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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Harris Beach, Special Referee

Case No. 92-CP-15-508

Nancy R. Beach ..... **Respondent,**

v.

Gresham Communications of Walterboro, Inc., a/k/a Gresham Communications, Inc.; Gresham Broadcasting, Inc., and Rudi H. Gresham ..... **Appellant.**

INITIAL BRIEF FOR APPELLANT

J. Seth Whipper, Esquire
SC Bar No.: 6061
WHIPPER LAW FIRM
Post Office Box 70070
North Charleston, SC 29415
843/ 740-7777
843/ 740-9108 Fax
Attorney for Appellant

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STATEMENT OF THE CASE

Gresham Communications of Walterboro, Inc., a/k/a Gresham Communications, Inc. (hereinafter "Gresham") has held the broadcast license of station WPAL-FM for more than thirty (30) years. On January 2, 1988, Gresham executed Promissory Notes in the total amount of $165,072.00 at 8% per year. Nancy R. Beach was the holder of the notes. On August 18, 1992, Ms. Beach filed suit against Gresham and others to collect on the notes. On June 2, 1998, the Colleton County Court of Common Pleas issued a final decree ordering payment of $61,903.10.

In 2001, William Saunders, majority owner of Gresham, met Judith Aidoo, majority owner of Caswell Capital Partners, LLC (hereinafter "Caswell"). In early 2002, the companies executed several agreements with an expectation of Caswell purchasing the station and offering Mr. Saunders a position with the new broadcast company. Under the Time Brokerage Agreement, Judith Aidoo and Caswell managed the business operations of WPAL-FM. Though a complete novice to the radio industry, Caswell through Judith Aidoo, personally, made changes in the staffing and programming. During her period of management, the parties on two occasions attempted to close a transfer of the broadcast license and station operations to Caswell. Caswell was not able to close on the transactions and the license assignment applications expired.

Caswell became disenchanted with the radio business after failing to reach their performance goals. When Caswell could not reach an agreement with Gresham on the dissolution of their involvement, Caswell utilized Nancy Beach's Judgment against Gresham.

In 2006, Nancy Beach sold her interest in the June 2, 1998 judgment to Caswell Capital Partners, LLC, who then initiated an action on August 23, 2006, to collect on the 1998 judgment.

On September 22, 2006, the Colleton County Court of Common Pleas, Special Referee Harris Beach presiding, ruled that the FCC license held by Gresham was subject to attachment and subject to judicial sale to satisfy the 1998 money judgment.

Gresham had appealed the September, 2006 Order but the appeal was not perfected and a concurrent Motion to Stay filed by Gresham in the Common Pleas Court was dismissed. On February 15, 2007, the Special Referee ordered that the subject FCC license be sold and concluded the sale on that same day. The Special Referee also ruled that "the sale of the license would be final upon the FCC grant of consent to the assignment, and that if the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of the license, then the FCC assignment application would be withdrawn."

On February 15, 2007, Caswell purchased the Gresham broadcast license for an amount shockingly less than the value of the license. The sale was allowed despite argument regarding the propriety of the Court's actions. The Special Referee further ordered that "the judgment debtor is to take any and all actions necessary to complete the application for FCC approval of the transfer [of] the license to the successful bidder at the sale." On March 26, 2006, the Special Referee filed an order appointing a Receiver to act on behalf of Gresham and to assist Caswell Capital Partners, LLC to obtain assignment of Gresham's FCC license.

The FCC did not approve the assignment application until recently, on March 3, 2009. Prior to that date, on April 7, 2008, Gresham tendered to the Court, pursuant to its order, an amount equal to the full amount of the "judgment in this matter" $56,276.10, "together with all interest, fees and costs due under the judgment" $49.992.68 for a total of $106,268.78 intended to satisfy the underlying judgment and known fees. Caswell objected to the tender on the

following basis: only the Receiver had standing to transfer Gresham's funds or, a fortiori, exercise the right to tender; Gresham's right to tender has been extinguished, expired, or waived, Gresham's right is barred by the doctrines of unclean hands, estoppels, and laches; Gresham's tenders is insufficient. In addition, Caswell moved for a Rule to Show Cause as to Gresham for failing to cooperate in, and actively impeding the transfer of the FCC license to the successful bidder (Caswell); and for failing to disclose or transfer to the receiver at least $106,268.78 in assets belonging to Gresham. Additionally, Plaintiff moved for the Special Referee to transfer the tendered funds to the receiver to manage according to his authority as granted by the Special Referee.

The parties argued their positions before the Special Referee on May 16, 2008. On June 10, 2008, the Special Referee, in an order prepared by Caswell without input and without a request for an alternative order from Gresham, filed his rulings denying the tender and granting Caswell all relief prayed for in a Memorandum and Petition/Motion for Rule to Show Cause and their objections to the tender.

On June 11, 2008, Gresham filed and served a Motion for Reconsideration of the June 10, 2008 Order and Motion to Stay Execution of the Order. Gresham's motion asked for reconsideration of every ruling in the June 10 Order and several other issues raised by the Special Referee's rulings.

Following a stay of the June 10 Order, Gresham's motion was argued on June 23, 2008 and on December 3, 2008, the Special Referee granted the reconsideration finding as follows: the ten year limitation on judgments has expired; Caswell may not pursue any other asset of Gresham's not liquidated by judicial sale; the only item liquidated by judicial sale is the FCC license for operation of a radio station; the license was sold in the usual course of judicial sale

and purchased by Caswell; the tender of money deposited with the Clerk of Court is now moot because the judgment is now null and void; that funds tendered to the Clerk of Court be returned to the third party owner; and that any finding or Order not inconsistent herein are affirmed as part of the June 6, 2008 order.

On December 31, 2008, Gresham filed and served its Notice of Intent to Appeal. On March 3, 2009, the Federal Communications Commission, as a part of its exercise of its federal jurisdiction over broadcast licenses, held that the Special Referee's Decree attaching the FCC license was "void ab inito." Specifically, the Federal Communications Commission stated:

> **Here, the State Court Order is facially inconsistent with the Commission's policy prohibiting attachment of a Station license**. The Court acknowledged that a licensee does not hold any property rights in the license itself. It also recognized that the Commission permits licensee creditors to have an interest in the proceeds from a sale of the license. Nevertheless, the Court held: "the FCC license held by Gresham Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached." In a further order, on February 21, 2007, the Court opined that the Station's license "was properly subject to attachment and that such License was thereby attached."
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> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission . . . ." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.
>
> **In these circumstances, the Commission's general deference to state court orders is not warranted. We find that the Court's attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act and Commission policy.**

FCC Media Bureau, Decision Letter, FCC DA 09-540 at 4-5.

ARGUMENT

I.

I. THE SPECIAL REFEREE ERRED IN HOLDING THAT TRANSFER OF BROADCAST LICENSE WAS WITHIN TEN YEAR LIMITATION OF JUDGMENT

On June 2, 1998, Master-in-Equity Louis E. Condon decreed that Gresham would pay Nancy Beach the sum of $56,276.10 together with interest at the rate of 8% per year beginning June 1, 1998 together with attorney's fee of $5,627.00 and costs of this action. This judgment is viable for ten (10) years beginning upon the date of entry of judgment. South Carolina jurisprudence has maintained this limitation and it is required by statute - S.C. Code Ann. 15-39-30; Executions may issue upon final judgments or decrees at anytime within ten years of the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period or such execution.

In his order signed February 16, 2007 and entered on February 21, 2007, the Special Referee declared that "the sale [of the license] will be final upon the FCC grant of consent to the assignment [to the successful bidder]". In oral argument regarding the tender of payment of the subject judgment, Plaintiff counsel describes the status of the pending sale as "...the only thing that remains to be done is just the perfection of that right that we provided for in the order..."

On March 3, 2009, the FCC held that the Special Referee's "attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act." The FCC went on to say that "the Special Referee's Order is facially inconsistent with the Commission's policy prohibiting attachment of a Station license". The FCC went on to analyze the Special Referee's Order and the arguments of Respondent as follows:

> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission..." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.

FCC Media Bureau, Decision Letter, FCC DA 09-540 at 4-5 (footnotes omitted).

The FCC's ruling is especially pertinent in this case because of South Carolina law regarding receivers. In Jeffcoat v. Morris, 300 S.C. 526, 528, 389 S.E.2d 159 (1989), the court describes the receiver as follows:

> We first address Jeffcoat's status as receiver. A receiver represents the court appointing him. He is an officer of the court and is the agency through which the court acts. Kirven v. Lawrence, 244 S.C. 572, 137 S.E.2d 764 (1964). However, the appointment of a receiver works no metamorphosis in the title or interest to or in the assets of the insolvent; the receiver takes possession of them as the arm of the court, subject to all existing liens and encumbrances, having due regard to the legal and equitable rights of the parties. Carwile v. Metropolitan Life Ins. Co., 136 S.C. 179, 134 S.E. 285 (1926). A receiver stands in the shoes of the debtor with respect to the property of the latter and the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon. National Cash Register Co. v. Burns, 217 S.C. 310, 60 S.E. 2d 615 (1950). A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver and becomes merely the assignee of the insolvent having exactly the same rights. Carwile at 290.

The receiver herein, by law, takes Gresham's role in this action and assumes control and authority as granted by the Special Referee. Therefore, though the receiver processes the application to assign the license, the receiver holds the license only to do what Gresham is required to do.

The legal term 'perfect' means to take all legal steps needed to complete, secure, or record a claim, right, or interest, to put in final conformity with the law. No one associated with this case would suggest that Beach's assignee of the note, Caswell, already held title to or possession of Gresham's license on June 4, 2008. A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried. Garrison v. Owens 258 S.C. 442, 189 S.E.2d 31 (1972). The South Carolina Supreme Court has indicated a judgment is utterly extinguished after the expiration of ten years from the date of entry. Hardee v Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948) (discussing effect of Act No. 516, 1946 S.C. Acts 1436).

On June 4, 1998, Judge Condon's judgment was entered, and ten (10) years later, the judgment execution still was not yet complete. Plaintiffs' were not vested in any possession represented by the judgment. Plaintiffs' merely held an inchoate interest in someone else's privilege: not hardly a completed execution. As the Special Referee held: the sale [of the license] will be final upon the FCC grant of consent to the assignment [to the successful bidder]" *See* Ex parte Moore, 352 S.C. 508, 575 S.E. 2d 561 (2003). (Citing rule 71, 71(b), S. C. Code Ann. at-39-660 (1977))(The terms and conditions of a judicial sale are controlled by court order.) Because of the special and peculiar nature of a broadcast license, the execution and sale is not completed by submitting the highest bid; and, according to the FCC, attaching and executing on a license is a nullity. The license and other material under the control of the receiver must be returned to Gresham.

II. THE SPECIAL REFEREE ERRED BY DISALLOWING THE TENDER IN SATISFACTION OF THE UNDERLYING JUDGMENT

In his February 21, 2007, the Special Referee held that "if the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of License, then the FCC assignment application will be withdrawn."

On December 3, 2008, after Gresham tendered payment of the underlying judgment and attorney's fees, the Special Referee inexplicably held the tender of payment of the judgment was an offer to settle the judgment. The Special Referee found that Gresham was arguing that the tender was the amount of the original judgment at the time of the judicial sale. The Special Referee in his ruling took the position that "there has accrued substantial interest and costs and fees for receivers which need to be added to any amount to satisfy the judgment."

Paradoxically, that same order the Special Referee ruled that the collection action is now null and void; that the Plaintiff may not pursue any other asset of the corporation; confirmed that the only item 'liquidated' by judicial sale is the FCC license for operation of a radio station; that the license was sold in the usual course of judicial sale and purchase by Caswell, Inc.; that the tender by the Defendants to the Plaintiff by depositing monies with the Clerk of Court is now null and void having been rejected by the Plaintiff as being insufficient; and, that the funds tendered to the Clerk of Court are to be returned by the Clerk to the third party owner of the funds or to the party so tendering those funds...

Gresham tendered $106,268.78. The original judgment amount including attorneys' fees was shown to be $61,903.10. Gresham even gave a basic explanation on how the amount tendered was calculated at a hearing on the tender before the Special Referee on May 16, 2008. The June 2, 1998 order declared a judgment against Gresham "for the sum of $56,276.10,

together with interest at the rate of eight (8%) per annum from June 1, 1998, together with attorney's fees of $5,627.00, and the costs of this action." There is no mention of interest for attorneys' fees. There is not mention of compounding of interest. The order specifically set forth a simple interest rate for the judgment amount, and a separate, non interest bearing amount for the attorney fee. The June 2, 1998 order controls the amount due on the underlying judgment in this action. A promissory note that calls for interest at 8% per annum calls for simple interest only, and it is error to compound interest on the same. Rhodus v Goins, 129 S.C. 40, 123 S.E.645 (1924). The judgment amount of $56.276.10, with simple interest rate of 8% per annum accruing from June 1, 1998, until April 7, 2008, the date which notice of redemption and tender of payment was filed with the Clerk of Court for Colleton County, amount to $106,268.78. Gresham's counsel explained that the amount tendered was reached by calculating each year's interest and each partial year's interest based on the June 2, 1998 decree. At several points in the hearing, Gresham expressed recognition that the information used to make the calculations may require some adjustment but continually expressed a willingness to pay whatever the Special Referee felt was the correct amount. Nevertheless, on reconsideration, the Special Referee inexplicably (and without explanation or elaboration) states: "The tender of the monies by the Defendants' to the Clerk of Court did not equal the true amount for interest and fees under the judgment as was obvious to both the Defendants and the Plaintiff and was therefore an offer to settle the dispute between the parties." The tender was thus rejected as somehow discretionary on the part of the Court.

Two things, however, are clear. The February 21, 2007 order represents the law of the case on this issue. The ruling was not appealed and controls how the matter can be resolved. Caswell argues that the Special Referee somehow reserved an authority to declare and modify

his rulings indefinitely. This obviously is not accurate. Caswell argues that the Special Referee's announcement at the end of order ('the Court retains jurisdiction to enter such further orders as are just under the circumstance) somehow supersedes the rules of civil procedure and the common law on judgments. It is most probable and more correct that the announcement is a restatement of the original Order of Reference: "that the written matter be referred...with authority being vested in the Special Referee to determine all issues in controversy and to issue a Final Decree. Any appeal from the Special Referee shall be directly to the South Carolina Supreme Court." The two statements read together mean that anything that arises in the matter of Beach v. Gresham Communications of Walterboro, Inc., et. al. must be and should be heard with finality in front of the Special Referee.

Moreover, there is no evidence in the record that the Defendant intended, or that Plaintiff treated the tender of $106,268.78 as an offer to settle. Caswell argued that the Court should transfer the money to the receiver or to Caswell as a way of paying on their fees and costs. Caswell even argued that the 'privilege' of making the tender was lost as a result of two subsequent orders, each more than thirty (30) days after the February 21, 2007, and neither order dealing with the issue of the tender.

In TranSouth Financial Corp. v. Cocran, 324 S.C. 290, 478 S.E.2d 63 (1996), TranSouth requested the Court of Appeals to order the entry of judgment in its favor rather than remanding the case for further substantive proceedings. The Court accepted TranSouth's figure on the principal as undisputed. The Court noted that TranSouth had introduced a calculation of the amount through the date of the trial. However, at trial, Cochran's counsel challenged the judgment rate of interest. In addition, the trial judge never made a determination of the amount of attorneys' fees. The Court of Appeals declined to order the entry of judgment, and remanded

the case for an additional evidentiary hearing to determine the amount of the judgment. The TranSouth case also involved application of the ten (10) year statute of limitation period on judgments.

In this case, the parties have conflicting positions on the amount due and owing. For this Court to resolve that dispute by affirming the Special Referees ruling with no evidence on the attorneys' fee and cost issue and no evidence of calculations as to the judgment amount would run contrary to the precedent established in TranSouth v. Cochran. Moreover, the Court would affirm a ruling that demonstrates an abuse of discretion. See Melton v. Olenik, 379 S.C. 45, 664S.E.2d 487 (2008) citing Boland v. S.C. Public Service Authority, 281 S.C. 293, 295, 315 S.E.2d 143, 145 (CA.App.1984) (an abuse of discretion arises when the judge's decision was controlled by some error of law or lacks evidentiary support); *also citing* Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988) (an abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support.)

Courts insist that the record supports the rulings: Where costs for producing documents at issue are not finally decided by the trial court, the matter is to be remanded to trial court for final determination. Ferguson v. Charleston Lincoln/Mercury, Inc., 344 S.C. 502, 544 S.E.2d 285 (2001). When party seeking attorney fees fails to present essential element of proof and trial court nevertheless awards attorney fees, the Appellate Court will reverse or vacate and remand for evidentiary hearing to allow cure of the matter. Hardnett v. Ogundele, 291 Ga. App. 241, 661 S.E.2d 627 (2008). A trial court is required to make findings of fact on record regarding reasonableness of attorney fees when awarding successful plaintiff's attorney fees. Smith v. Strictland, 314 S.C. 192, 442 S.E.2d 207 (1994).

This action is for a money judgment. During the oral argument regarding the tender, Counsel for Gresham, offered and solicited the Special Referee on more than one occasion to establish a figure so that Gresham could complete the tender. The Special Referee's only response was to rule that the tender was an insufficient offer to settle: that was error.

III. THE SPECIAL REFEREE ERRED BY FINDING GRESHAM AND SAUNDERS IN CONTEMPT

Caswell objected to Gresham's tender of payment and ostensibly filed a Petition for a Rule to Show Cause by submitting a 'Memorandum in Opposition to Redemption and Petition for Rule to Show Cause.' The Plaintiff did not serve a Summons and Complaint, Summons and Petition, or Petition with Affidavit and Request for Rule to Show Cause. In the text of the 'Memorandum in Opposition to Redemption, the Plaintiff recites that "Plaintiff moves the court for a Rule to Show Cause why the Defendant Gresham and its principal William Saunders should not be held in contempt by... [1] failing to cooperate in, and actively impeding, the transfer of the FCC License to the successful bidder at the judicial sale of the license; and ... [2] failing to disclose or transfer to the Receiver at least $106,268.78 in assets..." Plaintiff's submission and argument in this format does not meet due process or procedural requirements.

In a seminal case on the law of contempt, the South Carolina Supreme Court said:

> "Of course, as stated in 13 C.J. 68, 'before a person can be found guilty of contempt not committed in the presence of the Court, he must have due and reasonable notice of the proceedings. A rule to show cause, an attachment, or other process should issue.' And it is said in State v. Nathans, 49 S.C. 199, 27 S.E. 57, 58 (1897) that 'the almost universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential. The verified petition of the party applying for a rule to show cause, however, is a substantial compliance with the principle of law above stated, when and if the petition alleges facts sufficient upon which to base the issuance of such order." Hornsby v. Hornsby, 187 S.C. 463, 198 S.E. 29 (1938).

The South Carolina Supreme Court in Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 267, 442 S.E.2d 611 (1994) held "Constructive contempt, such as that alleged here, is that occurring outside the presence of the Court. State v. Johnson, 249 S.C. 1, 152 S.E.2d 669 (1967). Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition. *Id.* The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect. See, e.g., State v. Blackwell, 10 S.C. 35 (1978). Here, there was neither an affidavit nor a verified petition and S.E.T. timely objected. The contempt order must be reversed. State v. Blackwell, supra." The plaintiff herein did not properly plead or serve to acquire the court's jurisdiction to entertain their bald allegations. Moreover, there is nothing in the record that mitigates the impact of the kind of pleading that is presented.

Plaintiff does not inform the Defendant that on May 16, 2008 their actions would be adjudged with prejudice as a result of having seen the "Memorandum In Opposition." Further, Counsel for Gresham stated their objection to the Special Referee during argument on the question of contempt in two different instances and by their prayer for relief in their Motion for Reconsideration.

In his Order of Reconsideration, the Special Referee ruled that the tendered funds should be returned to the third party owner, so that holding effectively preempts Plaintiff's memorandum point #2 as a basis for a contempt ruling. As to Plaintiff's memorandum point #1, the South Carolina Court of Appeals, in an opinion by Judge Cureton, said that "this court does not criticize appropriate use of the appellate process to obtain review of orders or decisions issued by the circuit court. Wells ex.rel. A.C. Sutton & Sons, Inc. v. Suttons, 299 S.C. 19, 382 S.E.2d 14 (1989).

The procedural requirements for initiating contempt to action are well-established and clear. Caswell has not followed procedure and the South Carolina court will not discourage litigation based on legal principles. The Special Referee must conform to these standards when processing allegations of contempt. His contempt ruling must be reversed.

In light of the FCC ruling in this matter and Gresham's obligation to legally protect itself from overreaching and unjust enrichment, the Court's policy finds approbation in preserving the total dynamic of our adversarial system.

IV. THE SPECIAL REFEREE'S ATTACHMENT OF THE FCC LICENSE, AND ITS SUBSEQUENT SALE WAS ILLEGAL AN CONTRARY TO FCC LAW

The Federal Communications Commission has consistently held that a broadcast license, as distinguished from a station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. See Sections 301, 304, 309(h), 310(d), of the Communications Act, as amended (47 U.S.C. §§ 301, 304, 309(h) and 310(d)), and Section 73.1150 of the Commission's Rules (47 C.F.R. § 73.1150) . See also, Radio KDAN, Inc., 11 F.C.C.2d 934, *recon. denied,* 13 R.R.2d 100 (1968), affirmed on procedural grounds sub nom., W. H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969). Thus, while a court is permitted to grant an interest with respect to a broadcast station's physical property, its receivables, or even future proceeds from any future sale of the such station (In re Cheskey, 9 FCC Rcd 986, 987 (1994) (holding that licensee may give security interest in the proceeds of sale of license, but not in the license itself)), the court may *not* treat a broadcast license in a similar manner, and a lien, mortgage, security interest, or reversionary interest in a broadcast license is not permitted. In other words, although the cases and propositions cited by the Special Referee were entirely correct (*i.e.*, licensees do have a proprietary right in the

proceeds from a sale of a license; the holder of a license may receive proceeds from the transfer of the license to a third party, etc.), the Court then totally *misused* the precedent to rule, incorrectly, that the license held by Gresham Communications, Inc. is properly subject to attachment. Attachment 6 at 2 (emphasis added). In Radio KDAN, Inc., 11 F.C.C.2d 934 (1968), *recon. denied*, 13 R.R.2d 100 (1968), *aff'd*, W.H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969), the Commission stated that the mortgage clause granting the seller the right to act as the purchaser's attorney in fact upon default was:

> *void ab initio* since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by sec. 73.139 of our rules. The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable.
> a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc. This principle, deriving ultimately from Section 301 of the Communications Act, is firmly rooted in Commission practice, its rationale being that such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust. If this rider [had] been submitted to the Commission as required by our rule at the time of its origin, it would have been rejected for two vital defects: (1) it purported to mortgage the KDAN license; (2) and it reserved to Hansen a reversionary interest in the KDAN license. *Id.* at n.1.

Radio KDAN, Inc., 13 R.R.2d 100, 102 (1968) (*Radio KDAN II*). Despite the citation of absolutely no authority that would allow a judicial "attachment on an FCC license, that is exactly what the Special Referee did in this case. Following its "attachment" of the license, the Special Referee then took it upon himself to sell the license in a public sale. As is clear, and as the Special Referee acknowledges, *all* that was sold in the public sale was the FCC license. Notably, Caswell has not appealed that determination.

As is now evident, the "attachment" itself (and therefore the subject sale) was not legal and was violative of federal broadcast licensing law, as Gresham has argued repeatedly all along. As the Federal Communications Commission has stated:

> **Here, the State Court Order is facially inconsistent with the Commission's policy prohibiting attachment of a Station license.** The Court acknowledged that a licensee does not hold any property rights in the license itself. It also recognized that the Commission permits licensee creditors to have an interest in the proceeds from a sale of the license. Nevertheless, the Court held: "the FCC license held by Gresham Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached." In a further order, on February 21, 2007, the Court opined that the Station's license "was properly subject to attachment and that such License was thereby attached."
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> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission . . . ." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.
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> **In these circumstances, the Commission's general deference to state court orders is not warranted. We find that the Court's attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act and Commission policy.**

Media Bureau, Decision Letter, FCC DA 09-540 at 4-5 (emphasis added; footnotes omitted).

As the United States Supreme Court, the United States Court of Appeals, and the Federal Communications Commission all agree -- the Federal Communications Commission has superior jurisdiction over broadcast licensing matters and over matters pertaining to the disposition of FCC licenses. See 47 U.S.C. Secs. 301, 303, 307, 308, 309 and 310; Radio Station WOW v. Johnson, 326 U.S. 120, 131-32 (1945). As the Commission has succinctly stated: "While courts may determine the ownership of physical assets, such as station facilities, the Commission retains exclusive authority to determine who shall be licensed to operate broadcast stations."

Dale J. Parsons, Jr., *10 FCC Rcd 2718,* ¶ 14 (1995). Just as a license cannot be an asset of the bankrupt estate (citing In re: D.H. Overmyer Telecasting Co., Inc., 35 BR 400 (Bankr ND Ohio 1983); In re: Twelve Seventy, Inc., 6 RR 2d 301 (1965)), it also could not be the subject of an "attachment sale" in this case. Under Commission precedent, a state court Order that is contrary to and violates Commission policy is not honored. The seminal case in this area is Kirk Merkley, 94 F.C.C.2d 829 (1983). In that case, acknowledging that the courts have the expertise and jurisdiction to resolve contractual disputes, the Commission explained that a courts rulings nevertheless are subject to the Commission's own licensing policies and interests. *Id.* at 839.

At this time, it no longer can be viewed as a subject of speculation or argument concerning the efficacy of the Special Referee's attachment order. The FCC, as a federal agency of superior jurisdication, already has ruled that the order is "void *ab initio,*" and as such, all of the Special Referee's subsequent actions must be scrutinized and weighed with that legal conclusion in mind.

Just as a navigator who marks a course erroneous the further be/she travels with the incorrect bearing then the further away from the intended distinction he/she will arrive. The major impact of the FCC ruling is that there is no correction available, especially since the viability of the judgment is time limited. The FCC ruling clearly reaffirms the relationship of media law and regulation to state court jurisdiction.

As evident from the Special Referee's February 21, 2007 order, he did not appreciate or understand the peculiar characteristics of the broadcast license and did not honor the exclusivity of the remedies prescribed for managing the existence of broadcast rights. Broadcast rights are beyond rudimentary property rights. It was clear error to attach Gresham's FCC license.

V. THE SPECIAL REFEREE ERRED BY FAILING TO DIRECT PROPER DISTRIBUTION OF EXCESS VALUE OF LICENSE

The Special Referee in his Order of Reconsideration acknowledged that the value of the asset, *i.e.*, FCC License is in excess of the judgment. He holds that any additional costs or expenses can be absorbed in the increased valuation. The Special Referee acknowledges that offers ranging from $1.6 to 2 million dollars have been made to purchase the FCC license. The Special Referee recognized that the sale price of the license was set without appraisal of the asset and acknowledged that the disparity of the sale price and the value should be considered as a part of properly resolving this dispute. However, the Special Referee failed to direct the proper distribution of excess value of the license. Defendants in arguing the equities involved in this dispute pointed out many factors that require the application of equitable principles to resolving this matter. The primary fact is that for less than $106,268.78 someone in a judicial sale has purchased the right to own a $1.6 million to 2 million-dollar enterprise.

The general value of the license is well-established in this case. In April 2006, when Caswell and Gresham were working together in the marketing and operation of the Station, Caswell pressured Mr. Saunders to accept an offer for the sale of the Station for $2 million. Much more recently, even though Caswell is not yet the owner of the Station, an agreement evidently *already* has been reached to sell the Station immediately upon its acquisition. As Mr. Cherry testified, an offer has *already* been accepted to sell the Station to WAY-FM for $1.6 Million. In fact, Caswell, on March 9, 2009, filed an application for assignment or transfer of the license based on a contract signed in January, 2008. Caswell/Aidoo have been soliciting buyers for the station for more than four years. Caswell/Aidoo had no control over this enterprise and Caswell/Aidoo had no allegiance to the broadcast business except to speculate. Since that time, as recently as April 29, 2008, Gresham received an offer for the Station for $1.89 million from

Radio Training Network.

In light of the foregoing, allowing (as the June 6, 2008 Order provided), for Caswell to keep the license, simply so it can in turn "flip" ownership of the license to WAY-FM, for an additional sum of $1.6 million, would result in a massive and manifest injustice

In light of the understandings of facts relative to the value of the FCC license and the obvious overreaching of Caswell, combined with the demonstrated recognition by the Special Referee that equities require the realignment of the amount of the judgment, interest, fees, and costs to avoid an injustice, the failure to direct the appropriate distribution of excess value of the license is error. The judgment creditor should not be allowed to use the Court to process to achieve such unwarranted gain. Henry v. Blakely, 216 S.C. 13, 56 S.E 2d 581 (1949).

CONCLUSION

FCC license is a peculiar item with special federally protected properties. These intrinsic qualities are so important to the public interest until only one entity decides how and when a broadcast license is conveyed. What a state court does in an order for judicial sale relative to a broadcast license cannot grant ownership, it cannot grant possession, and it cannot assert jurisdiction to order disposition of the license. Further, and of primary concern in this matter, after the passage of ten (10) years a judgment creditor has failed to obtain the object of their execution then the right or authority to pursue the debt is utterly extinguished. Caswell is time barred from any further action to secure the Gresham broadcast license.

The Special Referee erred in disallowing the tender and satisfaction of the underlying judgment, and he failed to provide Gresham the opportunity to resolve any differences or conflicts in the amount of the tender necessary to pay the funds due and outstanding. The

Special Referee ignored the evidence of the good faith tender by Gresham and arbitrarily mischaractized the positions of the parties and declared the tender merely insufficient. The Special Referee usurped the authority to exercise the privilege awarded in his February 21, 2007 order. This issue should be remanded for further proceedings not inconsistent with the extent of the order.

The Special Referee's findings of contempt against Gresham and William Saunders are procedurally unsupported and improper. The failure to satisfy the standards and requirements of due process cannot sustain a finding of contempt. Contemptuous behavior out of the presence of the court can only lie where a proper rule to show cause has been issued. The finding of contempt must be reversed.

The FCC has consistently held that a broadcast license, as distinguished from a station's plant or physical assets is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. In this case, on March 3, 2009, the FCC, as a part of its exercise of its federal jurisdiction over broadcast licenses, held that the Special Referee's decree attaching the FCC license was void *ab initio*. The FCC stated that the state court order, on its face, is inconsistent with the Commission's policy prohibiting attachment of a station license. The order of attachment is a nullity; therefore, Caswell must fail in its attempt to proceed against the Gresham broadcast license. Caswell and the receiver have no authority to proceed against Gresham's broadcast license and the attachment order must be rescinded.

The Special Referee acknowledges offers ranging from $1.5 million to $2 million have been made to purchase this FCC license. The Special Referee knows that the values are establish contemporaneous to, before, and after the sale. He knows that a $2 million should not sell for

less than $106,268.78. Special Referee recognize the sale price of the license was set without appraisal of the asset and acknowledge that the disparity of the sale price and the value of the license should be considered as a part of properly resolving this dispute. He even holds that any additional costs or expenses can be absorbed in the increased evaluation. In light of the understanding of facts relative to the value of the FCC license, and the obvious overreaching of Caswell, combined with the demonstrated recognition by the Special Referee that equities require the realignment of the amount of the judgment interest fees and costs to avoid an injustice, the failed to direct the appropriate distribution of excess value of the license is error. The judgment creditor should not be allowed to use the court process to achieve unwarranted gain. Any excess value realized by the sale of the broadcast license should be awarded to Gresham.

Respectfully Submitted,

April 1, 2009

J. Seth Whipper, Esquire
SC Bar No.: 6061
WHIPPER LAW FIRM
Post Office Box 70070
North Charleston, SC 29415
843/ 740-7777
843/ 740-9108 Fax
Attorney for Appellant

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APR 06 2009

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Harris Beach, Special Referee

Case No. 92-CP-15-508

Nancy R. Beach ..... **Respondent,**

v.

Gresham Communications of Walterboro, Inc., a/k/a Gresham Communications, Inc.; Gresham Broadcasting, Inc., and Rudi H. Gresham ..... **Appellant.**

INITIAL BRIEF FOR APPELLANT

J. Seth Whipper, Esquire
SC Bar No.: 6061
WHIPPER LAW FIRM
Post Office Box 70070
North Charleston, SC 29415
843/ 740-7777
843/ 740-9108 Fax
Attorney for Appellant

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STATEMENT OF THE CASE

Gresham Communications of Walterboro, Inc., a/k/a Gresham Communications, Inc. (hereinafter "Gresham") has held the broadcast license of station WPAL-FM for more than thirty (30) years. On January 2, 1988, Gresham executed Promissory Notes in the total amount of $165,072.00 at 8% per year. Nancy R. Beach was the holder of the notes. On August 18, 1992, Ms. Beach filed suit against Gresham and others to collect on the notes. On June 2, 1998, the Colleton County Court of Common Pleas issued a final decree ordering payment of $61,903.10.

In 2001, William Saunders, majority owner of Gresham, met Judith Aidoo, majority owner of Caswell Capital Partners, LLC (hereinafter "Caswell"). In early 2002, the companies executed several agreements with an expectation of Caswell purchasing the station and offering Mr. Saunders a position with the new broadcast company. Under the Time Brokerage Agreement, Judith Aidoo and Caswell managed the business operations of WPAL-FM. Though a complete novice to the radio industry, Caswell through Judith Aidoo, personally, made changes in the staffing and programming. During her period of management, the parties on two occasions attempted to close a transfer of the broadcast license and station operations to Caswell. Caswell was not able to close on the transactions and the license assignment applications expired.

Caswell became disenchanted with the radio business after failing to reach their performance goals. When Caswell could not reach an agreement with Gresham on the dissolution of their involvement, Caswell utilized Nancy Beach's Judgment against Gresham.

In 2006, Nancy Beach sold her interest in the June 2, 1998 judgment to Caswell Capital Partners, LLC, who then initiated an action on August 23, 2006, to collect on the 1998 judgment.

On September 22, 2006, the Colleton County Court of Common Pleas, Special Referee Harris Beach presiding, ruled that the FCC license held by Gresham was subject to attachment and subject to judicial sale to satisfy the 1998 money judgment.

Gresham had appealed the September, 2006 Order but the appeal was not perfected and a concurrent Motion to Stay filed by Gresham in the Common Pleas Court was dismissed. On February 15, 2007, the Special Referee ordered that the subject FCC license be sold and concluded the sale on that same day. The Special Referee also ruled that "the sale of the license would be final upon the FCC grant of consent to the assignment, and that if the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of the license, then the FCC assignment application would be withdrawn."

On February 15, 2007, Caswell purchased the Gresham broadcast license for an amount shockingly less than the value of the license. The sale was allowed despite argument regarding the propriety of the Court's actions. The Special Referee further ordered that "the judgment debtor is to take any and all actions necessary to complete the application for FCC approval of the transfer [of] the license to the successful bidder at the sale." On March 26, 2006, the Special Referee filed an order appointing a Receiver to act on behalf of Gresham and to assist Caswell Capital Partners, LLC to obtain assignment of Gresham's FCC license.

The FCC did not approve the assignment application until recently, on March 3, 2009. Prior to that date, on April 7, 2008, Gresham tendered to the Court, pursuant to its order, an amount equal to the full amount of the "judgment in this matter" $56,276.10, "together with all interest, fees and costs due under the judgment" $49.992.68 for a total of $106,268.78 intended to satisfy the underlying judgment and known fees. Caswell objected to the tender on the

following basis: only the Receiver had standing to transfer Gresham's funds or, a fortiori, exercise the right to tender; Gresham's right to tender has been extinguished, expired, or waived, Gresham's right is barred by the doctrines of unclean hands, estoppels, and laches; Gresham's tenders is insufficient. In addition, Caswell moved for a Rule to Show Cause as to Gresham for failing to cooperate in, and actively impeding the transfer of the FCC license to the successful bidder (Caswell); and for failing to disclose or transfer to the receiver at least $106,268.78 in assets belonging to Gresham. Additionally, Plaintiff moved for the Special Referee to transfer the tendered funds to the receiver to manage according to his authority as granted by the Special Referee.

The parties argued their positions before the Special Referee on May 16, 2008. On June 10, 2008, the Special Referee, in an order prepared by Caswell without input and without a request for an alternative order from Gresham, filed his rulings denying the tender and granting Caswell all relief prayed for in a Memorandum and Petition/Motion for Rule to Show Cause and their objections to the tender.

On June 11, 2008, Gresham filed and served a Motion for Reconsideration of the June 10, 2008 Order and Motion to Stay Execution of the Order. Gresham's motion asked for reconsideration of every ruling in the June 10 Order and several other issues raised by the Special Referee's rulings.

Following a stay of the June 10 Order, Gresham's motion was argued on June 23, 2008 and on December 3, 2008, the Special Referee granted the reconsideration finding as follows: the ten year limitation on judgments has expired; Caswell may not pursue any other asset of Gresham's not liquidated by judicial sale; the only item liquidated by judicial sale is the FCC license for operation of a radio station; the license was sold in the usual course of judicial sale

and purchased by Caswell; the tender of money deposited with the Clerk of Court is now moot because the judgment is now null and void; that funds tendered to the Clerk of Court be returned to the third party owner; and that any finding or Order not inconsistent herein are affirmed as part of the June 6, 2008 order.

On December 31, 2008, Gresham filed and served its Notice of Intent to Appeal. On March 3, 2009, the Federal Communications Commission, as a part of its exercise of its federal jurisdiction over broadcast licenses, held that the Special Referee's Decree attaching the FCC license was "void ab inito." Specifically, the Federal Communications Commission stated:

> **Here, the State Court Order is facially inconsistent with the Commission's policy prohibiting attachment of a Station license.** The Court acknowledged that a licensee does not hold any property rights in the license itself. It also recognized that the Commission permits licensee creditors to have an interest in the proceeds from a sale of the license. Nevertheless, the Court held: "the FCC license held by Gresham Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached." In a further order, on February 21, 2007, the Court opined that the Station's license "was properly subject to attachment and that such License was thereby attached."
>
> * * *
>
> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission . . . ." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.

In these circumstances, the Commission's general deference to state court orders is not warranted. We find that the Court's attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act and Commission policy.

FCC Media Bureau, Decision Letter, FCC DA 09-540 at 4-5.

ARGUMENT

I.

I. THE SPECIAL REFEREE ERRED IN HOLDING THAT TRANSFER OF BROADCAST LICENSE WAS WITHIN TEN YEAR LIMITATION OF JUDGMENT

On June 2, 1998, Master-in-Equity Louis E. Condon decreed that Gresham would pay Nancy Beach the sum of $56,276.10 together with interest at the rate of 8% per year beginning June 1, 1998 together with attorney's fee of $5,627.00 and costs of this action. This judgment is viable for ten (10) years beginning upon the date of entry of judgment. South Carolina jurisprudence has maintained this limitation and it is required by statute - S.C. Code Ann. 15-39-30; Executions may issue upon final judgments or decrees at anytime within ten years of the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period or such execution.

In his order signed February 16, 2007 and entered on February 21, 2007, the Special Referee declared that "the sale [of the license] will be final upon the FCC grant of consent to the assignment [to the successful bidder]". In oral argument regarding the tender of payment of the subject judgment, Plaintiff counsel describes the status of the pending sale as "...the only thing that remains to be done is just the perfection of that right that we provided for in the order..."

On March 3, 2009, the FCC held that the Special Referee's "attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act." The FCC went on to say that "the Special Referee's Order is facially inconsistent with the

Commission's policy prohibiting attachment of a Station license". The FCC went on to analyze the Special Referee's Order and the arguments of Respondent as follows:

> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission..." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.

FCC Media Bureau, Decision Letter, FCC DA 09-540 at 4-5 (footnotes omitted).

The FCC's ruling is especially pertinent in this case because of South Carolina law regarding receivers. In Jeffcoat v. Morris, 300 S.C. 526, 528, 389 S.E.2d 159 (1989), the court describes the receiver as follows:

> We first address Jeffcoat's status as receiver. A receiver represents the court appointing him. He is an officer of the court and is the agency through which the court acts. Kirven v. Lawrence, 244 S.C. 572, 137 S.E.2d 764 (1964). However, the appointment of a receiver works no metamorphosis in the title or interest to or in the assets of the insolvent; the receiver takes possession of them as the arm of the court, subject to all existing liens and encumbrances, having due regard to the legal and equitable rights of the parties. Carwile v. Metropolitan Life Ins. Co., 136 S.C. 179, 134 S.E. 285 (1926). A receiver stands in the shoes of the debtor with respect to the property of the latter and the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon. National Cash Register Co. v. Burns, 217 S.C. 310, 60 S.E. 2d 615 (1950). A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver and becomes merely the assignee of the insolvent having exactly the same rights. Carwile at 290.

The receiver herein, by law, takes Gresham's role in this action and assumes control and authority as granted by the Special Referee. Therefore, though the receiver processes the

application to assign the license, the receiver holds the license only to do what Gresham is required to do.

The legal term 'perfect' means to take all legal steps needed to complete, secure, or record a claim, right, or interest, to put in final conformity with the law. No one associated with this case would suggest that Beach's assignee of the note, Caswell, already held title to or possession of Gresham's license on June 4, 2008. A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried. Garrison v. Owens 258 S.C. 442, 189 S.E.2d 31 (1972). The South Carolina Supreme Court has indicated a judgment is utterly extinguished after the expiration of ten years from the date of entry. Hardee v Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948) (discussing effect of Act No. 516, 1946 S.C. Acts 1436).

On June 4, 1998, Judge Condon's judgment was entered, and ten (10) years later, the judgment execution still was not yet complete. Plaintiffs' were not vested in any possession represented by the judgment. Plaintiffs' merely held an inchoate interest in someone else's privilege: not hardly a completed execution. As the Special Referee held: the sale [of the license] will be final upon the FCC grant of consent to the assignment [to the successful bidder]" *See* Ex parte Moore, 352 S.C. 508, 575 S.E. 2d 561 (2003). (Citing rule 71, 71(b), S. C. Code Ann. at-39-660 (1977))(The terms and conditions of a judicial sale are controlled by court order.) Because of the special and peculiar nature of a broadcast license, the execution and sale is not completed by submitting the highest bid; and, according to the FCC, attaching and executing on a license is a nullity. The license and other material under the control of the receiver must be returned to Gresham.

II. THE SPECIAL REFEREE ERRED BY DISALLOWING THE TENDER IN SATISFACTION OF THE UNDERLYING JUDGMENT

In his February 21, 2007, the Special Referee held that "if the judgment debtor satisfies the full amount of the underlying judgment in this matter, together with all interest, fees and costs due under the judgment before the FCC grant of assignment of License, then the FCC assignment application will be withdrawn."

On December 3, 2008, after Gresham tendered payment of the underlying judgment and attorney's fees, the Special Referee inexplicably held the tender of payment of the judgment was an offer to settle the judgment. The Special Referee found that Gresham was arguing that the tender was the amount of the original judgment at the time of the judicial sale. The Special Referee in his ruling took the position that "there has accrued substantial interest and costs and fees for receivers which need to be added to any amount to satisfy the judgment."

Paradoxically, that same order the Special Referee ruled that the collection action is now null and void; that the Plaintiff may not pursue any other asset of the corporation; confirmed that the only item 'liquidated' by judicial sale is the FCC license for operation of a radio station; that the license was sold in the usual course of judicial sale and purchase by Caswell, Inc.; that the tender by the Defendants to the Plaintiff by depositing monies with the Clerk of Court is now null and void having been rejected by the Plaintiff as being insufficient; and, that the funds tendered to the Clerk of Court are to be returned by the Clerk to the third party owner of the funds or to the party so tendering those funds...

Gresham tendered $106,268.78. The original judgment amount including attorneys' fees was shown to be $61,903.10. Gresham even gave a basic explanation on how the amount tendered was calculated at a hearing on the tender before the Special Referee on May 16, 2008. The June 2, 1998 order declared a judgment against Gresham "for the sum of $56,276.10, together with interest at the rate of eight (8%) per annum from June 1, 1998, together with attorney's fees of $5,627.00, and the costs of this action." There is no mention of interest for attorneys' fees. There is not mention of compounding of interest. The order specifically set forth a simple interest rate for the judgment amount, and a separate, non interest bearing amount for the attorney fee. The June 2, 1998 order controls the amount due on the underlying judgment in this action. A promissory note that calls for interest at 8% per annum calls for simple interest only, and it is error to compound interest on the same. Rhodus v Goins, 129 S.C. 40, 123 S.E.645 (1924). The judgment amount of $56.276.10, with simple interest rate of 8% per annum accruing from June 1, 1998, until April 7, 2008, the date which notice of redemption and tender of payment was filed with the Clerk of Court for Colleton County, amount to $106,268.78. Gresham's counsel explained that the amount tendered was reached by calculating each year's interest and each partial year's interest based on the June 2, 1998 decree. At several points in the hearing, Gresham expressed recognition that the information used to make the calculations may require some adjustment but continually expressed a willingness to pay whatever the Special Referee felt was the correct amount. Nevertheless, on reconsideration, the Special Referee inexplicably (and without explanation or elaboration) states: "The tender of the monies by the Defendants' to the Clerk of Court did not equal the true amount for interest and fees under the judgment as was obvious to both the Defendants and the Plaintiff and was therefore an offer to

settle the dispute between the parties." The tender was thus rejected as somehow discretionary on the part of the Court.

Two things, however, are clear. The February 21, 2007 order represents the law of the case on this issue. The ruling was not appealed and controls how the matter can be resolved. Caswell argues that the Special Referee somehow reserved an authority to declare and modify his rulings indefinitely. This obviously is not accurate. Caswell argues that the Special Referee's announcement at the end of order ('the Court retains jurisdiction to enter such further orders as are just under the circumstance) somehow supersedes the rules of civil procedure and the common law on judgments. It is most probable and more correct that the announcement is a restatement of the original Order of Reference: "that the written matter be referred...with authority being vested in the Special Referee to determine all issues in controversy and to issue a Final Decree. Any appeal from the Special Referee shall be directly to the South Carolina Supreme Court." The two statements read together mean that anything that arises in the matter of Beach v. Gresham Communications of Walterboro, Inc., et. al. must be and should be heard with finality in front of the Special Referee.

Moreover, there is no evidence in the record that the Defendant intended, or that Plaintiff treated the tender of $106,268.78 as an offer to settle. Caswell argued that the Court should transfer the money to the receiver or to Caswell as a way of paying on their fees and costs. Caswell even argued that the 'privilege' of making the tender was lost as a result of two subsequent orders, each more than thirty (30) days after the February 21, 2007, and neither order dealing with the issue of the tender.

In TranSouth Financial Corp. v. Cocran, 324 S.C. 290, 478 S.E.2d 63 (1996), TranSouth requested the Court of Appeals to order the entry of judgment in its favor rather than remanding

the case for further substantive proceedings. The Court accepted TranSouth's figure on the principal as undisputed. The Court noted that TranSouth had introduced a calculation of the amount through the date of the trial. However, at trial, Cochran's counsel challenged the judgment rate of interest. In addition, the trial judge never made a determination of the amount of attorneys' fees. The Court of Appeals declined to order the entry of judgment, and remanded the case for an additional evidentiary hearing to determine the amount of the judgment. The TranSouth case also involved application of the ten (10) year statute of limitation period on judgments.

In this case, the parties have conflicting positions on the amount due and owing. For this Court to resolve that dispute by affirming the Special Referees ruling with no evidence on the attorneys' fee and cost issue and no evidence of calculations as to the judgment amount would run contrary to the precedent established in TranSouth v. Cochran. Moreover, the Court would affirm a ruling that demonstrates an abuse of discretion. See Melton v. Olenik, 379 S.C. 45, 664S.E.2d 487 (2008) citing Boland v. S.C. Public Service Authority, 281 S.C. 293, 295, 315 S.E.2d 143, 145 (CA.App.1984) (an abuse of discretion arises when the judge's decision was controlled by some error of law or lacks evidentiary support); *also citing* Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988) (an abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support.)

Courts insist that the record supports the rulings: Where costs for producing documents at issue are not finally decided by the trial court, the matter is to be remanded to trial court for final determination. Ferguson v. Charleston Lincoln/Mercury, Inc., 344 S.C. 502, 544 S.E.2d 285 (2001). When party seeking attorney fees fails to present essential element of proof and trial

court nevertheless awards attorney fees, the Appellate Court will reverse or vacate and remand for evidentiary hearing to allow cure of the matter. Hardnett v. Ogundele, 291 Ga. App. 241, 661 S.E.2d 627 (2008). A trial court is required to make findings of fact on record regarding reasonableness of attorney fees when awarding successful plaintiff's attorney fees. Smith v. Strictland, 314 S.C. 192, 442 S.E.2d 207 (1994).

This action is for a money judgment. During the oral argument regarding the tender, Counsel for Gresham, offered and solicited the Special Referee on more than one occasion to establish a figure so that Gresham could complete the tender. The Special Referee's only response was to rule that the tender was an insufficient offer to settle: that was error.

III. THE SPECIAL REFEREE ERRED BY FINDING GRESHAM AND SAUNDERS IN CONTEMPT

Caswell objected to Gresham's tender of payment and ostensibly filed a Petition for a Rule to Show Cause by submitting a 'Memorandum in Opposition to Redemption and Petition for Rule to Show Cause.' The Plaintiff did not serve a Summons and Complaint, Summons and Petition, or Petition with Affidavit and Request for Rule to Show Cause. In the text of the 'Memorandum in Opposition to Redemption, the Plaintiff recites that "Plaintiff moves the court for a Rule to Show Cause why the Defendant Gresham and its principal William Saunders should not be held in contempt by... [1] failing to cooperate in, and actively impeding, the transfer of the FCC License to the successful bidder at the judicial sale of the license; and ... [2] failing to disclose or transfer to the Receiver at least $106,268.78 in assets..." Plaintiff's submission and argument in this format does not meet due process or procedural requirements.

In a seminal case on the law of contempt, the South Carolina Supreme Court said:

> "Of course, as stated in 13 C.J. 68, 'before a person can be found guilty of contempt not committed in the presence of the Court, he must have due and reasonable notice of the proceedings. A rule to show cause, an attachment, or

> other process should issue.' And it is said in State v. Nathans, 49 S.C. 199, 27 S.E. 57, 58 (1897) that 'the almost universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential. The verified petition of the party applying for a rule to show cause, however, is a substantial compliance with the principle of law above stated, when and if the petition alleges facts sufficient upon which to base the issuance of such order." Hornsby v. Hornsby, 187 S.C. 463, 198 S.E. 29 (1938).

The South Carolina Supreme Court in Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 267, 442 S.E.2d 611 (1994) held "Constructive contempt, such as that alleged here, is that occurring outside the presence of the Court. State v. Johnson, 249 S.C. 1, 152 S.E.2d 669 (1967). Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition. *Id.* The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect. See, e.g., State v. Blackwell, 10 S.C. 35 (1978). Here, there was neither an affidavit nor a verified petition and S.E.T. timely objected. The contempt order must be reversed. State v. Blackwell, supra." The plaintiff herein did not properly plead or serve to acquire the court's jurisdiction to entertain their bald allegations. Moreover, there is nothing in the record that mitigates the impact of the kind of pleading that is presented.

Plaintiff does not inform the Defendant that on May 16, 2008 their actions would be adjudged with prejudice as a result of having seen the "Memorandum In Opposition." Further, Counsel for Gresham stated their objection to the Special Referee during argument on the question of contempt in two different instances and by their prayer for relief in their Motion for Reconsideration.

In his Order of Reconsideration, the Special Referee ruled that the tendered funds should be returned to the third party owner, so that holding effectively preempts Plaintiff's memorandum point #2 as a basis for a contempt ruling. As to Plaintiff's memorandum point #1, the South Carolina Court of Appeals, in an opinion by Judge Cureton, said that "this court does

not criticize appropriate use of the appellate process to obtain review of orders or decisions issued by the circuit court. Wells ex.rel. A.C. Sutton & Sons, Inc. v. Suttons, 299 S.C. 19, 382 S.E.2d 14 (1989).

The procedural requirements for initiating contempt to action are well-established and clear. Caswell has not followed procedure and the South Carolina court will not discourage litigation based on legal principles. The Special Referee must conform to these standards when processing allegations of contempt. His contempt ruling must be reversed.

In light of the FCC ruling in this matter and Gresham's obligation to legally protect itself from overreaching and unjust enrichment, the Court's policy finds approbation in preserving the total dynamic of our adversarial system.

IV. THE SPECIAL REFEREE'S ATTACHMENT OF THE FCC LICENSE, AND ITS SUBSEQUENT SALE WAS ILLEGAL AN CONTRARY TO FCC LAW

The Federal Communications Commission has consistently held that a broadcast license, as distinguished from a station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. See Sections 301, 304, 309(h), 310(d), of the Communications Act, as amended (47 U.S.C. ' ' 301, 304, 309(h) and 310(d)), and Section 73.1150 of the Commission's Rules (47 C.F.R. ' 73.1150) . See also, Radio KDAN, Inc., 11 F.C.C.2d 934, *recon. denied,* 13 R.R.2d 100 (1968), affirmed on procedural grounds sub nom., W. H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969). Thus, while a court is permitted to grant an interest with respect to a broadcast station=s physical property, its receivables, or even future proceeds from any future sale of the such station (In re Cheskey, 9 FCC Rcd 986, 987 (1994) (holding that licensee may give security interest in the proceeds of sale of license, but not in the license itself)), the court may *not* treat a broadcast

license in a similar manner, and a lien, mortgage, security interest, or reversionary interest in a broadcast license is not permitted. In other words, although the cases and propositions cited by the Special Referee were entirely correct (*i.e.*, licensees do have a proprietary right in the proceeds from a sale of a license; the holder of a license may receive proceeds from the transfer of the license to a third party, etc.), the Court then totally *misused* the precedent to rule, incorrectly, that the license held by Gresham Communications, Inc. is properly subject to attachment. Attachment 6 at 2 (emphasis added). In Radio KDAN, Inc., 11 F.C.C.2d 934 (1968), *recon. denied*, 13 R.R.2d 100 (1968), *aff'd*, W.H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969), the Commission stated that the mortgage clause granting the seller the right to act as the purchaser's attorney in fact upon default was:

> *void ab initio* since it attempts to retain for Hansen a reversionary interest in the KDAN license, and as such is expressly forbidden by sec. 73.139 of our rules. The extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable.
> a broadcast license (as distinguished from a station's plant or physical assets) may not be hypothecated by way of mortgage, lien, pledge, lease, etc. This principle, deriving ultimately from Section 301 of the Communications Act, is firmly rooted in Commission practice, its rationale being that such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust. If this rider [had] been submitted to the Commission as required by our rule at the time of its origin, it would have been rejected for two vital defects: (1) it purported to mortgage the KDAN license; (2) and it reserved to Hansen a reversionary interest in the KDAN license. *Id.* at n.1.

Radio KDAN, Inc., 13 R.R.2d 100, 102 (1968) (*Radio KDAN II*). Despite the citation of absolutely no authority that would allow a judicial Aattachment on an FCC license, that is exactly what the Special Referee did in this case. Following its "attachment" of the license, the Special Referee then took it upon himself to sell the license in a public sale. As is clear, and as the Special Referee acknowledges, *all* that was sold in the public sale was the FCC license. Notably, Caswell has not appealed that determination.

As is now evident, the "attachment" itself (and therefore the subject sale) was not legal and was violative of federal broadcast licensing law, as Gresham has argued repeatedly all along. As the Federal Communications Commission has stated:

> **Here, the State Court Order is facially inconsistent with the Commission's policy prohibiting attachment of a Station license.** The Court acknowledged that a licensee does not hold any property rights in the license itself. It also recognized that the Commission permits licensee creditors to have an interest in the proceeds from a sale of the license. Nevertheless, the Court held: "the FCC license held by Gresham Communications, Inc. is properly subject to attachment. I hereby direct that such FCC license . . . be and hereby is attached." In a further order, on February 21, 2007, the Court opined that the Station's license "was properly subject to attachment and that such License was thereby attached."
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> * * *
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> The Receiver and Caswell assert that the Court *intended* to grant a security interest in the proceeds from the sale of the license. We find that the Court's plain language states otherwise. Moreover, we reject as unsupported the Receiver's and Caswell's argument that the Commission's prohibition against attachment of a broadcast license is only of concern when an automatic right of reversion is involved. The prohibition on treating a broadcast license as a property right is premised on the rationale "that such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission . . . ." Finally, the Receiver and Caswell contend that we should honor the State Court Order because Caswell would have received the proceeds from the Station's sale had it not submitted the winning bid and that the State Court Order expressly provides that the sale is subject to Commission approval. We disagree. To give effect to this portion of the State Court Order would require that we ignore our longstanding policy against the attachment of a broadcast license.
>
> **In these circumstances, the Commission's general deference to state court orders is not warranted. We find that the Court's attachment of the WPAL-FM license exceeded its authority and to this extent its order is void *ab initio* as violative of the Act and Commission policy.**

Media Bureau, Decision Letter, FCC DA 09-540 at 4-5 (emphasis added; footnotes omitted).

As the United States Supreme Court, the United States Court of Appeals, and the Federal Communications Commission all agree -- the Federal Communications Commission has superior

jurisdiction over broadcast licensing matters and over matters pertaining to the disposition of FCC licenses. See 47 U.S.C. Secs. 301, 303, 307, 308, 309 and 310; Radio Station WOW v. Johnson, 326 U.S. 120, 131-32 (1945). As the Commission has succinctly stated: "While courts may determine the ownership of physical assets, such as station facilities, the Commission retains exclusive authority to determine who shall be licensed to operate broadcast stations." Dale J. Parsons, Jr., *10 FCC Rcd 2718,* ¶ 14 (1995). Just as a license cannot be an asset of the bankrupt estate (citing In re: D.H. Overmyer Telecasting Co., Inc., 35 BR 400 (Bankr ND Ohio 1983); In re: Twelve Seventy, Inc., 6 RR 2d 301 (1965)), it also could not be the subject of an "attachment sale" in this case. Under Commission precedent, a state court Order that is contrary to and violates Commission policy is not honored. The seminal case in this area is Kirk Merkley, 94 F.C.C.2d 829 (1983). In that case, acknowledging that the courts have the expertise and jurisdiction to resolve contractual disputes, the Commission explained that a courts rulings nevertheless are subject to the Commission's own licensing policies and interests. *Id.* at 839.

At this time, it no longer can be viewed as a subject of speculation or argument concerning the efficacy of the Special Referee's attachment order. The FCC, as a federal agency of superior jurisdication, already has ruled that the order is "void *ab initio*," and as such, all of the Special Referee's subsequent actions must be scrutinized and weighed with that legal conclusion in mind.

Just as a navigator who marks a course erroneous the further be/she travels with the incorrect bearing then the further away from the intended distinction he/she will arrive. The major impact of the FCC ruling is that there is no correction available, especially since the viability of the judgment is time limited. The FCC ruling clearly reaffirms the relationship of media law and regulation to state court jurisdiction.

As evident from the Special Referee's February 21, 2007 order, he did not appreciate or understand the peculiar characteristics of the broadcast license and did not honor the exclusivity of the remedies prescribed for managing the existence of broadcast rights. Broadcast rights are beyond rudimentary property rights. It was clear error to attach Gresham's FCC license.

V. THE SPECIAL REFEREE ERRED BY FAILING TO DIRECT PROPER DISTRIBUTION OF EXCESS VALUE OF LICENSE

The Special Referee in his Order of Reconsideration acknowledged that the value of the asset, *i.e.*, FCC License is in excess of the judgment. He holds that any additional costs or expenses can be absorbed in the increased valuation. The Special Referee acknowledges that offers ranging from $1.6 to 2 million dollars have been made to purchase the FCC license. The Special Referee recognized that the sale price of the license was set without appraisal of the asset and acknowledged that the disparity of the sale price and the value should be considered as a part of properly resolving this dispute. However, the Special Referee failed to direct the proper distribution of excess value of the license. Defendants in arguing the equities involved in this dispute pointed out many factors that require the application of equitable principles to resolving this matter. The primary fact is that for less than $106,268.78 someone in a judicial sale has purchased the right to own a $1.6 million to 2 million-dollar enterprise.

The general value of the license is well-established in this case. In April 2006, when Caswell and Gresham were working together in the marketing and operation of the Station, Caswell pressured Mr. Saunders to accept an offer for the sale of the Station for $2 million. Much more recently, even though Caswell is not yet the owner of the Station, an agreement evidently *already* has been reached to sell the Station immediately upon its acquisition. As Mr. Cherry testified, an offer has *already* been accepted to sell the Station to WAY-FM for $1.6 Million. In fact, Caswell, on March 9, 2009, filed an application for assignment or transfer of the license based on a contract signed in January, 2008. Caswell/Aidoo have been soliciting buyers for the station for more than four years. Caswell/Aidoo had no control over this enterprise and

Caswell/Aidoo had no allegiance to the broadcast business except to speculate. Since that time, as recently as April 29, 2008, Gresham received an offer for the Station for $1.89 million from Radio Training Network.

In light of the foregoing, allowing (as the June 6, 2008 Order provided), for Caswell to keep the license, simply so it can in turn "flip" ownership of the license to WAY-FM, for an additional sum of $1.6 million, would result in a massive and manifest injustice

In light of the understandings of facts relative to the value of the FCC license and the obvious overreaching of Caswell, combined with the demonstrated recognition by the Special Referee that equities require the realignment of the amount of the judgment, interest, fees, and costs to avoid an injustice, the failure to direct the appropriate distribution of excess value of the license is error. The judgment creditor should not be allowed to use the Court to process to achieve such unwarranted gain. Henry v. Blakely, 216 S.C. 13, 56 S.E 2d 581 (1949).

CONCLUSION

FCC license is a peculiar item with special federally protected properties. These intrinsic qualities are so important to the public interest until only one entity decides how and when a broadcast license is conveyed. What a state court does in an order for judicial sale relative to a broadcast license cannot grant ownership, it cannot grant possession, and it cannot assert jurisdiction to order disposition of the license. Further, and of primary concern in this matter, after the passage of ten (10) years a judgment creditor has failed to obtain the object of their execution then the right or authority to pursue the debt is utterly extinguished. Caswell is time barred from any further action to secure the Gresham broadcast license.

The Special Referee erred in disallowing the tender and satisfaction of the underlying judgment, and he failed to provide Gresham the opportunity to resolve any differences or conflicts in the amount of the tender necessary to pay the funds due and outstanding. The Special Referee ignored the evidence of the good faith tender by Gresham and arbitrarily mischaractized the positions of the parties and declared the tender merely insufficient. The Special Referee usurped the authority to exercise the privilege awarded in his February 21, 2007 order. This issue should be remanded for further proceedings not inconsistent with the extent of the order.

The Special Referee's findings of contempt against Gresham and William Saunders are procedurally unsupported and improper. The failure to satisfy the standards and requirements of due process cannot sustain a finding of contempt. Contemptuous behavior out of the presence of the court can only lie where a proper rule to show cause has been issued. The finding of contempt must be reversed.

The FCC has consistently held that a broadcast license, as distinguished from a station's plant or physical assets is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. In this case, on March 3, 2009, the FCC, as a part of its exercise of its federal jurisdiction over broadcast licenses, held that the Special Referee's decree attaching the FCC license was void *ab initio*. The FCC stated that the state court order, on its face, is inconsistent with the Commission's policy prohibiting attachment of a station license. The order of attachment is a nullity; therefore, Caswell must fail in its attempt to proceed against the Gresham broadcast license. Caswell and the receiver have no

authority to proceed against Gresham's broadcast license and the attachment order must be rescinded.

The Special Referee acknowledges offers ranging from $1.5 million to $2 million have been made to purchase this FCC license. The Special Referee knows that the values are establish contemporaneous to, before, and after the sale. He knows that a $2 million should not sell for less than $106,268.78. Special Referee recognize the sale price of the license was set without appraisal of the asset and acknowledge that the disparity of the sale price and the value of the license should be considered as a part of properly resolving this dispute. He even holds that any additional costs or expenses can be absorbed in the increased evaluation. In light of the understanding of facts relative to the value of the FCC license, and the obvious overreaching of Caswell, combined with the demonstrated recognition by the Special Referee that equities require the realignment of the amount of the judgment interest fees and costs to avoid an injustice, the failed to direct the appropriate distribution of excess value of the license is error. The judgment creditor should not be allowed to use the court process to achieve unwarranted gain. Any excess value realized by the sale of the broadcast license should be awarded to Gresham.

Respectfully Submitted,

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J. Seth Whipper, Esquire
SC Bar No.: 6061
WHIPPER LAW FIRM
Post Office Box 70070

North Charleston, SC 29415
843/ 740-7777
843/ 740-9108 Fax
Attorney for Appellant