

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 REPLY BRIEF

H. Fred Kuhn, Jr., Esquire
Moss, Kuhn & Fleming, P.A.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 – Telephone
(843)524-1302 – Facsimile

Attorneys for the Appellant

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JUN 22 2017

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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?

In their Brief the Respondents argue that their failure to comply with the statutorily mandated requirements of §15-39-80 of the South Carolina Code of Laws should be ignored by this Court because: (1) The Appellant has suffered no prejudice and (2) No remedy exists. Respondent’s Brief, pp. 1 – 2. Each of these arguments is addressed in turn below.

A. PREJUDICE

Without explaining why they believe the Appellant has not been prejudiced, the Respondents summarily conclude that the Appellant has suffered no prejudice, and therefore, their failure to comply with the statutorily mandated requirements of §15-39-80 should be ignored.

First, it is respectfully submitted that the Courts do not have the authority to “waive” a statutorily mandated requirement. Section 15-39-80 plainly, clearly, definitely, and unambiguously requires that an execution “must” state, *inter alia*, “the amount of the judgment if it be for money,” and “the amount actually due thereon.” S.C. Code Ann. §15-39-80. The legislature, in its wisdom, has mandated that an execution must contain the amount of the judgment, as well as the amount actually due on the judgment. With all due respect, the Courts do not have the power to second guess the legislature and decide that a failure to comply with these requirements is harmless.

When the language of a statute is clear and explicit, a Court cannot rewrite the statute. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000). See also, *Timmons v. South Carolina Tricentennial Commission*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970). “When examining statutes, the cardinal rule of statutory construction is to ascertain and give effect to the

intent of the legislature. If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." *Fullbright v. Spinnaker Resorts, Inc.*, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 2153920 (May 17, 2017).

Respondents are asking this Court to rewrite the statute, and make the inclusion of the amount of the judgment, as well as the amount actually due on the judgment, optional.

The legislature, for sound reasons of public policy, has mandated that an execution must set forth the amount of the judgment, as well as the amount actually due on the judgment. This public policy is sound. Imagine the chaos which would ensue if, in every case, a judgment creditor could select an arbitrary number to be stated in the execution, and the burden were shifted to the judgment debtor to prove prejudice, a burden which could be impossible to meet in many cases.

Although the public policy is sound, even if it were not, the Courts are not free to substitute their judgment for the judgment of the legislature. See, e.g., *Sigmon Coal Company, Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000).

Even if it were tempting for this Court to interpret the mandatory "must" of §15-39-80 to be the equivalent of the optional "may," the Court should exercise restraint. Under much more compelling circumstances, the United States Fourth Circuit Court of Appeals explained that the Court should resist temptation even when confronted with what it believes may be an improvement to the statute, stating:

What we are being asked to do is improve the statute - - to amend it, really. The Commissioners' reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch:

If Congress did not say what may appear more reasonable, and said something else, a Court may not step in and perform a congressional, i.e., legislative, act.

... We must interpret statutes as written, not as we may wish for them to be written. Congress' role is to enact statutes – the judiciary's to interpret those statutes as written.

Sigmon Coal Company, Inc. v. Apfel, 226 F.3d 291, 308 (4th Cir. 2000).

The language and requirements of §15-39-80 are clear, plain and definite. The public policy of requiring that an execution must state “the amount of the judgment if it be for money” and “the amount actually due thereon” is sound.

Additionally, although prejudice need not be shown, the Appellant in this case has suffered prejudice. He lost his property. As Respondents state in their Brief, pg. 1, his property was sold at the judicial sale for \$51,000.00. If the true, substantially lower, amount of the judgment had been known, the bidding might have been higher. Indeed, the Appellant might have been able to raise this lower sum of money himself and completely avoid the loss of his property. This prejudice is compounded by the fact that, rather than a single judgment for \$125,270.04, in truth four (4) judgments existed: one (1) in favor of the Respondent Mitchell Lowther in the principal amount of \$59,659.86, and three (3) separate judgments in favor of the Respondents Clark Lowther, Sandra Lowther and C.E. Lowther, Jr., in the amount of \$21,870.06 each. Special Referee's Order on Defendant's Motion to Suspend Sale dated August 1, 2014, pg. 4.

Finally, as Respondents note in their Brief, pg. 2, the Respondents were the successful bidders at the judicial sale, purchasing the Appellant's interest in the property for \$51,000.00, and subsequently, pursuant to an Order issued by the Honorable Marvin H. Dukes, III, sold this property.¹ As noted by Judge Dukes in his Order, this property was appraised with a worth of between \$320,000.00 and \$370,000.00, and his Order authorized the Respondents to accept an

¹ In their Brief, Respondents state that this sale was done with the consent of the Appellant. Respondents' Brief, pg. 2. This is inaccurate. The Appellant objected to this sale, as noted by Judge Dukes' in his Order, pg. 1, which is what necessitated the Order.

offer to purchase the property for \$277,500.00. Order, pp. 2 and 3. Accordingly, the Respondents' fifty (50%) percent interest in this property was worth between \$160,000.00 and \$185,000.00, and actually sold for \$137,500.00, substantially more than the \$51,000.00 received at the judicial sale. The prejudice to the Appellant should be obvious, not to mention the windfall received by the Respondents.

B. REMEDY

Without explanation the Respondents summarily conclude that there is no remedy available to the Appellant.

The remedy available to the Appellant is very simple. Set aside the sale. The execution and the notice of sale upon which the sale was based were fatally defective. They did not comply with the statutorily mandated requirements set forth in the statute. This is the remedy which was requested in the lower Court and which the Special Referee denied. Fortunately, as a practical matter, the remedy of setting aside the judicial sale will be less disruptive in this particular case inasmuch as the Respondents were the successful bidders at the sale, and Judge Dukes, upon the subsequent sale of this property by the Respondents to a third party, ordered all proceeds to be held in escrow. Order of Judge Dukes dated September 28, 2016, pg. 3. Not only was Judge Dukes aware of this appeal, but the third-party purchaser had constructive notice, at least, of this appeal.

CONCLUSION

Without citing a single case, statute, or other legal authority (see Respondents' Brief, Table of Authorities) the Respondents summarily conclude that the Appellant has suffered no prejudice and has no available remedy. In their Brief, the Respondents do not dispute the fact that the execution and notice of sale were defective and did not comply with the requirements of §15-39-

80 of the South Carolina Code of Laws. Instead, Respondents ask this Court to simply ignore the clear directive of the legislature.

The public policy of requiring an execution to set forth the amount of the judgment, as well as the amount due thereon, is sound. It is an unambiguous mandate. It is a mandate with which compliance is simple and easy.

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 & ELEMING, P.A.

By: 

H. Fred Kuhn, Jr.
1501 North Street
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373
(843)524-1302 - facsimile

Beaufort, South Carolina
June 19, 2017

Attorneys for Appellant

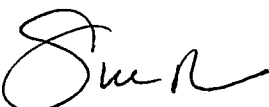
CERTIFICATE OF SERVICE

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, on June 19, 2017.

MOSS, KUHN & FLEMING, P.A.

By: 

Sue Radford

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LAW OFFICES
MOSS, KUHN & FLEMING P.A.

JAMES H. MOSS
H. FRED KUHN, JR.
CORY H. FLEMING

1501 North Street P.O. Drawer 507~Beaufort, South Carolina 29901-0507
TELEPHONE 843-524-3373
FAX 843-524-1302

*ALSO MEMBER OF GA BAR

June 19, 2017

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Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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 the Appellant's Initial Reply Brief regarding the above-referenced matter. By copy of this letter and the enclosure, I am serving a copy of the same on all counsel of record.

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

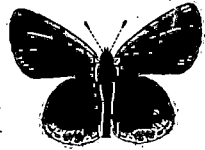
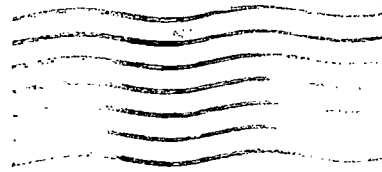
HFK

MOSS, KUHN & FLEMING, P.A.

1501 North Street

P.O. Drawer 507

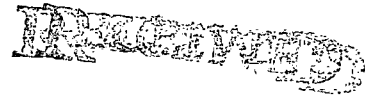
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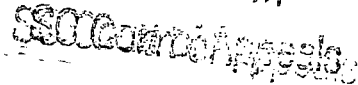
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Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211



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