# APPENDIX

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**[ENTERED: April 26, 2018]**

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**No. 17-1936**

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JEFFREY O'NEAL; SHERRIE O'NEAL,

Plaintiffs - Appellees,

v.

G. RUSSELL ROLLYSON, JR., in his official and individual capacities,

Defendant - Appellant,

and RICHARD WISEN,

Defendant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Irene C. Berger, District Judge. (5:16-cv-08597)

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Submitted: April 24, 2018

Decided: April 26, 2018

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Before KING and THACKER, Circuit Judges, and SHEDD, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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Charles R. Bailey, Michael W. Taylor, BAILEY & WYANT, PLLC, Charleston, West Virginia, for Appellant. Gary M. Smith, Bren J. Pomponio, MOUNTAIN STATE JUSTICE, Charleston, West Virginia, for Appellees.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Defendant G. Russell Rollyson, Jr. appeals the district court's order denying his motion for summary judgment on the basis that he is entitled to qualified immunity as to the 42 U.S.C. § 1983 (2012) due process claim filed by Jeffrey and Sherrie O'Neal ("Plaintiffs"). For the following reasons, we affirm the district court's judgment.[1]

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[1] Because the district court did not find that any genuine issues of fact remain unresolved with respect to Rollyson's qualified-immunity defense and neither Rollyson nor Plaintiffs dispute any controlling facts, we have jurisdiction to hear Rollyson's appeal. *See Yates v. Terry*, 817 F.3d 877, 882 (4th Cir. 2016).

"We review qualified immunity determinations *de novo*." *Adams v. Ferguson*, 884 F.3d 219, 226 (4th Cir. 2018). Qualified immunity—an affirmative defense to liability under § 1983—"'shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id*. (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted)). "To overcome this shield, a plaintiff must demonstrate that: (1) the defendant violated the plaintiff's constitutional rights, and (2) the right in question was clearly established at the time of the alleged violation." *Id*. Applied properly, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (internal quotation marks omitted).

Rollyson challenges the district court's finding that, although "[u]nder West Virginia law, the purchaser of a tax-delinquent property is responsible for conducting the title search and obtaining the names and addresses to which notice should be sent[,] . . . Rollyson . . . is responsible for serving the notice, and, ultimately approving the tax deed." (J.A. 412).[2] He asserts that no court has interpreted the West Virginia statutory scheme as placing the duty to provide constitutionally sufficient notice on his office. However, Rollyson does not dispute that he never informed the purchaser that the notices sent to the designated post office box were returned or that he failed to send notice addressed to "Occupant"

[2] "J.A." refers to the electronic copy of the joint appendix filed by the parties in this appeal.

as required by the statute. Rollyson further does not dispute that, knowing that the attempted notices were unsuccessfully sent, he transferred the Property deed to the purchaser anyway. Accordingly, and even assuming that the statutory scheme places the burden of ensuring constitutionally sufficient notice on the purchaser as Rollyson suggests, Rollyson fails to demonstrate how his transfer of the deed to the purchaser, despite Rollyson's knowledge that the attempted notices were returned, did not violate the O'Neals' constitutional rights, clearly established in *Jones v. Flowers*, 547 U.S. 220 (2006), and *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005).

Rollyson further argues that Plaintiffs and their daughter had specific knowledge of the tax deficiency and the impending tax sale and that this differentiates the present case from the facts of *Jones* and *Plemons* such that their holdings do not amount to "clearly established law" applicable to his duties in this case. Indeed, it is undisputed that the O'Neals were aware prior to the sale that the Property was in delinquency and, if not redeemed, could be sold at a tax sale. However, and as recognized by the district court, the present dispute concerns the notice required under W. Va. Code Ann. §§ 11A-3-52 to -55 (LexisNexis 2017)—that is, the notice indicating that the Property had been sold and explaining the steps needed to redeem the property in order to avoid transfer of the tax deed to the purchaser. Even assuming that Plaintiffs' having actual notice would affect the applicability of *Jones* or *Plemons*, Rollyson does not contend—nor does the record establish—that Plaintiffs were aware that the Property was sold to the purchaser, that they could

nonetheless redeem the Property to avoid transfer of the deed to the purchaser, or the price, deadline, or process by which to do so. Accordingly, Rollyson has failed to demonstrate any actual knowledge on the part of the O'Neals or their daughter that would make the facts of this case distinguishable from *Jones* or *Plemons*.

Finally, Rollyson contends that, if he had a duty to issue the challenged tax deed, but did so in violation of the notice requirements, then he acted in an unauthorized manner under the *Parratt*/*Hudson*[3] doctrine. However, we have specifically held that "where . . . state employees . . . have broad authority to effect deprivations, as well as the duty to provide predeprivation procedural safeguards, the *Parratt*/*Hudson* doctrine is inapplicable." *Bogart v. Chapell*, 396 F.3d 548, 563 (4th Cir. 2005). Indeed, as recognized in *Hudson* itself, "[w]hether an individual employee himself is able to foresee a deprivation is simply of no consequence[;] [t]he controlling inquiry is solely whether the state is in a position to provide for predeprivation process." *Hudson*, 468 U.S. at 534. Rollyson makes no attempt to argue that the State was not in a position to provide for a predeprivation process. He further does not contest the district court's conclusion that he easily could have provided for the requisite predeprivation process by taking reasonable efforts to provide the O'Neals notice of the sale. "The underlying rationale of *Parratt* is that when deprivations of property are effected through random

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[3] *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330 (1986).

and unauthorized conduct of a state employee, predeprivation procedures are simply impracticable since the state cannot know when such deprivations will occur." *Id.* at 533 (internal quotation marks omitted). Considering that the State delegated to him the power and authority both to deprive the O'Neals of their property rights and to provide for predeprivation process, Rollyson has failed to establish that his conduct was "random and unauthorized" under *Parratt*, 451 U.S. at 541, such that predeprivation procedures were impracticable.

It is undisputed that Rollyson was aware that the notices he sent to the post office box provided by the purchaser were returned as undeliverable and/or unclaimed. It is also undisputed that Rollyson failed to attempt any other reasonably available measures to provide notice before issuing the tax deed. Because Rollyson's obligation, pursuant to the Fourteenth Amendment, to take such measures was established, at the latest, in 2006 by the Supreme Court in *Jones*, we conclude that the district court did not err in finding that Rollyson's actions violated the O'Neals' clearly established Fourteenth Amendment due process rights.

Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

**ENTERED: April 26, 2018**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 17-1936
(5:16-cv-08597)

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JEFFREY O'NEAL; SHERRIE O'NEAL

Plaintiffs - Appellees

v.

G. RUSSELL ROLLYSON, JR.,
in his official and individual capacities

Defendant - Appellant

and

RICHARD WISEN

Defendant

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J U D G M E N T

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In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

**[ENTERED: August 1, 2017]**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BECKLEY DIVISION**

JEFFREY O'NEAL and
SHERRIE O'NEAL,

Plaintiffs,

v. CIVIL ACTION NO. 5:16-cv-08597

RICHARD WISEN and
G. RUSSELL ROLLYSON, JR.,

Defendants.

**MEMORANDUM OPINION AND ORDER**

The Court has reviewed the *Plaintiffs' Motion for Partial Summary Judgment Upon Plaintiffs' First Claim for Relief* (Document 32) and *Memorandum in Support* (Document 33), and *Defendant G. Russell Rollyson, Jr.'s Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Upon Plaintiffs' First Claim for Relief* (Document 42). The Court has also reviewed *Defendant G. Russell Rollyson, Jr.'s Motion for Summary Judgment* (Document 35) and *Memorandum of Law in Support* (Document 36), the *Plaintiffs' Memorandum in Opposition to Defendant Rollyson's Motion for Summary Judgment*

(Document 41), and *Defendant G. Russell Rollyson, Jr.'s Reply to Plaintiffs' Memorandum in Opposition to Defendant Rollyson's Motion for Summary Judgment* (Document 44). In addition, the Court has reviewed *Defendant Richard Wisen's Motion for Summary Judgment* (Document 39) and the *Memorandum in Support of Defendant Wisen's Motion for Summary Judgment and Motion to Extend Time for Motion for Leave to Add Third-Party, Jennifer Reynolds, Daughter of Plaintiffs, Jeffrey O'Neal and Sherrie O'Neal* (Document 40). For the reasons stated herein, the Court finds that the Plaintiffs' motion for summary judgment should be granted, and the Defendants' motions should be denied.

## FACTUAL BACKGROUND

The Plaintiffs, Jeffrey and Sherrie O'Neal, were the owners of record of a home and property in Skelton, Raleigh County, West Virginia (the Property). They initiated this action on September 6, 2016, and named as Defendants Richard Wisen, and G. Russell Rollyson, Jr., both individually and in his official capacity as the Deputy Commissioner of Delinquent and Nonentered Lands of Raleigh County, West Virginia. The O'Neals have lived apart since approximately 2001, and have not resided in the Property since the late 1990s. In 2002, they entered into an unwritten agreement with their daughter, Jennifer Reynolds, that she and her children could live in the home, and she could have the Property if she made the remaining five years of mortgage payments and paid the property taxes. She did so, and, although Jeffrey and Sherrie O'Neal

remain on the deed, and Mr. O'Neal indicated that he retains some rights and responsibilities with respect to the Property, they consider Ms. Reynolds the owner of the Property. When Ms. Reynolds took possession of the Property, she began using the same post office box her parents had used in Skelton, West Virginia. Tax notices, addressed to Jeffrey and Sherrie O'Neal, continued to be sent to the Skelton post office box.[1] Tax records reveal that the Property was redeemed from delinquent status on multiple occasions prior to 2012, and Mr. O'Neal stated that, on previous occasions, he had seen the Property listed as delinquent in the newspaper, informed his daughter, and she had taken care of it.

The 2012 taxes were not paid, and the Property was listed as delinquent in the newspaper. The first newspaper notice identifies delinquent properties. A second notice identifies delinquent properties and provides a date at which such properties will be sold by the Sheriff. Mr. O'Neal stated that his brother-in law notified him that the Property was listed as delinquent in the newspaper at some point, and he told Ms. Reynolds, but did not follow up with her or take any other steps to ensure the taxes were paid. On October 17, 2013, someone signed for a letter, sent by certified mail to the Skelton post office box in connection with the unpaid taxes. Neither of the Plaintiffs believe they either signed for the letter or received it. The O'Neal's Property did not sell at the local Sheriff's sale. It was, therefore, held for eighteen (18) months. During

[1] Although the home has a street address, neither the O'Neals nor Ms. Reynolds put up a mailbox or received mail at the Property.

that eighteen-month period, Ms. Reynolds communicated with the Auditor's office regarding redemption. She received a statement of the taxes due via email, and a second statement some months later by mail to the Skelton post office box. The Property was not redeemed during the eighteen (18) months, and was certified to the Deputy Commissioner, Mr. Rollyson, for a second sale orchestrated by Mr. Rollyson's office. Prior to the second sale, the property was advertised three (3) times in the Beckley Register-Herald.

Mr. Wisen purchased the Property at the second sale for $400. At that time, he was provided with a form letter briefly describing the steps to notify the record owners of their right to redeem the property, and ultimately receive a deed if the owners failed to redeem. Although the letter advises purchasers to retain an attorney to conduct a title search and provide guidance on the notice process, Mr. Wisen identified the O'Neals and their addresses on his own. He completed a form, supplied by Mr. Rollyson's office, listing Jeffrey and Sherrie O'Neal as the record owners, with the Skelton post office box as the address. He opted to have the required notice sent to the post office box via regular and certified mail, with letters addressed to Jeffrey O'Neal and Sherrie O'Neal. The notice listed a total amount payable to the Sheriff of Raleigh County of $1353.65 to redeem the property or that Mr. Wisen would receive a deed on or after November 12, 2015. The postal service returned each notice as undeliverable and/or unclaimed. Mr. Wisen stated that he was not informed that the notices that were returned were not sufficient under the law. Neither Mr. Wisen nor

Mr. Rollyson attempted any other form of notice after the sale until after Mr. Wisen received the deed.

Mr. Wisen indicated that he believed the property was unoccupied based on a drive-by observation. However, after he obtained the deed, he had an eviction notice served to the Property and posted on the door and also had a title search conducted when he learned that someone was living in the house and that there was a tax lien on the Property. Mr. Wisen and Mr. O'Neal had some conversations in an attempt to resolve the situation, but Mr. Wisen ultimately sought eviction through a suit in state court, and the O'Neals brought this action. The Plaintiffs seek relief for deprivation of their property under color of state law without due process, in violation of 42 U.S.C. § 1983. In addition, they allege violations of W.Va. Code §11A-3-54 and § 11A-3-55. They seek declaratory and injunctive relief, voiding the tax deed of December 8, 2015, as well as actual damages, costs, attorney fees, and punitive damages from the Defendants in their individual capacities, for the violations. In addition, they assert that they are "entitled to an order setting aside the December 8, 2015 tax deed issued by defendant Rollyson to defendant Wisen, pursuant to West Virginia Code §11A-4-4(a)" because the Defendants did not comply with statutory and constitutional procedure for obtaining the tax deed. (Compl. at ¶ 52.)

## STANDARD OF REVIEW

The well-established standard in consideration of a motion for summary judgment is

that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a)–(c); *see also Hunt v. Cromartie*, 526 U.S. 541, 549 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 169 (4th Cir. 2014). A "material fact" is a fact that could affect the outcome of the case. *Anderson*, 477 U.S. at 248; *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010). A "genuine issue" concerning a material fact exists when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *FDIC v. Cashion*, 720 F.3d 169, 180 (4th Cir. 2013); *News & Observer*, 597 F.3d at 576.

The moving party bears the burden of showing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 322–23. When determining whether summary judgment is appropriate, a court must view all of the factual evidence, and any reasonable inferences to be drawn therefrom, in the light most favorable to the nonmoving party. *Hoschar*, 739 F.3d at 169. However, the non-moving party must offer some "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson*, 477 U.S. at 256. "At the summary judgment stage, the non-moving party must come forward with more than 'mere speculation or the building of one inference upon another' to resist dismissal of the

action." *Perry v. Kappos*, No.11-1476, 2012 WL 2130908, at *3 (4th Cir. June 13, 2012) (unpublished decision) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)).

In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter," *Anderson*, 477 U.S. at 249, nor will it make determinations of credibility. *N. Am. Precast, Inc. v. Gen. Cas. Co. of Wis.*, 2008 WL 906334, *3 (S.D. W. Va. Mar. 31, 2008) (Copenhaver, J.) (citing *Sosebee v. Murphy,* 797 F.2d 179, 182 (4th Cir. 1986). If disputes over a material fact exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," summary judgment is inappropriate. *Anderson*, 477 U.S. at 250. If, however, the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment should be granted because "a complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322–23.

When presented with motions for summary judgment from both parties, courts apply the same standard of review. *Tastee Treats, Inc. v. U.S. Fid. & Guar. Co.*, 2008 WL 2836701 (S.D. W. Va. July 21, 2008) (Johnston, J.) *aff'd*, 474 F. App'x 101 (4th Cir. 2012). Courts "must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law," resolving factual disputes and drawing inferences for the non- moving party as to each motion. *Rossignol*

*v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation marks and citations omitted); *see also Monumental Paving & Excavating, Inc. v. Pennsylvania Manufacturers' Ass'n Ins. Co.*, 176 F.3d 794, 797 (4th Cir. 1999).

**DISCUSSION**

The Plaintiffs argue that they are entitled to summary judgment with respect to their claim that the Defendants acted jointly to deprive them of their Property, under color of state law, without due process. They assert that the Defendants were required to send a notice addressed to "Occupant," in addition to those addressed to the O'Neals, and should have taken additional steps to provide notice after the notices were returned to Mr. Rollyson as undeliverable and/or unclaimed. The Plaintiffs note that, although state law requires a purchaser of a delinquent tax lien to perform the title search, Mr. Rollyson is responsible for serving notice on the individuals identified by that title search. Further, they emphasize that Mr. Rollyson, under color of state law, "personally extinguishes the prior owner's property rights" by issuing a tax deed. (Document 41 at 5.) The Plaintiffs argue that their claims for injunctive relief against Mr. Rollyson in his official capacity should be permitted to proceed in order to halt his practice of issuing tax deeds despite knowing that service of notice to redeem was unsuccessful.

Mr. Rollyson argues that the applicable statute does not permit recovery of monetary damages, that West Virginia law places the duty to

provide notice on the tax lien purchaser, that the methods of notice attempted were legally sufficient, and that he is entitled to qualified immunity. He emphasizes that placing additional burdens on his office would interfere with the goals of obtaining money from tax sales and returning the properties to the tax rolls. Mr. Rollyson further contends that the Plaintiffs have not been deprived of the Property because they consider it their daughter's property, rather than their own. Finally, Mr. Rollyson argues that Ms. Reynolds is an indispensable and necessary party, and this litigation must be dismissed because she has not been joined.

Mr. Wisen adopts Mr. Rollyson's arguments. He further contends that the Plaintiffs had notice of the tax sale, satisfying their due process rights.

West Virginia Code Section 11A-3-1 *et. seq*. sets forth the procedures involved in the notification, sale, and redemption of properties with delinquent taxes. In short, notice is published in a local newspaper, and the county sheriff may attempt to sell the property. If a property does not sell in the local sale, and is not redeemed during an eighteen-month period, it may be sold in a second sale conducted by the Commissioner for Delinquent and Non-entered Lands from the state Auditor's office. In this case, Mr. Wisen purchased the Property at the second sale, and the instant dispute concerns the notice to redeem required after that point.

Section 11A-3-52 provides that the purchaser must "[p]repare a list of those to be served with notice to redeem and request the deputy

commissioner to prepare and serve the notice" within forty-five (45) days after approval of the sale. W.Va. Code § 11A-3-52(a)(1). For Class II properties, including the property at issue here, the purchaser must also "provide the deputy commissioner with the actual mailing address of the property." *Id.* at § 11A-3-52(a)(2). The statute prescribes a format for the required notice, and directs the deputy commissioner to prepare the notice and "cause it to be served upon all persons on the list generated by the purchaser" "in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested." *Id.* at § 11A-3-55. In addition, notice addressed to "Occupant" must be mailed, by first class mail, to the physical mailing address for the property or, if not deliverable to the physical location of the property, to "any other mailing address that exists to which the notice would be delivered to an occupant of the subject property" for Class II properties. *Id.*

In 2006, the United States Supreme Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones v. Flowers*, 547 U.S. 220, 225 (2006). Although actual notice is not required, "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id* at 226 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). In *Jones*, as in the instant

case, the property owner learned of the tax sale when a notice was posted on the door to the home after the new owner obtained a deed. The Court did not prescribe a formula for providing notice, but suggested sending notice by both certified and regular mail, posting notice on the property, and sending notice addressed to "occupant." *Id.* at 234-35.

The West Virginia Supreme Court of Appeals has likewise concluded that "certified mail envelopes returned 'not deliverable as addressed' or 'unclaimed' constituted insufficient notice to the [property owners] of the right to redeem the property from the tax sale." *Mason v. Smith*, 760 S.E.2d 487, 494 (W. Va. 2014). The Fourth Circuit similarly held that "[w]hen a party required to give notice *knows* that a mailed notice has, for some reason, failed to inform a person holding a property interest of the impending deprivation, the notice does not pass constitutional muster." *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2005). Moreover, both the Fourth Circuit and the United States Supreme Court have emphasized that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation," rejecting any argument that the taxpayer's own negligence in failing to pay taxes, ignoring earlier tax notices, or failing to update his or her address negates the right to receive constitutionally sufficient notice. *Id.* at 574; *Jones*, 547 U.S. at 232 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983)). Applying the West Virginia statutory scheme, the Fourth Circuit held that "reasonable diligence required [the tax purchaser] to search all publicly available county records once the prompt return of

the mailings made clear that its initial examination of the title…had not netted the [owners'] correct address." *Plemons*, 396 F.3d at 578 (but concluding that summary judgment was inappropriate, because the record did not reveal whether such a search would have produced an address.)

There is little factual dispute between the parties in this case. As an initial matter, the unwritten agreement between Jeffrey and Sherrie O'Neal, the undisputed record owners of the Property, and their daughter, Jennifer Reynolds, does not alter the notice requirements. The Plaintiffs' plan to transfer legal ownership to their daughter does not negate their right to due process before being deprived of the Property. Although Ms. Reynolds, as the resident and anticipated owner of the Property, will be impacted by the outcome of this litigation, she is not an indispensable party. The Court previously denied Mr. Rollyson's motion to file a third-party complaint against Ms. Reynolds, finding that "[t]he O'Neal's arrangement with their daughter may be relevant as to any notices sent or received, but it is not relevant with respect to the Defendant's obligations, constitutional and statutory, to provide adequate notice and opportunity to redeem prior to transferring ownership of the party." (Order, Document 46.)

Mr. Rollyson argues (a) that the duty to provide notice rests exclusively with the purchaser and (b) that he is entitled to qualified immunity.[2]

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[2] Mr. Rollyson also argues that the due process claim cannot proceed against him in his official capacity. The Plaintiffs clarified that they sought only injunctive relief against Mr.

Qualified immunity is an affirmative defense intended to shield public officials from civil suits arising out of their performance of job-related duties. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009). Defendants asserting a qualified immunity defense first bear the burden of "demonstrating that the conduct of which the plaintiff complains falls within the scope of the defendant's duties." *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997) (internal quotation marks omitted.) The defense of qualified immunity is available unless the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff…." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (internal emphases omitted). Officials are protected even if they make reasonable mistakes of fact or law, so long as they do not violate a clearly established statutory or constitutional right. *Pearson*, 555 U.S. at 231–32. "A constitutional right is 'clearly established' when its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Cooper v. Sheehan*, 735 F.3d 153, 158 (4th Cir. 2013) (internal quotation marks and citations omitted). Courts are advised to "ask first whether a constitutional violation occurred and second whether the right violated was clearly established."[3] *Id.*

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Rollyson in his official capacity, and do not appear to seek summary judgment with respect to the injunctive relief aspects of Count One. The parties have not fully briefed the availability or scope of potential injunctive relief, and so the Court declines the opportunity to address the issue.

[3] "Courts are 'permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances

Under West Virginia law, the purchaser of a tax-delinquent property is responsible for conducting the title search and obtaining the names and addresses to which notice should be sent. Mr. Rollyson, however, is responsible for serving the notice, and, ultimately, approving the tax deed. Because Mr. Rollyson sent the notices, by certified and regular mail, to the Skelton post office box, he received those notices when they were returned to the sender. It is not clear from the record whether Mr. Rollyson informed Mr. Wisen that the notices had been returned to the sender. In addition, no notice addressed to "occupant" was sent to either the street address of the Property or to the Skelton post office box. The statute requires the purchaser to supply the address, but directs the deputy commissioner to send a copy of the notice, by first class mail, to "Occupant," at either the physical mailing address or any other mailing address to which notice would be delivered to an occupant of the property. W. Va. Code § 11A-3-55. Further, Mr. Rollyson provided Mr. Wisen with a deed despite his knowledge that the attempts at notice were unsuccessful. Thus, Mr. Rollyson has not demonstrated, as a matter of law, that his actions complied with due process.

The case law surrounding provision of notice of a tax sale and/or the right to redeem a property was well-established at all relevant times. In 2006, the United States Supreme Court made clear in *Jones v. Flowers* that additional reasonable steps, if

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in the particular case at hand.'" Smith v. Ray, 781 F.3d 95, 106, fn 3 (4th Cir. 2015) (citing Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

available, must be taken when an actor is aware that notice has failed. The Fourth Circuit and the West Virginia Supreme Court issued similar holdings prior to the transfer of the Property in this case. That West Virginia places the responsibility to identify the property owners with the purchaser does not absolve Mr. Rollyson or his office of any due process obligations when he is aware that notice has failed. In short, purchasers bear the burden of the additional efforts required to notify property owners of their right to redeem, but granting a deed with the knowledge that notice failed and no additional reasonable efforts were attempted is itself a due process violation.[4] Therefore, the Court finds that Mr. Rollyson is not entitled to summary judgment.

Mr. Wisen is likewise not entitled to summary judgment. It is undisputed that he did not direct a notice to the "occupant" of the Property and took no additional measures to provide notice when the initial mailings were returned (although it is unclear when he learned of the returned notices). He argues that the O'Neals did have notice. However, notice of a tax delinquency or of taxes due does not substitute for notice of the right to redeem following a tax sale,

[4] Mr. Rollyson argues that his role is merely ministerial, and the actions of his office are prescribed by statute. The Court does not find that the statute requires Mr. Rollyson to issue deeds following inadequate notice. Indeed, the suggestion that state law requires Mr. Rollyson to give deeds to purchasers who have not fulfilled their statutory and constitutional duty to properly identify and seek to notify owners, borders on the absurd. Although the statute does not specify that additional reasonable attempts to locate and notify property owners are required when an initial attempt fails, it cannot reasonably be read to preclude such a requirement, particularly in light of the precedent.

and the lack of diligence of the property owner does not justify a lack of notice by the purchaser. As Judge Irene Keeley noted in a similar case in the Northern District of West Virginia, "[p]erhaps the simplest, most efficient, and most direct way of providing notice…would have been to do exactly what [the purchaser] did once it had acquired the deed to the property—go to the property and knock on the door (or post notice)." *Kelber, LLC v. WVT, LLC*, 213 F. Supp. 3d 789, 804 (N.D.W. Va. 2016). Mr. Wisen made contact with the O'Neals without great difficulty by posting an eviction notice on the door of the property. He could have effectively provided notice *before* depriving the O'Neals of their property by taking the same or similar steps. Therefore, Mr. Wisen has not met his burden of demonstrating that he undertook additional reasonable efforts to provide notice after learning that the initial mailed notices were returned, and summary judgment should be denied.

The Plaintiffs seek summary judgment as to their due process claims under 42 U.S.C. § 1983. They have produced evidence that the notices sent to the Skelton post office box by certified and regular mail were returned to the sender, and no additional attempts at notice were made. They have also produced evidence that additional steps to provide notice were reasonably available. As in *Kelber*, posting notice at the property proved effective after the transfer of the deed, and would very likely have been effective prior to depriving the O'Neals of their property rights. In addition, both Plaintiffs received personal property or other tax notices at updated addresses, which could have been located with a

search of public records. Neither Mr. Rollyson nor Mr. Wisen has produced any direct evidence to show that (a) no reasonable additional steps were available, or (b) that they made any attempt to provide notice after the initial mailings were returned. Further, neither has produced any evidence on this issue from which a reasonable inference could be drawn in their favor. Mr. Rollyson and Mr. Wisen proceeded as if the extensive case law requiring additional efforts to provide notice did not exist. The Court finds that no dispute as to any material fact exists, and the Defendants deprived the Plaintiffs of their property without due process. Therefore, the Plaintiffs are entitled to partial summary judgment as to Count One.

## CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the *Plaintiffs' Motion for Partial Summary Judgment Upon Plaintiffs' First Claim for Relief* (Document 32) be **GRANTED**.

The Court further **ORDERS** that *Defendant G. Russell Rollyson, Jr.'s Motion for Summary Judgment* (Document 35) and *Defendant Richard Wisen's Motion for Summary Judgment* (Document 39) be **DENIED.**

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: August 1, 2017

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

**[ENTERED: July 6, 2018]**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BECKLEY DIVISION**

JEFFREY O'NEAL and
SHERRIE O'NEAL,

Plaintiffs,

v. CIVIL ACTION NO. 5:16-cv-08597

RICHARD WISEN and
G. RUSSELL ROLLYSON, JR.,

Defendants.

**MEMORANDUM OPINION AND ORDER**

The Court has reviewed *Defendant G. Russell Rollyson, Jr.'s Rule 60(b) Motion Seeking Relief from an Order* (Document 70) and supporting memorandum (Document 71), as well as *Defendant G. Russell Rollyson, Jr.'s Motion to Vacate the Scheduling Order Pending Resolution of Rule 60(b) Motion and Petition for Writ of Certiorari* (Document 72). For the reasons stated herein, the Court finds that the motions should be denied.

This matter involves the sale of the Plaintiffs' property to Defendant Richard Wisen for delinquent

taxes. Defendant G. Russell Rollyson, Jr. is the Deputy Commissioner of Delinquent and Nonentered Lands in West Virginia, responsible for issuing the tax deed. The facts and the parties' positions were fully explored in the Court's *Memorandum Opinion and Order* (Document denying the Defendants' motions for summary judgment and granting the Plaintiffs' partial motion for summary judgment. In brief summary, the Plaintiffs owned a home, occupied by their adult daughter, and neglected to pay the 2012 property taxes. The property did not sell at an initial tax sale, and was certified to Mr. Rollyson's office for a second sale. Mr. Wisen purchased the property for $400 at that sale.

West Virginia law places the duty to conduct a title search and identify the owners of record on the purchaser of the property. Mr. Rollyson's office then sends notice of the right to redeem the property to a list of addresses supplied by the purchaser. Although West Virginia law requires that notice be sent addressed to "occupant" at owner-occupied homes, Mr. Wisen did not include that in his list of addresses for notice, and Mr. Rollyson did not send such a notice. It is not clear whether such notice could have been sent to the physical address of the home, as neither the O'Neals nor their daughter had put out a mailbox. Mr. Wisen found the address for a post office box, and regular and certified letters addressed to Mr. and Ms. O'Neal were mailed to that address. The letters were returned to Mr. Rollyson's office as undeliverable and/or unclaimed. The factual record did not establish whether Mr. Rollyson informed Mr. Wisen that the letters were returned.

Mr. Wisen testified that he was not informed that those notices were legally insufficient.

Neither Mr. Wisen nor Mr. Rollyson attempted any other form of notice of the right to redeem before Mr. Rollyson issued the deed to Mr. Wisen. After obtaining the deed, Mr. Wisen had an eviction notice served to the property and posted on the door, and negotiations between Mr. Wisen and Mr. O'Neal began.

Mr. Rollyson moved for summary judgment, arguing that West Virginia law places the duty to provide notice on the tax lien purchaser, and that he was entitled to qualified immunity. The Court found that United States Supreme Court precedent established that Constitutional due process requires additional steps, if reasonably available, when mailed notice is returned to the sender. Because Mr. Rollyson issued the tax deed despite his awareness that the notices were returned to the sender, the Court concluded that he was not entitled to qualified immunity, and a reasonable jury could find that his actions did not comply with due process. The Court further granted partial summary judgment to the Plaintiffs as to their claim that the Defendants deprived them of their property without due process.

Mr. Rollyson filed an interlocutory appeal. On April 26, 2018, the Fourth Circuit affirmed this Court's denial of qualified immunity in an unpublished opinion. The Court found that "even assuming that the statutory scheme places the burden of ensuring constitutionally sufficient notice on the purchaser…Rollyson fails to demonstrate how

his transfer of the deed to the purchaser, despite Rollyson's knowledge that the attempted notices were returned, did not violate the O'Neals' constitutional rights, clearly established in *Jones v. Flowers*, 547 U.S. 220 (2006), and *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005). (Fourth Circuit Opinion at 4) (Document 61.)

Also on April 26, 2018, the West Virginia Supreme Court issued a decision addressing notice requirements related to tax sales of property. *Archuleta v. U.S. Liens, LLC*, 813 S.E.2d 761 (W.Va. 2018). Mr. Rollyson seeks reconsideration of this Court's prior summary judgment opinion based on *Archuleta*. In addition, Mr. Rollyson indicates that he intends to file a petition for a writ of certiorari to the United States Supreme Court, and requests that the Court stay this matter pending resolution of such a petition.

## STANDARD OF REVIEW

Rule 60(b) of the Federal Rules of Civil Procedure permits relief from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The Fourth Circuit has held that, while the "catchall reason" contained in Rule 60(b)(6) "includes few textual limitations, its context requires that it may be invoked in only 'extraordinary circumstances.'" *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011). The Fourth Circuit has "thus required—in addition to the explicitly stated requirements that the motion under Rule 60(b)(6) be filed on 'just terms' and within 'a reasonable time'—that the party filing the motion have a meritorious claim or defense and that the opposing party not be unfairly prejudiced by having the judgment set aside." *Id*. at 501. Further, "if the reason asserted for the Rule 60(b)(6) motion could have been addressed on appeal from the judgment, we have denied the motion as merely an inappropriate substitute for an appeal." *Id.*

## DISCUSSION[1]

Mr. Rollyson argues that the West Virginia Supreme Court recently conclusively established that "the burden of notice is exclusively upon a tax purchaser and not the State Auditor." (Mot. at 1). He relies upon *Archuleta v. U.S. Liens, LLC*, 813 S.E.2d 761 (W.Va. 2018) for the proposition that the Auditor's duties regarding notice are limited to sending notice to the addresses directed by the purchaser. He contends that the West Virginia Supreme Court's decision controls here, and the issuance of a controlling case constitutes extraordinary circumstances sufficient to justify relief pursuant to Rule 60(b).

In *Archuleta*, the state circuit court vested title in the purchaser of a tax lien, despite a challenge by the delinquent owner. Finding that the purchaser had failed to direct that notice addressed to "Occupant" be mailed to the physical address of the home in accordance with state law, the Supreme Court reversed. The court rejected the purchaser's argument that it was the State Auditor's duty to send notice addressed to "Occupant" to the property address, even absent instruction from the purchaser. The court noted that a question had been raised as to whether the property owner should have brought the State Auditor into the proceeding, but declined to address the question because it had not been fully

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[1] The Court has ruled on this matter prior to expiration of the response period, given the approaching deadlines in this case. Given the Court's analysis and resolution, the Plaintiffs are not prejudiced by the Court's ruling without consideration of any response they may have chosen to file.

briefed. *Archuleta*, 813 S.E.2d at 767, fn. 13. The court noted that "[o]ur cases have long made clear that the burden is exclusively upon the tax purchaser to show that the delinquency tax sales statutes have been complied with." *Id*. at 768.

The State Auditor was not a party to *Archuleta*, and the court did not address questions of due process. The court considered only whether the purchaser had complied with the statutory requirement to have notice addressed to "Occupant" mailed to the property address, and whether failure to comply with that statute required the tax deed be set aside. Here, the issue presented as to Mr. Rollyson is whether constitutional due process permits granting a tax deed despite knowledge that notices were returned and when no further steps were taken to notify the owners of record of their right to redeem. *Archuleta* does not alter the Court's opinion that due process requires more. Indeed, because the Court's conclusions are grounded in precedent from the United States Supreme Court and the Fourth Circuit Court of Appeals establishing federal Constitutional requirements for deprivation of property for tax delinquency, West Virginia Supreme Court decisions are of limited weight. Accordingly, the Court finds that Mr. Rollyson's motion to set aside judgment should be denied.

Mr. Rollyson additionally requests that the Court stay all trial-related deadlines pending (a) resolution of the Rule 60 motion and (b) resolution of a forthcoming petition for writ of certiorari with the United States Supreme Court. The Court has now resolved the Rule 60 motion, and the Court finds that

a stay pending resolution of a petition for a writ of certiorari is not justified under the circumstances presented.

## CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that *Defendant G. Russell Rollyson, Jr.'s Rule 60(b) Motion Seeking Relief from an Order* (Document 70) and *Defendant G. Russell Rollyson, Jr.'s Motion to Vacate the Scheduling Order Pending Resolution of Rule 60(b) Motion and Petition for Writ of Certiorari* (Document 72) be **DENIED.**

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

ENTER: July 6, 2018

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

**§11A-3-1.**

In view of the paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes; and in view of the further fact that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; and in view of the rights of owners of real property to adequate notice and an opportunity for redemption before they are divested of their interests in real property for failure to pay taxes or have their property entered on the landbooks; and in view of the fact that the circuit court suits heretofore provided prior to deputy commissioners' sales are unnecessary and a burden on the judiciary of the state; and in view of the necessity to continue the mechanism for the disposition of escheated and waste and unappropriated lands; now therefore, the Legislature declares that its purposes in the enactment of this article are as follows: (1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners; (3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax deed; (4) to permit deputy commissioners of delinquent and nonentered lands to sell such lands without the necessity of proceedings in the circuit courts; (5) to reduce the expense and burden on the state and its subdivisions of tax sales so that such sales may be conducted in an efficient manner while

respecting the due process rights of owners of real property; and (6) to provide for the disposition of escheated and waste and unappropriated lands.

**§11A-3-2(b)**

(b) In addition to such publication, no less than thirty days prior to the sale, the sheriff shall send a notice of the delinquency and the date of sale by certified mail: (1) To the last known address of each person listed in the land books whose taxes are delinquent; (2) to each person having a lien on real property upon which the taxes are due as disclosed by a statement filed with the sheriff pursuant to the provisions of section three of this article; (3) to each other person with an interest in the property or with a fiduciary relationship to a person with an interest in the property who has in writing delivered to the sheriff on a form prescribed by the Tax Commissioner a request for such notice of delinquency; and (4) in the case of property which includes a mineral interest but does not include an interest in the surface other than an interest for the purpose of developing the minerals, to each person who has in writing delivered to the sheriff, on a form prescribed by the Tax Commissioner, a request for such notice which identifies the person as an owner of an interest in the surface of real property that is included in the boundaries of such property: *Provided,* That in a case where one owner owns more than one parcel of real property upon which taxes are delinquent, the sheriff may, at his or her option, mail separate notices to the owner and each lienholder for each parcel or may prepare and mail to the owner and each lienholder a single notice which pertains to all such delinquent

parcels. If the sheriff elects to mail only one notice, that notice shall set forth a legally sufficient description of all parcels of property on which taxes are delinquent. In no event shall failure to receive the mailed notice by the landowner or lienholder affect the validity of the title of the property conveyed if it is conveyed pursuant to section twenty-seven or fifty-nine of this article.

**§11A-3-42.**

All lands for which no person present at the sheriff's sale, held pursuant to section five of this article, has bid the total amount of taxes, interest and charges due, and which were subsequently certified to the Auditor pursuant to section eight of this article, and which have not been redeemed from the Auditor within eighteen months after such certification, together with all nonentered lands, all escheated lands and all waste and unappropriated lands, shall be subject to sale by the deputy commissioner of delinquent and nonentered lands as further provided in this article. References in this chapter to the sale or purchase of certified or nonentered lands by or from the deputy commissioner shall be construed as the sale or purchase of the tax lien or liens thereon.

**§11A-3-45**.

(a) Each tract or lot certified to the deputy commissioner pursuant to the preceding section shall be sold by the deputy commissioner at public auction at the courthouse of the county to the highest bidder between the hours of nine in the morning and four in the afternoon on any business working day within one

hundred twenty days after the Auditor has certified the lands to the deputy commissioner as required by the preceding section. The payment for any tract or lot purchased at a sale shall be made by check or money order payable to the sheriff of the county and delivered before the close of business on the day of sale. No part or interest in any tract or lot subject to such sale, or any part thereof of interest therein, that is less than the entirety of such unredeemed tract, lot or interest, as the same is described and constituted as a unit or entity in said list, shall be offered for sale or sold at such sale. If the sale shall not be completed on the first day of the sale, it shall be continued from day to day between the same hours until all the land shall have been offered for sale.

(b) A private, nonprofit, charitable corporation, incorporated in this state, which has been certified as a nonprofit corporation pursuant to the provisions of Section 501(c)(3) of the federal Internal Revenue Code, as amended, which has as its principal purpose the construction of housing or other public facilities and which notifies the deputy commissioner of an intention to bid and subsequently submits a bid that is not more than five percent lower than the highest bid submitted by any person or organization which is not a private, nonprofit, charitable corporation as defined in this subsection, shall be sold the property offered for sale by the deputy commissioner pursuant to the provisions of this section at the public auction as opposed to the highest bidder.

The nonprofit corporation referred to in this subsection does not include a business organized for profit, a labor union, a partisan political organization

or an organization engaged in religious activities and it does not include any other group which does not have as its principal purpose the construction of housing or public facilities.

**§11A-3-52.**

(a) Within forty-five days following the approval of the sale by the auditor pursuant to section fifty-one of this article, the purchaser, his heirs or assigns, in order to secure a deed for the real estate purchased, shall:

(1) Prepare a list of those to be served with notice to redeem and request the deputy commissioner to prepare and serve the notice as provided in sections fifty-four and fifty-five of this article;

(2) When the real property subject to the tax lien was classified as Class II property, provide the deputy commissioner with the actual mailing address of the property that is subject to the tax lien or liens purchased; and

(3) Deposit, or offer to deposit, with the deputy commissioner a sum sufficient to cover the costs of preparing and serving the notice.

(b) If the purchaser fails to fulfill the requirements set forth in paragraph (a) of this section, the purchaser shall lose all the benefits of his or her purchase.

(c) After the requirements of paragraph (a) of this section have been satisfied, the deputy commissioner may then sell the property in the same manner as he sells lands which have been offered for sale at public auction but which remain unsold after such auction, as provided in section forty-eight of this article.

(d) If the person requesting preparation and service of the notice is an assignee of the purchaser, he shall, at the time of the request, file with the deputy commissioner a written assignment to him of the purchaser's rights, executed, acknowledged and certified in the manner required to make a valid deed.

**§11A-3-54.**

Whenever the provisions of section fifty-two of this article have been complied with, the deputy commissioner shall thereupon prepare a notice in form or effect as follows:

To _____

You will take notice that _____, the purchaser (or _____, the assignee, heir or devisee of _____, the purchaser) of the following real estate, _____, (here describe the real estate sold) located in _____, (here name the city, town or village in which the real estate is situated or, if not within a city, town or village, give the district and a general description) which was _____ (here put whether the property was returned delinquent or nonentered) in the name of _____, and

was sold by the deputy commissioner of delinquent and nonentered lands of _____ County at the sale for delinquent taxes (or nonentry) on the _____ day of _____, 19____, has requested that you be notified that a deed for such real estate will be made to him on or after the _____ day of _____, 19____, as provided by law, unless before that day you redeem such real estate. The amount you will have to pay to redeem on the _____ day of _____,19__ will be as follows:

Amount equal to the taxes, interest and charges due on the date of sale, with interest to _____ .....$_____

Amount of taxes paid on the property, since the sale, with interest to _____ .....$_____

Amount paid for title examination and preparation of list of those to be served, and for preparation and service of the notice with interest to _____ .....$_____

Amount paid for other statutory costs (describe) _____ _____..... $_____

Total ..... $_____

You may redeem at any time before _____ by paying the above total less any unearned interest.

Given under my hand this _____ day of _____, 19_____.

_____
Deputy Commissioner of Delinquent and Nonentered Lands

_____ County,
State of West Virginia

The deputy commissioner for his service in preparing the notice shall receive a fee of $10 for the original and $2 for each copy required. Any costs which must be expended in addition thereto for publication, or service of such notice in the manner provided for serving process commencing a civil action, or for service of process by certified mail, shall be charged by the deputy commissioner. All costs provided by this section shall be included as redemption costs and included in the notice described herein.

**§11A-3-55**.

As soon as the deputy commissioner has prepared the notice provided for in section fifty-four of this article, he shall cause it to be served upon all persons named on the list generated by the purchaser pursuant to the provisions of section fifty-two of this article. Such notice shall be mailed and, if necessary, published at least thirty days prior to the first day a deed may be issued following the deputy commissioner's sale.

The notice shall be served upon all such persons residing or found in the state in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested. The notice shall be served on or before the thirtieth day following the request for such notice.

If any person entitled to notice is a nonresident of this state, whose address is known to the purchaser, he shall be served at such address by certified mail, return receipt requested.

If the address of any person entitled to notice, whether a resident or nonresident of this state, is unknown to the purchaser and cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication as a Class III-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such real estate is located. If service by publication is necessary, publication shall be commenced when personal service is required as set forth above, and a copy of the notice shall at the same time be sent by certified mail, return receipt requested, to the last known address of the person to be served. The return of service of such notice, and the affidavit of publication, if any, shall be in the manner provided for process generally and shall be filed and preserved by the auditor in his office, together with any return receipts for notices sent by certified mail.

In addition to the other notice requirements set forth in this section, if the real property subject to the tax lien was classified as Class II property at the time

of the assessment, at the same time the deputy commissioner issues the required notices by certified mail, the deputy commissioner shall forward a copy of the notice sent to the delinquent taxpayer by first class mail, addressed to "Occupant", to the physical mailing address for the subject property. The physical mailing address for the subject property shall be supplied by the purchaser of the property, pursuant to the provisions of section fifty-two of this article. Where the mail is not deliverable to an address at the physical location of the subject property, the copy of the notice shall be sent to any other mailing address that exists to which the notice would be delivered to an occupant of the subject property.

**§11A-3-59.**

If the real estate described in the notice is not redeemed within the time specified therein, but in no event prior to thirty days after notices to redeem have been personally served, or an attempt of personal service has been made, or such notices have been mailed or, if necessary, published in accordance with the provisions of section fifty-five of this article, following the deputy commissioner's sale, the deputy commissioner shall, upon the request of the purchaser, make and deliver to the person entitled thereto a quitclaim deed for such real estate in form or effect as follows:

This deed, made this _____ day of _____, 19____, by and between _____, deputy commissioner of delinquent and nonentered lands of _____ County, West Virginia, grantor, and _____, purchaser

(or _____ heir, devisee, assignee of _____, purchaser) grantee, witnesseth, that

Whereas, in pursuance of the statutes in such case made and provided, _____, deputy commissioner of delinquent and nonentered lands of _____ County, did, on the _____ day of _____, 19_____, sell the real estate hereinafter mentioned and described for the taxes delinquent thereon for the year(s) 19_____, (or as nonentered land for failure of the owner thereof to have the land entered on the land books for the years _____, or as property escheated to the State of West Virginia, or as waste or unappropriated property) for the sum of $_____, that being the amount of purchase money paid to the deputy commissioner, and _____ (here insert name of purchaser) did become the purchaser of such real estate, which was returned delinquent in the name of _____ (or nonentered in the name of, or escheated from the estate of, or which was discovered as waste or unappropriated property); and

Whereas, the deputy commissioner has caused the notice to redeem to be served on all persons required by law to be served therewith; and

Whereas, the real estate so purchased has not been redeemed in the manner provided by law and the time for redemption set forth in such notice has expired.

Now, therefore, the grantor for and in consideration of the premises recited herein, and

pursuant to the provisions of Article 3, Chapter 11A of the West Virginia Code, doth grant unto _____, grantee, his heirs and assigns forever, the real estate so purchased, situate in the County of _____, bounded and described as follows: _____ (here insert description of property)

Witness the following signature:

_____

Deputy Commissioner of Delinquent and Nonentered Lands of _____ County

Except when ordered to do so as provided in section sixty of this article, the deputy commissioner shall not execute and deliver a deed more than thirty days after the purchaser's right to the deed accrued.

For the preparation and execution of the deed and for all the recording required by this section, a fee of $50 and the recording expenses shall be charged, to be paid by the grantee upon delivery of the deed. The deed, when duly acknowledged or proven, shall be recorded by the clerk of the county commission in the deed book in his office, together with the assignment from the purchaser, if one was made, the notice to redeem, the return of service of such notice, the affidavit of publication, if the notice was served by publication, and any return receipts for notices sent by certified mail.

**§11A-4-4.**

(a) If any person entitled to be notified under the provisions of section twenty-two or fifty-five,

article three of this chapter is not served with the notice as therein required, and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed. No deed shall be set aside under the provisions of this section until payment has been made or tendered to the purchaser, or his heirs or assigns, of the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum.

(b) No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.

(c) Upon a preliminary finding by the court that the deed will be set aside pursuant to this section, such amounts shall be paid within one month of the entry thereof. Upon the failure to pay the same within said period of time, the court shall upon the request of the purchaser, enter judgment dismissing the action with prejudice.

**[ENTERED: April 26, 2018]**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2018 Term**

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**No. 17-0528**

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**FILED**
**April 26, 2018**
**released at 3:00 p.m.**
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**JULIAN S. ARCHULETA,**
**Defendant Below, Petitioner**

**V.**

**US LIENS, LLC,**
**Plaintiff Below, Respondent**

---

**Appeal from the Circuit Court of Berkeley County**
**Honorable Christopher C. Wilkes, Judge**
**Civil Action No. 15-C-407**

**REVERSED AND REMANDED**

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**Submitted: April 10, 2018**
**Filed: April 26, 2018**

**Tammy M. McWilliams**
**Trump & Trump**
**Martinsburg, West Virginia**
**Attorney for Petitioner**

**Christopher P. Stroech**
**Arnold & Bailey**
**Charles Town, West Virginia**
**Attorney for Respondent**

**JUSTICE DAVIS delivered the Opinion of the Court.**

## SYLLABUS BY THE COURT

1. Noncompliance with the mandatory requirements of W. Va. Code § 11A-3-19 (2010) (Repl. Vol. 2017) is a jurisdictional defect not subject to curative measures.

2. West Virginia Code § 11A-3-19 (2010) (Repl. Vol. 2017) provides that a property owner must be served notice of the right to redeem property as outlined under W. Va. Code § 11A-3-22 (2013) (Repl. Vol. 2017), and that failure to provide notice in the manner required will result in the tax purchaser of the property losing all benefits of the purchase.

3. West Virginia Code § 11A-3-22(d) (2013) (Repl. Vol. 2017) provides that, in order to comply with the redemption notice requirements for Class II property, in addition to other notice requirements set

forth in W. Va. Code § 11A-3-22, notice must also be addressed to "Occupant" and mailed to the property.

**Davis, Justice:**

This is an appeal by Petitioner, Julian S. Archuleta (defendant below), from a summary judgment order of the Circuit Court of Berkeley County. The circuit court's order vested title to Petitioner's home to the Respondent, US Liens, LLC (plaintiff below). In this appeal, the Petitioner contends that she was entitled to summary judgment because there was no material issue of fact in dispute regarding the Respondent's failure to comply with all of the requirements for providing her notice of the right to redeem her home. After a careful review of the briefs, the appendix record, and listening to the oral arguments of the parties, we reverse.

## I.

## FACTUAL AND PROCEDURAL HISTORY

The record indicates that the Petitioner, who is in her seventies, and her father purchased a home in Martinsburg, West Virginia, in 1994. The home was subject to a mortgage. It appears that the lender required the Petitioner and her father to make monthly payments for property taxes into an escrow account for the life of the loan. The lender was ultimately responsible for paying property taxes from the escrow account. The Petitioner's father died in 2003, after which title to the property vested in Petitioner by right of survivorship. The mortgage was satisfied in 2012. Once the loan was satisfied

the lender was no longer responsible for paying property taxes.

After the termination of the tax escrow account, the Petitioner failed to pay her property taxes for the year 2012. As a result of the 2012 taxes not having been paid, the Sheriff of Berkeley County held an auction on November 19, 2013, to sell the tax lien on the Petitioner's home. The Respondent purchased the tax lien on the property at the auction. It appears that during the first few months of 2015, the Respondent, through the West Virginia State Auditor, unsuccessfully attempted to have the Petitioner notified, [1] by mail [2] and newspaper publications,[3] of her right to redeem the property. On April 1, 2015, a deed to the property was conveyed to the Respondent by a State Auditor appointee. Thereafter, on July 23, 2015, the Respondent filed the instant proceeding in circuit court to quiet title to the property.[4]

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[1] See Syl. pt. 1, in part, Wells Fargo Bank, N.A. v. UP Ventures II, LLC, 223 W. Va. 407, 675 S.E.2d 883 (2009) ("Under W. Va. Code, 11A-3-19(a), a tax sale purchaser is required to provide notice to parties who are of record at any time after the thirty-first day of October of the year following the sheriff's sale, and on or before the thirty-first day of December of the same year.").

[2] The mail was returned "unclaimed."

[3] The Respondent claims that he also attempted personal service on Petitioner. The circuit court's summary judgment order did not indicate that personal service was attempted.

[4] "In West Virginia, a suit to quiet the title to a tax deed is authorized by W. Va. Code, 11A-3-62(b)." MZRP, LLC v. Huntington Realty Corp., No. 35692, 2011 WL 12455342, at *2 (W. Va. Mar. 10, 2011) (Memorandum Decision).

The Petitioner filed an answer and counterclaim to the petition to quiet title.[5] In her response, the Petitioner asserted that in January 2015 she was hospitalized in Arlington, Virginia.[6] The hospital eventually released her to a nursing facility in Arlington. The Petitioner was not able to return to her home in Martinsburg until April 2015. The Petitioner further alleged that the Respondent failed to comply with all of the statutory requirements for providing her with notice of the right to redeem her home. Specifically, the Petitioner alleged that the Respondent failed to comply with W. Va. Code § 11A-3-22(d) (2013) (Repl. Vol. 2017), by addressing a notice to redeem to "Occupant" and sending it by first class mail to her home.

Both parties eventually moved for summary judgment. By order entered May 9, 2017, the circuit court granted summary judgment in favor of the Respondent. The circuit court's order acknowledged that the Petitioner was recovering from health problems in Virginia during the period of time the Respondent attempted to provide her with notice to redeem the property. However, the order held that the Petitioner's incapacitation "does not toll the redemption deadline." The order also concluded that, although the notice to "Occupant" mailing was not complied with, the Petitioner "would not have received any additional notice had a . . . first class letter been delivered to her under a pseudonym."

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[5] West Virginia Code § 11A-4-4 (1994) (Repl. Vol. 2017) allows a civil action to set aside a tax deed by a party claiming not to have received notice of the right to redeem property.

[6] The Petitioner was visiting a friend when she took ill.

The circuit court ultimately concluded that the Respondent substantially complied with the redemption notice requirements. This appeal followed.

## II.

## STANDARD OF REVIEW

This proceeding was brought from a summary judgment order of the circuit court. We have held that "[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). We have also held that

> [s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). We will apply these standards to our analysis of this appeal.

## III.

## DISCUSSION

The Petitioner contends that the circuit court's summary judgment order should be reversed, because

the evidence clearly showed that the Respondent failed to have a notice addressed to "Occupant," and mailed to her home as required by W. Va. Code § 11A-3 22(d). The Respondent concedes that it failed to comply with the "Occupant" notice requirement. However, the Respondent argues that it provided the West Virginia State Auditor with the address of the property, and that it was the duty of the State Auditor to send out a notice of redemption addressed to the "Occupant" of the address given. The Respondent further argues that it should not be held responsible for the State Auditor's failure to comply with W. Va. Code § 11A-3-22(d).

To start, we note that the Legislature has carved out detailed statutes that regulate every aspect of the sale of real property for delinquent taxes and the redemption of such property. *See* W. Va. Code § 11A-3-1 *et seq*. We have previously observed that "this area of the law has undergone significant change in the last several years, with each change increasing the protections afforded the delinquent land owner." *Mingo Cty. Redev. Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000). Many of the changes in this area of the law took place after a decision by the United States Supreme Court recognized certain constitutional due process notice requirements for owners of real property subject to delinquent tax sales. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712, 77 L. Ed. 2d 180 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the . . . property interests of any party, whether unlettered or well versed in commercial

practice, if its name and address are reasonably ascertainable."). This Court adopted the federal constitutional standard in *Lilly v. Duke*, 180 W. Va. 228, 376 S.E.2d 122 (1988), where we held:

> There are certain constitutional due process requirements for notice of a tax sale of real property. 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 actual notice.

Syl. pt. 1, *Lilly*. Although *Lilly* addressed the issue of due process notice to a property owner before a delinquent tax sale occurs, we have found that those constitutional protections are equally applicable to notice of the right to redeem property after a tax sale. *See Mason v. Smith*, 233 W. Va. 673, 680, 760 S.E.2d 487, 494 (2014).

The issue in this case concerns the notice of the right to redeem real property that was sold for delinquent taxes. Before examining the specific statutory provision at issue in this case, W. Va. Code § 11A-3-22(d), we must first review W. Va. Code § 11A-3-19 (2010) (Repl. Vol. 2017), a general statute that impacts the resolution of the issue raised under W. Va. Code § 11A-3-22(d).

As a prerequisite to receiving a deed to property sold for delinquent taxes, W. Va. Code § 11A-3-19 requires the tax purchaser to "[p]repare a

list of those to be served with notice to redeem and request the State Auditor to prepare and serve the notice as provided in sections twenty-one [§ 11A-3-21[7]] and twenty-two [§ 11A-3-22[8]] of this article." (Footnotes added). The statute also makes clear that, "*[i]f the purchaser fails to meet these requirements, he or she shall lose all the benefits of his or her purchase*."[9] (Emphasis added).

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[7] This statute provides an outline of what should be included in a notice to redeem.

[8] This statute instructs as to how notice to redeem must be served.

[9] West Virginia Code § 11A-3-19 (2010) (Repl. Vol. 2017) provides in full as follows:

> (a) At any time after October 31 of the year following the sheriff's sale, and on or before December 31 of the same year, the purchaser, his or her heirs or assigns, in order to secure a deed for the real estate subject to the tax lien or liens purchased, shall:
>
> (1) Prepare a list of those to be served with notice to redeem and request the State Auditor to prepare and serve the notice as provided in sections twenty-one and twenty-two of this article;
>
> (2) When the real property subject to the tax lien is classified as Class II property, provide the State Auditor with the physical mailing address of the property that is subject to the tax lien or liens purchased;
>
> (3) Provide the State Auditor with a list of any additional expenses incurred after January 1 of the year following the sheriff's sale for the preparation of the list of those to be served with notice to redeem including proof of the additional expenses in the form of receipts or other evidence of reasonable legal expenses incurred for the services of any attorney who has performed an examination of the title to the real estate and rendered written

Further, prior to 1994, the text of W. Va. Code § 11A-3-19 was contained in a former version of W. Va. Code § 11A-3-20. This Court held the following regarding the pre-1994 version of W. Va. Code § 11A-3-20:

> Noncompliance with the mandatory requirements of West Virginia Code
>
> ---
>
> documentation used in the preparation of the list of those to be served with the notice to redeem;
>
> (4) Deposit with the State Auditor a sum sufficient to cover the costs of preparing and serving the notice; and
>
> (5) Present the purchaser's certificate of sale, or order of the county commission where the certificate has been lost or wrongfully withheld from the owner, to the State Auditor.
>
> (b) *If the purchaser fails to meet these requirements, he or she shall lose all the benefits of his or her purchase*. If the person requesting preparation and service of the notice is an assignee of the purchaser, he or she shall, at the time of the request, file with the State Auditor a written assignment to him or her of the purchaser's rights, executed, acknowledged and certified in the manner required to make a valid deed.
>
> (c) Whenever any certificate given by the sheriff for a tax lien on any land, or interest in the land sold for delinquent taxes, or any assignment of the lien is lost or wrongfully withheld from the rightful owner of the land and the land or interest has not been redeemed, the county commission may receive evidence of the loss or wrongful detention and, upon satisfactory proof of that fact, may cause a certificate of the proof and finding, properly attested by the State Auditor, to be delivered to the rightful claimant and a record of the certificate shall be duly made by the county clerk in the recorded proceedings of the commission.
>
> (Emphasis added).

> § 11A-3-20 (1983 Replacement Vol.) is a jurisdictional defect not subject to curative measures.

Syl. pt. 3, *State ex rel. Morgan v. Miller*, 177 W. Va. 97, 350 S.E.2d 724 (1986). In light of the fact that W. Va. Code § 11A-3-20 was rewritten in 1994, and its text was placed in W. Va. Code § 11A-3-19, we take this opportunity to now hold that noncompliance with the mandatory requirements of W. Va. Code § 11A-3-19 is a jurisdictional defect not subject to curative measures.[10]

As we previously mentioned, and now hold, W. Va. Code § 11A-3-19 provides that a property owner must be served notice of the right to redeem property as outlined under Va. Code § 11A-3-22, and that failure to provide notice in the manner required will result in the tax purchaser of the property losing all benefits of the purchase. The Petitioner contends that the Respondent failed to comply with the "Occupant" notice requirement contained in W. Va. Code § 11A-3-22(d). The relevant text of this statutory provision provides as follows:

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[10] This holding, as taken from Syllabus point 3 of *State ex rel. Morgan v. Miller*, 177 W. Va. 97, 350 S.E.2d 724 (1986), is directed at the presumptive curing of certain irregularities in tax sale procedures as stated in W. Va. Code § 11A-3-31 (1994) (Repl. Vol. 1995). This statute, however, by referencing W. Va. Code § 11A-4-4, exempts its application to a procedural defect involving notice under W. Va. Code § 11A-3-22 (2013) (Repl. Vol. 2017). *See Gates v. Morris*, 123 W. Va. 6, 11, 13 S.E.2d 473, 476 (1941) ("Generally the want of notice required by statute is a jurisdictional defect which cannot be cured." (internal quotations and citations omitted)).

> In addition to the other notice requirements set forth in this section, if the real property subject to the tax lien was classified as Class II property at the time of the assessment, at the same time the State Auditor issues the required notices by certified mail, *the State Auditor shall forward a copy of the notice sent to the delinquent taxpayer by first class mail, addressed to "Occupant"*, to the physical mailing address for the subject property. The physical mailing address for the subject property shall be supplied by the purchaser of the tax lien pursuant to the provisions of section nineteen of this article.[11]

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[11] The full text of W.Va. Code § 11A-3-22 provides the following:

(a) As soon as the State Auditor has prepared the notice provided in section twenty-one of this article, he or she shall cause it to be served upon all persons named on the list generated by the purchaser pursuant to the provisions of section nineteen of this article.

(b) The notice shall be served upon all persons residing or found in the state in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested. The notice shall be served on or before the thirtieth day following the request for the notice.

(c) If a person entitled to notice is a nonresident of this state, whose address is known to the purchaser, he or she shall be served at that address by certified mail, return receipt requested.

If the address of a person entitled to notice, whether a resident or nonresident of this state, is unknown to the purchaser and

W. Va. Code § 11A-3-22(d). (Emphasis and footnote added).

For purposes of this appeal, the relevant text of W. Va. Code § 11A-3-22(d) is not ambiguous. We have held that "[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe

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cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication as a Class III-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and the publication area for the publication shall be the county in which the real estate is located. If service by publication is necessary, publication shall be commenced when personal service is required as set forth in this section and a copy of the notice shall at the same time be sent by certified mail, return receipt requested, to the last known address of the person to be served. The return of service of the notice and the affidavit of publication, if any, shall be in the manner provided for process generally and shall be filed and preserved by the State Auditor in his or her office, together with any return receipts for notices sent by certified mail.

In addition to the other notice requirements set forth in this section, if the real property subject to the tax lien was classified as Class II property at the time of the assessment, at the same time the State Auditor issues the required notices by certified mail, the State Auditor shall forward a copy of the notice sent to the delinquent taxpayer by first class mail, addressed to "Occupant", to the physical mailing address for the subject property. The physical mailing address for the subject property shall be supplied by the purchaser of the tax lien pursuant to the provisions of section nineteen of this article. Where the mail is not deliverable to an address at the physical location of the subject property, the copy of the notice shall be sent to any other mailing address that exists to which the notice would be delivered to an occupant of the subject property.

but to apply the statute." Syl. pt. 1, *State ex rel. Fox v. Board of Trs. of Policemen's Pension or Relief Fund of City of Bluefield*, 148 W. Va. 369, 135 S.E.2d 262 (1964), *overruled on other grounds by Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (1995). Consequently, we now hold West Virginia Code § 11A-3-22(d) provides that, in order to comply with the redemption notice requirements for Class II property, in addition to the other notice requirements set forth in W. Va. Code § 11A-3-22, notice must also be addressed to "Occupant" and mailed to the property.

The "Occupant" requirement of W. Va. Code § 11A-3-22(d) was added in 2010. Although there is no legislative history explaining why the "Occupant" provision was added to the statute, it is possible that the provision was added in response to the 2006 decision by the United States Supreme Court in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

The decision in *Jones* squarely addressed the issue of sending mail addressed to "Occupant" before real property may be taken from an owner for tax purposes. The plaintiff in *Jones* had a thirty year mortgage on his home in Arkansas. He paid his mortgage each month for thirty years, and the mortgage company paid his property taxes during that period. After the plaintiff paid off his mortgage in 1997, the property taxes went unpaid, and the State certified the property as delinquent. The State attempted to notify the plaintiff of the tax delinquency, and his right to redeem the property, by mailing a certified letter to his home. The post office

returned the mail marked "unclaimed." Two years later, the State published a notice of public sale of plaintiff's property in a local newspaper. After several months passed, the State mailed a second certified letter to the plaintiff informing him that the property was going to be sold to a specific bidder. The second letter was also returned marked "unclaimed." The plaintiff learned of the sale of his property as a result of an unlawful detainer notice being delivered to his daughter.[12] The plaintiff filed an action in an Arkansas State court for a determination of whether the State provided sufficient notice to him that his home was going to be sold for delinquent taxes. The plaintiff argued that the notice provided by the State was insufficient to satisfy constitutional due process. The Arkansas trial court and supreme court disagreed with the plaintiff. The United States Supreme Court granted certiorari "to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered." *Jones*, 547 U.S. at 225, 126 S. Ct. at 1713, 164 L. Ed. 2d 415. The Supreme Court agreed with the plaintiff that due process under the facts of the case required more from the State before his home could be taken for delinquent taxes. Relevant to the instant case, the opinion held the following:

> In response to the returned form suggesting that Jones had not received

[12] It appears that the plaintiff did not receive the certified mailings because he was living at another address.

notice that he was about to lose his property, the State did-nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. . . .

. . . .

Other reasonable follow up measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, *or to address otherwise undeliverable mail to "occupant*." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. . . . . Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only

> because a change in ownership could well affect their own occupancy.

*Jones*, 547 U.S. at 234-35, 126 S. Ct. at 1718-19, 164 L. Ed. 2d 415. The decision in *Jones* suggests that, before states may take property for delinquent tax purposes, due process may require mailing notice to the property addressed to "Occupant." West Virginia Code § 11A-3-22(d) makes this constitutional suggestion mandatory for redemption purposes.

In the instant proceeding, the record is clear in showing that the requirement under W. Va. Code § 11A-3-22(d), that redemption notice be mailed and addressed to the "Occupant," did not occur. The circuit court found that this noncompliance with the statute was harmless because the Petitioner would not have received the notice. However, the decisions of this Court have made clear that "the right of a landowner to have the statutory procedures complied with before he is deprived of his land is fundamental[.]" *Morgan*, 177 W. Va. at 106, 350 S.E.2d at 734. *See also* Syl. pt. 1, *Cook v. Duncan*, 171 W. Va. 747, 301 S.E.2d 837 (1983) ("Persons seeking to obtain complete title to property sold for taxes must comply literally with the statutory requirements."). To follow the logic of the circuit court would require rewriting the statute and omitting the "Occupant" notice requirement. This requirement is no less important than any of the other notice requirements set out under W. Va. Code § 11A-3-22. It is not the role of the courts to cherry pick which notice is important and which notice may be tossed to the curb. The role of courts is to apply the law fully, not to partially ignore it. It is for this reason that W. Va.

Code § 11A-3-19(a)(5) clearly instructs courts that "*[i]f the purchaser fails to meet these requirements, he or she shall lose all the benefits of his or her purchase*." Nothing could be any clearer. The circuit court was simply wrong in discounting the omission of the "Occupant" notice requirement. *See Koontz v. Ball*, 96 W. Va. 117, 121-22, 122 S.E. 461, 463 (1924) ("Those statutes which require notice to the owner . . . of the tax purchase and of the time of expiration of the period for redemption are strictly construed in favor of the owner, and against the purchaser, and, unless their provisions are literally complied with, the sale will be void.").

The Respondent argues that the failure to comply with the "Occupant" notice requirement was made by the State Auditor; therefore, it should not be penalized for the error.[13] The Respondent correctly asserts that W. Va. Code § 11A-3-22(d) obligates the State Auditor to mail notice to the "Occupant" of a

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[13] The Respondent also suggested that the Petitioner should have brought the State Auditor into this proceeding. The Petitioner notes that this issue was not presented to the circuit court and we should, therefore, not address it. *See* Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."). Assuming, for the sake of argument, that the issue was presented to the circuit court, the Respondent has not adequately briefed the issue for consideration in this appeal. *See State v. White*, 228 W. Va. 530, 541 n.9, 722 S.E.2d 566, 577 n.9 (2011) ("Typically, this Court will not address issues that have not been properly briefed."); *State, Dep't of Health & Human Res., Child Advocate Office v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("[A] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim[.]" (internal quotations and citation omitted)).

Class II property.[14] However, this duty is not imposed until a tax purchaser complies with its duty under W. Va. Code § 11A-3-19 to provide the State Auditor with a list of names and addresses that, when applicable, should include "Occupant" as a named entity to receive notice. The statute specifically provides that a tax purchaser must "[p]repare a list of those to be served with notice to redeem[.]" W. Va. Code § 11A-3-19(a)(1). For purposes of Class II property, "Occupant" is one of those that must receive notice to redeem. In other words, the State Auditor does not have a duty to hazard a guess in every tax delinquency proceeding as to when notice must be addressed and mailed to "Occupant." West Virginia Code § 11A-3-19 imposed the duty on the Respondent to inform the State Auditor that notice to "Occupant" was also required.[15] The record in this

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[14] The parties do not dispute that Petitioner's property is designated as Class II. *See Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 675 n.5, 687 S.E.2d 768, 774 n.5 (2009) ("Owner-occupied properties used exclusively for residential purposes and farms are Class II property.").

[15] In addition to finding that W. Va. Code § 11A-3-19 requires the Respondent to add "Occupant" to the list of names submitted to the State Auditor, we also find that W. Va. Code § 11A-3-22(d) requires the same. We understand that, read in isolation, W. Va. Code § 11A-3-22(d) does not expressly state that the tax purchaser is required to inform the State Auditor that notice must be addressed to "Occupant." However, such a requirement is implicit in statute's purpose of protecting the rights of property owners. We have long recognized that, "[t]hat which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect . . . , is as much a part of it as if it had been declared in express terms." *Crouch v. West Virginia Workers' Comp. Comm'r*, 184 W. Va. 730, 733, 403 S.E.2d 747, 750 (1991) (internal quotations and citation omitted). *See also Conner v. Conner*, 175 W. Va. 512, 516, 334

case does not show that the Respondent directed the State Auditor to serve notice addressed to "Occupant." *See O'Neal v. Wisen*, No. 5:16-CV-08597, 2017 WL 3274437, at *6 (S.D. W. Va. Aug. 1, 2017) ("It is undisputed that [tax purchaser] did not direct a notice to the 'occupant' of the Property[.]").

Our cases have long made clear that the burden is exclusively upon the tax purchaser to show that the delinquency tax sale statutes have been complied with. *See Mike Ross, Inc. v. Bergdorf*, No. 16-1046, 2017 WL 4712793, at *4 (W. Va. Oct. 20, 2017) (Memorandum Decision) ("[T]he burden was on respondents to prove that they strictly complied with the statutory requirements."); *Mason v. Smith*, 233 W. Va. 673, 680, 760 S.E.2d 487, 494 (2014) ("[I]n an action for cancellation of a tax deed, the tax deed grantee has the burden of proving compliance with the statutory steps required." (internal quotations and citation omitted)); *Rebuild Am., Inc. v. Davis*, 229 W. Va. 86, 94, 726 S.E.2d 396, 404 (2012) ("Our law is clear that in a suit for cancellation of tax deed, the tax deed grantee has the burden of proving compliance with the statutory steps required, including the validity of statutory notice of application for tax deed."); *Gates v. Morris*, 123 W. Va. 6, 9, 13 S.E.2d 473, 475 (1941) ("The burden was on the tax deed grantee, Morris, to prove the validity

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S.E.2d 650, 654 (1985) ("Even though our statute did not originally provide for reasonable notice, it would appear that we considered this requirement to be implicit in the statute."); *Bailey Lumber Co. v. Ball*, 124 W. Va. 340, 342, 20 S.E.2d 241, 242 (1942) ("The affidavit is a requisite part of the notice to the landowner. . . . We believe that the requirement of an affidavit is implicit in the statute.")

of this published notice."); Syllabus, *Dickerson v. Flanagan*, 103 W. Va. 233, 136 S.E. 854 (1927) ("Where the statute authorizes the publication and posting of a notice, which affects property rights, the steps directed by the statute must be strictly pursued. The burden of showing such pursuance is on him who would profit by such notice."). The Respondent has not carried its burden by burying its head in the sand and blaming the State Auditor for not providing notice addressed to "Occupant."

Insofar as there is no dispute that the Respondent failed to have notice to redeem mailed to the Petitioner's address as required by W. Va. Code § 11A-3-22(d), it was error for the circuit court to grant summary judgment in favor of the Respondent.[16]

## IV.

## CONCLUSION

In view of the foregoing, we reverse the circuit court's summary judgment order in favor of the Respondent. This matter is remanded to the circuit court with instructions to grant summary judgment in favor of the Petitioner, set aside the Respondent's tax deed to her home, and determine

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[16] The Petitioner raised additional issues as to why summary judgment for the Respondent was error. The Petitioner alleged that the Respondent should have taken additional steps to provide actual notice, and that the circuit court committed error in finding that additional steps would have failed. Because we have reversed this case on the failure to mail notice to "Occupant," we need not address the two other issues raised.

the amount to be paid by the Petitioner to redeem the property.[17]

Reversed and Remanded.

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[17] *See* Syl. pt. 2, *Rebuild Am., Inc. v. Davis*, 229 W. Va. 86, 726 S.E.2d 396 (2012) ("Before a trial court may enter a final order setting aside a tax deed pursuant to W. Va. Code, 11A-4-4 [1994], the trial court must make a preliminary finding that the tax deed will be set aside if, within thirty days of the entry of the preliminary finding, there is paid or tendered to the tax deed purchaser, or his heirs or assigns: (1) the amount of money that would have been required to redeem the property, (2) the amount of real estate taxes paid on the property since delivery of the deed, and (3) interest at the rate of twelve percent per annum. If these amounts are not paid or tendered to the tax deed purchaser within thirty days of entry of the preliminary findings, the trial court, upon the request of the tax deed purchaser, must enter an order dismissing the case seeking to set aside the tax deed.").

**[ENTERED: September 30, 2016]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA**

**KELBER, LLC,**

**Plaintiff,**

**v. // CIVIL ACTION NO. 1:15CV80
(Judge Keeley)**

**WVT, LLC, OAK HALL,**

**Defendants.**

**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [DKT. NO. 23] AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 25]**

Pending for consideration is the motion for partial summary judgment (dkt. no. 23) filed by the plaintiff, Kelber, LLC ("Kelber"). Also pending is the motion for summary judgment (dkt. no. 25) filed by the defendants, WVT, LLC ("WVT") and Oak Hall ("Hall") (collectively "defendants"). For the reasons that follow, the Court **GRANTS** Kelber's motion and **DENIES** the defendants' motion.

## I. BACKGROUND

In August 2011, Kelber purchased a rental property located at 796 Willey Street in Morgantown from Sunhersh, LLC ("Sunhersh"), for $384,000. Kelber, a Maryland limited liability company, obtained a mortgage with United Bank, which recorded the deed of trust in the Monongalia County Clerk's office in September 2011. Kelber then contracted with a management company to oversee and maintain the property, which was occupied by several residential tenants.

When the first installment of the 2012 property taxes became due in September 2012, the Monongalia County Sheriff sent the bill to Sunhersh instead of to Kelber. Sunhersh, however, never paid the taxes because it no longer owned the property; nor did it forward the bill to Kelber. Consequently, Kelber never received and paid the bill, and it became delinquent on the rental property's taxes. In November 2013, the Sheriff sold the property at a tax lien sale, where WVT purchased it.[1] West Virginia Code § 11A-3-19 requires a tax lien purchaser such as WVT to prepare a list of all persons or entities entitled to redeem the property by paying all monies owed. In particular, the statute requires the purchaser to prepare its list "after October 31 of the year following the sheriff's sale, and on or before December 31 of the same year." W. Va. Code § 11A-3-19.

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[1] Defendant, Oak Hall, is the lone member of WVT, LLC.

Rather than wait for the statutory time period, however, WVT prepared and submitted its list to the State Auditor ("Auditor") immediately after purchasing the property at the tax foreclosure sale.[2] WVT requested that notice be sent to the names on the list not only by certified mail, return receipt requested, but simultaneously by regular mail to those listed, by mail to the West Virginia Secretary of State's office ("Secretary"), and by publication in the appropriate local newspaper (dkt. no. 25-3 at 4). WVT's list included the former owner of the property, Sunhersh, as well as United Bank, which was listed as a mortgage holder on the property.[3] Kelber also was listed, but at an address in Severna Park, Maryland, where it was no longer located; at the time the list was created, Kelber had in fact relocated to a different, unknown address. WVT's mailings to the Severna Park address were returned as "Not Known, Unable to Forward," "Not Deliverable," and "Unclaimed." As a result, Kelber never received notice of the sale, and never had an opportunity to redeem the property by paying the delinquent taxes.

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[2] This is roughly one year prior to the opening of the statutory window in which to submit such a list. It is unclear what impact, if any, this would have had on the facts of this case, and, as it does not impact the Court's ruling here, thus, it need not be discussed further.

[3] Apparently, neither Sunhersh nor its managing member, Michael Castle, ever forwarded the redemption notices to Kelber because Sunhersh had sold the property to Kelber three years prior and was not responsible for the delinquent taxes (dkt. no. 24-2 at 3). Similarly, because Kelber had paid and satisfied the mortgage prior to United Bank's receipt of the redemption notice, the bank never forwarded it to Kelber (dkt. no. 24-4 at 2-3).

Sometime after April 1, 2015, in accordance with state statute, the Auditor delivered a quitclaim deed to WVT. WVT immediately recorded the deed, and the County Clerk filed it in the record book on April 7, 2015. Two days later, April 9, 2015, WVT's agent, Hall, knocked on the door of the Willey Street property and asked a tenant for Kelber's phone number. After obtaining the number, Hall called Kelber to advise it that WVT now owned the property and would be collecting revenues from the tenants from that point on. Apparently, Hall also contacted Kelber's property manager on the same day. The property manager then began holding revenues from the property in escrow, and also retained outside counsel.

After being contacted by WVT, Kelber offered to pay the redemption amount pursuant to the state code, but WVT refused (dkt. nos. 24-4 at 4, 24-6 at 2). WVT then offered to return the property to Kelber for either $100,000 or "50 cents on the dollar" (dkt. nos. 24-4 at 4, 24-6 at 2). In addition, WVT posted a notice on the door of the property advising the tenants that they needed to "make contact with [WVT] so we can arrange to rent you the property. Should you fail to make contact with [WVT], [WVT] will be forced to take steps to evict you. Should you choose not to deal with [WVT] steps will be taken to evict you."

On April 27, 2015, Kelber filed a complaint in the Circuit Court of Monongalia County, asserting that the returned mailings triggered additional duties on the part of WVT to attempt to ascertain Kelber's new address. Kelber also contended that WVT was required to send notice to the 796 Willey

Street address of the subject property. As well, Kelber's complaint sought a preliminary injunction to set aside the tax-sale deed on the basis that WVT had failed to comply with W. Va. Code § 11A-3-22(d) by not using "due diligence" to locate and contact Kelber during the redemption period. It also asserted that, in its efforts to notify Kelber of the tax sale, WVT had performed a state function, and, by its failure to provide due process, had violated Kelber's constitutional rights. Finally, the complaint claimed that, by contacting its property manager and tenants, WVT had tortiously interfered with its contracts with those individuals.

WVT removed the case, with Kelber's motion for preliminary injunction pending, to this Court on May 14, 2015. Given the state of the pleadings on removal, the Court denied Kelber's motion for preliminary injunctive relief on May 20, 2015 (dkt. no. 14).

Thereafter, on October 2, 2015, Kelber moved for partial summary judgment, seeking to set aside the tax-sale deed and to obtain a declaration that it holds indefeasible title to the subject property, free and clear from any claims or interest of WVT (dkt. no. 23 at 1). WVT followed with its own motion for summary judgment, seeking to dismiss the entire case with prejudice. Both motions are ripe for disposition. As explained below, the Court **GRANTS** Kelber's motion for partial summary judgment and **DENIES** the defendants' motion for summary judgment.

## II. LEGAL STANDARD

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" establish that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence "in the light most favorable" to the nonmoving party. Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000). The Court must avoid weighing the evidence or determining its truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has made the necessary showing, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256 (internal quotation marks and citation omitted). The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment; the evidence must be such that a rational trier of fact could reasonably find for the nonmoving party. Id. at 248–52.

## III. APPLICABLE LAW

Under West Virginia law, a property owner who is delinquent in paying property taxes exposes that property to public sale. See W. Va. Code § 11A-3-1. et seq. Prior to any sale, however, the county sheriff is required to publish a list of the county's delinquent lands and send a notice of delinquency by certified mail to the responsible taxpayers listed in the county land books. § 11A-3-2. The delinquent property owner may redeem at any point prior to the sale by tendering to the sheriff all of the taxes due, together with any interest and fees accrued. §§ 11A-3-4, 11A-2-18. Unredeemed properties are thereafter subject to the sheriff's public sale of tax liens against them. § 11A-3-5.

If the highest bidder at the public sale pays all of the taxes due, and any interest and fees accrued, the "sheriff shall certify the real estate to the State Auditor for disposition." § 11A-3-8. The Auditor then provides notice to the purchaser outlining the requirements he or she must satisfy in order to secure a deed to the property. See § 11A-3-14. One of those requirements is that, "[a]t any time after October 31 of the year following the sheriff's sale, and on or before December 31 of the same year," the purchaser must "[p]repare a list of those to be served with notice to redeem and request the State Auditor to prepare and serve the notice."§ 11A-3-19(a).

When serving the notice to redeem, the Auditor is required to provide the form notice provided in § 11A-3-21 to non-resident recipients by certified mail. § 11A-3-22. Furthermore, "[i]f the address of

any person entitled to notice . . . is unknown to the purchaser and cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication." Id. (emphasis added). Finally, "[i]f the real estate described in the notice is not redeemed within the time specified therein, . . . the deputy commissioner shall, upon the request of the purchaser, make and deliver to the person entitled thereto a quitclaim deed for such real estate." § 11A-3-59.

Pursuant to § 11A-4-4(a), those entitled to notice to redeem, but who were not properly served with the requisite notice, may bring a civil action to set aside a tax deed within three years of its delivery to the grantee. However,

> [n]o title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.

§ 11A-4-4(b) (emphasis added). Importantly, in suits seeking to set aside a tax sale deed, it is the tax sale grantee who bears the burden of proving full compliance with the statutory and due process notice requirements. See Rebuild America, Inc. v. Davis, 726 S.E.2d 396, 404 (W. Va. 2012); Mason v. Smith, 760 S.E.2d 487, 494 (W. Va. 2014) (citing Rebuild America).

To be clear, actual notice is not required before the government may deprive a person of their property. See Jones v Flowers, 547 U.S. 220, 226 (2006). Rather, the government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). The Supreme Court of Appeals of West Virginia has further defined these requirements as follows:

> There are certain constitutional due process requirements for notice of a tax sale of real property. 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 actual notice.

Mason v. Smith, 760 S.E.2d 487, 488 (W. Va. 2014) (quoting Syl. pt. 1, Lilly v. Duke, 376 S.E.2d 122 (W. Va. 1988)).

The notifying party must utilize methods or means that anyone honestly seeking to actually effectuate the notice would reasonably employ. See Jones, 547 U.S. at 229 (quoting Mullane, 339 U.S. at 315 ("[W]hen notice is a person's due ... [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.")).

There is a core question presented in this case: What constitutes reasonable due diligence by someone actually desirous of providing notice when the address of the party to be noticed is unknown? Over the last several decades, opinions on this issue have evolved, gradually establishing more due process protections for the delinquent property owner. In West Virginia, the Supreme Court of Appeals has consistently expanded the minimum efforts required to meet the reasonable due diligence threshold. See Mingo Cty. Redevelopment Auth. v. Green, 534 S.E.2d 40, 45 (W. Va. 2000) (describing evolution of minimum notice requirements).

As an example of this evolution, the 1967 version of the tax sale statute, W. Va. Code § 11A-2-13 (1967), merely required that a list of delinquent properties be posted on the county courthouse door and published as a legal advertisement in the newspaper. See Lilly, 1376 S.E.2d at 125 n. 2, n. 3. In Lilly, West Virginia's highest court invalidated that version of the statute[4] because it allowed for the sale of delinquent properties without "personal notice to affected owners and others having an interest in the property."[5] Id. at 125. Lilly articulated the minimum

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[4] In 1983 and 1985, during the pendency of Lilly, West Virginia amended W. Va. Code § 11A-3-2 to require personal notice to the property interest holder. See Lilly, 376 S.E.2d at 125.

[5] The Court relied heavily on, and fully complied with, the opinion of the Supreme Court of the United States in Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983). Mennonite held that "constructive notice to a mortgagee violated due process where the mortgagee could reasonably be identified from public records:

standard for notice to a property interest holder of a pending tax sale as follows:

> There are certain constitutional due process requirements for notice of a tax sale of real property. 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 actual notice.

Id. at Syl. pt. 1.

Notably, "West Virginia's statutory notice requirements parallel the requirements of the United States Constitution." Plemons v. Gale, 396 F.3d 569, 572 (4th Cir. 2005) ("Plemons II"). Accordingly, the Court will draw on both bodies of law to resolve the issues in this case. See Button v. Chumney, 2014 WL 2931901, at *6 (N.D.W. Va. June 27, 2014).

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When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane."

Lilly, 376 S.E.2d at 124 (quoting Mennonite, 462 U.S. at 798).

## IV. DISCUSSION

No material facts are in dispute.[6] The parties agree that Kelber was a party to be noticed and that its address of record was no longer valid. Further, the actions taken by WVT in its attempt to comply with the statutory notice requirements, as well as the results of those efforts, are undisputed. The sole question is whether WVT was reasonably diligent in fulfilling its statutory and constitutional due process duty to provide Kelber with adequate notice of its right to redeem. The Court concludes that it was not.

Challenges to tax sales of private property can generally be divided into two distinct areas of inquiry: (1) whether the state, or, as in this case, a private party that has been statutorily assigned the duty to provide notice to redeem, [7] has reasonably

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[6] WVT argues in its opposition to Kelber's motion for summary judgment that there are genuine issues of material fact in dispute, and then proceeds to list the issues. But this list contains mere disagreements with Kelber's legal arguments, and assertions of WVT's own legal conclusions. There are no claims that some fact, such as the actions by either party, or the results of those actions, did not occur in the way claimed by the opposing party. Indeed, WVT's own motion for summary judgment notes that Kelber "has failed to establish any genuine issue of material fact for a jury to decide" (dkt. no. 25-3 at 1). Notably, nor has WVT.

[7] See Plemons v. Gale, 298 F.Supp.2d 380, 388 (S.D.W.Va. Jan. 13, 2004) ("Plemons I"), vacated 396 F.3d 569, 570 (4th Cir. 2005), remanded to 382 F.Supp.2d 826 (S.D.W.Va. July 27, 2005) ("Plemons III") ("Under West Virginia law, the tax lien purchaser has the duty to give notice . . . ."); see also Huggins v. Prof'l Land Res., Inc., 2013 WL 431770 (N.D.W.Va. Jan. 25, 2013) (noting that the statutory scheme "assigns to a private party the State's Fourteenth Amendment obligation to notify

identified all parties with an interest in the subject property; or (2) whether the government, or its statutorily substituted party, has satisfied the due process requirement of providing adequate notice to all of those identified parties. Here, there is no question Kelber was a record party of interest properly identified on the list WVT prepared for the Auditor. Consequently, the Court need only determine whether WVT fully complied with the due process requirement to provide adequate notice to Kelber.

The Supreme Court of Appeals of West Virginia recently addressed similar facts in Mason v. Smith, 760 S.E.2d 487 (W. Va. 2014). There, the tax sale purchaser did not attempt personal service on the record owners of a delinquent property "in the manner provided for commencing a civil action," nor did they attempt notice by publication. Id. at 493. Instead, the purchaser opted to send notice by certified mail to the record owners, and also to a bank that held a mortgage on the property. Id. at 489-90. The certified mail receipts showed that, while the bank received notice, the notices to the three record owners were returned as undelivered. Id. at 490. Importantly, the returned notices were not marked "refused," but rather "return to sender—not deliverable as addressed—unable to forward" or "return to sender—unclaimed—unable to forward." Id.

Mason held that certified mail returned and marked as "undeliverable as addressed," or "unclaimed," did not provide adequate notice to the

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property owners of their right to redeem their property interest").

property owner of its right to redeem. Id. at 494. It noted that, after the unsuccessful initial mailing, the tax sale purchaser had failed to take any additional steps to effectuate service on the owners, despite the fact that the three property owners' "correct addresses were reasonably ascertainable and could have been confirmed through the exercise of due diligence." Id. at 494.

Importantly, prior to Mason, in Jones v. Flowers, the Supreme Court of the United States held that when mail is returned unclaimed, the due process requirement of adequate notice has not been satisfied. 547 U.S. 220, 225 (2005). In Jones, the Arkansas Commissioner of Lands sent notice by certified mail to a land owner informing him of his tax delinquency and his right to redeem. Id. at 223. The mailings were returned, marked "unclaimed." Id. at 223-24. Just prior to the tax lien sale, the Commissioner published a legal notice of the sale in the newspaper. Id. at 224. After selling the property to the highest bidder, the Commissioner again mailed notice to the delinquent property owner, informing him that, unless he redeemed by paying the past due taxes and fees, the property would be transferred to the lien holder. Id. at 224.

Based on these facts, the Supreme Court recognized that, although its precedent allowed for certified mail to satisfy the due process requirement, it had never addressed directly "whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." Id. at 227. Noting that a majority of the federal circuit courts of appeals

and state supreme courts that had addressed the issue had "decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale," id. at 227-28 (collecting cases), the Court observed:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

Id. at 229. Accordingly, "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide

notice to the property owner before selling his property, if it is practicable to do so." Id. at 225.

In the case at bar, it is undisputed that the notices sent to Kelber by certified mail were returned as undeliverable. There is also no dispute that, at the time WVT directed the Auditor to send notice to Kelber by certified mail, it also directed the Auditor to provide notice by regular mail, by publication in the local newspaper, and by service on the Secretary. Finally, it is undisputed that, once the certified mailing was returned as undeliverable, WVT took no further steps to notify Kelber. In actuality, WVT not only failed to take further steps after the unsuccessful delivery, it also demonstrated no desire whatsoever to ascertain the results of its notification efforts. Essentially, it closed its eyes and hoped for the best.

Nevertheless, WVT contends that it fully complied with the requirements of due process, arguing that, regardless of the failed delivery of the certified mailings, it had no duty to take any further steps. The Court now turns to these contentions.

### A. WVT's Lack of Actual Knowledge that the Certified Mail was Returned as Undeliverable Does not Obviate its Obligationto Take Further Action

Because it had no knowledge that its certified mailings were returned to the Auditor as undeliverable, WVT argues that it had no obligation to take any additional steps. In support, it relies on the holdings in Jones and Plemons, claiming those

decisions excused it from any obligation to take further steps towards providing notice, barring its actual awareness of the unsuccessful initial attempt. See Jones, 547 U.S. at 227 ("[W]hen the government learns its attempt at notice has failed . . . ."[8]) (emphasis added); Plemons II, 396 F.3d at 573 ("When a party required to give notice knows that a mailed notice has, for some reason, failed . . . ."). According to WVT, this language indicates that the duty to take additional steps is only triggered by actual knowledge of the failed notice attempt.

The issue of actual knowledge was not specifically addressed by the courts in either Jones or Plemons. In both of those cases, the notifying party conceded its awareness of the failed notice attempt. Nevertheless, to WVT's point, the Court finds that it would be antithetical to the clearly established duty to provide adequate notice if the state or other responsible party could evade that duty simply by sending a certified mailing and avoid, purposefully or otherwise, learning of its outcome. The very essence of requiring the "return receipt requested" option with certified mail indicates that the sending party desires confirmation of its receipt. A sender cannot know of a prompt return of

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[8] To be clear, the quoted language from Jones comes from the Court's discussion of what other courts have decided, while its conclusion does not explicitly demand knowledge:

> We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable todo so.

Jones, 547 U.S. at 225.

undeliverable mail if allowed to turn a blind eye. Moreover, allowing a party to exercise willful blindness to the outcome of the certified mailing would ignore the reasoning of courts that have required a party on notice of a failed attempt to take additional steps.[9]

This Court declines WVT's invitation to validate the practice of turning a blind eye to the outcome of notice by certified mail. It is untenable to hold that the duty to provide notice does not include a duty to determine whether a certified mailing was successful. That is after all the very purpose of requiring a return receipt. Such a holding would be particularly detrimental in a case such as this, where the state will receive the returned undeliverable mail, thus allowing the notifying party to shield itself through purposeful ignorance from having to take any additional reasonable steps to provide notice.[10]

In Plemons III, Judge Goodwin recognized the inherent conflict of interest present in a system that places the duty to provide notice on the very party

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[9] See Plemons II, 396 F.3d at 575-76 (collecting cases holding that additional steps are required once the notice is returned as undeliverable).

[10] In fact, the State had instituted an online system by which purchasers could track the status of the certified mail, and it expected that the purchasers would do such. See Dkt. No. 24-8 at 11-18. WVT admits that it often utilizes the system to track roughly 300 properties, but for some unknown reason, it allegedly failed to check the mailings for the Kelber property. See Dkt. No. 24 at 28-29 (citing preliminary injunction hearing testimony of Senior Deputy State Auditor).

that stands to profit most if the notice is unsuccessful. See 382 F.Supp.2d 826, 830 (S.D.W.Va. July 27, 2005). "This conflict of interest makes it imperative that courts strictly scrutinize the efforts of a tax lien purchaser to ensure that they are 'such as one desirous of actually informing the absentee' might reasonably adopt." Id. (quoting Mullane, 339 U.S. at 315).

It can hardly be considered a reasonably diligent effort when, as here, a party charged with providing notice fails to inquire as to the results of the certified mailing. Whether a party knows, or should reasonably know, that its notice efforts have initially failed is an appropriate inquiry in a case such as this one. Utilizing that benchmark, the Court has no difficulty in concluding that, at a minimum, WVT had a duty to inquire as to the results of the certified mailing, and therefore should have reasonably known of the unsuccessful delivery.

**B. WVT Failed to Take Sufficient Additional Steps Once the Certified Mail was Returned as Undeliverable**

WVT next argues that it had already undertaken all additional steps required when, at the time of the certified mailing, it preemptively directed the Auditor to send notice by regular mail, by service on the Secretary, and by publication in the local newspaper. Kelber contends that such "concurrent initial efforts do not equate to additional or follow-up efforts," as required once notice has been returned as undeliverable (dkt. no. 30 at 5). Essentially, Kelber argues that a multi-step process is involved; that is,

once the party tasked with notice knows that the mailing has been unsuccessful, it then must take additional steps to ascertain a correct address. Only after the initial effort fails, as well as all subsequent reasonable efforts to discover a correct address, should the party then resort to the less likely methods of regular mail, service through the Secretary, or publication in the newspaper.

The holdings in Plemons II, Jones, and Mason underscore that standard methods of attempting notice do not suffice when the sender is on notice that the certified mail has been returned as undeliverable. In such an instance, these additional attempts at notice may only suffice when they are utilized after the initial effort has failed. Only then, armed with any information garnered from the failed attempt, can the notifying party reasonably calculate whether those methods might provide adequate notice of the pending tax lien sale. See Plemons II, 396 F.3d at 575, where the court observed:

> [A]dopting the rule that prompt return of mailed notice triggers a duty to make reasonable follow-up efforts would seem to best comport with the instruction in Mullane that due process requires efforts "reasonably calculated" to actually "apprise interested parties" of the possible deprivation; that is, notice consistent with that of "one desirous of actually informing the absentee," rather than efforts that are but a "mere gesture."

(quoting Mullane, 339 U.S. at 314-15).

Similarly, in Jones, the Supreme Court held that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." 547 U.S. at 230. It is logical that further obligations would be triggered only subsequent to knowledge of the failed certified mailing. Without such knowledge, the notifying party cannot properly evaluate whether regular mail, notice to the Secretary, or publication are reasonably calculated to provide notice under the circumstances. In other words, those methods cannot be characterized as further efforts if they are exhausted beforehand, without knowledge that the record address may be invalid.

It makes sense that any such additional efforts would be steps at resolving the undeliverability issue, not just further attempts directed at what then is most likely known to be an invalid address. Knowledge that a certified mailing has been returned as undeliverable puts the sender on notice that it is highly probable that the recipient no longer resides at that address. See Plemons II, 396 F.3d at 575 ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."). Armed with that knowledge, the sender can presume that a regular mailing likely, although not absolutely, will face the same fate.

Moreover, it is reasonable for the sender to question whether the incorrect address in the county records the same address on file with the Secretary

is, or even whether the property owner has registered with the Secretary at all. Certainly, a reasonable additional step would be to contact the Secretary by telephone or website to ascertain whether there is an address on file and, if so, whether it matches the county record address.

Finally, WVT argues that publication of the notice in the newspaper ultimately satisfied its due process obligation. This argument fails, however, in the face of WVT's constructive knowledge that the certified mailing was returned as undeliverable, and its failure to undertake any additional efforts to ascertain the property owner's valid address.

Notice by publication is a "last ditch" attempt, to be utilized when all else fails:

> If the address of a person entitled to notice, whether a resident or nonresident of this state, is unknown to the purchaser and cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication as a Class III-0 legal advertisement . . . and the publication area for the publication shall be the county in which the real estate is located. If service by publication is necessary, publication shall be commenced
> . . . .

§ 11A-3-22 (emphasis added). The statute is clear. Only after duly diligent efforts to discover a valid address have failed shall the party tasked with notice

be allowed to satisfy due process by publication. Indeed, pursuant to Jones, service by publication is akin to a "hail mary": "Several decades ago, this Court observed that '[c]hance alone' brings a person's attention to 'an advertisement in small type inserted in the back pages of a newspaper,' and that notice by publication is adequate only where 'it is not reasonably possible or practicable to give more adequate warning.'" Jones, 547 U.S. at 237 (quoting Mullane, 339 U.S. at 315, 317); see also Mennonite, 462 U.S. at 799 ("Neither notice by publication and posting, nor mailed notice to the property owner, are means 'such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it.'"). This observation is even more appropriate when the property owner is known to live out of state.

Accordingly, the Court concludes that due process required WVT to exercise due diligence in its duty to provide notice, including taking further reasonable steps to ascertain Kelber's current address once the certified mailing was returned as undeliverable. This it failed to do. Therefore, based on its failure to undertake any additional efforts, its publication of the notice does not satisfy the due process requirements established in Plemons II, Jones, and Mason.

### C. WVT Could Have Undertaken Reasonably Diligent Efforts at Notification that were not Extraordinary

WVT asserts that it was reasonably diligent when it searched the public records prior to sending

notice by certified mail, and that, in any case, Kelber's current address could not have been ascertained from them (dkt. no. 25-3 at 17). Moreover, it claims that, by contemporaneously providing notice by regular mail, service on the Secretary, and publication in the newspaper, it undertook all the efforts required by due process. According to WVT, this was more notice than had been provided to either of the property owners in Jones or Plemons (dkt. no. 25-3 at 18-19). Finally, WVT relies on Plemons II for the proposition that a party "need not undertake extraordinary efforts to discover . . . whereabouts . . . not in the public record." 396 F.3d at 574.

This, however, is only a partial reading of the court's holding in Plemons II. The entirety of the passage quoted by WVT reads:

> Although a party required to provide notice need not "undertake extraordinary efforts to discover . . . whereabouts . . . not in the public record," it must use "reasonably diligent efforts" to discover addresses that are reasonably ascertainable.

Plemons II, 396 F.3d at 574 (quoting Mennonite, 462 U.S. at 798 n. 4. Thus, efforts clearly are not extraordinary simply because they are beyond a search of the public record. Rather, once a party is on notice that the recipient's address is no longer valid, it must undertake a reasonably diligent effort to acquire a valid address, if ascertainable, so long as that effort is not extraordinary. See Plemons II, 396 F.3d at 575-

76 (collecting cases indicating that, once a mailing is returned as undeliverable, the sender is obligated to make an effort to ascertain the correct address[11]). A review, or re-review, of all available public records is not the end of the reasonableness inquiry, but rather "the very least"of what may be required. Id. at 577.

Courts have been reticent to define the contours of "extraordinary efforts." Nevertheless, "'all the circumstances' of a case, including its 'practicalities and peculiarities,' must be considered in determining the constitutional sufficiency of notice." Id. at 574 (quoting Mullane, 339 U.S. at 314). In Plemons I, the district court suggested several ways in which Plemons's correct address might have been reasonably ascertained, including consulting the phonebook, inquiring of the tenants at the subject property, and contacting the mortgagee bank. See 298 F. Supp. 2d 380, 389 (S.D.W. Va. Jan. 13, 2004). On review, the Fourth Circuit held that such efforts were not compelled in that particular case. Plemons II, 396 F.3d at 577. Although recognizing that checking the phonebook might be reasonable in some cases, it concluded that such an effort would have been futile because the telephone number and address listed for Plemons were no longer valid. Id. The circuit court also dismissed the

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[11] As all of these cases recognize, initial reasonable efforts to mail notice to one threatened with loss of property will normally satisfy the requirements of due process. However, when prompt return of an initial mailing 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 II, 396 F.3d at 576.

idea that contacting the tenants would have been reasonable because mailings addressed to the occupant had already been returned as undeliverable. Id. Further, it noted that a property owner and mortgagee are not in privity and "under normal circumstances, one cannot be expected to communicate notice of an impending tax sale to the other." Id. (citing Mennonite, 462 U.S. at 799). Despite these conclusions, it is clear from the Fourth Circuit's opinion that, in an appropriate case, such methods could be considered reasonably diligent efforts.

Notably, in Plemons II the Fourth Circuit remanded the case to the district court expressly for the purpose of determining "what efforts, if any, [the purchaser] made to search public documents, or whether Plemons' proper address would have been ascertainable from such a search." Id. at 578. On remand, Judge Goodwin determined that, although the purchaser had failed to make any further efforts to locate Plemons, a subsequent search of the public records would not have revealed her correct address. He therefore concluded that the deed should not be set aside. Plemons III, 382 F.Supp.2d at 828.

Judge Goodwin nevertheless expressed puzzlement with the inquiries requested by the Fourth Circuit. Questioning how a re- examination of the same public records as originally searched could possibly satisfy due process, he noted that such a futile re- examination would be the kind of "mere gesture" disapproved in Mullane. Id. at 829 ("As the Supreme Court noted in Mullane, 'when notice is a person's due, process which is a mere gesture is not due process.'" (quoting Mullane, 339 U.S. at 315)).

Anticipating the outcome in Jones, he posited that the "only relevant inquiry is to ask what process would be undertaken by a reasonable person under the specific circumstances of the case." Id.

In Jones, the Supreme Court confronted the question of what constituted reasonable diligence when a mailing is promptly returned as undeliverable. See 547 U.S. 220. After certified mail to Jones was returned as undeliverable, the State of Arkansas took no further action; two years later, after sending a second round of certified mail to the invalid address and publishing an advertisement in the newspaper, it sold the property at public auction. In the view of the Supreme Court, "[d]eciding to take no further action is not what someone 'desirous of actually informing' [the property owner] would do; such a person would take further reasonable steps if any were available." Id. at 230.

Jones argued that the state should have searched for his address in the "phonebook and other government records such as income tax rolls." Id. at 235-36. Although the Supreme Court declined to mandate such an open-ended search of all records, id. at 236, it did note several other reasonable steps that Arkansas could have undertaken, including posting notice on the front door of the residence, or addressing otherwise undeliverable mail to "occupant."[12] Id. at 235. Indeed, it reasoned that an

[12] The parties go to great lengths to argue whether mailing to the physical address could have been accomplished because of a technically incorrect address, i.e., 796 Willey Street rather than 796A or 796B Willey Street. Whether such an effort would have been successful or futile is of no import to the outcome here, however, as WVT never even attempted to send mail to

open-ended search of government records "imposes burdens on the State significantly greater than the several relatively easy options outlined above," including simply posting notice on the front door. Id.

In dismissing Arkansas's complaints that such efforts were overly burdensome, the Court noted that the state's current statute mandated that, in the absence of proof that the property owner has received notice by certified mail, the state was required to provide actual notice through personal service. Id. at 236 (citing Ark. Stat. § 26-37-301(e)). Similarly, in West Virginia, civil lawsuits may be initiated by actual notice through personal service. Concomitantly, posting notice on the property, knocking on the front door, or addressing mail to "occupant" cannot be considered overly burdensome when the method of service mandated by West Virginia law to initiate all civil lawsuits is personal service. See W. Va. R. Civ. P. 4.

Considering the current state of the law in West Virginia, it is notable that, in Mason, the Supreme Court of Appeals of West Virginia set aside a tax deed after certified mail sent to the property owner was returned as undeliverable, where the purchaser had made no further efforts at notification. See 760 S.E.2d 487, 494 (W.Va. 2014). The court noted that, although the record addresses for the property owners were no longer valid, their "correct addresses were reasonably ascertainable

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"occupant," an effort that might have informed them of the mailing address discrepancy and allowed them to correct for it.

and could have been confirmed through the exercise of due diligence." Id. at 494.

Ultimately, the court found that the purchaser had "failed to take a single additional step to attempt to notify the [property owner]." Id. at 494.

WVT purports to find support for its contention that it was not required to mail notice to the subject property address in this Court's decision in Button, where notice to the record owner, Ms. Mills, was returned as undeliverable. See 2014 WL 2931901 (N.D.W.Va. 2014). Notably, although it may have been possible for the tax lien purchaser to have reasonably ascertained Mills's current address from a search of the county records, any mailing to that address ultimately would have been futile because she had died. Id. Accordingly, this Court held that, under the circumstances, all due process requirements had been met. Seizing on this holding, WVT asserts that it also was not required to mail notice to the subject property address of record, 796 Willey Street, because mailing there would have been futile.[13]

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[13] WVT provided an affidavit of Troy Rickles, Officer in Charge of the Morgantown Post Office. Dkt. No. 25-1. Mr. Rickles swore that 796 Willey Street it not a valid mailing address and any mail sent there would have been returned as undeliverable. Id. at 1. The correct mailing addresses were 796 Willey Street Apartment A and 796 Willey Street Apartment B. Id. According to Mr. Rickles, any mail addressed to Kelber LLC at either of those addresses would also have been returned as undeliverable, however, because it is not listed as the occupant of those residences. Id. at 2.

Button, however, is factually distinguishable from the case at bar in several important respects. First, it dealt with the question of providing notice to Button's predecessor in interest, Ms. Mills. Button had acquired the property interest through Ms. Mill's will, but she never recorded it with the county. Having never been an owner of record, neither Button (nor her address) could have been ascertained from a reasonable search of the county records. Perhaps of greater relevance to the issue here, however, is the fact that Button dealt with mineral rights that were subject to a tax lien sale, and the property under which those minerals were situated was unimproved, uninhabited land. Id. Posting notice on the minerals, or knocking on the front door of a residence on the property above them, were not options available to the tax lien purchaser.

Nevertheless, Button recognized that "[w]hether a tax lien purchaser performs his or her duties in a reasonably diligent manner, however, can be examined only 'under all the circumstances' of a given case." Id. at *6 (citing Mullane, 339 U.S. at 314). The circumstances in the instant case are distinguishable from those in Button. Once it should reasonably have known that the certified mail was returned as undeliverable, and that, more likely than not, the address it had used for Kelber was no longer valid, WVT made no further effort to ascertain Kelber's current address. While there is no dispute that a re-examination of the county records would have been futile in this regard, WVT did have a multitude of non- extraordinary means available to it to attempt to ascertain that address. A party actually desirous of notifying Kelber could have

called the bank that formerly held the mortgage on the property and simply asked whether it had a contact phone number or address for Kelber.[14] As WVT was aware that Kelber was a Maryland LLC, it also could have visited the Maryland Secretary of State's website in pursuit of a current address. Neither of these efforts would have required even leaving the office, and certainly were not extraordinary.

Perhaps the simplest, most efficient, and most direct way of providing notice to Kelber, however, would have been to do exactly what WVT did once it had acquired the deed to the property — go to the property and knock on the door (or post notice). See Jones, 547 U.S. at 236-37 (noting that "rather than taking relatively easy additional steps to effect notice, [including posting at the property,] the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property"). WVT was well aware that the property at issue was a rental property with multiple tenants, and, potentially, a property manager, and it should have reasonably surmised that it could ascertain Kelber's contact information simply by visiting the property. See Plemons II, 396 F.3d at 573 ("Only a method that is reasonable, taking into account 'the practicalities and peculiarities of the case,' will be adequate." (quoting Mullane, 339 U.S. at 314-15)). Posting at the property would also have been reasonable and no

[14] While it is true that the bank may not have given such information to WVT, one cannot know because no one asked. Moreover, the bank may have forwarded the request to Kelber as a service to its former customer, but again, we cannot know this because it was not attempted.

more burdensome than the personal service outlined as one method of satisfying the statute.

Such efforts are not extraordinary. In fact, they are so ordinary that almost immediately after it received the deed WVT was able to speak directly with the property manager and Kelber itself when it wanted to collect the rents and make an offer for 50 cents on the dollar. WVT also posted notice two days after recording the deed, when it sought to inform the tenants that it would now be collecting the rents.

In light of the circumstances, it is beyond debate that WVT could have taken additional steps "reasonably calculated, under all the circumstances, to apprise [Kelber] of the pendency of the action and afford them an opportunity to present their objections." Jones, 547 U.S. at 226 (internal quotation omitted). While it may be inappropriate for a court to prescribe exactly what steps must be used in any given case, the additional steps available to WVT here clearly were not extraordinary. Rather, they provided reasonable methods of notification that someone actually desirous of notifying Kelber might have employed under the circumstances. WVT, however, merely sat back and waited for the redemption period to expire.

### D. Kelber's Own Failure to Pay its Taxes and Update its Address with the State Does Not Excuse the Due Process Requirement for Adequate Notice

WVT avers that Kelber failed to pay its property taxes, failed to keep its address current with the

County Clerk or Sheriff, and failed to keep its address updated with the Auditor. It contends that these facts constitute a lack of "reasonable diligence," thus making Kelber "solely responsible" for the tax sale transfer. These arguments are unavailing.

In Jones, the Supreme Court specifically addressed whether a property owner who had received a tax bill and then failed to pay the taxes owed was on inquiry-notice that the property was subject to a tax sale. It held that "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property." 547 U.S. at 231-32 (citing Mennonite, 462 U.S. at 800).

Jones also summarily dispatched the argument that the failure of property owners to update their addresses, even in the face of a statutory requirement to do so, relieved the state of its constitutional obligation to provide adequate notice. Id. at 232. While acknowledging that a statute requiring a property owner to update its address did support the contention that mailing a certified letter to the record address was a reasonably calculated method of reaching the property owner, the Court concluded that a property owner's failure to update its record address did not excuse the obligation of the State to take additional steps once notice is promptly returned as unclaimed or undeliverable. Id. at 232.

### E. WVT's Mailing of Notice to the West Virginia Secretary of State's Office was not Adequate Notice to Kelber

WVT's final argument is that Kelber was statutorily required to register with the West Virginia Secretary of State's office to acquire a business certificate. By Kelber's failure to do so, WVT contends that, pursuant to W. Va. Code § 31D-15-1501(e), Kelber is presumed to have appointed the Secretary as its attorney-in-fact. Kelber counters that it is not subject to that portion of the Code, which applies to West Virginia corporations, because it is a limited liability company ("LLC") licensed in Maryland. Kelber, however, is subject to the Uniform Limited Liability Company Act ("LLC Act"), codified at W. Va. Code § 31B-10-101, et seq. That statute contains a substantially similar provision appointing the Secretary as attorney-in-fact for unregistered foreign LLCs. See W. VA. Code § 31B-10-1008.

The Court need not resolve this dispute, inasmuch as both of these statutes must yield to constitutional due process requirements. Merely sending notice to the Secretary, even if considered Kelber's de facto agent, does not comport with the due process requirements under the circumstances of this case. The holding in Jones clearly dispelled any notion that one's failure to comply with laws requiring payment of property tax, or failure to update one's address as statutorily required, somehow abrogated the State's obligation to provide adequate notice. See 547 U.S. at 231-32. Similarly, a statute automatically appointing the Secretary as attorney-in-

fact for an unregistered LLC in no way mitigates the State's obligation to provide a property owner with adequate notice of its right to redeem.[15]

This view is in keeping with the legislative intent of West Virginia's statutory scheme governing tax lien sales, which recognizes "the rights of owners of real property to adequate notice and an opportunity for redemption before they are divested of their interests in real property for failure to pay taxes" W. Va. Code § 11A-3-1. It also aligns with the clear trend of the majority of courts mandating that reasonable efforts be undertaken to provide actual notice to the property owner. See Mingo Cty., 534 S.E.2d at 45; see also Dkt. No. 16 at 100 ("I believe that . . . the West Virginia Supreme Court is moving in th[e] direction [of actual notice]. I believe [Jones] has already put the Federal Courts there." (testimony of West Virginia University College of Law, Dean Emeritus, John W. Fisher, II, during preliminary injunction hearing on May 20, 2015)).

## V. CONCLUSION

For the reasons discussed, the Court concludes that WVT failed to provide Kelber with adequate notice of its right to redeem the subject property. Consequently, it **GRANTS** Kelber's motion for

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[15] Indeed, one might argue that, if a tax lien purchaser knows that a foreign LLC has not registered, he may choose only to mail notice to the Secretary, with full knowledge of the futility of reaching the owner, and simply rely on the Secretary's statutory appointment as agent to conclude that notice has been perfected.

partial summary judgment and **DENIES** WVT's motion for summary judgment.

The Court is cognizant that, pursuant to W. Va. Code § 11A-3- 1, et seq., before the deed may be set aside, Kelber is required to present to WVT the full redemption amount, together with any additional taxes paid by WVT and any other statutorily mandated costs. Moreover, Kelber is entitled to any rents collected since the deed was recorded, less any expenses paid by WVT. Accordingly, the Court **ORDERS** the parties each to submit an accounting of the amounts owed no later than **Monday, October 31, 2016**, following which it will schedule a hearing to address setting aside the tax sale deed and Kelber's requested declaration that it is vested with indefeasible title to the subject property, free and clear from all claims and interest of WVT.

It is so **ORDERED.**

The Court directs the Clerk to transmit copies of this Memorandum Opinion and Order to counsel of record.

DATED: September 30, 2016.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

**[ENTERED: January 25, 2013]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA**

**BETTY L. HUGGINS, ELLA JEAN MOORE, and LARRY B. GROVES,**

**Plaintiffs,**

**v. // CIVIL ACTION NO. 1:12CV46
(Judge Keeley)**

**PROFESSIONAL LAND RESOURCES, LLC, a West Virginia limited liability company,**

**Defendant.**

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS [DKT. NO. 17]**

On July 9, 2012, the defendant, Professional Land Resources, LLC ("PLR"), filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, the Court **DENIES** PLR's motion.

**I.**

**A.**

This case arises from the delinquent tax sale of two oil and gas estates. The plaintiffs, Betty L. Huggins, Ella Jean Moore, and Larry B. Groves ("the Silva heirs"), are descendants of John Silva ("Silva").

In 1941, Silva sold the surface rights to two pieces of property located in Preston County, West Virginia, but severed and retained the properties' oil and gas estates. Upon Silva's death in 1960, he devised those estates to his wife, Freda, who upon her death in 1992, devised them to her three daughters, Betty, Ella Jean, and Mary. Mary died testate in 2005, leaving her interest in the estates to her son, Larry.

Silva and his heirs did not enter the oil and gas estates on the land books of Preston County, West Virginia, as required by W. Va. Code § 11A-3-37. That failure resulted in two outstanding tax liens, which the Deputy Commissioner of Delinquent and Nonentered Lands of Preston County ("the Deputy Commissioner") sold to PLR on September 9, 2009 and October 5, 2010. W. Va. Code § 11A- 3-52 requires a tax lien purchaser, such as PLR, to "prepare a list of those to be served with notice to redeem and request the deputy commissioner to prepare and serve the notice." The tax lien purchaser must conduct that search with reasonable diligence. Id. §§ 11A-3-55, 11A-4-4.

Based on its search of the Preston County land records, PLR identified no parties in interest to the oil and gas estates who were due actual notice of their redemption rights, and it therefore directed the Deputy Commissioner to effect notice by publication. Relying solely on PLR's representation, the Deputy Commissioner published a legal notice in local newspapers. As no one came forward to redeem the oil and gas estates after publication, the Deputy Commissioner deeded them to PLR on March 9, 2010 and April 17, 2011.

After discovering PLR's tax deeds, the Silva heirs filed suit against PLR in the Circuit Court of Preston County, West Virginia, pursuant to 42 U.S.C. §§ 1983 and 1988(b), alleging that PLR had violated their Fourteenth Amendment right to proper notice when it failed to conduct a duly diligent record search. They also sought a declaration that PLR's tax deeds were void, and that they were the legal owners of the estates pursuant to W. Va. Code §§ 11A-4-3, 4 and 6. PLR removed the case based on federal question jurisdiction, and then filed the pending motion to dismiss. That motion is fully briefed and ripe for review.

**B.**

Articles 3 and 4 of Chapter 11A of the W. Va. Code contain the real property tax sale statutes of the State of West Virginia ("the State"). The State requires each landowner to enter his property on the landbooks for taxation. W. Va. Code § 11A-3-37. If a landowner fails to do so for five successive years, the State Auditor will certify the property to the Deputy Commissioner of the appropriate county, who then sells the State's outstanding tax lien at a public auction. Id. §§ 11A-3-42, 44, 45(a). At this point, the property has not left the hands of its original owner; the State has simply sold its tax lien against the property to a third-party.

To take ownership of the property, the tax lien purchaser must secure a tax deed from the State. To do so, the lien purchaser must first "prepare a list of those to be served with notice to redeem [their interest in the property] and request the deputy

commissioner to prepare and serve the notice as provided in sections fifty-four and fifty-five of this article." Id. § 11A-3-52(a); see Mingo County Redevelopment Auth. v. Green, 534 S.E.2d 40, 48-49 (2000). In other words, the lien purchaser is to search public records for others with an interest in the property subject to the tax lien, and to communicate those names and address to the Deputy Commissioner so that the interested party may receive actual notice of his right to redeem the property prior to the issuance by the State of a tax deed to the lien purchaser. Should the lien purchaser not discover other interested parties, the Deputy Commissioner effects notice only by publication. W. Va. Code § 11A- 3-55.

The tax lien purchaser must search the public records with reasonable diligence. Id. §§ 11A-3-55, 11A-4-4. The "reasonable diligence" requirement found in the State's statutory tax sale system "parallel[s] the [notice] requirements of the United States Constitution." Plemons v. Gale, 396 F.3d 569, 572 (4th Cir. 2005) [hereinafter "Plemons II"] (citing Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)). It is vital that the lien purchaser comply with the statutory and constitutional requirement of a reasonably diligent search because the State does not require the Deputy Commissioner to conduct his own check of the records before issuing the tax deed. Instead, to protect property owners from insufficient record searches by the tax lien purchaser, the State permits the tax sale deed to be set aside if it is shown 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 to the complaining party or his predecessors in title." W. Va. Code § 11A-4-4(b).[1]

The State's real property tax sale system is a unique balance between a property owner's Fourteenth Amendment rights and the state's limited budget. Wells Fargo Bank, N.A. v. UP Ventures II, LLC, 675 S.E.2d 883, 886 (W. Va. 2009). Enacted in 1994 in response to a series of decisions by the West Virginia Supreme Court of Appeals adopting the standard of Mennonite,[2] the statutes "make the cost of [providing constitutionally-required] notice an expense of the purchaser of the tax lien" and not the State. John W. Fisher, II, Delinquent and Non-entered Lands and Due Process, 115 W. Va. L. Rev. 43, 60 (2012). Moreover, the statutes not only shift the cost of such notice to the lien purchaser, but also the burden of effecting a constitutionally adequate search. Plemons v. Gale, 298 F.Supp.2d 380, 381 (S.D.W. Va. 2004) [hereinafter "Plemons I"] (rev'd on other grounds, 396 F.3d 569 (4th Cir. 2005)) ("Plemons I"). In sum, the State's tax sale statute does more than simply delegate a state function. It assigns to a private party the State's Fourteenth Amendment obligation to notify property owners of their right to redeem their property interest.

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[1] As noted at oral argument, unlike a successful 42 U.S.C. § 1988 claim, West Virginia's statutory remedy for an unreasonably diligent search does not allow for recovery of attorney's fees and costs.

[2] See Syl. pt. 1, Lilly v. Duke, 376 S.E.2d. 122 (W. Va. 1988); Anderson v. Jackson, 375 S.E.2d 827 (W. Va. 1988); Citizens Nat'l Bank of St. Albans v. Dunnaway, 400 S.E.2d 888 (W. Va. 1988).

**C.**

To survive a motion to dismiss filed pursuant to Fed.R.Civ.P. 12(b)(6), a complaint must contain factual allegations sufficient to state a plausible claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). With this standard in mind, the Court turns to whether the complaint of the Silva heirs' states a claim under 42 U.S.C. §1983.

**II.**

**A.**

To state a claim under 42 U.S.C. § 1983, the Silva heirs must plausibly plead two elements: that PLR deprived them of a right secured by the Constitution, and that it did so under color of state law. PLR does not dispute the first element. What PLR does dispute, and what lies at the heart of its motion, is that it acted under color of state law when it searched the Preston County, West Virginia land records for persons entitled to notice of their right to redeem the oil and gas estates in issue.

Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 does not encompass private action, no matter how egregiously the private party has violated another's constitutional rights. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922, 935-36 (1982). The Supreme Court

has frequently cautioned courts to adhere to that general principle in order to "preserve[] an area of individual freedom by limiting the reach of federal law." Mentavlos v. Anderson, 249 F.3d 301, 310 (4th Cir. 2001) (quoting Lugar, 457 U.S. at 936; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991)). A private party does not act under color of state law when he simply uses the courts, invokes a state-created remedy, Tulsa Prof'l Collection Servs., 485 U.S at 485 (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)), or when he acts only with the state's approval or acquiescence. Philips v. Pitt County Mem'l Hosp., 572 F.3d 176, 181 (4th Cir. 2009).

Something more is necessary to transform the actions of a private party into actions that are fairly attributable to the state. While the Fourth Circuit has announced various tests for fair attribution, compare Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 343 (4th Cir. 2000) (listing four tests, including "the extent and nature of public assistance and public benefits accorded the private entity"), with Haavistola v. Cmty. Fire Co., 6 F.3d 211, 215 (4th Cir. 1993) (listing three tests), the central inquiry for all remains constant – "whether the party can be described 'in all fairness' as a state actor." United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc., 43 F.3d 902, 906 (4th Cir. 1995) (citing Edmonson, 500 U.S. at 620).

Due to "the extent and nature of public assistance and public benefits accorded" to PLR by the State's real property tax sale statutes, Goldstein, 218 F.3d at 343 (citing Edmonson, 500 U.S.

at 621; Tulsa Prof'l Collection Servs., 485 U.S 478), PLR can, and should, be fairly described as a state actor. In Tulsa Professional, the Supreme Court determined that a private party required by Oklahoma's Probate Code to provide notice to creditors of a probate estate was, for purposes of the Fourteenth Amendment, a state actor. Under the nonclaim statute at issue in Tulsa Professional, once a court instituted a probate proceeding and appointed the executor, the executor was charged with providing notice by publication to the decedent's creditors and providing proof of such notice to the court. By publishing that notice, the executor triggered a two-month period during which creditors of the estate had to present their claims against the estate or be forever barred from collecting on those debts.

Due to Oklahoma's substantial involvement in the probate process, the private party charged with notifying creditors could be fairly described as a state actor because

> [t]he probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or

> executrix to publish notice "immediately" after appointment. . . . Finally, copies of the notice and an affidavit of publication must be filed with the court. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Tulsa Prof'l, 485 U.S. at 487.

The State's real property tax sale system is characterized by similar, if not more extreme, pervasive and substantial state involvement. First, the State sells its tax lien to a private party, like PLR. Like the appointment of the executor under Oklahoma's probate code, the sale of the tax lien triggers the private party's obligation to perform a reasonably diligent search of public records; absent the sale of the lien by the State, the private party has no role in the tax sale system at all. After the private party searches the public records, it provides the results of its search to the Deputy Commissioner, who then notifies interested parties. The method of notice used by the Deputy Commissioner, actual or constructive, depends entirely on the list provided by the private party. W. Va. Code § 11A-3-55. Finally, by issuing the tax deed, the State transfers ownership of the property from the tax debtor to the tax lien

purchaser, extinguishing the tax debtor's interest in the property. Plemons I, 298 F.Supp.2d at 384.

In short, the State of West Virginia's involvement in the tax sale process is even greater than was sufficient to find state action under the Oklahoma non-claim statute. Thus, despite its private nature, it is fair to conclude that, when PLR conducted the record search and reported its findings to the State, it acted under color of state law due to "the extent and nature of public assistance and public benefits accorded" to it by the State's real property tax sale statutes. Goldstein, 218 F.3d at 343 (citing Edmonson, 500 U.S. at 621; Tulsa Prof'l Collection Servs., 485 U.S. 478).

Other courts have also observed that lien purchasers required to perform a reasonably diligent search by the State's tax sale statutes act under color of state law. Plemons v. Gale, 396 F.3d 569, 572 n.3. (4th Cir. 2005) ("Plemons II"); Plemons I, 298 F. Supp. 2d at 385 n.4; Wells Fargo Bank, N.A. v. UP Ventures II, LLC, 675 S.E.2d 883, 886 (W. Va. 2009). While not the primary issue in Plemons II, the Fourth Circuit noted that a lien purchaser such as PLR, who acted under West Virginia's tax sale statutes and was alleged to have failed to perform a reasonably diligent search for interested parties, was a state actor.

> [T]he tax-sale procedure in this case constitutes state action, although state law charges a private party with providing notice. 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 II, 396 F.3d at 572 n.3 (citing Tulsa Prof'l, 485 U.S. at 486).

Moreover, the Supreme Court of Appeals of West Virginia relied on Plemons II when it observed that state action existed for purposes of a Fourteenth Amendment challenge to the record search conducted by a private party who purchased a tax lien at a sheriff's sale. Wells Fargo Bank, N.A., 675 S.E.2d at 886. Such lien purchasers must also conduct a reasonably diligent search of public records. W. Va. Code § 11A-3-22. As to whether the tax lien purchaser's action could fairly be attributed to the State, the Supreme Court of Appeals stated, "[The plaintiff's] due process concerns are triggered because a tax sale to a private party under West Virginia law involves 'state action' requiring due process, since, to accomplish a tax sale, a private party must make use of state procedures with overt, significant assistance of state officials." Wells Fargo Bank, N.A., 675 S.E.2d at 886 (citing Plemons II, 396 F.3d at 572).

In sum, PLR acted with the substantial assistance and encouragement of the State, and therefore acted under the color of state law for the purposes of the Silva heirs' 42 U.S.C. §§ 1983 HUGGINS et al v. PROF'L LAND RESOURCES, LLC 1:12CV46 and 1988 claims.

**B.**

Based on the Silva heirs' allegation that PLR's record search violated the "reasonable diligence" standard required by W. Va. Code §§ 11A-3-55 and 11A-4-4, PLR contends the complaint describes a mere "private misuse" of a statute that cannot be fairly attributed to a state actor. In other words, PLR argues that the plaintiffs cannot state a claim for relief under 42 U.S.C. § 1983 because they allege that PLR broke state law, an action that necessarily runs afoul of state policy. The Court does not agree.

In Lugar, the Supreme Court adopted a two-part approach to determine whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." 457 U.S. at 937.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Id. When a private party misuses a state statute, the private party disregards state policy, and its actions may not be fairly attributed to the state under the first prong of Lugar. 457 U.S. at 940.

On its face, the Silva heirs' complaint satisfies the first prong of Lugar. Clearly, a lien purchaser's obligation under W. Va. Code § 11A-3-52(a) to notify other interested parties of their redemption rights is a "rule of conduct imposed by the state." Moreover, it is not the case here that PLR merely misused the State's real estate tax sale statutes. See Jones v. Poindexter, 903 F.2d 1006, 1011 (4th Cir. 1990) ("In Lugar, the Supreme Court held the unlawful application of the pre-judgment attachment statute did not constitute the state action required for a successful § 1983 claim.") (emphasis added). Unlike many of the pre-judgment attachment decisions cited by PLR, the Silva heirs do not allege that the oil and gas estates were improperly subjected to the tax sale system, but rather that PLR failed to provide them with proper notice of their right to redeem while fulfilling its role within the State's tax sale statutes.

The Supreme Court's decision in Edmonson, 500 U.S. 614, is helpful in understanding this distinction. There, the Supreme Court held that, in a civil case, a private attorney's racially discriminatory use of peremptory challenges constituted state action. Regardless of the fact that the private attorney's discriminatory actions certainly did not reflect the policy of the State of Louisiana, the Court easily found the first prong of Lugar to be satisfied because "peremptory challenges have no significance

outside a court of law," and "[t]heir sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact." Id. at 620.

Similarly, while PLR's allegedly insufficient record search cannot be considered the policy of the State, like the peremptory challenges examined in Edmonson, that record search has no significance outside the State's real property tax sale statutes. Furthermore, PLR's role in the tax sale system is to assist the State to "reduce the expense and burden on the [S]tate and its subdivisions of tax sales so that such sales may be conducted in an efficient manner while respecting the due process rights of owners of real property." W. Va. Code § 11A-3-1. Assuming all allegations in the complaint to be true, PLR deprived the Silva heirs of constitutionally required notice while exercising a right created by solely by the State, and did so to assist the State. Thus, the Silva heirs' alleged deprivation can be fairly described as due to the "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state." Lugar, 457 U.S. at 937. In short, contrary to PLR's argument, the Silva heirs' allegations satisfy the first prong of Lugar, and thus describe conduct that may be fairly attributed to the State for the purposes of their 42 U.S.C. §§ 1983 and 1988 claims.

## CONCLUSION

In conclusion, for the reasons discussed, the Court **DENIES** the defendant's motion to dismiss. It is so **ORDERED**.

DATED: January 25, 2013

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE