

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM COLLETON COUNTY

Court of Common Pleas

Harris Beach, Special Referee

Case No. 1992-CP-15-508

ORIGINAL

Nancy R. Beach Respondent,

v.

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

APPELLANT'S FINAL REPLY BRIEF

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SC Court of Appeals

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STATEMENT OF THE CASE IN REPLY

William Saunders, owner of Gresham Communications, Incorporated (hereinafter 'Gresham') and Judith Aidoo¹, owner of Caswell Communications, Inc. (hereinafter 'Caswell') contracted to transfer Saunders' interest in Gresham along with any and all accouterment necessary for the operation of the station to Caswell. **(R. pp. 448-464)** Saunders and Aidoo, representing their respective companies, also entered into a Time Brokerage Agreement (hereinafter 'TBA') wherein Caswell would pay Gresham an amount per month to cover Gresham's expenses and to allow Caswell to operate the station and obtain receivables. **(R. pp. 431-444)** As a part of preparing for the transfer of Gresham's interest in the radio station, Caswell, by and through Aidoo, performed the requisite due diligence in ascertaining the assets and liabilities of Gresham. **(R. p. 432, sec. 5)** Pursuant to the TBA, Caswell made all management decisions in operating the broadcast station, including marketing, staffing, sound format, and account receivables. The TBA also included an agreement to pay a sum certain to Saunders. **(R. p. 432, sec. 3(a))** The status of Caswell's promises to pay Saunders and Gresham are subject to dispute.

Caswell/Aidoo failed to close on the purchase of Gresham's broadcast rights on two different occasions. **(R. p. 410, footnote 1)** Ms. Aidoo negotiated the terms of these transfers and was fully aware of the asset base of Gresham. Caswell/Aidoo, during the period of the TBA, loss ground operating the broadcast station, and then, without taking ownership of the broadcast operation, began to market the station for sale. See 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Exhibit 4 Attach. A. **(R. pp. 475-476)**

¹ Judith Aidoo is also the owner of Caswell Capital Partners, LLC, and the successful bidder at the judicial sale of the Gresham license: for purposes of brevity, Caswell Capital Partners, LLC and Caswell Communications, Inc. will be identified with one name.

Caswell/Aidoo agreed to pay certain liabilities as a condition of purchasing the station. Caswell/Aidoo satisfied a judgment held by a prior judgment creditor, Nancy Beach, and promised Gresham/Saunders that they would be released from any obligations to pay the debt. **(R. p. 428; p.450 sec. 3)** Once Caswell/Aidoo decided they could not survive in the broadcast business, and they could not convince Mr. Saunders to liquidate his business on their terms, Caswell/Aidoo changed its character from buyer to judgment creditor and sued to collect from Gresham for the payment of the judgment Caswell/Aidoo had agreed to take. **(R. p. 448)**

On September 20, 2006, the parties attended a hearing pursuant to a Supplemental Proceeding. Caswell/Aidoo was represented and Gresham/Saunders appeared pro se. During the hearing, Mr. Saunders requested a continuance and complained that he was not comfortable going forward because he could not be sure if he would respond to questions properly. **(R. pp. 197-200; 214)**

After explaining that Gresham owned the broadcasting business and the broadcast license, Mr. Saunders became threatened and suggested to the Court that exercising his Fifth Amendment rights would be preferred instead of answering more questions. **(Suppl. R. p. 2)** At that point, Caswell's attorney elicited the focal testimony of this matter. Caswell then asked for a moment of indulgence, stopped the hearing, and stepped out of the hearing room. Ms. Aidoo and her attorney returned to announce that the hearing could end and that "we have identified an asset that should be used to satisfy the outstanding debt." **(R. p. 215)**

Even after other property was identified, Caswell did not seek satisfaction of the judgment through that property.

ARGUMENT

I. STATE COURT LACKS SUBJECT MATTER JURISDICTION TO DISPOSE OF A FEDERAL COMMUNICATION COMMISSION BROADCAST LICENSE

On March 3, 2009, the Federal Communication Commission, in this case, 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." This is not a matter of first impression for the Federal Communication Commission (hereinafter 'FCC') because, in the opinion, 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." Letter Decision, Media Bureau FCC, DA 09-540, Ref# 1800B3-KV: In Re: WPAL-FM at 4. (Mar. 3, 2009).

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. § 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 B.R. 400 (Bankr. N.D. Ohio 1983); In re: Twelve Seventy, Inc., 6 Rad. Reg 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 void. 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 ruling nevertheless are subject to the Commission's own licensing policies and interests. *Id.* at 839.

In South Carolina, the actions and judgment of a court in the absence of subject matter jurisdiction are void. S.C. Dept. of Motor Vehicles v. Holtzclaw, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009); See, Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003). The acts of a court with respect to a matter as to which it has no jurisdiction are void. Paschal v. Price, 380 S.C. 419, 670 S.E. 2d 374 (Ct. App. 2008). Moreover, it is well-settled that issues relating to subject matter jurisdiction may be raised at any time. Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997); and, subject matter jurisdiction may not be waived or conferred by consent. Atlanta Skin and Cancer v. Hallmark General Partners, 320 S.C. 113, 463 S.E.2d 600 (1995). The Special Referee has exceeded the authority provided in this supplemental proceeding and all acts pursuant to his order relative to the FCC license are a nullity.

Caswell contends that the Court of Appeals has ruled on this issue, but they are incorrect. This court held that the issue of the propriety of the Special Referee's appointment of a receiver in this case had not been raised with the Special Referee; therefore, the issue was not ripe for review. The jurisprudence regarding the validity of courts acting without authority and power disfavors giving the blessing of propriety to such instances. In the Restatement (Second) of Judgments §12, the rule is as follows:

“[W]hen a court has rendered a judgment in a contested action; the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction."

Restatement (Second) of Judgment §12 (1982).

Finally, the policy and interpretation of the Communications Act essentially preempts state court action as to FCC broadcast licenses. Courts should not lightly infer preemption. Int'l Paper Co. v. Ouellete, 479 U.S. 481, 491(1987). "Federal Law may preempt state law in three ways: (1) Congress may expressly define the extent to which it preempts state law; (2) Congress may occupy a field of regulation, "impliedly" preempting state law; or (3) a state law may be preempted to the extent it "conflicts" with federal law." Prof'l Samplers, Inc. v. S.C. Employment Sec. Comm'n, 334 S.C. 392, 397, 513 S.E.2d 374, 377 (Ct. App. 1999). As to the third method, "conflict arises when either compliance with both laws is impossible or when the state law frustrates the federal purpose and creates an obstacle to the fulfillment of federal objectives." *Id.* as cited in Normandy Corp. v. S.C. Dept. of Transp. 386 S.C. 393 (2009).

"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...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." Letter Decision, Media Bureau FCC, DA 09-540, Ref# 1800B3-KV; In Re: WPAL-FM at 4. (Mar. 3, 2009). The Special Referee lacks the subject matter jurisdiction to dispose of a FCC broadcast license.

II. SPECIAL REFEREE'S REFUSAL OF GRESHAM'S TENDER OF JUDGMENT AMOUNT IS A JUSTICIABLE CONTROVERSY

On April 7, 2008, in response to provision in a Court Order allowing for Gresham to pay off the judgment that is the subject of this action, Gresham tendered what it believe was the full amount due to Caswell/Aidoo in this proceeding. The funds were supplied on behalf of Gresham from a third-party supporter of Gresham. The Court not only wrongfully rejected that tender, it ultimately returned the funds to that third-party. It has consistently been Gresham's position that the Court's failure to accept the tender was improper.

Caswell/ Aidoo asserts that the release of the tendered funds leaves the satisfaction of judgment a moot issue. The Special Referee allowed the funds tendered by a third party on behalf of Gresham/Saunders to be released to that party. (R. p. 54) Caswell/Aidoo does not appreciate the significance of the Special Referee's refusal to process the tender. His refusal was error. "A case becomes moot when judgment, if rendered will have no practical effect upon an existing controversy." Seabrook v. City of Folly Beach, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999) (quoting Mathis v. S.C. State Highway Department, 260 S.C. 344, 346, 195 S.E.2d 713,715 (1973)). "In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); see also Byrd, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Curtis, 345 S.C. at 568, 549 S.E.2d at 596. Finally, if a decision by

the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” Id. (as cited in Holden v. Cribb, 349 S.C. 132, 137-8, 561 S.E.2d 634 (Ct. App. 2002)). Before any action can be maintained there must exist a “justiciable controversy” and a “justiciable controversy” is a real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of a contingent, hypothetical or abstract character. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996).

The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. Holden, 349 S.C. at 137, 561 S.E.2d at 637.

The Special Referee’s failure to allow Gresham’s tender to satisfy the outstanding judgment that is the object of this appeal was error and remains a justicable controversy. The effects of the Special Referee’s rulings in the June 10, 2008 and December 3, 2008 orders are real and substantial consequences for the rights of Gresham and Mr. Saunders, i.e. losing control and ownership of a substantial business interest and capital asset.

III. SPECIAL REFEREE ERRED BY FAILING TO DETERMINE JUDGMENT AMOUNT

In his February 21, 2007 order, the Special Referee ruled as follows: “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.” (**R. p. 12**) All of the subsequent orders were comprehensive, detailed, and clear. The “satisfaction” language was never stricken or vacated by any subsequent rulings of the Special Referee. There are three factors in this February 21, 2007 order that bear materially on the Special Referee’s June 10, 2008 holdings and

the December 3, 2008 holdings: first, the ruling provides that the “judgment debtor” may satisfy the judgment; second, the ruling does not restrict or proscribe how the judgment debtor would develop the sums needed to satisfy the judgment; third, the ruling anticipates that the amount required to satisfy the judgment must be determined at some time after February 21, 2007 in that the judgment is not stated as a fixed amount. **(R. pp. 11-14)**

TranSouth Financial Corp. v. Cochran, 324 S.C. 290, 478 S.E.2d 63(1996), establishes the legal standards and procedures for resolving the issues raised by the Special Referee’s ruling. TranSouth requires the trial court to determine, through admissible evidence, the amount of the judgment. Once the amount is established, the tender could be adjusted. Gresham’s tender complies with the ruling and is not an offer of settlement, and as the judgment debtor, Gresham’s opportunity to satisfy the judgment was erroneously foreclosed.

IV. RESPONDENT LACKS FOUNDATION TO ASSERT “UNCLEAN HANDS” DOCTRINE

Caswell/Aidoo suggests that Gresham and Saunders come to the Court with unclean hands; they allege that Mr. Saunders misled their efforts to determine what Gresham owned. This position is not supported by pertinent facts in this case.

The following facts are uncontroverted: 1) Gresham/Saunders and Caswell/Aidoo had been negotiating the sale of this broadcast operation since early 2002 **(R. p. 431)**; 2) Gresham/Saunders and Caswell/Aidoo had agreed to a purchase of the broadcast operations and related assets **(R. pp. 448-464)**; 3) Gresham/Saunders made application to the FCC for approval to transfer the broadcast license to Caswell/Aidoo **(R. p. 427)**; 4) Caswell/Aidoo operated and managed the broadcast facilities and programming at Gresham for at least four years **(R. p. 475, 431)**; 5) Ms. Aidoo was the sole negotiator for Caswell, and led all efforts to vet the transaction

(R. pp. 466-469); 6) Gresham's WPAL-FM, the object of this litigation, was an active, functioning broadcast operation with the appropriate assets **(R. pp. 431-446)**. Suggesting that Mr. Saunders misled or could mislead the one person who had been operating the station, vetting the station, and attempting to buy the station for four consecutive years is not reasonable and is disingenuous. While declaring to this Court that Mr. Saunders falsely described Gresham's lack of assets, Caswell/Aidoo was claiming before the FCC that Caswell "currently owns the WPAL-FM tower and antenna, the tower building and leases, and most of the station's furniture, fixtures, and broadcast equipment." 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Ex. 5 at 3. **(R. pp. 486-488)** This is not the behavior of a victim.

Because Gresham owned a fully functioning radio enterprise, Caswell/Aidoo was intimately aware that assets and rights existed *prior* to her involvement. As seen in 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Ex. 4, Attach. A., per the Time Brokerage Agreement ("TBA") entered into on February 23, 2002 **(R. p. 431)**, while Caswell obtained a license during the term of the TBA to use Gresham's studios Id. Ex. 4, Attach. A, the TBA specifically recited that "this Agreement shall not constitute an assignment of any contract or lease to which licensee is a party, including, without limitation, any studio or tower leases." **(R. p. 433)** Id. Ex. 4, Attach. A. Thus, Caswell was aware of those Gresham assets. Section 9 of the TBA reflected that "[t]he transmitter equipment and antennas" were owned by Licensee and were required to be maintained by Gresham. Id. Ex. 4, Attach. A. **(R. p. 434)** Finally, Section 19.6 of the TBA even required Caswell, in the event of termination of the Agreement to "return the Station and its equipment to Licensee in the same condition, usual wear and tear excluded, as existed on the Operation Commencement Date." Id. Ex. 4, Attach. A. **(R. p. 438)**

In short, Caswell not only was aware of Gresham's assets at the time Aidoo commenced

involvement with the Station, Caswell was contractually obligated to *return* possession of all assets when its involvement in the Station ended. Moreover, as seen in Ex. 4, Attach. B, not only was Caswell/Aidoo aware of the assets, she entered into an agreement to purchase those assets. Section 1 of the Asset Purchase Agreement ('APA') stated Caswell was to purchase the following:

At the Closing, and subject to the provisions of Paragraph 2 hereof, Sellers shall sell, assign and transfer to Buyer and Buyer shall purchase from Sellers all of Sellers' assets used or useful in the operation of the Station or the conduct of its

business, including the following ("Assets"), free and clear of liens, encumbrances, and other security interests except *as* specifically provided herein:

A. Tangible Personal: All the fixed and tangible personal property owned by Sellers, used or useful in the operation of the Station listed in Schedule A hereto, less any property consumed, depleted or otherwise disposed of in the ordinary course of business, and all similar tangible property acquired by a Seller in the ordinary course of business prior to the Closing Date (the "Tangible Personalty").

* * * * *

C. Agreements, Leases and Contracts: The rights of Sellers under (1) all agreements, leases or contracts, written or oral, listed in Schedule C hereto and all agreements for the broadcast of advertising over the Station in exchange for goods or services other than cash ("Trade Agreements")) which are in effect on the Closing Date and which, by notation on Schedule C, Buyer expressly agrees to assume, (2) all contracts for the sale of air time for cash consistent with the Station's customary terms, rates and selling practices that are in effect on the Closing Date, and (3) all contracts entered into by Seller between the date hereof and the Closing Date, to the extent expressly permitted hereunder (collectively, the "Contracts").

D. Intangible Personal Property: Any trademarks, service marks, copyrights, trade names, common law property rights, good will and all other intangible personal property owned by Seller and used by it in connection with the operation of the Station (the "Intangible Property").

E. Records: Such of Sellers' files, logs, and other records relating to the operation of the Station required to be maintained by the FCC and advertising sales records of Seller (the "Records"). Sellers will be permitted to retain or obtain copies of all Records as needed for tax and financial purposes at Seller's cost. If required for tax audits, Sellers will furnish to Buyer at Buyer's cost copies of all other records Sellers will retain which are reasonably requested by Buyer.

Ex. 4, Attach. B. (R. p. 449)

Hence, as early as 2001, Caswell/Aidoo clearly knew there were other assets, which Gresham owned, because Caswell was attempting to purchase them.

Mr. Saunders appeared pro se at the Supplemental Proceeding of September 20, 2006. Early in the hearing he expressed concern that the matter was more than he could handle by himself. (R. pp. 197-200;214) Later in the hearing, Mr. Saunders becomes very concerned about his ability to represent himself and attempts to assert his Fifth Amendment Right. (Suppl. R. p. 2) Caswell's attorney coaxes Mr. Saunders to respond to pointed questions regarding the FCC license. Ms. Aidoo, a law school graduate, is present at this hearing. Mr. Saunders eventually accords with the characterization that the license is Gresham's only asset. (Suppl. R. p. 2-4). There were no questions about what equipment, automobiles, furniture, real estate, rental property, bank accounts, contracts, copyrights, broadcast towers, broadcast appliances, or other accoutrement were under the control or possession of Gresham. Early in the hearing, Mr. Saunders said, "This is about the radio station. This is not about the Nancy Beach judgments. To me, it's a backdoor way to get back to the asset." (R. p. 199) Mr. Saunders is a layman, and most likely did not appreciate the breadth of the word. Even when he says, "that's all it owns." His answer is really to the question, does Gresham own any other business.

Fundamentally, the professional, legally trained Aidoo, who had been operating this broadcast station, can not reasonably expect that her behavior at this hearing was unsuspecting trust and confidence betrayed. After eliciting the desired response, Ms. Aidoo and her attorney asked to go off the record, exited the hearing room, conferred, and returned to say... "what we would like to do is to... you know, we have identified an asset that should be used to satisfy the outstanding debt." (R. p. 215) Caswell/Aidoo's use of the June 1998 Beach judgment confirms her familiarity with the assets and liabilities of Gresham Communications.

In a declaration attached as an exhibit to Gresham's Second Supplement to Memorandum In Support of Defendant's Motion to Reconsider submitted to the Special Referee on July 25, 2008, Mr. Saunders recounted that Caswell/Aidoo was obligated to pay the Beach judgment as a part of closing on the purchase of Gresham's assets. 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Ex. 4. **(R. p. 428)** As noted earlier, Caswell/Aidoo failed to close on the assignment of the broadcast license on two separate occasions. Caswell/Aidoo did not pledge in good faith to protect Gresham/Saunders from its debt, but used the judgment to take Gresham's broadcast license. Pursuant to their Asset Purchase Agreement, Caswell/Aidoo declares that the Beach judgment and all claims were satisfied and released as against the assets of Gresham. 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Ex. 4, Attach. B. **(R. p. 450, sec. 3 (b))** Caswell/Aidoo's mercenary use of the Beach judgment co-opts the state court in a tact to scoop a windfall that is not countenanced by fairness or good conscience. One other uncontroverted fact is that at the beginning of this litigation, the Gresham broadcast license was valued at least \$1.6 million dollars. **(R. p. 283, 1.7-9)**

Caswell/Aidoo's argument against the plain language of February 21, 2007 order is another beguiling effort to trap the license and delay Mr. Saunders' attempts to maintain title to his property. Certainly, it is reasonable that after more than thirty years in the broadcast business, and more than 12 years operating and owning Gresham Communications, Inc., and considering the true value of the enterprise, Mr. Saunders would choose to satisfy the Beach judgment rather than forcing a judicial sale of his broadcast license.

All courts have the power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Buckley v. Shealy, 370 S.C. 317, 635 S.E.2d 76 (Ct. App. 2006) citing Ex Parte Dibble, 279 S.C. 592, 595-96, 310 S.E.2d 440, 442 (Ct. App. 1983).

He who seeks equity must do equity. Johnson v. Arbabi, 355 S.C. 64, 584 S.E.2d 113 (2003) citing Ingram v. Kasey's Assocs., 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (quoting Norton v. Matthews, 249 S.C. 71, 152 S.E.2d 680 (1967)). Seeking an order for contempt is an action for equitable relief. Johnson v. Johnson, 194 S.C. 115, 8 S.E.2d 351 (1940).

“Supplementary proceedings are equitable in nature.” Ag-Chem Equip. Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). In an equitable matter referred to a master for final judgment with direct appeal to the Supreme Court, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence. Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995).

In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee. See Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001); Wilder Corp. v. Wilke, 324 S.C. 570, 479 S.E.2d 510 (Ct. App. 1996).

As seen in mid-2002, Closing Documents were prepared for the consummation of the transaction. 2nd Suppl. Mem. in Support. of Def. Mot. to Recon., Ex. 4, Attach. B. **(R. pp. 466-473)** Therefore, in mid-2002, Caswell/Aidoo clearly knew there were other assets; that Gresham owned them; and that Caswell was purchasing them.

It also is noteworthy that Caswell/Aidoo have claimed to the FCC that:

As a result of such expenditures, Caswell (or an entity controlled by Judith Aidoo, Caswell's sole Member) currently owns the WPAL-FM tower and antenna, the tower building and leases, and most of the station's furniture, fixtures and broadcast equipment.

2nd Suppl. Mem. in Supp. of Def. Mot. to Recon., Ex. 5. **(R. pp. 486-488)** Interestingly, here,

before this Court, however, by and through plaintiff's counsel, Caswell/Aidoo is claiming "unclean hands," and is taking the opposite tact – seemingly acknowledging that Caswell does *not* own the property; that Gresham does *indeed* own the property; and Gresham hid those assets from the Court. In short, Caswell has argued one thing to the FCC and is taking quite a different position before this Court.

The plain and simple truth is that Caswell/Aidoo at all times knew or should have known the status of the ownership of the physical assets of the station. Their feigned ignorance, should not foster them extra equities before the Court. They have elevated a simple error, which they *always* knew or should have known was a simple error, into a platform to sustain a very inequitable sale of a broadcast license and to impugn Mr. Saunders' character: mere opportunism, not the behavior of a victim.

V. RESPONDENT MISCHARACTERIZES APPELLANT'S 'OPTIONS'

Caswell's reference to the case of Ingram v. Kasey's Associates, 340 S.C. 98, 531 S.E.2d 287 (2000) does not apply to Gresham's options in this matter. Ingram deals with option contracts, not alternatives, and mere options, i.e. choices available to resolve a debt. Further, laches is inapplicable because the February 21, 2007 order set the time limit for satisfying the judgment: before the FCC grant of assignment.

The February 21, 2007 order was written to control the parties and set the parameters for Gresham conveying the license to the successful bidder. Holding #2 is entitled "**The judgment debtor is ordered 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.**" Despite this clear statement of the Special Referee's intent, and fact of this matter, Caswell/Aidoo seeks to imply that the assignment is limited to the receiver; that conclusion is factually and legally

wrong. See Jeffcoat v. Morris, 300 S.C. 526, 528, 389 S.E.2d 159 (1989) (a receiver holds the property coming into his hands by the same right and title the person for whose property he is receiver, and becomes merely the assignee of the insolvent, having exactly the same rights) citing Kirven v. Lawrence, 244 S.C. 572, 137 S.E.2d 764 (1964); Carwile v. Metropolitan Life Ins. Co., 136 S.C. 179, 134, S.E. 285 (1926); National Cash Register Co. v. Burns, 217 S.C. 310, 60 S.E.2d 615 (1950) (emphasis added).

CONCLUSION

The Special Referee and the state court does not have the authority to attach an FCC broadcast license for judicial sale, and the failure of subject matter jurisdiction can not be purged by a subsequent appointment of a Receiver. The FCC, in this case ruled that the Special Referee's attachment order is **voib ab initio**. The ruling is final and was never appealed to the Commission.

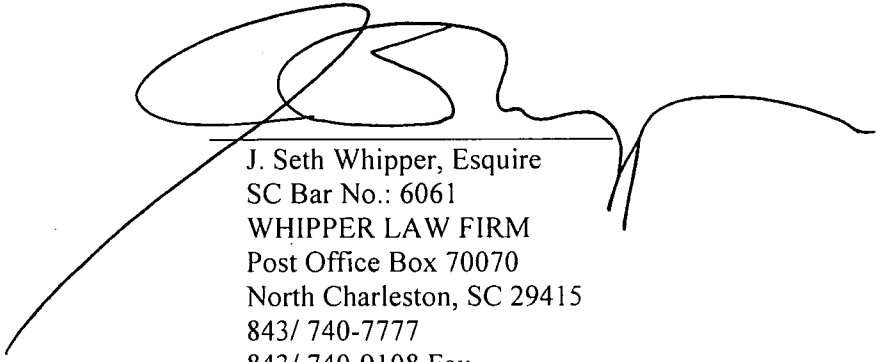
Notwithstanding the status of Gresham's tender to satisfy the judgment herein, the issue of the propriety of the trial court's ruling is very much a justiciable controversy. Further, the Special Referee's rulings in this regard are error and must be reversed and remanded.

Caswell/Aidoo lacks the foundation to claim equitable relief. Taking advantage of a lay person and offering contradictory self-serving claims in two forums is beyond the pale of fair play. He who seeks equity must do equity. Johnson v. Arbabi, supra. Respondents cannot reasonably be seen as victims in their dealings with Gresham. Caswell/Aidoo could not close on the Asset Purchase Agreement because they did not have the finances to finish the deal, and they knew all along that the Beach judgment was their obligation as a part of concluding the purchase. There is nothing in the record that certifies the exchange of consideration for the assignment of the Beach judgment but Caswell/Aidoo now attempts to take what they could not buy.

Finally, the FCC's jurisdictional ruling has redeemed Gresham and places the rights of the parties in the proper perspective. Gresham has acted properly in following the Special Referee's February 21, 2007 order in that the option of tender was granted by the trial court, and the tender was timely as anticipated by that same order.

Respectfully Submitted,

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