the administration of justice in South Carolina. Appellants submit that the Decision conflicts with and does not "effectuate the intent of the legislature" to which "courts are bound to give effect."

It is well-established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is

considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

In ascertaining the meaning of language used in a statute, we presume the General Assembly is "aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); see also *Beck v. Prupis*, 529 U.S. 494, 500–01, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000)

Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 535-36, 725 S.E.2d 693, 695-96 (2012) (holding that a statute using the terminology "negligent act or omission" does not embrace the element of causation).

Taken collectively and individually, the statute, the case, and the treatise cited by this Court in its Decision neither allow nor support the direct transfer of ownership of the Appellants' Property. The Decision stated:

Authority to Transfer Title to Real Property: S.C. Code Ann. § 15-39-10 (2005) ("There shall be three kinds of executions, (a) against the property of the judgment debtor, (b) against his person and (c) for the delivery of the possession of real or personal property or such delivery with damages for withholding the property. They shall be deemed the process of the court."); *Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955) ("Proceedings supplementary to execution, in addition to providing for examination of the judgment debtor for the purpose of discovering property out of which the judgment against him may be satisfied, furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution...."); see also 30 Am. Jur. 2d Executions, Etc. §12 ("A court of equity will always find the means of enforcing its decree against a delinquent defendant and its power in this respect is as extensive as the exigencies of the case.").

I.

As to the Cited Statute

South Carolina Code Ann. § 15-39-10 (Kinds of Execution) does not give a court power to transfer ownership of property absent a court sale as required by § 15-30-610.

The Executions issued for the satisfaction of the judgments in the cases before this Court were against the property of the judgment debtors, subsection (a) of § 15-39-10. R. 1016, 1020 (the Executions). When one compares the wording of S.C. Code Ann. § 15-39-80 (Contents of Executions) to the Executions it is clear these Executions are against property of the judgment debtors. In addition, the lower court understood and in fact stated in its January 21 Order (R. p. 10) that it was charged with executing on the judgment debtors' property.

These proceedings are conducted under Chapter 39 of Title 15 of the South Carolina Code, for the purpose of executing on property owned by debtor (*sic*) to satisfy judgments against them. (emphasis added)

However, instead of executing on the judgment debtors' real property and selling it by auction, the lower court deeded the real property to Respondent, which action was improvidently affirmed by this Court's Decision in contravention of the applicable plainly worded statutes. The Decision also improvidently affirmed the transfer of the limited partnership and limited liability company interests of Appellant Hammer when the proper and only statutorily sanctioned procedure was to initially issue a charging order. See, S.C. Code Ann. §§ 33-42-

1230 and 33-44-504 (2006).¹

An outright transfer of the Property is not allowed by the plain and unambiguous language of the applicable statute. S.C. Code Ann. § 15-39-610 (2005) specifically requires that in an execution against real property that the master demand that a judgment debtor satisfy the judgment, and if the judgment debtor does not comply, that the master **sell the real property by auction**, not simply transfer its ownership:

When any sheriff or other officer shall take the lands, tenements, goods and chattels of any person whatsoever by virtue of any execution and the owner of such lands, tenements, goods and chattels shall not, within five days after such taking, satisfy the debt, damages and costs of the party issuing such execution, **such sheriff or officer shall and may sell, by auction, the lands, tenements, goods and chattels** so taken or so much thereof as shall be sufficient to satisfy the judgment for the best price that can be got for them. (emphasis added).²

In the event that this Court intended to follow the lower court's January 21 Order and to rely upon § 15-39-10(c) ("delivery of the possession of real or personal property"), possession is simply a concept dealing with occupancy or control of property (Restatement of Torts § 157 (1934); Restatement of Property § 7 (1936)). Other authorities further address the concept of possession: "Possession has been defined as the detention and control" "Possession of

¹ If the charging order proves ineffective to collect the judgment, foreclosure is the next proper procedure. "In short, if a judgment will not be paid through distributions in the reasonably foreseeable future, then foreclosure usually should be ordered." *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 383, 746 S.E.2d 26, 34 (2013).

² See also, S.C. Code Ann. 15-39-630 (2005) (in counties where the office of a master exists judicial sales shall be made by the master).

real property can also mean control; it may, but need not, imply title.” 63C Am. Jur. 2d Property § 28.

Possession is but one of the bundle of rights inherent in property. Other rights in property include ownership and “the lawful, unrestricted right of its use, enjoyment and disposal.” *Id.*, § 1. See, *S.C. Dept. of Highways and Public Transp. V. Balcome*, 289 S.C. 243, 345 S.E.2d 762 (Ct. App. 1986).

Possession is not a concept dealing with the power to sell, or the power to collect rent, or the profits of the *res*, all of which were erroneously transferred by the lower court and affirmed by this Court’s Decision. Had the legislature intended to give a master the authority to transfer title or ownership of a complete estate, it would not have so limited the authority to simply “delivery of possession.” (§ 15-39-10(c)). Further, the legislature would not have directed that a master sell lands and chattels coming into his control. (§ 15-39-610). Instead, the legislature would have used language allowing the master to transfer ownership of the property and all appurtenant rights, not just deliver possession.

As this court has held, “. . . [W]here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” *Grier*, 397 S.C. 532, 536, 725 S.E.2d 693, 696. Just as this Court in *Grier* refused to graft a causation element into the legislature’s use of the terminology “negligent act or omission,” this Court should not graft the power to transfer ownership and the bundle of rights in property into a statute only allowing “for the delivery of possession,” and it is respectfully submitted that this Court has “no right to impose another meaning.” *Id.*

Respondent's only remedy, as well as her adequate remedy, as to the judgment debtors' real property was for either the sheriff on execution or the master in supplementary proceedings to sell the real property if the judgment debtors failed to pay the judgments. This is what the applicable statute plainly requires (S.C. Code § 15-39-610). Even in a matter which is equitable in nature, a court is bound and required to follow the applicable statute:

When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent.

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) quoting *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996).

Moreover, we find it was error to fashion an equitable remedy in this case. While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). **Indeed, a "court's equitable powers must yield in the face of an unambiguously worded statute."** *Id.* [emphasis added] There is simply nothing inadequate about the remedy of a full refund provided by the plain language of the prior version of section 12-51-150; hence, there was no reason for the lower courts to resort to equity principles.

Key Corporate Capital, Inc. v. Cnty. of Beaufort, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007).

S.C. Code Ann. § 15-36-10 lends no support to the proposition that a court has the authority to make an outright transfer of title of the Appellants' Property in supplementary proceedings. Respondent's adequate remedy, as stated in the applicable legislation, was for the real property to be sold at auction and for a charging order on the personal property.

II.

As to the Cited Case

Lynn v. Int'l Bhd. of Firemen & Oilers provides only, and nothing more than, that a court has the power to order money owed to a judgment debtor by a third party be paid directly to a judgment creditor.

Lynn v. Int'l Bhd. of Firemen & Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955) lends no support to the proposition that a Court may order the transfer of judgment debtors' real property, or interests in a limited partnership and limited liability company. The Decision cited *Lynn* for the proposition that supplementary proceedings ". . . furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution...." This proposition bears no relevance to the facts of the cases before this court.

In the cases before this Court the real property, in fact, could be reached through ordinary execution. It was openly identified and discussed by all parties as a reachable asset, it was stipulated by all parties to be worth more than the debt, and it was directly within the power (and obligation) of the lower court to sell the real property by auction. S.C. Code Ann. § 15-39-610 (2005). Further, the limited partnership and limited liability interests owned by Mr. Hammer were not beyond reach of the lower court as was patently clear by its erroneous conveyance of those interests to Respondent in face of the unambiguous statutes providing the exclusive remedy of a charging order.³

³ S.C. Code Ann. §§ 33-42-1230 and 33-44-504 (2006). As to the charging order provided for in the limited partnership and limited liability company statutes, This Court has held that when a judgment will not be paid in a reasonable time under a charging order that a **foreclosure** of the charging lien may be had. *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 383, 746 S.E.2d 26, 34 (2013).

Lynn's facts involved a situation where a third party held funds owed to a judgment debtor which the Supreme Court found to be a chose in action. Choses in action may not be reached by a sheriff, but may be reached only through supplementary proceedings. *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933). The facts of *Lynn* are so inapposite to the facts of the cases before this Court that it is submitted that the statement quoted by the Court bears no relevance to a court's authority to transfer the real property owned by the judgment debtors. Nor does *Lynn* bear any relevance to Appellant Hammer's partnership and limited liability company interests given the specific statutes which provide for a charging order.

The fact that supplementary proceedings are equitable in nature gives neither this Court nor the lower court the authority to overlook the applicable statutes which provide for seizure and auction of the real property and a charging order on the personal property.

Second, the fact that the writ [of habeas corpus] has been called an "equitable" remedy, . . . does not authorize a court to ignore this body of statutes, rules, and precedents. . . . Rather, "courts of equity must be governed by rules and precedents no less than the courts of law." *Missouri v. Jenkins*, 515 U.S. 70, 127, 115 S.Ct. 2038, 2068, 132 L.Ed.2d 63 (1995) (THOMAS, J., concurring).

Lonchar v. Thomas, 517 U.S. 314, 323, 116 S. Ct. 1293, 1298, 134 L. Ed. 2d 440 (1996) (holding that Court of Appeals could not dismiss habeas corpus petition for ad hoc equitable reasons outside the framework of habeas rules and legal precedent).

Nevertheless, even foreclosure requires a public sale by the master, not a direct transfer of property to the judgment creditor. Rule 71, SCRPC. Although this rule deals with foreclosure of mortgages on real property, the author of this brief is not aware of any provision in South Carolina law in which a public sale of the property subject to the foreclosure action is not required. Yet, the Decision affirmed a direct transfer of title of Appellant Hammer's personal property interests.

III

As to the Cited Treatise

30 Am. Jur. 2d Executions, Etc. §12 provides only that a court of equity may enforce its decree against a delinquent defendant, and therefore it provides no support for this Court's decision.

The cited treatise deals with courts of equity enforcing their own decrees, accordingly reliance on the treatise is misplaced. Here, the one and only decree entered by the master for the enforcement and collection of the judgments was the transfer of the Property provided for in the January 21 Order. There was no antecedent order or decree issued to enforce and collect the judgments; therefore, the January 21 Order was not issued by the lower court to enforce any decree, and the citation to the treatise has no application to the facts of these cases.⁴

Instead of enforcing a decree, the lower court simply found it expedient and convenient to transfer the Property.

THE COURT: Why wouldn't it be simpler, if you've identified an asset, just to transfer it to Mrs. Hammer's name, she'd be the owner in full, and we can all go home.

⁴ The lower court did order Respondent to serve discovery and for Mr. Hammer to answer the discovery. R. 8. Mr. Hammer answered the interrogatories and also objected to some of the questions. R. 12. However, the lower court's January 21 Order making a transfer of the property cannot be interpreted as attempting to enforce the order providing for written discovery, and answers thereto. Nothing in the January 21 Order indicates that the transfer was made to enforce any decree or prior order of the lower court. Once the lower court realized that the Property existed and was unencumbered, the lower court assumed it had the power to transfer it. As to the discovery, no motion to compel responses had been filed by Respondent. The responses to discovery were the subject of Respondent's Motion for Contempt against Howard Hammer, but the Master denied this motion. Therefore, the January 21 Order was not issued to enforce a decree of the lower court.

R. 263, ll. 19-22.

A court is obligated and bound to follow the applicable statutes. *Grier*. A court is not permitted as a matter of convenience or simplicity to disregard legislation.

[A] court's views of convenience (or of wise policy more generally) are poor grounds for disregarding a law. The Commission's motion rests on an unarticulated belief that, despite a statute establishing rules of procedure, courts can do anything they think wise. Not at all; courts lack common-law authority to disregard legislation that sets rules for the conduct of litigation.

Sacramento Mun. Util. Dist. v. F.E.R.C., 683 F.3d 769, 771 (7th Cir. 2012).

In the cases before this Court, the lower court disregarded the applicable statutes by failing to conduct a sale of the real property and by failing to issue a charging order on the personal property. This Court's reliance on 30 Am. Jur. 2d Executions, Etc. for the proposition that the lower court had the authority to enforce its decrees is simply not relevant in these cases. The January 21 Order was the only decree by which the lower court addressed the collection of the judgments. Further, even if this court could find that the January 21 Order issued from a court of equity to enforce its decree, the court of equity is still bound to follow, and may not disregard, the controlling legislation in the applicable statutes previously cited.

IV.

Conclusion

Appellants petition this Court to rehear this appeal and order the remedy unambiguously prescribed by the legislature. We are a nation of laws, and

adherence to those laws as legislated, regardless of the parties before the court, is the bedrock of our jurisprudence, especially before this highest Court of the State.

This case brings squarely before this Court an issue of paramount importance, one of everyday implementation, which begs for a clear precedent-setting pronouncement not only in fairness to the instant litigants but also for the guidance of judges, masters, sheriffs, and attorneys in what appears to be a matter of first impression for this Court.⁵ Although the Decision ostensibly has no precedential value, in reality it can have an untoward and misleading influence on litigants and the courts. The Decision is one of seven cases, and the first case, cited in Westlaw under S.C. Code Ann. § 15-36-10. See, Exhibit A attached hereto. With all respect for this Court, the cited statute (especially when coupled with § 15-39-610) simply does not countenance the precipitous transfer of the types of property at issue in these cases from a judgment debtor to a judgment creditor, and these statutes particularly do not permit such a transfer for the convenience and simplicity of a lower court. The transfer is even more astonishing in these cases since the transferred property was worth significantly more than the judgments, and the lower court strayed outside the statutory

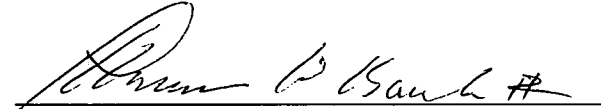
⁵ The issue before this court is not the first time the lower court has transferred property directly to a judgment creditor. In *A Fast Photo Express, Inc. v. First Nat'l Bank of Chicago*, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006), The Honorable Joseph Strickland ordered the direct transfer of property in the hands of a personal representative and in the judgment debtors' hands to a judgment creditor. The Master's order was reversed on other grounds, and the issue of the direct transfer was not addressed. The case is cited to show that the direct transfer of property is not a unique incident limited to 1634 Main and Howard Hammer.

mandated procedure of a public sale to fashion a remedy fraught with problems and not recognized by any previous jurisprudence in this State (and maybe no other). Such actions - by the lower court and this Court – eviscerate an entire statutory scheme enacted for the protection of both creditor and debtor. There is no support for the lower court's actions in any of the authorities relied upon by this Court.

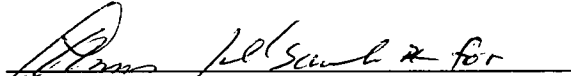
Appellants assert that the correct remedy follows: The lower court may issue a charging order on the limited partnership and limited liability company interests. S.C. Code Ann. §§ 33-42-1230 and 33-44-504 (2006). The lower court may ultimately determine that such an order would be fruitless, or at least insufficient to satisfy the judgments at issue. Then, "if sufficient personal property cannot be found" (Executions; R. 1016, 1020), the lower court should take the real property of the judgment debtors and satisfy the judgment "**by auction**" sale. S.C. Code Ann. § 15-39-610. Further, the lower court must give the judgment debtors five days notice to "satisfy the debt, damages and costs of the party issuing such execution" before selling the real property. This is a relatively simple process and had the lower court followed it, the judgments in these cases would have been paid months ago, or the real property would have gone to sale at auction.

Appellants respectfully request that this Court rehear the matter and reverse the January 21 Order with respect to the transfer of Appellants property.

Signature block on following page



Thomas W. Bunch, II
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
tbunch@robinsonlaw.com



Arthur K. Aiken
AIKEN & HIGHTOWER, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
(803) 779-5205
art@aikenandhightower.com

ATTORNEYS FOR APPELLANTS

November 21st, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

Shirley Hammer,

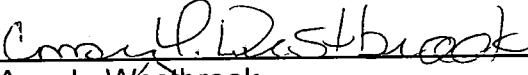
Respondent

CERTIFICATE OF SERVICE

This is to certify that I, Amy L. Westbrook, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Appellants' Petition for Rehearing and Appellants' Memorandum in Support of Petition for Rehearing** in the foregoing matter by hand delivery to the following address:

Desa Ballard, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169

Dated at Columbia, South Carolina this 21st day of November, 2014.


Amy L. Westbrook