**SUPREME COURT OF KENTUCKY**
**NO. 2010-SC-000572**

DAVID WADE — APPELLANT

vs.

COURT OF APPEALS NO. 2009-CA-204-MR
JEFFERSON CIRCUIT COURT
ACTION NOS. 91-CI-00782, AND 08-CI-004766

POMA GLASS & SPECIALTY WINDOWS, INC. — APPELLEE

---

**APPELLEE'S BRIEF**

---

I certify that a copy of this Brief was served by deposit in the U.S. Mail, first class, postage prepaid, on this the 9th day of August 2011, addressed to the following named persons:

Hon. Audra Eckerle
Judge - Division 7
Jefferson Circuit Court
700 West Jefferson Street
Louisville, Kentucky 40202

Mr. Philip C. Kimball
Attorney at Law
1970 Douglass Boulevard
Louisville, Kentucky 40205

Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601

Submitted by:

GREGORY B. WATSON
Attorney at Law
P.O. Box 43369
Louisville, Kentucky 40253-0369
502/582-2017
COUNSEL FOR APPELLEE

**SUPREME COURT OF KENTUCKY**
**NO. 2010-SC-000572**

DAVID WADE — APPELLANT

vs.

COURT OF APPEALS NO. 2009-CA-204-MR
JEFFERSON CIRCUIT COURT
ACTION NOS. 91-CI-00782, AND 08-CI-004766

POMA GLASS & SPECIALTY WINDOWS, INC. — APPELLEE

# APPELLEE'S BRIEF

## STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Poma Glass & Specialty Windows, Inc., d/b/a AGC Flat Glass North America ("POMA"), as successor to American Flat Glass Distributors, Inc., the Judgment Creditor in Jefferson Circuit Court Case No. 91-CI-00782, and the original named Defendant in Jefferson Circuit Court Case No. 08-CI-4766, believes that this appeal is capable of decision by reference to the parties' briefs and the record of the case, and that oral argument of the case appears unwarranted.

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

Appellee accepts much of Appellant's Statement of the Case as an accurate characterization of the Procedural History and Factual Circumstances of the case. As an initial exception, despite Appellant's contrary representation on page 1 of his Brief to having at last "*managed to get the . . . Appellee's name right*," Appellant continues to refer incorrectly to Appellee, POMA Glass & Specialty Windows, Inc., as "*POMO*." Appellee's correct name at last appears in the final line of page 8 of Appellant's Brief.

The following exception is not conclusive of the issue presented by this case, but is offered in response to an inaccurate representation made by Appellant. Despite Appellant's contrary assertion that, "Appellant Wade has never made any partial voluntary payments on POMA's judgment against him"; (Appellant's Brief, p. 8, ¶4); Appellant Wade made four voluntary $1,000.00 partial payments between July 30, 1991, and November 8, 1991. The payments were each made by money order, and were tendered to the counsel who first represented Appellee's legal predecessor. A copy of a letter from Appellant Wade, dated November 17, 2002, and copies of four money order receipts submitted with the letter to document those payments are included in the Appendix to this Brief. (Appendix, pp. 1-2).

Appellant also asserts incorrectly that Appellee last issued garnishments upon its Judgment in March 2005. (Appellant's Brief, p. 4, ¶2). Appellant never moved for a Stay of Execution upon the Judgment entered in Jefferson Circuit Court Case No. 91-CI-782, nor posted any bond, and Appellee has levied garnishments as recently as August 18, 2010. One such garnishment levied against PNC Bank seized funds from two accounts, holding combined an approximate $70,000.00, maintained in the joint names of Appellant and his

wife, Barbara Wade. Appellant Wade filed a challenge to that garnishment; a copy of the Affidavit to Challenge Garnishment is included in the Appendix to this Brief. (Appendix, p. 3). After a hearing held before a Jefferson Circuit Court Deputy Master Commissioner on September 15, 2010, the challenge was sustained and the Garnishee, PNC Bank, was directed to return all seized funds to the joint accounts of Appellant and his spouse, upon entry on October 4, 2010, of the Court's related Order granting the challenge. The Master Commissioner's Report, the Court's related Order, and a copy of Appellant Wade's fax cover sheet to the Garnishee are included in the Appendix. (Appendix, pp. 4-8).

Appellant continues to claim that prior to filing Jefferson Circuit Court Case No. 08-CI-4766, he was unaware Appellee had filed a Judgment Lien with the Oldham County Clerk. (Appellant's Brief, p. 5, ¶1). Appellant makes his assertion despite continuing to acknowledge his awareness a Judgment Lien was filed at the same time with the Jefferson County Clerk. Appellant's asserted unawareness would more accurately be characterized as a failure by Appellant to carefully read the two separate Judgment Lien copies which were served upon him – in the same envelope – on January 25, 2000. The sole difference in the lien copies was a reference to the Oldham County Clerk in one, and a reference to the Jefferson County Clerk in the other, with each copy bearing the caption from Jefferson Circuit Court Case No. 91-CI-782, as KRS 426.720(1) requires.

More pertinently, the Jefferson Circuit Court concluded the Judgment entered in Case No. 91-CI-782, was not time-barred and remained enforceable against Appellant. (TR, pp. 356-360). In dicta, the Court of Appeals indicated that although an affirmative conclusion was consistent with its analysis, it need not opine whether Judgment Liens filed pursuant to

KRS 426.720 are "executions" as that term is used in KRS 413.090(1), because Appellee's last effort at collection undertaken in 2005 was a garnishment proceeding. (Opinion of the Court of Appeals, pp. 9-10). The Court of Appeals then affirmed the Opinion and Order of the Jefferson Circuit Court and held specifically:

> . . . when a judgment creditor complies with KRS 426.381, the successor statute to section 439 of the prior Civil Code, and pursues garnishment proceedings pursuant to KRS 425.501, et seq., the most recent date on which such garnishment proceeding is initiated is "the date of last execution" on a judgment as that term is used in KRS 413.090(1). (Opinion of the Court of Appeals, p. 10).

## ARGUMENT

The issue for decision by this Court involves validity of the Court of Appeals statutory interpretation of KRS 413.090, which states in relevant part:

> The following actions shall be commenced within fifteen (15) years after the cause of action first accrued:
>
> (1) An action upon a judgment or decree of any court of this state or of the United States, or of any state or territory thereof, *the period to be computed from the date of the last execution thereon*[.] (emphasis supplied).

(Opinion of the Court of Appeals, p. 2). The Court of Appeals articulated the issue more specifically and thereafter summarized the opposing positions as follows:

> how do we define 'execution' as that term is used in KRS 413.090(1)? . . . Wade interprets the single word "execution" in a technical sense, i.e., the issuance of the formal process, known as a "writ of execution," for the collection of a judgment as

described in KRS 426.020. The Jefferson Circuit Court concluded that, as the term is intended in KRS 413.090(1), the word "execution" has a more general meaning. (Opinion of the Court of Appeals, pp. 2-3).

Appellee's Position

In his appeal to the Court of Appeals, Appellant advocated the narrow interpretation – that the word "execution" as used in KRS 413.090(1) meant solely a property execution issued pursuant to KRS 426.020 – since any more broad interpretation of "execution" would result in the Court of Appeals affirming the decision of the Jefferson Circuit Court that the Judgment entered in Jefferson Circuit Court Case No. 91-CI-00782, remained valid and enforceable.

Appellee asserted the following four grounds for the Court of Appeals to affirm the Opinion of the Jefferson Circuit Court:

- Judgment Liens recorded on January 26, 2000, in the Jefferson County Clerk's Office, and in the Oldham County Clerk's Office, are "executions" within the meanings of KRS Chapter 426 and KRS 413.090(1).
- Post-judgment discovery examinations are a sufficient basis to extend the limitations period pursuant to KRS 413.090(1).
- Garnishments issued upon the Judgment constitute "executions" within the meaning of KRS 413.090(1).
- The Joinder of a Garnishee as a Defendant and Judgment Debtor was a supplementary action on the Judgment which extended the limitations period pursuant to KRS 413.090(1).

**A. Appellee's filing of the Judgment Liens recorded on January 26, 2000, in the Jefferson County Clerk's Office, and in the Oldham County Clerk's Office, are "executions" within the meanings of KRS Chapter 426 and KRS 413.090(1).**

As noted above, in dicta the Court of Appeals indicated that although an affirmative conclusion was consistent with its analysis, it need not opine whether Judgment Liens filed pursuant to KRS 426.720 are "executions" as that term is used in KRS 413.090(1), because Appellee's last effort at collection undertaken in 2005 was a garnishment proceeding. (Opinion of the Court of Appeals, pp. 9-10).

Appellant argues, "Clearly, by using the word execution in KRS 413.090(1), the legislature meant execution and execution only. After all, **it enacted the statute concerning executions into KRS chapter 426**, and the other forms of enforcement remedies for the satisfaction of judgments into KRS chapter 425." (Appellant's Brief, p.12, ¶4)(emphasis added).

Appellant acknowledges that Appellee had filed a Judgment Lien on January 26, 2000, against Appellant Wade's interest in real estate with the Jefferson County Clerk. (Appellant's Brief, p. 4, ¶3; TRSI, p. 5, ¶8; p. 26, ¶3). The referenced Lien was recorded at Book 592, Page 267, in the records of the Jefferson County Clerk's Office. Appellant has also acknowledged that "during January 2000," Appellee filed a Judgment Lien against Appellant Wade's interest in real estate with the Oldham County Clerk. (Appellant's Brief, p. 4, ¶4; TRSI, p. 26, ¶3). The referenced Lien was also recorded on January 26, 2000, at Book E53, Page 166, in the records of the Oldham County Clerk's Office. As stated above, the two separate Judgment Lien copies were served upon Appellant – in the same envelope – on January 25, 2000. The sole difference in the lien copies was a reference to the Oldham

County Clerk in one, and a reference to the Jefferson County Clerk in the other, with each copy bearing the caption from Jefferson Circuit Court Case No. 91-CI-782, as KRS 426.720(1) requires.

KRS 426.720, enacted in 1988, is the statutory authority for the Judgment Liens recorded against Appellant's interest in his residential real property located within Jefferson County, and against his commercial real property located within Oldham County, as well as other interests in additional real property, if any, Appellant may hold in either County. KRS 426.720 states in applicable part:

> A final judgment for the recovery of money or costs in the courts of record in this Commonwealth, whether state or federal, shall act as a lien upon all real estate in which the judgment debtor has any ownership interest, in any county ***in which the following first shall be done:***
>
> *(1) The judgment creditor or his counsel shall file with the county clerk of any county a notice of judgment lien containing the court of record entering the judgment, the civil action number of the suit in which the judgment was entered, and the amount of the judgment* . . . (emphasis added).

Appellant argues incorrectly, "Since liens exist as of the date of the judgment, the mandatory act of filing them cannot be said, in law or logic, to have any greater cosmic significance than the judgment itself, such as to somehow extend the 'life' of the judgment." (Appellant's Brief, pp. 17-18). Appellant's argument simply ignores mandatory conditions of KRS 426.720 required for creation of a lien in a particular county. In addition, Appellant's argument fails to recognize the logical basis why a judgment creditor may wait to file a

judgment lien until a judgment debtor's ownership of real property in one or more of the 120 counties in Kentucky is discovered. Once Appellee's Counsel discovered Appellant's ownership of his commercial real property in Buckner, Kentucky, then the Oldham County Judgment Lien was recorded, and by the express language of KRS 426.720, no lien existed in Oldham County, prior to January 26, 2000.

Appellee acknowledges KRS 426.720 does not contain the word "execution," but the statute is one form of the execution issues addressed in KRS Chapter 426, "Enforcement of Judgments." As stated in *Adams v. Napier*, Ky., 334 S.W.2d 915, 916 (1960), "[a]n execution creates a lien on the defendant's property, and the sale thereunder is to satisfy the lien." See *Pineville Steam Laundry v. Phillips*, 254 Ky. 391, 71 S.W.2d 980 (1934). Appellee continues to assert the recording of a Judgment Lien on January 26, 2000, constituted an "execution" pursuant to KRS 413.090(1), as the Court of Appeals indicated, in dicta, "was consistent with its analysis." (Opinion of the Court of Appeals, p. 10). Appellee further asserts the fifteen-year limitations period for commencing an action on the underlying judgment could then be properly recalculated as beginning the date the Judgment Lien was recorded, January 26, 2000.

**B. Post-judgment discovery examinations taken by Appellee are a sufficient basis to extend the limitations period pursuant to KRS 413.090(1).**

Appellant argues, "If the legislature had intended for the statute of limitations for actions upon judgments to run from the date of any other form of enforcement action than an execution, it would have used another word or words than execution. (Appellant's Brief, p. 12, ¶2). Appellant once again cites two decisions in a manner implying that those cases

construe the term "execution," and support the definition he advocates in this appeal: *"The language of KRS 413.090(1) is clear and unambiguous; its use of the word "**execution**" must be held to mean what that word plainly expresses," Hawley Coal Co. v. Bruce*, 252 Ky. 455, 67 S.W.2d 703 (1934)(emphasis added); (Appellant's Brief, p. 12, ¶1); and, "*Since the word **execution** has a well-defined legal meaning separate and apart from that of other remedies for the enforcement of judgments, and since all of these remedies . . . were created by the General Assembly, the word **execution** must be given its well-defined legislative meaning created by the Courts," London v. Franklin*, 118 Ky. 105, 80 S.W. 514 (1904) (emphasis added). (Appellant's Brief, p. 13, ¶6).

**Although both cases cited by Appellant construe the meanings of words and phrases, neither cited case involves interpretation of the term "execution."** In *Hawley Coal Co. v. Bruce*, the Court construed the meaning of "personal property." *Hawley Coal Co.*, 67 S.W.2d 703, 705. In *London v. Franklin*, the Court construed the phrase "at the pleasure of," and found it to be different than a right to remove for cause. *London v. Franklin*, 80 S.W. 514, 515.

As reported by the Court of Appeals, "The limitations statute was enacted as part of Kentucky Revised Statutes in 1942, but the relevant language can be traced to 1852. *Davidson v. Simmons,* 11 Bush 330, 74 Ky. 330, 332, 1875 WL 6748 (1875)("Section 1 of article 3, chapter 63 of the Revised Statutes, which went into effect in 1852, fixed fifteen years as the period of limitations to actions on the judgments or decrees of the courts of the United States or of any state or territory thereof, the period to be computed from the date of the last execution thereon.")." (Opinion of the Court of Appeals, p. 3, ¶2). The same

statutory language eventually became Section 2514 of the Civil Code. Section 2514 concerned Limitation of Actions, and read in relevant part:

> "Civil actions, other than those for the recovery of real property, shall be commenced within the following periods after the cause of action has accrued, and not after. An action upon a judgment or decree of any court of this State, or of the United States, or of any State or Territory thereof, the period to be computed from the date of the last **execution** thereon . . . shall be commenced within fifteen years . . . ". (emphasis added).

The underlined part of the original statute still exists today - in the same language - in the current limitations statute, KRS 413.090. When Section 2514 was construed in 1913, in the case of *Slaughter v. Mattingly*, 159 S.W. 980 (Ky., 1913), the Court held:

> A creditor may keep a judgment alive indefinitely by either 1) Causing executions to issue from time to time within the period prescribed by statute; or 2) commencing an equitable action under Section 439 of the Civil Code. *Id.*, at 982.

The narrow interpretation of KRS 413.090(1) advocated by Appellant seeks nothing other than to disregard an alternative means to "keep a judgment alive indefinitely," held to exist in *Slaughter v. Mattingly*. Section 439 stated:

> After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, **the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and**

**all other property to which the Defendant is entitled,** and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants. (emphasis added).

The express language of Section 439 suggests that actions undertaken to discover a Judgment Debtor's assets were also sufficient to "keep the judgment alive indefinitely," pursuant to *Slaughter v. Mattingly.*

Appellee concurs that much of Section 439 of the Civil Code is now embodied within KRS 426.381. Although not initiated by the filing of a pleading entitled, "an amended and supplemental petition," as Appellant contends is required; (Appellant's Brief, p. 16, ¶3); Appellee asserts that the post-judgment discovery examinations taken upon Bills of Discovery pursuant to Jefferson Rule of Procedure 508, are "actions for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the Defendant is entitled." (TR pp. 31-32). Appellee further asserts that these post-judgment discovery examinations taken upon Bills of Discovery are, "such supplemental proceeding . . . [taken] (at his option) [by which] the plaintiff may have discovery . . . and may have any property discovered . . . subjected to the satisfaction of the judgment." KRS 426.381(1). Appellee further notes that these post-judgment discovery examinations taken upon Bills of Discovery are taken under oath pursuant to the mandate of KRS 426.382.

A post-judgment discovery examination was last taken from Appellant on November 8, 2002, and a post-judgment discovery examination was last taken from Appellant's wife, Barbara Wade, on May 30, 2003. Appellee asserts that pursuant to *Slaughter v. Mattingly*,

these post-judgment discovery examinations remain a sufficient basis to extend the limitations period pursuant to KRS 413.090(1); therefore, the fifteen-year limitations period for commencing an action on the underlying judgment against Appellant could than have been properly recalculated as beginning the date of the last such discovery examination, May 30, 2003.

### C. Garnishments issued upon the Judgment constitute "executions" within the meaning of KRS 413.090(1).

As stated by the Court of Appeals, "the law pertaining to enforcement and collection of judgments has seen notable administrative and substantive changes in the century and a half since the statute's original enactment." (Opinion of the Court of Appeals, pp. 3-4). Once again, Section 439 of the Civil Code stated:

> After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, **the plaintiff in the execution may institute an equitable action** for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the Defendant is entitled, and for **subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants**. (emphasis added).

In 1952, the legislature enacted KRS Chapter 425, effective July 1, 1953, which compiled

various provisions of the Civil Code concerning the process for levying attachments or garnishments. KRS 425.225, which originated as Section 203 of the Civil Code, was titled, "Execution of order," and addressed both attachments and garnishments:

> The order of attachment shall be executed by the sheriff without delay in the following manner:
>
> (1) Upon real property, by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order;
>
> (2) Upon personal property capable of manual delivery, by taking it into his custody and holding it subject to the order of the court; or, if it be held by another officer under process or under a distress for taxes, by delivering to him a copy of the order, with a notice specifying the property attached;
>
> (3) Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it; or, as to stock in a corporation, or property held, or a debt or demand owing by it, to the officer or agent upon whom a summons may be served, and by summoning the person or corporation to answer as a **garnishee** in the action. The sheriff shall deliver copies to, and summon, such persons as **garnishees** as the plaintiff may direct. But no notice need be given in any case describing or specifying the debt or demand attached, but only a notice that the persons or corporation to whom the order of attachment is delivered is summoned to answer as a garnishee in the manner and at the time provided for an answer by the Rules of Civil Procedure, (1952 c 84, ss11. Eff. 7-1-53. 1886 c 1163). (emphasis added).

In 1976, the statutory authority for non-wage garnishments was amended and re-titled as KRS 425.501. Subsection 5 of KRS 425.501, in a similar and just as express manner as KRS 425.225, refers to the garnishment process as one of "execution." A Garnishment Order issued pursuant to KRS 425.501, is nothing other than an execution levied against a debt, demand, or other monies which are the personal property of a Judgment Debtor.

As the Court of Appeals stated:

> "*Slaughter* was decided when the ancient rules of pleading and collection required the filing of a separate action in a court of equity in order to collect on a judgment obtained in a court of law. *Shepherd v. Haymond*, 291 Ky. 780,165 S.W.2d 812, 816 (1942)("The reason for Section 439 *et seq.*, of the Civil Code of Practice, is that the plaintiff's claim or demand is purely a legal one and the law is inadequate to afford him complete redress by reaching over and out into the province of equity."). Only by filing a separate action in a court of equity, pursuant to section 439 of the old Civil Code, could a judgment creditor discover and garnish assets of the judgment debtor. *Davidson v. Simmons, supra,* 74 Ky. at 333 (equity action "was the only kind of action that could then or can now be maintained upon a judgment of a court of this state"). When the Kentucky Revised Statutes supplanted the old Civil Code and the modern rules of procedure were adopted, the distinction between a suit in equity and an action at law was eliminated. *Caudill v. Little,* 293 S.W.2d 881, 882 (Ky. 1956)("our new Civil Rules of Practice and Procedure abolish distinctions between a suit in equity and an action at law and provide that there shall be but one form of action"; citing Kentucky Rule of Civil Procedure (CR) 2). Specifically, the

old Section 439 was replaced by KRS 426.381(1) which took into account the elimination of the equity/law dichotomy. Today, a judgment creditor may proceed with collection efforts in the same proceeding in which the judgment was awarded. KRS 426.381(1). Furthermore, the judgment creditor now "may have an attachment against the property of the defendant in the execution, pursuant to the attachment procedures provided for in KRS Chapter 425." KRS 426.381(2). These attachment procedures include garnishment pursuant to KRS 425.501. While garnishment existed at common law, these specific procedures did not; they were created for the first time by enactment of the statute in 1976, thereby expanding the available processes by which a judgment may be collected.

*Slaughter* specifically holds that a creditor relying on a judgment "may keep it alive indefinitely by commencing an action on the judgment under section 439 of the Civil Code within the time and in the manner prescribed by said section, and keeping the action on the docket." *Slaughter* at 982. It is logical to conclude that a creditor relying on a judgment may keep it alive indefinitely by pursuing the relief afforded by the successor statutes to section 439, *i.e.,* KRS 426.381 and KRS 425.501, *et seq.* and keeping the action on the docket. That is what occurred here." (Opinion of the Court of Appeals, pp. 5-7). The Court of Appeals continued in footnote 6 of its Opinion:

"Wade argues that Poma failed to comply with KRS 426.381 because it never filed an "amended and supplemental petition." We disagree. Poma's collection efforts comported with KRS 426.381 because they came only "[a]fter an execution of fieri

facias [was] returned . . . no property found" and in the form of a garnishment naming and summoning additional parties as garnishees who were compelled by KRS 425.501(8) to answer. This satisfies the statute's requirement of an amended and supplemental petition." (Opinion of the Court of Appeals, p. 7).

The Court of Appeals offered four reasons for its conclusion that a garnishment constitutes an "execution" within the meaning of KRS 413.090(1):

> "First, KRS 446.015 instructs that statutes be written "in [a] clear and coherent manner using words with common and everyday meanings." When interpreting these words we assume that the legislature followed this directive so that we will ascribe to a word its common meaning, not a technical one. KRS 446.015 ("Enactment of a bill by the general assembly shall be a conclusive presumption that such bills conform to this section.") In this case, the word "execution" is used. Webster's Dictionary defines execution as "the act or process of executing." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 405 (10th ed. 1993). Execute means "to carry out fully." *Id.* Black's Law Dictionary defines execution as "[t]he act of carrying out or putting into effect[.]" BLACK'S LAW DICTIONARY 589-590 (7th ed. 1999).
>
> Second, our use of the more common and general definition is consistent with authority that has addressed the question in a broader sense.
>
> As used in statutes the term "execution" often is construed in a broad sense as including more than the writ as already defined, although it is sometimes used as merely equivalent to a fieri facias. Thus, it sometimes embraces all

the appropriate means of execution of the judgment; all means by which the judgments or decrees of courts are enforced; all processes issued to carry into effect the final judgment of a court; and all processes and proceedings in aid of, or supplemental to, execution that are customary in civil cases.

33 C.J.S. Executions § 1 (citations in footnotes omitted).

Third, this Court has specifically referred to the collection method used most often by Poma, garnishment, as a form of execution. *Brown v. Commonwealth*, 40 S.W.3d 873, 880 (Ky.App. 1999)("In *Barton v. Hudson,* [560 S.W.2d 20 (Ky.App. 1977)] this Court was asked to decide whether a joint checking account . . . was subject to *garnishment* [or] was immune from *such execution.*" Emphasis supplied); *accord, Moory v. Quadras, Inc.*, 970 S.W.2d 275, 277 (Ark. 1998)(" a writ of garnishment is a form of 'execution' in the general sense as a post-judgment collection remedy"); *Division of Employment Sec. v. Westerhold*, 950 S.W.2d 618, 621 (Mo.App. 1997)("Garnishment is a form of execution."); *Russell v. Fred G. Pohl Co.*, 7 N.J. 32, 80 A.2d 191, 194 (N.J. 1951)("Attachment and garnishment are forms of execution").

Fourth, the garnishment statute itself treats garnishment as a form of execution from which the debtor may claim exemption if such exemption is applicable in the debtor's particular case. KRS 425.501(4)(debtor may "claim the exemption of any property or debt that is exempt from *execution*"; emphasis supplied); KRS 425.501(5)("If . . . garnishee [possessed] property of the judgment debtor, or was indebted to him, and the property or debt is not exempt from

*execution*, the court shall order the property or the proceeds of the debt applied upon the judgment." Emphasis supplied). Furthermore, for decades our legislature has equated attachment, garnishment and execution in its enactments."

(Opinion of the Court of Appeals, pp. 7-9). The Court of Appeals then stated the following in footnote 8:

"The following statutes place attachments, garnishments, and executions on an equal footing. KRS 21.470; KRS 61.690(1); KRS 67A.350; KRS 154A.110(1); KRS 161.700; KRS 164.2871; KRS 164A.350(9); KRS 304.33-110(3)(a); KRS 304.33-580; KRS 304.39-260; KRS 427.010(1); KRS 427.030; KRS 427.040; and KRS 427.045. KRS 304.14-330(1)(b) specifically refers to the process of "garnishee execution." (Opinion of the Court of Appeals, p. 9).

Appellant asserts incorrectly that, "Garnishment procedures . . . require that the judgment creditor *know* that the third person to whom the process is directed . . . hold[s] property belonging to or [is] indebted to the judgment debtor." (Appellant's Brief, p.28, ¶3). Appellant ignores KRS 425.501(3), which states in applicable part:

"The processing fee may be retained by the garnishee regardless of whether the court finds that the garnishee was or was not, at the time of the service of the order upon him, possessed of any property of the judgment debtor."

KRS 425.501(3). It appears beyond dispute the legislature contemplates circumstances where a judgment creditor may believe - but does not know with certainty - that a third-party may hold property of or may be indebted to a judgment debtor, but the levy of a garnishment to enforce the judgment does not confirm any such knowledge and proves unsuccessful. This

Court need look no further for confirmation than the numerous unsuccessful garnishment returns which are part of the record in Jefferson Circuit Court Case No. 91-CI-782.

Subsequent to elimination of the distinction between a suit in equity and an action at law, and now that a judgment creditor may proceed with collection efforts in the same case in which a judgment is awarded, as the term "execution" is used in KRS 413.090(1), no fundamental difference exists between a garnishment levied pursuant to KRS 425.501, and a property execution levied pursuant to KRS 426.020. The intent of both remedies is to enforce collection of a judgment, and no logical reason exists to distinguish between those remedies when interpreting the term "execution" as used in KRS 413.090(1). Once again, the narrow interpretation of KRS 413.090(1) advocated by Appellant seeks nothing other than to disregard an alternative means to "keep a judgment alive indefinitely," held to exist in *Slaughter v. Mattingly*.

When Appellant appealed this case to the Court of Appeals, the most recent Garnishment Orders which had been levied upon the underlying Judgment were issued against multiple financial institutions in March 2005. (TRSI, p. 26, ¶3; TR, p. 320-329). None of those garnishments were successful. The last successful Garnishment Orders levied upon the Judgment which seized funds and resulted in monies credited toward the Judgment were returned to Appellee's Counsel on April 26, 2004, and June 9, 2004. As noted on page 1 of this Brief, Appellant never moved for a Stay of Execution upon the Judgment entered in Jefferson Circuit Court Case No. 91-CI-782, and Appellee has since levied garnishments as recently as August 18, 2010. One such garnishment levied against PNC Bank seized funds from two accounts maintained in the names of Appellant and his wife, Barbara Wade.

Appellant Wade filed a challenge to that garnishment. (Appendix, p. 3). A Jefferson Circuit Court Deputy Master Commissioner sustained the challenge, directing PNC Bank to return all seized funds to the joint accounts of Appellant and his spouse, and the Court's related Order granting the challenge was entered on October 4, 2010. (Appendix, pp. 4-7).

If the Court construes that the issuance and levy of a Garnishment Order which proves unsuccessful constitutes an adequate basis for extension of the statute of limitation for actions upon judgments, either as an "execution" within the meaning of KRS 413.090(1), or as another permitted means to "keep a judgment alive indefinitely," as determined in *Slaughter v. Mattingly*, then the fifteen-year limitations period for commencing an action on the underlying judgment should be recalculated from the appropriate date in 2010. If the Court construes that only the issuance and levy of a Garnishment Order that liens or seizes funds which are then paid with the Garnishee's Answer, and are thereafter credited against the judgment, constitute an "execution" within the meaning of KRS 413.090(1); "[a] n execution creates a lien on the defendant's property, and the sale thereunder is to satisfy the lien," *Adams v. Napier*, 334 S.W.2d 915, 916; or another permitted means to "keep a judgment alive indefinitely," as determined in *Slaughter v. Mattingly*, then the fifteen-year limitations period for commencing an action on the underlying judgment should apparently be recalculated from the date the last successful return on a Garnishment Order was received, on June 9, 2004.

**D. The Joinder of a Garnishee, James Winn, as a Defendant and Judgment Debtor was a supplementary action on the Judgment which extended the limitations period pursuant to KRS 413.090(1).**

No dispute exists that a supplementary action was instituted during 2003, against a

Garnishee. During 2003, Appellee caused the issuance of Garnishment Orders against several tenants of premises at Appellant's commercial real property located in Buckner, Oldham County, Kentucky. One such Garnishee, James Winn, was served with the Garnishment Order in July 2003. (TR, p. 196). Due to his continued failure to comply with the Garnishment Order, upon a Motion filed by Appellee on August 21, 2003, and after a hearing held before the court on September 16, 2003, the Jefferson Circuit Court entered a Judgment for Contempt against Garnishee Winn, on September 17, 2003. (TR, pp. 209-219). On October 17, 2003, a Judgment Lien was recorded against Winn, as a co-Judgment Debtor, at Book 743, Page 111, in the records of the Jefferson County Clerk's Office. Pursuant to additional issued Garnishment Orders, funds belonging to Winn were thereafter seized and credited against the Judgment entered against Appellant Wade.

Upon a Motion by Winn, on October 8, 2003, the Jefferson Circuit Court afforded Winn an opportunity to cure his contempt, and Set Aside the Judgment against him, by the Court's Order entered on October 15, 2003. (TR, pp. 244-247). When Winn thereafter remained in contempt, upon a Motion filed by Appellee on December 11, 2003, and after a hearing held before the court on December 15, 2003, the Jefferson Circuit Court reinstated the Judgment against Winn, by the Court's Order entered on March 9, 2004. (TR, pp. 266-276). On March 26, 2004, another Judgment Lien was recorded against Winn, at Book 765, Page 78, in the Jefferson County Clerk's Office, and pursuant to another Garnishment Order additional funds belonging to Winn were seized – and were again credited against the Judgment entered against Appellant Wade – Winn again moved the Court for relief from the Judgment. (TR, pp. 316-319).

Winn's second motion seeking relief from the Judgment for Contempt asserted that he no longer owed any rent to Appellant Wade, at the time the last Garnishment Order was served upon him, due to a "trade out" agreement entered, allegedly, between Appellant Wade and Winn, in May 2003; a copy of the alleged "trade out" agreement was included in the Appendix to Appellee's Brief to the Court of Appeals, and another copy is included in the Appendix to this Brief. (Appendix, p.9). Curiously, the document bearing the original signatures of Appellant Wade and Winn was sent to Appellee's Counsel, by Winn, and more curiously, the alleged "trade out" for rent was scheduled to commence October 1, 2003. The Jefferson Circuit Court again Set Aside the Judgment against Winn, the Court's Order was entered on August 27, 2004, despite Appellee's argument that the alleged "trade out" agreement was nothing other than a sham to frustrate further garnishments against Winn, to seize rent he owed to Appellant Wade, for premises leased by Winn at the commercial real property owned by Appellant in Buckner, Kentucky.

If the Court construes the actions undertaken by Appellee against Garnishee Winn, as constituting another permitted means to "keep a judgment alive indefinitely," as determined in *Slaughter v. Mattingly*, then pursuant to KRS 413.090(1), the fifteen-year limitations period for commencing an action on the underlying judgment could then be recalculated from the last qualifying date for the actions undertaken against Winn.

## CONCLUSION

For the reasons stated in this Brief, Appellant is not entitled to the relief sought from this Court. Appellant continues to seek nothing less than for this Court to reward his exhaustive efforts to frustrate collection and to avoid payment of the Judgment entered

against him. Appellee asserts that the existing law and the facts in this case do not support Appellant's narrow interpretation of KRS 413.090(1). Whether solely upon the basis of the Judgment Liens recorded on January 26, 2000, or upon the additional basis of the post-judgment discovery examinations - the date of the last such discovery examination being May 30, 2003, or upon the basis of the most recent Garnishment Orders issued upon the Judgment, successful or unsuccessful, or upon the proceedings instituted to join Garnishee Winn as a Defendant and co-Judgment Debtor, Appellee asserts that the position advocated by Appellant Wade is an inaccurate interpretation of KRS 413.090(1).

Therefore, for the reasons discussed hereinabove, Appellee, Poma Glass & Specialty Windows, Inc., d/b/a AGC Flat Glass North America, as successor to American Flat Glass Distributors, Inc., requests respectfully that the Court reject Appellant Wade's appeal, and AFFIRM the Opinion of the Court of Appeals and the Judgment of the Jefferson Circuit Court, and their respective rulings concluding the Judgment entered in Jefferson Circuit Court Case No. 91-CI-782, is not time-barred and remains enforceable against Appellant Wade.

Respectfully submitted,

GREGORY E. WATSON
Attorney at Law
P.O. Box 43369
Louisville, Kentucky 40253-0369
502/582-2017
COUNSEL FOR POMA