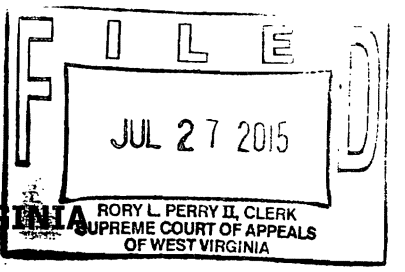

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 15-0364

ALBIN LITTELL, individually, and as TRUSTEE OF THE LITTELL COAL INTEREST TRUST — **PETITIONER/APPELLANT**

V.

STEVE MULLINS, and DONALD HICKS CLERK OF THE COUNT COMMISSION OF MCDOWELL COUNTY, WEST VIRGINIA, — **RESPONDENTS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

(08-C-178)

BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

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ASSIGNMENTS OF ERROR

Appellant, Albin Littell, assigns the following errors from the proceedings before the Circuit Court of McDowell County, West Virginia.

I. The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based Upon Appellee, Steve Mullins' Failure to Comply With West Virginia Code §11A-3-19.

II. The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based on the Denial of Appellant's Rights to Due Process Under the Constitutions of Both United States and the State of West Virginia.

III. The Trial Court Erred Failing to Set Aside the Deed Dated April 26, 2006 Based Upon the Lack of Notice to Appellant

STATEMENT OF THE CASE

The matter below was an action pursuant to West Virginia Code §11A-4-3, and West Virginia Code § 11A-4-4, to set aside a deed dated April 26, 2006, from Appellee, Donald Hicks, the Clerk of the County Commission of McDowell County, West Virginia, (hereinafter "Hicks"), to Appellee, Steve Mullins (hereinafter "Mullins") pursuant to Mullins' purchase of a tax lien for 2003 ad valorem taxes on an undivided interest in 279 acres in the Big Creek District of McDowell County, at a November 16, 2004 tax sale conducted by the Sheriff of McDowell County.

Following a bench trial, the trial court denied Appellant's request to have the April 26, 2006 deed set aside. Appellant seeks reversal of the trial court's decision, and requests the April 26, 2006 deed be set aside.

The action before the trial court involved two parcels located in the Big Creek District of McDowell County. The properties, located on Slate Creek, in the Big Creek District of McDowell County, were assessed and taxed as Parcel 7 on Tax Map 286, and Parcel 5 on Tax Map 366. (Plaintiff's Exhibit 8) (App. 176). The Slate Creek properties are historically owned in multiple undivided fractional interests, by individual and entities with various family connections. The instant appeal concerns only Parcel 7, on Tax Map 286 of the Big Creek District of McDowell County.

Up to 1998, the Slate Creek properties were taxed under a single ticket associated with Parcel 7 on Map No. 286. The stated acreage on such ticket was 643 acres. The parcels are not, however, contiguous to one another. (Plaintiff's Ex. 9). (App. 177).

In 1999, the tax ticket was split and the Slate Creek properties were taxed as the two parcels noted above. The split of the tax parcels in the 1999 tax year is displayed, by example, in the interests of Hall Mining Company, a co-owner holding an undivided interest in the parcels. Hall Mining was taxed on the parcel appearing on Map 386 at Parcel 7, described as 279 acres, and Parcel 5 on Tax Map 366 as 364 acres. (Plaintiff's Exhibit 8) (App. 176).

After the split of the tax tickets, beginning in 1999, an entry also appeared in relation to Parcel 7 of Map 286 as an undivided interest in 279 acres in the name of "Nancy Doonan Est.", indicating the interest was that belonging to the estate of Nancy Doonan. In all, beginning with the 1999 tax year, there were 13 or 14 separate interests assessed separately on the 279 acres, which is Parcel 7 Map 286. (App. 120-21).

Nancy Doonan died in approximately 1989. Plaintiff, Albin Littell, is the grandson of Nancy Doonan, and an heir to her interest in Parcel 7 of Map 386. Upon her death, the interest owned by Nancy Doonan in the Slate Creek properties passed to plaintiff, Albin E. Littell and his mother, who established the Littell Coal Interest Trust, in approximately 1999. The trust assumed control of the interest passed to Albin Littell and his mother by Nancy Doonan, although, there does not appear to have been a deed of conveyance specifically conveying the Slate Creek property to the Trust. (App. 53-54) (App. 185-86).

Taxes on the Nancy Doonan Est. interest, assessed on Parcel 7 of Map 386, were paid through the 2002 tax year. However, taxes for the 2003 tax year on the Nancy

Doonan Est. interest in Parcel 7 on Map 386, went unpaid, and on November 16, 2004, Appellee Mullins purchased the tax lien for the undivided interest at the tax sale conducted by the Sheriff of McDowell County, West Virginia. The unpaid taxes were $34.10. Mullins paid $115.84 to purchase the tax lien at the sheriff's sale. (App. 159).

Subsequent to the sheriff's sale in order to receive a deed and for the property purchased, Appellee Mullins was required, pursuant to West Virginia Code §11A-3-19, to provide a list to the Clerk of the County Commission of McDowell County, Appellee Hicks, of persons to be served with a notice to redeem, and to request that the Clerk prepare and serve such Notice to Redeem. In fulfillment of this obligation, defendant Mullins, provided a statement to the clerk which simply said "No Known Heirs". (Plaintiff's Ex. 2) (App. 160).

Prior to providing the Clerk the list of individuals to whom notice was required to be sent, defendant Mullins, performed the examination of the title to the subject property himself. He did not at any time consult or retain the services of legal counsel for the purpose of title examination, or preparation of the list provided to the Clerk. (App. 86).

Mullins acknowledged the listing in the tax books for the subject property indicated ownership in the Nancy Doonan Estate, indicating that Nancy Doonan was in fact deceased, and the interest was owned by her heirs. (App. 88). He also acknowledged his understanding that the interest Ms. Doonan, or her heirs, owned was an "undivided" interest meaning there were others who owned an interest in the parcel. (App. 85).

In examining the title, Mullins reviewed the lien index, as well as the grantor and grantee indexes for deeds and deeds of trust in the office of the Clerk of the County Commission. Mullins also checked with the Sheriff's Office to determine if there had been a change of address as to the tax ticket on the subject property. He did not, however, make inquiry of the Sheriff's office as to who had paid the taxes in previous years or any information as to the identity or address of the previous payor derived from previous payments.

In the course of his search Mullins reviewed map cards held in the McDowell County Assessor's office relating to Parcel 7. (Plaintiff's Exhibit 10). (App. 179). He acknowledged that the map card listed the owners of the property as Hall Mining Co., et al. and contained an address of Box 187, Tazewell, VA 24651. He also acknowledged an understanding of the term "et.al." as meaning the owners of the property were Hall Mining and others. (App. 95). However, Mullins undertook no action, or made any attempt to identify any of those co-owners. (App. 92). Mullins also acknowledged that he did not notify the clerk of the identity of any cotenant or co-owner, including Hall Mining, as those entitled to receive notice of the transfer to him, or the right to redeem. (App. 96).

On February 16, 2006, following the submission of the list of persons to be served by Appellee, Mullins, the Clerk sent a "Notice to Redeem" by certified mail to "Nancy Doonan Est." at 6035 E. Grant Rd., Tucson, AZ 85712. The certified mail was returned with the notation "ANK" (Addressee Not Known). (Plaintiff's Ex. 3). (App. 161).

No notice of the intended conveyance, or the right to redeem were sent to any other parties, including owners of other fractional interests in the parcel. (App. 91).

Mullins made no inquiry as to whether the certified mailing to those entitled to notice was in any fashion successful, and undertook no additional efforts to provide actual notice to property owners, or others entitled to notice. (App. 91).

Thereafter, the Clerk published a Notice of the Right to Redeem in the Welch News, and the Industrial News for three consecutive weeks beginning February 8, 2006, and ending February 22, 2006. The notice to redeem which was published also made reference to the Nancy Doonan Estate and the Grant Road address set forth above. (Plaintiff's Ex. 4) (App. 163).

Neither Mr. Mullins, nor Mr. Hicks undertook additional action to identify other information which might reasonably assist the attempt to provide notice to the owners of the subject property. (App. 22, 91).

On April 26, 2006, Mr. Hicks executed a deed presented to him by Mullins, conveying the property which was subject to the certificate of sale initially presented. Hicks undertook no independent action with reference to the deed and merely executed it upon presentation as a function of his office. Following execution by Hicks, the deed was recorded in the Clerk's office in Deed Book 502 at Page 559. (Plaintiff's Ex. 5) (App. 165).

Prior, on May 6, 2003, the Sherriff of McDowell County accepted payment of the 2002 real estate taxes on the Nancy Doonan Est. interest, by a check dated April 28, 2003, issued upon the account of "Littell Coal Interest Trust" and "Albin Littell" in the

amount of $34.62. The check contained the address 4640 E. Skyline Dr., Tucson Az. 85716-1631. (Plaintiff's Ex. 7) (App. 175).

Hall Mining Company is one of several owners of undivided interests in the Slate Creek parcel located in the Big Creek District of McDowell County, West Virginia listed as Parcel 7 on Map 386. Hall Mining and these other owners of undivided interests were co-owners with Nancy Doonan, and her heirs, in Parcel 7. Each of their interests were, and are, assessed separately. (App. 120-121).

Charles Hart is the Secretary/Treasurer of Hall Mining Company. In his capacity at Hall Mining, he is responsible for the receipt and handling of tax tickets relating to Hall Mining Company's interests including the Slate Creek tracts. (App. 66).

The address noted by Mullins on the assessor's map card, Box 187 Tazewell Va., is the correct mailing address for Hall Mining Company. Mr. Hart testified he did not, at any time receive, on behalf of Hall Mining Company, or any other co-owner, notification that the taxes for the interest taxed to the Nancy Doonan estate was delinquent, had been sold, was subject to any right of redemption, or was to be conveyed to Mr. Mullins. (App. 63)

Mr. Hart testified he knows the Appellant, Albin Littell, personally and they have a relationship in which they communicate with some frequency. Mr. Hart testified that had he received such notice, or any information indicating a delinquency or potential transfer of the Nancy Doonan estate interests, he would have immediately contacted Albin Littell to inform him of the status of this property and to encourage him to immediately address the delinquency and/or redemption. (App. 66). For his part Mr.

Littell testified such a communication from Mr. Hart would have prompted immediate action and payment of the amounts necessary to redeem the property. (App. 42).[1]

Testimony from Appellant, Albin Littell, provided explanation about the failure to receive the notices sent, as well as the failure to pay the 2003 taxes on Parcel 7 of Map 386, in the Big Creek District. Littell testified that the East Grant Road address in Tucson, Arizona contained in the tax records in McDowell County was a prior address of Dennis Reidy, an accountant who provided services to Nancy Doonan, as well as to Mr. Littell and his family. (App. 38-39), Mr. Reidy is now deceased, having passed away one month prior to the trial. (App. 47). In years prior to 2003, Mr. Reidy would either pay the real estate taxes for the subject parcel, or forward the tax ticket to Mr. Littell for payment. (App. 47).

Mr. Littell testified he did not at anytime receive notice that the 2003 taxes for the subject parcel were delinquent. Nor did he receive any notice that the subject property had been sold for 2003 taxes, that he had the right to redeem, or that a conveyance would be made to Steve Mullins in the absence of any redemption. (App. 42). Littell testified that had he been notified of any of these facts, in any manner, he would have immediately paid the taxes.

Littell also testified he was prepared to tender all amounts owing for back taxes, subsequently pay taxes and any fees relating to, or required for, the reacquisition of ownership of the subject property. (App. 42).

[1] Littell found out about the April 26, 2006 deed when another lawyer doing a title exam discovered it and contacted him (Tr. 43).

These facts are generally consistent with the trial court's factual findings as set forth in pages 1-3, and the first paragraph of page 4 of the trial court's Final Order. (App. 144-47). Appellant does not take exception to the trial court's factual findings to this extent.

SUMMARY OF ARGUMENT

I.

The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based Upon Respondent, Steve Mullins Failure to Comply With West Virginia Code §11A-3-19.

West Virginia Code §11A-3-19(a) required Appellee, Steve Mullins, as the purchaser of the tax lien on subject property at a sheriff's sale, to provide the Clerk of the County Commission of McDowell County, West Virginia, a list of all those individuals to be served with a notice of the right to redeem, and to request the clerk prepare and serve the notice as provided in the statute. Among the persons entitled to the notice to redeem are those who would be permitted to redeem the property subject to the tax lien, principally the owner and any other person entitled to pay taxes on the property.

Under West Virginia Code §11A-1-9, a co-owner of real estate, whose interest is subject to separate assessment, is permitted to pay the taxes of either his own interest alone or, in addition to, the interest of any or all of his co-owners. Such co-owner of an interest subject to separate assessment would be among those permitted to redeem the property, and therefore required to be included on the list of those to be served with a notice to redeem.

The law is well-established that a person seeking to obtain title to property sold for taxes must strictly comply with all statutory requirements. In this matter, Appellee, Steve Mullins, as purchaser of the tax lien, failed to comply with the requirements of the statute by failing to include in the list of those to be provided notice to redeem

those cotenants of petitioner whose interests were assessed separately. Such failure is fatal to the conveyance to Mr. Mullins as a matter of law.

The trial court erred in its failure to recognize the illegality of the transfer to Mr. Mullins based upon his failure to meet these statutory requirements.

II.

The Trial Court Erred In Failing to Set Aside the Deed Dated April 26, 2006 Based on the Denial Rights to Due Process under the Constitutions of Both The United States and the State of West Virginia.

As set forth above, failure to meet statutory requirements imposed on Appellee Mullins to provide notice to those co-owners assessing separately assessed is fatal. However, such failure also served to deny Appellant's due process rights pursuant to the 14th Amendment of the United States Constitution, and Article III, Section 10, of the West Virginia Constitution.

While Appellee Hicks, as Clerk of the County Commission of McDowell County, West Virginia, provided notice to the address to which tax tickets had been sent, the return on that mailing, "UNK", indicating "address unknown", made clear that the mailing had not been received by any potential interested party. In those situations where the return of mailings require notice clearly indicate that no actual notice was received by the party, it is clear that simply publishing the additional required notice without further attempt to provide actual notice to interested parties, as was done in the instant matter, does not meet the demands of due process.

Evidence before the trial court clearly indicated that respondent Mullins took no action beyond providing the list to the clerk stating, "no known heirs" and made no

effort to ascertain the success of the mailing as to whether the mailing had achieved notice to a recipient at the address to which it was mailed.

Mullins made no further inquiry beyond his title examination as to any other public office in the county. He did however, acknowledge recognition of the name and address of at least one of petitioner's co-owners, Hall Mining, during his title examination but took no further action on that information.

Likewise, the Appellee Clerk, upon receiving the return clearly indicating the notice mailed had not been received by any intended party, took no further action other than to make required publications in the local newspapers of general circulation. The clerk also undertook no action to inform Appellee Mullins of the return of the notice mailed, and its indications that actual notice had not been received.

It is clear that neither Appellee undertook any additional efforts as required by due process to attempt to ascertain additional information which might have resulted in actual notice to the owners of property subject to the tax lien. In the instant case, payment for taxes for the year prior was tendered by check which contained an address different from that to which the tax tickets had been mailed. Utilizing such information would have resulted in notice to petitioner.

While it may be argued whether the action suggested would have resulted in additional information leading to actual notice, petitioner submits that due process requires the undertaking, and in the absence of such it cannot be said that due process requirements have been satisfied.

However, it is not subject to debate that had Appellee, Mullins satisfied the requirements of West Virginia Code §11A-1-9 and included within his list of individuals to be notified of the right to redeem, the owners of undivided interests in the same property, assessed separately, which would include Hall Mining Inc., Appellant would have received actual notice of the tax lien and the proposed conveyance.

Unrefuted testimony from Charles Hart of Hall Mining Inc. made clear that upon the receipt of the required notice to Hall Mining, his immediate action would have been to inform Albin Littell of the tax lien and the notice Hall Mining had received. Unrefuted testimony from Mr. Littell established that his response to Mr. Hart's communication would have been to pay the outstanding obligation and redeem the property. Therefore, the simple action of respondent Mullins complying with statutory requirements would have resulted in actual notice thereby satisfying due process requirements.

III.

The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based Upon the Lack of Sufficient Notice to Appellant

The provisions of West Virginia Code § 11A-4-1 et seq. are "to provide reasonable opportunities for delinquent taxpayers to protect their interest in the lands." Central to that intent is the requirements of notice to the property owner as well as others entitled to notice. The overarching goal is to provide actual notice to the property owner.

The statute contemplates the obvious, direct mailing to the property owner. However, the statute also provides other opportunities for notice through indirect channels, such as other individuals or entities required to be given notice.

As noted previously, co-owners with separately assessed interest, are required to be given notice. The unrefuted evidence before the trial court in this matter made clear that the required notice to Hall Mining Company would have resulted in actual notice to Appellant. The testimony and evidence before the trial court was unrefuted and made clear that Appellee Mullins failure to meet the statutory obligations for providing notice to such co-owners, and the subsequent failure of the Appellee clerk to serve such notices not only violated the requirements of strict adherence to the statute, but also resulted in the failure of Appellant to receive actual notice of the right to redeem.

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument is necessary in view of the criteria set forth in Rule 18 (a) of the West Virginia Rules of Appellate Procedure. The issues presented in the instant appeal, particularly those relating to the due process requirements for notice, have not been authoritatively decided. In addition, while facts and arguments are sufficiently and adequately presented in Appellant's brief, Appellant believes the decision process would be significantly aided by oral argument.

Appellant believes that the case at bar would be appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure, in that the appeal presents constitutional questions regarding rulings of the trial court.

ARGUMENT

The instant appeal arises from the decision of the Circuit Court of McDowell County, West Virginia, denying Appellant's complaint to set aside the conveyance following the sale of a tax lien. The Circuit Court's factual findings are reviewed under a clearly erroneous standard. Questions of law, or involving interpretation of a statute are subject to a *de novo* review. Syllabus Pt. 1 Chrystal R.M. v. Charlie A. L., 194 W.Va. 138, 459 S.E 2d 415 (1995)

The law imposes a duty on each real property owner to have their land entered on the land books for taxation purposes, and to pay the taxes thereon. W.Va. Const. art. 13, § 6. However, such obligations are not absolute. Rather, they are tempered by statutory requirements to which those seeking to divest ownership from a taxpayer must strictly adhere. These statutory provisions are intended, "to provide reasonable opportunities for delinquent taxpayers to protect their interests in their lands and to provide reasonable remedies in certain circumstances." W.Va. Code § 11A-4-1. Additionally, constitutional due process requirements provide a measure of protection to participants on both sides of the equation. W. Va. Const., Art. 3, § 10, U.S. Const. amend. V & XIV.

In the instant matter, the trial court discerned three issues presented by the case before it. Two of those issues were applicable to Parcel 7 of Map 286, as conveyed in the 2006 deed, and thus germane to the instant appeal.

As to Parcel 7, (the April 26, 2006 deed) the court identified the pertinent issues as (1) whether Appellee Mullins exercised reasonable efforts to provide Appellant with

actual notice of delinquent taxes, and (2) whether the Appellant can set aside the 2006 deed because Hall Mining Company, a co-owner with a separately assessed interest, was not given notice of the delinquent taxes.[2]

Appellant, however, asserts that there were before the court trial court three relevant issues:

1. Whether Appellee Mullins literally complied with the requirements of West Virginia Code §11A-3-1 et seq;

2. Whether requirements of due process requirements were satisfied; and

3. Whether Appellant received adequate notice, as required by statute.

I. The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based Upon Appellee, Steve Mullins' Failure to Comply With West Virginia Code §11A-3-19.

West Virginia Code §11A-4-3 provides for the setting aside of a tax sale deed "improperly obtained." The 2006 deed delivered from Appellee, Hicks to Appellee, Mullins was improperly obtained because of Mullins' failure to comply with the requirements of West Virginia Code §11A-3-19, which sets forth the obligations a purchaser at a Sheriff's sale must meet before a deed may be secured. The explicit language of the statute dictates," [f]or failure to meet these requirements, the purchaser shall lose all benefits of his or her purchase." West Virginia Code §11A-3-19(a).

[2] Issues arising from failure to provide notice to co-owners apply to all co-owners of Parcel 7. Reference to Hall Mining Company is simply as a representative example of such co-owners with a separately assessed interests.

These statutory obligations are a prerequisite to the purchaser of a tax lien obtaining a valid deed. Failure to comply with those requirements is fatal to the conveyance to the tax purchaser, and strips from the clerk the authority to effectuate the transfer. State ex rel. Miller, 177 W.Va. 97, 103, 350 S.E.2d 724, 730 (1986).[3]

The compliance required of the putative purchaser is strict. "The well established rule in this jurisdiction is that persons seeking to obtain complete title to property sold for taxes must comply literally with the statutory requirements.'" Syllabus Pt. 1, Cook v. Duncan, 171 W.Va. 747, 301 S.E.2d 837 (W.Va. 1983); citing Koontz v. Ball, 96 W.Va. 117, 122 S.E. 461 (W.Va. 1924).

Among the obligations of the purchaser is that found at § 11A-3-19(a), which dictates the purchaser is to "prepare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in §§ 21 and 22 of this article." West Virginia Code § 11A-3-19(a)(1). [4]

Pursuant to West Virginia Code § 11A-3-23(a), the persons entitled to notice to redeem are those who would be permitted to redeem the property subject to a tax lien, principally the owner and any other person entitled to pay taxes on the property. Syllabus Pt. 3, Cogar v. Lafferty, 219 W.Va. 743, 693 S.E. 2d 835 (2006); Syllabus Pt. 4, Rollyson v. Jordan, 205 W.Va. 368, 518 S.E. 2d 372 (1999).

Under West Virginia Code § 11A-1-9, "any co-owner of real estate whose interest is subject to separate assessment shall be allowed at his election to pay the taxes either

[3] Miller involved W.Va. Code §11A-3-20, the predecessor to §11A-3-19. However, the substance of the statutory provisions is identical.

[4] W.Va. Code §11A-3-21 & 22 set forth the form for notice to redeem, and the method of service required for such notice.

on his own interest alone, or in addition thereto upon the interests of any or all of his co-owners." West Virginia Code § 11A-1-9. [Emphasis added]

In the case at bar, the interest subject to the tax lien purchased by Mullins at the Sheriff's sale was an undivided interest in Parcel 7 of Map 286. In addition to the Nancy Doonan Est. interest, there are several other individuals or entities, owning interests in the tract. Each of those interests are assessed separately, including Hall Mining Company. Any of these co-owners were entitled to pay the real estate taxes on the Nancy Doonan Est. interest under § 11A-1-9, and therefore, were required, by statute, to be served notice of the right to redeem the interest of the Nancy Doonan Est. in Parcel 7 on Map 386.

The trial court found the failure of Appellee Mullins to include those co-owners with separately assessed interests in the list required under §11A-3-19 to be "irrelevant." (App. 150, at Footnote 3). The trial court also found that Mullins' submission simply stating "No Know Heirs" to be a correct and sufficient list in satisfaction of his obligations under §11A-3-19. While the statement "No Known Heirs" may be a correct statement as to the state of Mr. Mullins knowledge concerning the heirs of Nancy Doonan, it is clearly and unambiguously insufficient to satisfy Mullins' obligations under the code.

The explicit terms of the statute require notice not only to owners (or heirs), but also to any others who would have the right to pay taxes on the interest. The failure of the purchaser of the tax lien to provide a complete and accurate list of those entitled to

notice to redeem is, in and of itself, a failure to meet the purchaser's statutory obligations which are condition precedent to the clerk's authority to deliver a deed to the tax lien purchaser. Appellant submits that not only is this point highly relevant, it is in fact dispositive in this instance. Noncompliance with the mandatory requirements of West Virginia Code §11A-3-20 [Now §11A-3-19] is a jurisdictional defect, not subject to curative measures. Syllabus Pt. 3, State ex. Rel. Morgan v. Miller 350 S.E 2d 724, 177 W.Va. 97 (1986); citing Syllabus Pt. 1, Shaffer v. Mareve Oil Corp., 157 W.Va. 816, 204 S.E. 2d 404 (1974)

Appellee Mullins failed to meet his basic, but essential, statutory obligation for providing an appropriate list of those to be served with notice to redeem. The failure to provide notice of the right to redeem, and the intended conveyance, to those co-owners of Parcel 7 on Map 386, whose interests were separately assessed, constitutes a failure to meet his obligations under West Virginia Code § 11A-3-19(a) and therefore stripped Appellee Hicks of the authority to make the April 26, 2006 conveyance and entitles Appellant to relief under West Virginia Code § 11A-4-3.

II. The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based on the Denial of Appellant's Rights to Due Process under the Constitutions of Both United States and the State of West Virginia.

In addition to the statutory obligations discussed previously, there are constitutional, due process requirements which must be satisfied in order to effectively convey title through a deed following a sale such as the Sherriff's sale at which Mr. Mullins purchased the tax lien for Parcel 7, Map 286.

Both the Constitutions of The State of West Virginia, and the United States of America provide that no person shall be deprived of his property, "without due process of law." W.Va. Const. art. 3, §10; U.S. Const. amend. V & XIV.

> Under West Virginia's statutory scheme, the State is the initial seller of the tax lien; thereafter, the State provides the tax lien purchaser with the mechanism to provide notice to interested parties. The State also extinguishes the owner's rights to the property by issuing the tax deed to the property. In order to accomplish a tax sale, then, private parties must "make use of state" procedures with the overt, significant assistance of state officials," and thus, there is state action.

Plemons v. Gale, 396 F. 3d 569, 573 (4th Cir. 2005) at Fn. 3; citing, Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988).

When the putative purchaser fails to provide an appropriate list of persons to be served, the county clerk, in serving those required to be provided notice, has failed to provide full and proper notice as required by the statute, and by state action has deprived the land owner of his property without adequate notice.

Due process requires that where a party having an interest in the property can reasonably be identified from public records or otherwise, that such party be provided

notice by mail or other means as certain to ensure actual notice. Syllabus Pt. 1, Lilly v. Duke, 180 W.Va. 228, 376 S.E.2d 122 (W.Va. 1988).

The initial reasonable effort to mail notice to one threatened with loss of property will normally satisfy the requirements of due process. However, when prompt return of initial mailings makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient. Plemons v. Gale, 396 F. 3d at 577.

When notice sent by certified mail is returned unclaimed, reasonable diligence requires the purchaser to make further inquiry reasonably calculated to locate the interested parties. When, as in this case, certified mail notice of a tax sale is returned unclaimed, the state, as a matter of due process, must take additional reasonable steps to attempt to provide notice to the property owner before selling property, if it is practicable to do so. Jones v. Flowers, 547 U.S. 220, 225 126 S.Ct. 1708, 1713, 164 L.E2d. 415 (2006). Neither Appellee Mullins nor Appellee Hicks undertook any such steps or efforts.

It is clear in this matter that Appellant did not receive actual notice of the Sheriff's sale, or the right to redeem. Appellee, Hicks acknowledges that actual notice was not received, as evidenced by the return of his registered mail. In such situation courts have clearly recognized that something more than mere mailing and reliance on the return is required to pass constitutional muster. Rather, the return of registered mail in a fashion that indicates that landowner has not received actual notice imposes an obligation of "reasonable diligence" on the clerk issuing notice and the purchaser

providing information to serve the notice. Appellant submits that included within such "reasonable efforts" or the exercise of "reasonable diligence" would be service of notices on co-owners as required under statute.

Additionally, compliance with the statutory requirements providing notice to co-owners, such as Hall Mining, should be seen to significantly enhance the probability of receipt of actual notice to the property owner. Of course, the evidence before the trial court made clear that it would, in fact, have resulted in actual notice to Appellant.

The trial court suggested that the return on the certified mailing in this matter is distinguishable from that in Jones v. Flowers because in that case the certified mail was returned unsigned, whereas in this matter the mail was returned as addressee unknown. (App. 151 at Footnote 5). However, such distinction is flawed, as the relevant point is that in both instances, it was clear to the sender that the certified mail was not received and was not seen by its intended recipient, and that it was a certainty that the property owner had not received actual notice via the certified mailing. From there Jones makes clear that the "notice required will vary with the circumstances and conditions." Jones, 547 U.S. at 227; citing, Walker v. City of Hutchinson, 352 U.S. 112, 115, 77 S.Ct. 200, 1. L.Ed.2d 178 (1956).

The state's reliance on a certified mailing that indicates a lack of actual notice followed by notice by publication was insufficient to meet the state's due process burden. "The government must consider unique information about the intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." Jones, 547 U.S. at 221. Where, as here, the clerk merely

retrieved the certified mailing, which made clear that the property owner had not received the notice, proceeded with notice by publication, and proceeded with the conveyance, such process does not meet the minimum standards for 14th Amendment due process. Plemons v. Gale, 396 F. 3d 569, 577 (4th Cir. 2005).

It is not sufficient to provide statutory notice, receive prompt indication that such notice has failed, and then rely upon publication to constitute sufficient notice, especially when it is apparent that other means available may have been effective in conveying notice. In this instance, examination of the prior payment of taxes relating to the Nancy Doonan Est. interest would have revealed that the address utilized for prior notices was incorrect, a fact already obvious from the return of the prior notices. Moreover, such an examination would have provided an alternative address, the utilization of which would be reasonably calculated to provide actual notice to the landowner. (See Plaintiff's Ex. 7) (App. 40).

There was also information available within the Assessor's Office relating to the identity and mailing address for co-owners, other individuals interested in the property. Such co-owners would and did likely present a reasonable possibility of possessing information which would allow for actual notice to the property owner. The trial court dismissed Appellants' argument in this respect by pointing to a lack of privity of estate based upon the co-tenancy of co-owners as opposed to them being joint tenants with rights of survivorship, and asserted that there was no reason Mr. Mullins should have known and any special relationship between Appellant and Hall Mining Company which would lead to such notice.

The trial court cited Plemons v. Gale, for the proposition that reasonable efforts do not require contacting another entity absent evidence showing the special relationship between the entity and the delinquent owner exists, and that the entity will likely be expected to provide notice to the owner. However this point in Plemons entailed a discussion as to whether in that case reasonable efforts require contacting the mortgagee bank.

The Plemons court, making reference to Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, L.Ed.2d 180 (1983), and its recognition that the property owner and mortgagee are not in privity, and under normal circumstances one cannot be expected to communicate notice of the impending tax sale to the other, court found that "there is no evidence that Plemons enjoyed a special relationship with the bank such that attempting to enlist its help would have led to the discovery of her correct location." Plemons, 396 F.3d at 577. However, in the case at bar there was direct and undisputed evidence that Appellant enjoyed a relationship with Mr. Hart and Hall Mining, to whom statutory notice was required, and that the mere satisfaction of statutory obligations would have, in fact, lead to notice to Appellant.

Furthermore, it is clear in both Plemons and Mennonite Board of Missions, that the third party in question, a mortgagee bank was not required to be given notice under the statutory schemes in question. Here, however, notice to those third parties at issue is statutorily mandated, and a lack of privity of estate notwithstanding, a relationship does exist by virtue of those statutory requirements.

Prior to any action affecting an interest in life, liberty or property protected by the due process clause, a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action to afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). To satisfy due process requirements, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and "all the circumstances of a case, including its "practicalities and peculiarities" must be consider in determining the sufficiency of notice. Id at 314. Surely, due process cannot be said to be satisfied when statutory obligations are not met, and which, if met may reasonably be anticipated to, and according to unrefuted direct evidence, would have, provided notice to the property owner.

III. The Trial Court Erred in Failing to Set Aside the Deed Dated April 26, 2006 Based Upon the Lack of Sufficient Notice to Appellant

West Virginia Code § 11A-4-4 provides a remedy in instances where those entitled to notice are not properly notified. These provisions impose an obligation on the party seeking to set aside a deed to show by clear and convincing evidence that the tax sale purchaser "failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title." W.Va. Code § 11A-4-4(b).[5]

In this matter, Appellant asserts that, aside from the mandate under the law for strict compliance with statutory requirements, an element of Appellee Mullins "reasonable" efforts to provide notice to Appellant would have been to simply comply with the requirements of the statute, and provide notice to Hall Mining and other co-owners with separately assessed interests.

In this case service on co-owners, such as Hall Mining Company, would have, to a certainty, ensured communication of the substance of the notice and right to redeem to Appellant.

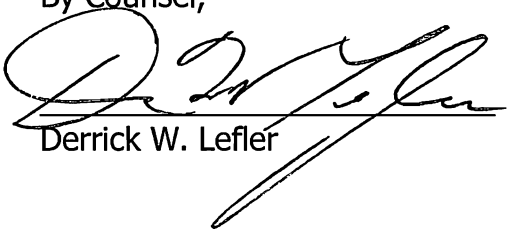
Appellant submits that "reasonably diligent efforts" includes compliance with the terms of the statute, and notice to those required to be served.

[5] To the extent that the burden of proof set forth in §11A-4-4(b) is contrary to the holding of the United State Supreme Court in Jones v. Flowers, *supra*, it may be seen to be unconstitutional.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the appeal sought herein be granted and the decision of the trial court be overturned and vacated and the deed dated April 26, 2006, be set aside. Appellant further requests the matter be remanded to the trial court for further proceedings consistent with this Court's decision.

ALBIN LITTELL,
By Counsel,



Derrick W. Lefler

CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via First Class U.S. Mail, addressed to said counsel as follows, on this the 22nd day of July, 2015:

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