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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
MONROE COUNTY CIVIL ACTION NO. 08-C-52**

**EARL J. REYNOLDS and ANNA REYNOLDS
V.
JERRY I. HOKE, SR.**

**APPEAL FROM THE CIRCUIT COURT OF
MONROE COUNTY, WEST VIRGINIA**

PETITIONER/APPELLANT'S BRIEF

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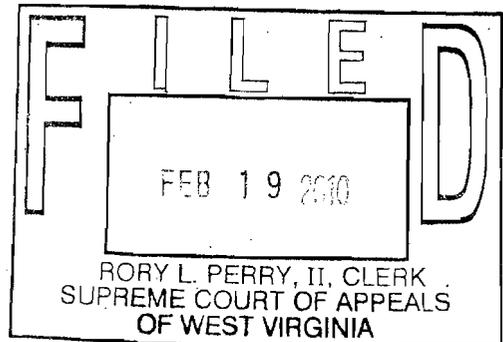


TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGE NUMBER</u>
STATEMENT OF CASE	4
BRIEF FACTUAL STATEMENT	4
ARGUMENT	7
A. Defendant asserts that the Circuit Court erred in granting summary judgment in favor of the Respondent where there existed a genuine issue of material fact on the issue of whether a routine record title examination, without more, is sufficient to comply with the "reasonable diligence" required under W. Va. Code § 11-4-4(b).	
CONCLUSION	14
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

STATUTES AND RULES:

PAGE NUMBER

West Virginia Code § 11-4-4(b)	4, 7
West Virginia Code § 11A-3-24	5, 6
West Virginia Code § 11A-3-22	11

CASES:

PAGE NUMBER

<u>Painter v. Peavy</u> , 192 W. Va. 189, 451 S.E.2d 755 (1994).	7
<u>The T.J. Hooper</u> , 60 F.2d 737, 740 (2d Cir. 1932)	8
<u>Citizens National Bank of St. Albans v. Dunnaway</u> , 184 W. Va. 453, 400 S.E.2d	9
<u>Martin v. Randolph County Bd. of Educ.</u> , 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995)	9
<u>Banker v. Banker</u> , 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996)	9
<u>Subcarrier Communications v. Nield</u> , 218 W. Va. 292, 624 S.E.2d 729 (2005)	11, 12
<u>Simpson v. Edminston</u> , 23 W. Va. 675, 680 (1884)	12

PETITIONERS/APPELLANTS, EARL REYNOLDS AND ANNA REYNOLDS' BRIEF

I. STATEMENT OF THE CASE

The Petitioners/Appellants, Earl Reynolds and Anna Reynolds, have petitioned this Court to hear an appeal in Monroe County Civil Action 08-C-58 from the Circuit Court's granting of summary judgment in favor of the Respondent, Jerry I. Hoke, Sr., finding that as a matter of law, the Respondent's routine record title examination qualified as "reasonable diligence" pursuant to W. Va. Code § 11-4-4(b). For the reasons set forth below, the Petitioners respectfully submit that the Circuit Court erred in granting summary judgment and that the case should be remanded for jury trial.

II. BRIEF FACTUAL STATEMENT

The Petitioners were conveyed the subject real property by quitclaim deed on February 6, 2006, and recorded the deed on June 7, 2006 in the Office of the Clerk of the County Commission of Monroe County, West Virginia. See Exhibit "A" of the Petition. The quitclaim deed was conveyed as part of a settlement agreement arising out of litigation in an estate action in Boone County, West Virginia, regarding the Estate of Bill Reynolds. See Exhibit "C" of the Petition. The Grantor of the deed was Beverly Haynes, who was then Executrix of the Estate of Bill Reynolds. However, Bill Reynolds' name was not included as a Grantor. Therefore, after being recorded in the Office of the Clerk of the County Commission of Monroe County, the deed would not necessarily show up during a routine record search of the Grantor/Grantee indexes.¹ Thereafter, the Petitioners paid property taxes on the property and were known to the Tax Assessor's Office and the Sheriff's Office as the taxpayers for the subject

¹ The deed would appear under Beverly Haynes' name rather than Bill Reynolds. Furthermore, there were apparently no probate documents filed in Monroe County regarding the Estate of Bill Reynolds.

property. See 2007 and 2008 "Statement of Taxes Due", attached to Petitioner's Response to Motion for Summary Judgment as Exhibit "A"; See also letter and "Classification and Sales Confirmation Questionnaire" attached to Petitioners' Response to Motion for Summary Judgment as Exhibit "B".

On or about October 2006, Monroe County Sheriff Robert V. Mann sold the subject property at tax auction to the Respondent, Jerry I. Hoke, Sr., for the sum of \$3,000.00 for taxes delinquent from the 2005 tax year.² After the property had not been redeemed, the Respondent retained counsel to effect a tax deed conveyance of the property, who in turn, performed a routine record title search in order to ascertain persons who may have a redeemable interest who are entitled to receive "notice to redeem" as is required by statute in W. Va. Code § 11A-3-24. Then, as is required by statute, the Respondent provided the names and addresses of all such persons ascertained, in this case only Beverly Haynes, to the County Clerk, who in turn sent the statutory "notice to redeem" to Beverly Haynes - but not to either of the Petitioners. For whatever reason, Beverly Haynes did not forward her notice to either of the Petitioners. On or about April 15, 2008, the County Commission of Monroe County, West Virginia, by its Clerk, Donald J. Evans, conveyed a tax-deed to the Respondent for the subject property, after which the Petitioners became aware that their property had been sold.

It is undisputed that the Petitioners are persons with a redeemable interest in the subject property, entitled to be notified of their right to redeem pursuant to W. Va. Code 11A-3-24. It is further undisputed that the Petitioners were not in fact notified of their right to redeem.

² Generally taxpayers are not able to pay property taxes for subsequent years if the property taxes for prior years are not paid, but for some reason that is what occurred in this case.

The Respondent filed a motion for summary judgment, arguing that there existed no genuine issue of material fact since neither of the Petitioners' names appeared in a Grantor/Grantee index search of the County Clerk's records, arguing essentially that a routine title examination constitutes "reasonable diligence" as is required pursuant to W. Va. Code § 11A-3-24, as a matter of law. The Petitioners responded that there was no authority standing for the claim that a Grantor/Grantee index search, in itself, legally constitutes "reasonable diligence," but rather that it should be examined on a case-by-case basis. And in this case, it is undisputed that the Respondent's title-searcher, paralegal did not walk across the hallway from the County Clerk's Office to the Tax Assessor's Office to verify that Beverly Haynes was the only person with a redeemable interest in the subject property when she could have easily done so. *See* Affidavit of Darla Ingles. Nor did she inquire with the Sheriff's Office, who also could have verified, if asked, that Earl J. Reynolds and Anna Reynolds had a redeemable interest in the property. *See* 2007 and 2008 "Statement of Taxes Due", attached to Petitioner's Response to Motion for Summary Judgment as Exhibit "A"; *See also* letter and "Classification and Sales Confirmation Questionnaire" attached to Petitioners' Response to Motion for Summary Judgment as Exhibit "B".

The Circuit Court granted the Respondent's Motion for Summary Judgment, holding that, as a matter of law that the Respondent complied with the proper procedures for applying for a tax deed.

It is from the Circuit Court's July 1, 2009 Order Granting Respondent's Motion For Summary Judgment that the Petitioners now appeal.

III. ASSIGNMENTS OF ERROR

Defendant asserts the following assignments of error:

- A. Defendant asserts that the Circuit Court erred in granting summary judgment in favor of the Respondent where there existed a genuine issue of material fact on the issue of whether a routine record title examination, without more, is sufficient to comply with the "reasonable diligence" required under W. Va. Code § 11-4-4(b).

IV. ARGUMENT

- A. Defendant asserts that the Circuit Court erred in granting summary judgment in favor of the Respondent where there existed a genuine issue of material fact on the issue of whether a routine record title examination, without more, is sufficient to comply with the "reasonable diligence" required under W. Va. Code § 11-4-4(b).

In the case *sub judice*, it is undisputed that had the Respondent inquired with the Tax Assessor's Office, or the Sheriff's Office, he could have ascertained the fact that the Petitioners had a redeemable interest in the subject property. It is undisputed that the Respondent did not do so. The Respondent argued, and the Circuit Court agreed, that as a matter of law, the Respondent did not have to do so under the circumstances, but rather that he only had to perform a routine title examination, consisting of a Grantor/Grantee index search. The Circuit Court erred in holding that as a matter of law such a search alone satisfies the requirements of W. Va. Code § 11-4-4(b).

A circuit court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 1 Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

West Virginia Code Section 11-4-4(b) requires that a person who seeks to receive a tax-deed conveyance must undertake a search consisting of "reasonable diligence" in ascertaining the names and addresses of any persons who may have a redeemable interest in the property

sought to be conveyed. This information is to then be provided to the County Clerk, who in turn is required to provide the statutory notice to redeem.

The Respondent's argument, which the Circuit Court adopted, was essentially that a routine title examination is compliance with the statute as a matter of law because that is what has always done prior to a tax-deed conveyance. To the contrary however, there exists no legal authority establishing that contention. As in the famous Learned Hand opinion in the The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), even if no tugboat operators equip their tugboats with radios, they *all* may be negligent:

Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

Id.

In the case of tax-deed conveyances, great precautions should be taken. Property rights are being stripped from Peter and given to Paul. Of course, if Peter is on notice of what is about to take place and cannot, or refuses, to pay the applicable taxes, then the outcome is justified. But, if the property is conveyed because Peter did not understand that he had unpaid taxes, or because he did not understand that the property was going to be conveyed to another, then that strikes at the very heart of private property ownership. Every effort should be given to notify Peter. It would not be reasonable for Paul to have to search the world-over for Peter in order to notify him of what he is seeking to do, but it would be reasonable to at least check with the Tax Assessor's Office to see what names and addresses they have on file, or with the Sheriff's Department to check and see who had been paying the taxes on the property. Such efforts could prevent the occurrence of such unfortunate incidents as that

which happened to the Petitioners in this case. Each case involves separate circumstances, and one method of notification may be better than another, thus the legislature's requirement of "reasonable diligence" rather than a form procedure.

The legislature could have easily prescribed the exact procedure for notifying persons with redeemable interests in tax-sale properties. However, they chose to set the standard at "reasonable diligence." And there is a good reason for this: not every situation is the same. The West Virginia Supreme Court of Appeals has long held that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995). Moreover, "it is not for the [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposefully included, we are not obligated to add to statutes something the legislature purposefully omitted." Banker v. Banker, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). And to transform "reasonable diligence" to meaning a Grantor/Grantee index search as a matter of law, would be to ignore the fact that tax sale properties are often ensnared in complex family or estate situations, or otherwise the result of some mistake or confusion. In the end, each case is different. A jury could find that such an index search was sufficient under the circumstances. Or, it may find otherwise. Regardless, it was improper for the Circuit Court to do so.

The Circuit Court cited Citizens National Bank of St. Albans v. Dunnaway, 184 W. Va. 453, 400 S.E.2d, noting that this Court held that "where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure notice." The Circuit Court then declared in the next sentence of its Order that "[t]he Court finds that the

Petitioners were not reasonably identifiable from the records at the Clerk's office." See p.6 of Order Granting Respondent's Motion for Summary Judgment. However, the Circuit Court ignored the Court's holding that where a party with interest can be reasonably identified *from public records or otherwise . . .*" due process requires that a party be provided notice (emphasis added). *Id.*

The Court in Citizens did not hold that notice is only required where a party can be reasonably identified from records in the Grantor/Grantee index in the Clerk's office - or even *all* records in the Clerk's office. The Court said "public records or otherwise." *Id.* It is undisputed that the Petitioners' names and addresses could have been found in the Tax Assessor's Office and the Sheriff's Office, both of which are "public records," and both of which could consist of "otherwise." See 2007 and 2008 "Statement of Taxes Due", attached to Petitioner's Response to Motion for Summary Judgment as Exhibit "A"; See also letter and "Classification and Sales Confirmation Questionnaire" attached to Petitioners' Response to Motion for Summary Judgment as Exhibit "B". This documents, on their face, indicate that both of said offices were aware that the Petitioners were persons with a legal interest in the property. A reasonable jury could find that a reasonable person would in fact inquire with either of said offices, given that the purchaser had purchased the property at *tax sale*, and both of said offices are in charge of administering and collecting real property taxes. It follows, therefore, that one should check with these offices for persons with a redeemable interest in property. A reasonable jury could find that had the Respondent or Respondent's counsel inquired with either of said offices, the Petitioners' names and addresses would have been discovered and served with notice, and that the end result would have been different.

Each case should turn on it's own facts rather than what the usual process is with regards what other attorneys or title searchers do in preparing and conveying tax deeds. In one case, the tax deed purchaser may have had some contact with persons owning a redeemable interest, and he or she should know that that person should be sent a notice to redeem. In other cases, such as the case *sub judice*, a walk across the courthouse hallway and a five-second inquiry could reveal persons with a redeemable interest. Each case should turn on it's own facts. This is a genuine issue of material fact which should be left to a jury to decide rather than a judge. In the majority of tax-deed conveyances where the properties are the products of long-forgotten estates, the usual procedure is just that: a formality, and the outcome is going to be the same either way. But in other cases where there is a misunderstanding, and someone stands to accidentally lose their property, there is no excuse for more precautions not being taken. If a routine title examination of the Grantor/Grantee index can be completed, an inquiry with the Assessor's and Sheriff's offices can be completed as well, as extra precautions to ensure that what happened to the Petitioners in this case does not happen to others who are similarly situated.

In Subcarrier Communications v. Nield, 218 W. Va. 292, 624 S.E.2d 729 (2005), the West Virginia Supreme Court of Appeals faced a similar case. There had been a tax sale of real property owned by Subcarrier Communications. The notice of right to redeem was sent to an old address. Subcarrier did not receive it. The certified mailing was returned undeliverable. The purchaser published constructive notice in the local newspaper pursuant to W. Va. Code § 11A-3-22, which provides for serving notice on an out-of-state landowner whose address "cannot be discovered by due diligence". However, at an earlier date, Subcarrier had notified the County Clerk's office of the change of address. Furthermore, the accurate address was

posted on a fence surrounding the property. Circuit Court Judge Lawrence S. Miller granted Summary Judgment in favor of Subcarrier, holding that, based upon the undisputed facts, the purchaser did not exercise due diligence in obtaining the landowners correct address in order to provide notice to the landowner of its right to redeem the property. The Court set aside the tax deed as void. On appeal, the Court upheld the circuit court's ruling.

Similarly, in the present case, the Petitioners, the owners of the subject property, had communicated their names and addresses to the county tax offices, as evidenced by the return communications from the sheriff's office and the assessor's office. See 2007 and 2008 "Statement of Taxes Due", attached to Petitioner's Response to Motion for Summary Judgment as Exhibit "A"; See also letter and "Classification and Sales Confirmation Questionnaire" attached to Petitioners' Response to Motion for Summary Judgment as Exhibit "B". A reasonable inquiry, or due diligence, by a tax sale purchaser, could have easily garnered this information. This, in turn, if not obviously indicating persons with a redeemable interest to whom notice should be served, would at least put a reasonable person on inquiry that a more thorough investigation should be undertaken to find any other persons with a redeemable interest.

Furthermore, tax sale purchasers are "never" eligible for status as bona fide purchasers.

In Subcarrier, the Court, citing Simpson v. Edminston, 23 W. Va. 675, 680 (1884), noted that:

A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or tend in any contingency to defeat them. A tax-purchaser, consequently, cannot be in any strict technical sense a *bona fide* purchaser, as that term is understood in the law. *And for the same reason his vendee cannot be such purchaser*, because a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it

(emphasis original). Thus, arguably, a tax sale purchaser is, by virtue of having purchased property at a tax sale, already on notice of some problem or defect with regard to the purchased property or its' owner(s).

It is always possible in such a situation that the underlying problem is confusion or mistake. A reasonable jury could come to the conclusion that due diligence, or a reasonable inquiry requires one to make an actual effort to notify persons with a redeemable interest. If someone actually had an incentive to find such persons, the first place they would look would be the sheriff's office or the tax assessor's office. Arguably, the last thing a reasonable person would do is to primarily and solely undertake a grantee/grantor index search. Such actions would be more akin to someone purposefully doing the bare minimum, and hoping that persons with a redeemable interest who are confused, or who have made a mistake, will not realize what is happening - until it's too late. A reasonable jury could find that, not only is that what happened here, but there is an entire industry of such persons, or businesses, who make a living capitalizing off the ignorance or mistake of innocent persons.

A reasonable jury could find that the Respondent failed to engage in "reasonable diligence" in not making an inquiry at the Tax Assessor's Office and Sheriff's Office. It is undisputed that the Petitioners owned a redeemable interest in the property. In is undisputed that both the Tax Assessor's Office and the Sheriff's Office had the names and addresses of the Petitioners as persons who pay the taxes on the subject property. It is undisputed that the Respondent did not inquire with the Tax Assessor's Office or the Sheriff's Office as to the identity and address of any persons with a redeemable interest in the property. It is undisputed that the Petitioners did not receive actual notice via Certified Mail or otherwise. And now, pursuant to the Circuit Court's order, the Petitioners have lost their interest in the property

outright. It was reversible error for the Circuit Court to conclude that there was no genuine issue of material fact for a jury to decide.

V. CONCLUSION

The Circuit Court of Monroe County erred in granting the Defendant's motion for summary judgment when there existed a genuine issue of material fact regarding whether or not the Defendant exercised "reasonable diligence" in his attempt at ascertaining the names and addresses of persons with a redeemable interest in the subject property prior to a tax-deed conveyance.

BASED ON THE FOREGOING, the Petitioners respectfully request that this Court find that the Circuit Court of Monroe County erred in granting summary judgment in favor of the Defendant, by order dated July 1, 2009. The Petitioners further requests that they be awarded attorney fees and the costs of this action, and such other and further relief as this Court deems just and fit.

APPELLANTS REQUEST ORAL ARGUMENT

Respectfully submitted,

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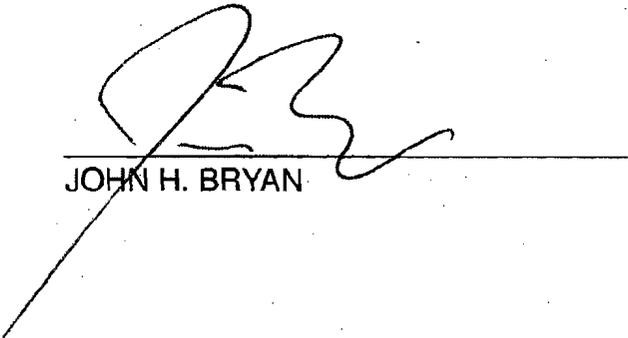
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CERTIFICATE OF SERVICE

I, John H. Bryan, counsel for the Petitioners/Appellants, Earl J. Reynolds and Anna Reynolds, certify that I have on this date served a true and correct copy of the foregoing PETITIONER/APPELLANT'S BRIEF by U.S. Mail, first class, postage prepaid on this the 18 day of February, 2010, upon:

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