THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE JASPER COUNTY
Court of Common Pleas

Darrell Thomas Johnson, Special Referee

Appellate Case No.: 2016-000042

C.E. Lowther, Jr., Clayton Clark Lowther,
Mitchell S. Lowther and Effie Sandra Turpin, Respondents

v.

E. Legrand Lowther, Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

A. Procedural History

This is an action to set aside a judicial sale which was held pursuant to the execution of a judgment.

On March 15, 2010 the Honorable Darrell Thomas Johnson, Jr., as Special Referee for the Jasper County Court of Common Pleas, issued his Report of Special Referee, granting a judgment against the Appellant in favor of the Respondents. See Report of Special Referee, pg. 9. In response, both the Appellant and the Respondents filed motions pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, requesting that Special Referee Johnson reconsider his decision. See Motions to Reconsider dated March 31, 2010 and April 30, 2010.

On March 19, 2012 Special Referee Johnson denied both parties' Rule 59 Motions to Reconsider. See Order filed March 19, 2012, pg. 3.

On April 5, 2012 the Appellant filed his Notice of Appeal, but subsequently withdrew his appeal. The case was remitted to the lower Court on September 11, 2012. See Notice of Appeal dated April 4, 2012, Order and Remittitur dated September 11, 2012. The Order of the Special Referee entering judgment against the Appellant in favor of the Respondents, accordingly, became final at that time.

On October 5, 2012 Special Referee Johnson issued an Order correcting the miscaptioning of his Order Denying the Motions to Reconsider of both parties to reflect the correct case number (2008-CP-27-151). See Order dated October 5, 2012.

On July 3, 2014, a document was filed with the Jasper County Clerk by Special Referee Johnson, setting forth a "computation of the money awarded under my Order of March 13, 2010 and is done for the Clerk of Court for Jasper County." This documents calculates the principal

amount of the judgment to be $193,231.32, plus accrued interest in the amount of $52,534.76 through December 13, 2013. See Computation filed July 3, 2014.

On July 7, 2014 a judicial sale (which is the subject of this appeal) was held by the Office of the Sheriff for Beaufort County pursuant to a Notice of Sale and Writ of Execution based on the March 18, 2010 Order of Special Referee Johnson. The Writ of Execution and Notice of Sale recite the amount of the judgment to be $245,766.08. The Respondents were the high bidders with a bid of $51,000.00 and received a deed for the Appellant's property (an undivided one-half interest in Lot 6, 73 Echo Tango Road, Okatie, Beaufort County, South Carolina) pursuant to a Sheriff's Deed dated August 14, 2014 and recorded on April 1, 2015 in the Office of the Register of Deeds for Beaufort County, South Carolina. See Notice of Sale, Writ of Execution and Deed.

On July 23, 2014, the Appellant filed his Motion to Reconsider the computation of the money awarded under the Order of March 13, 2010 and to set aside, cancel or nullify the judicial sale held on July 7, 2014.

On August 1, 2014 Special Referee Johnson issued his Order, entitled "Order on Defendant's Motion to Suspend Sale," calculating the principal amount of the judgment entered against Appellant in favor of Respondents to be $125,270.04, but refusing to set aside the sale.

On August 7, 2014 the July 7, 2014 judicial sale of Appellant's property, which had been subject to a thirty (30) day upset bid, became final. A deed for the Appellant's property was subsequently issued by the Beaufort County Sheriff to the Respondents as the successful bidders.

On August 11, 2014 the Appellant filed a motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, requesting Special Referee Johnson to reconsider his Order refusing to set aside the July 7, 2014 judicial sale.

On December 22, 2015 Special Referee Johnson issued his Order denying the Appellant's Motion to Reconsider.

On January 11, 2016 the Appellant filed his Notice of Appeal to the South Carolina Court of Appeals.

B. Factual History

Special Referee Johnson concludes his Order dated March 15, 2010 by stating "that the Plaintiffs (Respondents) are granted judgment against the Defendant E. Legrand Lowther (Appellant) in the amounts aforesaid." Order, pg. 9. Unfortunately, the "amounts aforesaid" are not neatly summarized nor readily ascertainable. Instead, the Order is subdivided into the following categories:

1. Wellington Property;
2. AgSouth Payment Reimbursements;
3. Mims Accounting;
4. Closing costs and closing on December 28, 2005;
5. Echo Tango;
6. Cost of capital;
7. Remedy; and
8. Attorney fees.

The Special Referee's findings as to each of these categorized is briefly summarized as follows:

Wellington Property. Wellington is a parcel of real estate located in Jasper County. It was owned partially by C.E. Lowther, Sr., who passed away in June of 2004. C.E. Lowther, Sr. had eight (8) children: E. Legrand Lowther (the Appellant), Mitchell S. Lowther (one of the

Respondents), Clark Lowther (one of the Respondents), C. E. Lowther, Jr. (one of the Respondents), Sandra Turpin (one of the Respondents) and three (3) other children who are not parties to this action: Rita Rogers, Mark Lowther and Gene Tillotson.

When C.E. Lowther, Sr. passed away in June of 2004, he owned a 25% undivided interest in Wellington which passed down pursuant to the terms of his Will to each of his children except for the Appellant. Portions of Wellington had been sold in four (4) separate transactions. The net proceeds from these Wellington sales was $132,984.98. The Special Referee determined that the Appellant owned a 50% undivided interest in the Wellington property, while the Respondent Mitchell Lowther owned a 25% undivided interest in the Wellington property, and the Estate of C.E. Lowther, Sr. owned an undivided 25% interest in the Wellington property. The Special Referee determined that the Respondent Mitchell Lowther acquired an additional $1/7^{th}$ of 25% or 3.571% interest in the Wellington property by virtue of his inheritance from C.E. Lowther, Sr., and that each of the other Respondents likewise acquired a 3.571% interest in the Wellington property.

AgSouth Payment Reimbursements. The Special Referee noted that as a result of a loan to AgSouth, which had formerly been known as the Federal Land Bank, rebates had been generated as a result of sales of land and timber from the Wellington property. The Special Referee concluded that the Estate of C.E. Lowther and Mitchell Lowther were owed $9,087.12 as their share of these AgSouth rebates which had previously been received by the Appellant.

Mims Accounting. The Special Referee concluded that as a result of an agreed upon accounting by David Mims, a local CPA, the Appellant owed $21,157.97 to the Estate of C.E. Lowther, Sr.

Closing Costs and Closing on December 28, 2005. As a result of a closing on a sale of various properties which had occurred on December 28, 2005 the Special Referee concluded that the Appellant owed each of the four (4) Plaintiffs the sum of $2,000.00 which they had advanced to the Appellant to pay closing costs.

Echo Tango. The Special Referee found that the Appellant and the Estate of C.E. Lowther, Sr. owned six (6) lots of real property on the Chechessee River in Beaufort County known as Echo Tango Plantation. The Special Referee criticizes "several different versions of an accounting of the Echo Tango monies," but does not reach a conclusion.

Cost of Capital. The Special Referee refuses to give the Appellant any credit for the "cost of capital" invested in the properties.

Remedy. The Special Referee concludes that the balance of funds held in escrow "shall be applied as a credit to any judgment rendered herein."

Attorney's Fees. The Special Referee declined to award to either party attorney's fees based upon the record before him.

As previously noted, the Special Referee did not summarize or total the amount or amounts of any judgments rendered against the Appellant in favor of the Respondents in this Order, but instead stated "that the Plaintiffs" Respondents are granted judgment against the Defendant E. Legrand Lowther (Appellant) in the amounts aforesaid. The Special Referee did, however, note "that should the parties not agree upon the mathematical computations aforesaid, I retain jurisdiction to clarify same."

Both the Appellant the Respondents filed Motions to Reconsider this Order pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, which were summarily denied by Special

Referee Johnson on March 19, 2012. When the Appellant withdrew his appeal of his Order on September 11, 2012, this Order became final.

On January 28, 2014 the Respondents caused execution to be issued against the Appellant's property in Beaufort County. The Execution references the March 18, 2010 judgment rendered by Special Referee Johnson. The Execution recites that judgment was rendered in the principal amount of $193,231.32. The Execution also indicates that post-judgment interest in the amount of $52,534.76 had accrued through December 13, 2013, resulting in a total of $245,766.08.

On July 3, 2014 an uncaptioned document signed by Special Referee Johnson was filed which sets forth his "computation of the money awarded under my Order of March 13, 2010." This calculation by Special Referee Johnson recites the principal amount of his judgment to be $193,231.32, which Special Referee Johnson calculated as follows:

Wellington Lot Sales	$132,984.98 x 82.1% $190,180.66
AgSouth Interest	$ 9,087.12
Mims Accounting	$ 21,157.97
Closing Costs	$ 8,000.00
Echo Tango	$ 45,805.57
Total Judgment	$193,231.32

In this calculation, Special Referee Johnson then calculates the post judgment interest at 7.25% through December 13, 2013 to be $52,534.76. These figures, accordingly, match the figures set forth on the previously filed Execution.

On July 2, 2014 the Appellant filed a Motion to Suspend the Judgment Sale of his property which was scheduled for July 7, 2014. This motion was heard by the Honorable Marvin H. Dukes,

III, Master in Equity for Beaufort County on July 7, 2014. Judge Dukes determined that the motion should properly be heard by Special Referee Johnson and deferred any ruling. The sale accordingly went forward on July 7 and the Respondents were the high bidders with a bid of $51,000.00. The sale, however, was not final in as much it remained subject to an upset bid within thirty (30) days pursuant to S.C. Code Ann. § 15-39-720. On July 23, 2014 the Appellant filed a Motion to Reconsider the computation of the money awarded under the Order of March 13, 2010 and to set aside, cancel or nullify the judicial sale which had been held on July 7, 2014.

On August 1, 2014 Special Referee Johnson issued his Order in response to said motion. In this Order, he recalculates the amount of the judgment entered against the Appellant in favor of the Respondents. Special Referee Johnson recalculated each portion of the judgment as set forth below.

With respect to the "Wellington" portion of his judgment, Special Referee Johnson agreed that the Respondents were not entitled to 82.1% of the $132,984.98 realized from Wellington lot sales, but rather, the Respondent Mitchell Lowther was entitled to 28.57% of the proceeds, and the Respondents Clark Lowther, Sandra Turpin and C.E. Lowther, Jr. were each entitled to 3.571% of the proceeds, which the Special Referee broke down as follows:

Total Wellington Sales Proceeds	$132,984.98
Mitchell 28.571%	$ 37,995.51
Clark 3.571%	$ 4,748.89
Sandra 3.571%	$ 4,748.89
C.E., Jr. 3.571%	$ 4,748.89

Accordingly, the Respondents share of the Wellington lot sales proceeds was reduced from $109,180.66 to $56,991.07.

With respect to the AgSouth rebate of $9,087.12, the Special Referee concluded that the Respondents were only entitled to a portion of this rebate and he calculated their shares as follows:

Total AgSouth Rebate	$9,087.12
Mitchell Lowther 57.14% (50% + 1/7th of 50%)	$5,192.38
Clark Lowther 7.14%	$ 648.82
Sandra 7.14%	$ 648.82
C.E. Lowther, Jr. 7.14%	$ 648.82

Accordingly, the Respondents share of the AgSouth rebate was reduced from $9,087.12 to $7,138.84.

With respect to the Mims accounting, the Special Referee agreed that the Respondents were entitled to only a portion of the $21,157.97 owed to the Estate of C.E. Lowther, Sr., proportionate to their 1/7th or 14.28% interest in the Estate, as follows:

Mims Accounting Total	$21,157.97
Mitchell Lowther 14.28%	$ 3,021.35
Clark Lowther 14.28%	$ 3,021.35
Sandra 14.28%	$ 3,021.35
C.E. Lowther, Jr. 14.28%	$ 3,021.35

Accordingly, the Mims accounting portion of the judgment was reduced from $21,157.97 to $12,085.04.

The Special Referee left the closing cost portion of the judgment, which was $8,000.00, unchanged.

Likewise, the Special Referee left the Echo Tango portion of the judgment essentially unchanged, but broke the total down according to each Respondents respective 25% interest as follows:

Mitchell Lowther 25%	$11,451.00
Clark Lowther 25%	$11,451.00
Sandra 25%	$11,451.00
C.E. Lowther, Jr. 25%	$11,451.00

Utilizing the aforesaid figures, the Special Referee modified the judgment with respect to each of the individual Respondents, awarding a principal judgment as to each individual Respondent against the Appellant in the following amounts:

Mitchell Lowther	$59,659.86
Clark Lowther	$21,870.06
Sandra Lowther	$21,870.60
C.E. Lowther, Jr.	$21,870.06

Accordingly, the Special Referee concluded that the total principal judgment rendered against the Appellant in favor of the Respondents to be $125,270.04. The Special Referee further calculated that post judgment interest from the date of the original Order through March 24, 2014 was $18,810.48 for Mitchell Lowther, and $6,895.62 each for Clark Lowther, Sandra Turpin, and C.E. Lowther, Jr.

The net result is a reduction in the total principal amount of the judgment from $193,231.32 to $125,270.04. Additionally, rather than a judgment for a single sum of $193,231.32 owed to all Respondents jointly, the Special Referee changed it to individual judgments rendered in favor of

each of the Respondents: a judgment of $59,659.86 in favor of Mitchell Lowther, and judgments of $21,870.06 each to the Respondents Clark Lowther, Sandra Turpin and C.E. Lowther, Jr.

Despite recognizing that the actual principal amount of the judgment was $67,961.28 less than the principal amount of the judgment as referenced in the Execution ($125,270.04 versus $193,231.32), Special Referee Johnson denied the motion and refused to suspend or set aside the sale.

Accordingly, the July 7, 2014 judicial sale became final on August 7, 2014 with the expiration of the 30-day upset bid period provided for in S.C. Code Ann. § 15-39-720.

The Appellant filed his Motion to Reconsider on August 11, 2014. The Motion to Reconsider was denied by Special Referee Johnson on December 22, 2015 and this appeal was filed on January 11, 2016.

I. DID THE SPECIAL REFEREE ERR IN REFUSING TO SET ASIDE THE JUDICIAL SALE OF APPELLANT'S PROPERTY WHERE THE AMOUNT OF THE JUDGMENT RECITED IN THE NOTICE OF SALE AND IN THE EXECUTION UPON WHICH THE SALE WAS BASED WAS SUBSTANTIALLY AND MATERIALLY HIGHER THAN THE ACTUAL AMOUNT OF THE JUDGMENT?

It is respectfully submitted that the Special Referee erred in failing to cancel or set aside the judicial sale of Appellant's property where the principal amount of the judgments against the Appellant totaled $125,270.04, and the Notice of Sale and the Execution upon which the judicial sale was based erroneously recited that the principal amount of the judgment was $193,231.32.

The procedure to be followed in executing on the property of a judgment debtor is governed by statute. Section 15-39-80 of the South Carolina Code of Laws, entitled "Contents of Executions," is crystal clear:

> The execution must be directed to the Sheriff or to the Coroner when the Sheriff is a party or interested, must be attested by the Clerk, subscribed by the party issuing it or his attorney and **must intelligibly refer to** the judgment, stating the Court, the County in which the judgment roll or transcript is filed, the names of the parties, **the amount of the judgment if it be for money**, the amount actually due thereon and the time of docketing in the County to which the execution is issued.

S.C. Code Ann. § 15-39-80 (emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the Courts are bound to give effect to the expressed intent of the legislature. *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language

used, and that language must be construed in light of the intended purpose of the statute. *McClanahan v. Richland County Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

Section 15-39-80, notably, employs the mandatory term "must." The legislature, by employing the term "must," mandated or commanded that each of the referenced contents of an execution are essential.

One of the essential contents of an execution mandated to be included by the statute in a proper execution is "the amount of the judgment if it be for money." § 15-39-80. This is a very basic, fundamental requirement, essential to a proper execution.

In this case, the execution simply did not contain "the amount of the judgment." The execution in this case listed a substantially higher, erroneous figure. The execution recited that the judgment was for $193,231.32, when in truth and fact it was only for $125,270.04.

The execution in this case did not comply with the mandatory provisions of § 15-39-80 in that it did not set forth the amount of the judgment, but rather, set forth a fictitious, erroneous, and substantially inflated number.

CONCLUSION

The Appellant's property was sold at a judicial sale pursuant to an execution issued by the Respondents indicating that the amount of the judgment was $193,251.32 when, in truth and fact, the judgment was only for $125,270.04. The execution failed to comply with the mandatory requirements of § 15-39-80 of the South Carolina Code of Laws, which commands that the execution must set forth "the amount of the judgment if it be for money." The execution in this case did not set forth "the amount of the judgment," but rather set forth an erroneous, fictitious, and materially different amount, over 50% higher than the correct amount. It is respectfully

submitted that the Special Referee erred in allowing the judicial sale to move forward to completion based upon the defective execution.

It is accordingly respectfully requested that the Order of the Special Referee dated August 1, 2014 refusing to suspend or set aside the July 7, 2014 judicial sale be reversed, and the sale of July 7, 2014 be vacated.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: _____

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April 19, 2017

CERTIFICATE OF SERVICE

Undersigned certifies that the Appellant's Initial Brief to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

R. Thayer Rivers, Jr., Esquire
Post Office Box 668
Ridgeland, SC 29936

in a post office or official depository under the exclusive care and custody of the United States Postal Service, April 19, 2017.

MOSS, KUHN & FLEMING, P.A.

By: _____
Sue Radford

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April 19, 2017

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: C.E. Lowther, Jr., Clayton Clark Lowther, Mitchell S. Lowther and Effie Sandra Lowther
v. E. Legrand Lowther
Appellate Case No.: 2016-000042

Dear Mrs. Kitchings:

Enclosed please find the original and one (1) copy of the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in Record on Appeal. Please return a filed copy of these documents to me in the enclosed self-addressed stamped envelope. By copy of this letter and the enclosures, I am serving a copy of the same on R. Thayer Rivers, Jr., Esquire, attorney for the Respondents.

With kindest regards, I am

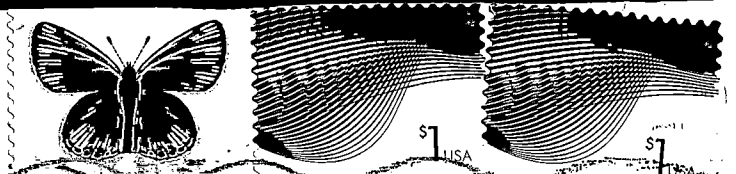
Very truly yours,

MOSS, KUHN & FLEMING, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: R. Thayer Rivers, Jr., Esquire (w/enclosure)



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