

TABLE OF CONTENTS

	Page
Supreme Court of Arkansas, No. CV-24-645, Opinion, filed June 5, 2025.....	1a
Circuit Court of Greene County, Arkansas, No. 28CV-22-388, “Revised” Order Denying Motion for Summary Judgment, filed September 5, 2024.....	25a
Supreme Court of Arkansas, No. CV-24-645, Order Denying Petition for Rehearing, filed September 4, 2025.....	29a
Circuit Court of Greene County, Arkansas, No. 28CV-22-388, First Amended Complaint, filed March 6, 2024.....	30a
Circuit Court of Greene County, Arkansas, No. 28CV-22-388, Excerpts of 30(b)(6) Deposition Transcript of Dr. Gary Solnit, taken July 19, 2024.....	43a

Appendix 1a

Cite as 2025 Ark. 107
SUPREME COURT OF ARKANSAS
No. CV-24-645

TOMMY LAND, IN
HIS CAPACITY AS
COMMISSIONER
OF STATE LANDS
FOR THE STATE
OF ARKANSAS,
APPELLANT
V.
BAS, LLC; PARCEL
STRATEGIES, LLC;
AND BANYAN
CAPITAL
INVESTMENTS,
LLC,
APPELLEES

Opinion Delivered:
June 5, 2025
APPEAL FROM THE
GREENE COUNTY
CIRCUIT COURT
[NO. 28CV-22-388]
HONORABLE
RICHARD LUSBY,
JUDGE
REVERSED.

NICHOLAS J. BRONNI, Associate Justice

This case is about whether the Commissioner of State Lands provided constitutionally adequate notice to BAS, a California LLC, before selling its Arkansas property to recover delinquent property taxes. Because the undisputed facts show that the Commissioner’s notice to BAS was constitutionally sufficient, BAS fails to raise a valid claim and sovereign immunity applies. We reverse.

I. Facts and Procedural Background

In October 2016, BAS purchased commercial property in Paragould, Arkansas. The property’s deed

Appendix 2a

listed BAS's mailing address as 3735 Winford Drive, Tarzana, California. Although Gary Solnit, one of BAS's two members, temporarily resided at that address, BAS conducted its business operations from a different location in Beverly Hills, California. Solnit asked the title company to change the deed to reflect the Beverly Hills address, but that change was never made. BAS also failed to register its mailing address with the county as required by state law. *See* Ark. Code Ann. § 26-35-705.

After BAS failed to pay its property taxes in 2017 and 2018, the Greene County Clerk certified the property to the Commissioner of State Lands for nonpayment. As required by statute, the Commissioner attempted to notify BAS of the upcoming tax sale and inform it of its right to redeem the property. On August 17, 2021, the Commissioner sent certified mail to BAS at 3735 Winford Drive in Tarzana, California—"the owner's last known address." Ark. Code Ann. § 26-37-301. Although certified mail typically requires a signature to complete delivery, the United States Postal Service temporarily relaxed that requirement during the COVID-19 pandemic. The Commissioner also requested a return receipt of the recipient's signature, even though the statute does not require one.

For reasons unknown, the Commissioner never received that physical return receipt. But using the USPS tracking data, the Commissioner verified that the notice had been "[d]elivered" to a front desk, reception area, or mailroom in Tarzana at 1:02 p.m. on August 24, 2021. Having no reason to question that data, the Commissioner did not investigate to determine whether 3735 Winford Drive had any such facilities. In June 2022, the Commissioner sent an

Appendix 3a

additional notice by certified mail directly to the Paragould property itself. That notice was returned undelivered.

Receiving no response from BAS, the Commissioner proceeded with the sale. On August 2, 2022, third parties purchased the property. Two months later, those purchasers filed an action to quiet title on the property. In response, BAS timely filed this lawsuit against the Commissioner, in his official capacity, contesting the validity of the tax sale. *See* Ark. Code Ann. § 26-37-203 (in general, “an action to contest the validity of a [tax delinquency sale]” must be “commenced within ninety (90) days after the date of conveyance”). BAS sought an injunction requiring the Commissioner to set aside the sale. *See* Ark. Code Ann. § 26-37-204 (the Commissioner “shall” set aside a tax sale if the “interested parties did not receive the required notice”). BAS’s complaint alleged that the Commissioner violated its due process rights under both the federal and state constitutions when he conducted the sale without providing proper notice. It also claimed that the sale constituted an unlawful taking under both the Fifth Amendment and the Arkansas Constitution for the same reason.

The Commissioner moved for summary judgment, asserting that sovereign immunity barred BAS’s claims. The circuit court denied that motion because it found that genuine issues of material fact remained concerning whether the Commissioner had violated BAS’s due process rights. That, it held, prevented it from determining whether BAS’s claim for injunctive relief fell within the recognized exception to sovereign immunity for illegal or unconstitutional acts. The Commissioner filed an interlocutory appeal. *See* Ark. R. App. P.–Civ. 2(a)(10).

Appendix 4a

II. *Discussion*

The Commissioner appeals the denial of his motion for summary judgment based on sovereign immunity. Summary judgment is appropriate only when no material dispute of fact remains and the moving party is entitled to judgment as a matter of law. *Gates v. Hudson*, 2025 Ark. 48, at 4–5, ___ S.W.3d ___, ___. We review decisions granting or denying summary judgment de novo. *See id.* at 5, ___ S.W.3d at ___; *Ark. Cmty. Corr. v. Barnes*, 2018 Ark. 122, at 2, 542 S.W.3d 841, 842. Applying that standard, we reverse the circuit court’s decision denying the Commissioner’s motion for summary judgment.

A. Sovereign Immunity

We begin with first principles. Our constitution provides that “[t]he State of Arkansas shall never be made defendant in any of her courts.” Ark. Const. art. 5, § 20. That provision bars actions both against the State itself and “against a state official in his or her official capacity.” *Ark. Dep’t of Fin. & Admin. v. Lewis*, 2021 Ark. 213, at 3, 633 S.W.3d 767, 770. An official-capacity suit is “a suit against that official’s office and is [consequently] no different than a suit against the State itself.” *Id.* at 3, 633 S.W.3d at 770; *see also Bd. of Trs. of Univ. of Ark. v. Andrews*, 2018 Ark. 12, at 5, 535 S.W.3d 616, 619 (“A suit against the State is barred.”). Indeed, by definition, an official-capacity suit seeks to “control the actions of the State or subject it to liability” via its officers. *Lewis*, 2021 Ark. 213, at 3, 633 S.W.3d at 770; *Hutchinson v. Armstrong*, 2022 Ark. 59, at 10, 640 S.W.3d 395, 400 (Womack, J., dissenting) (“[S]overeign immunity [applies] to state employees sued in their official capacities.”).

Appendix 5a

That bar, however, is not absolute. We have recognized an exception for “lawsuits seeking declaratory or injunctive relief against state officials committing ultra vires, unconstitutional, or illegal acts.” *Osage Creek Cultivation, LLC v. Ark. Dep’t of Fin. & Admin.*, 2023 Ark. 47, at 6, 660 S.W.3d 843, 847. That exception is narrow and applies only when a plaintiff asserts a valid claim that identifies an illegal or unconstitutional act. *See Brizendine v. Dep’t of Hum. Servs.*, 2025 Ark. 34, at 3, 708 S.W.3d 351, 353 (“A plaintiff seeking to surmount sovereign immunity under this exception is not exempt from complying with our fact-pleading requirements.”); *Lewis*, 2021 Ark. 213, at 4, 633 S.W.3d at 770 (similar).

Consistent with that limitation, we have held that to avoid dismissal on sovereign immunity grounds, a plaintiff alleging a due process violation must “plead facts that, if proven, would demonstrate a due process violation that she can argue was an illegal or unconstitutional act sufficient to avoid sovereign immunity.” *Williams v. McCoy*, 2018 Ark. 17, at 4, 535 S.W.3d 266, 269. When a plaintiff fails to do so, sovereign immunity applies and an official-capacity defendant is entitled to summary judgment. *See Chaney v. Union Producing, LLC*, 2020 Ark. 388, at 7, 611 S.W.3d 482, 487. That rule is particularly relevant here, and it is with that rule in mind that we turn to BAS’s substantive claims.

B. Due Process

The trial court concluded that a genuine dispute of material fact exists about whether the Commissioner’s attempt to notify BAS was reasonable, making it unclear whether an exception to sovereign immunity applies. We disagree. Instead, we conclude the facts

Appendix 6a

about the Commissioner's efforts are undisputed and that, as a matter of law, the Commissioner's efforts satisfied due process. BAS has therefore failed to allege an illegal or unconstitutional act that would overcome sovereign immunity, and the Commissioner is entitled to summary judgment.

1. The Due Process Clause of the Fourteenth Amendment prohibits states "from depriving any person of property 'without due process of law.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2002); U.S. Const. amend. 14, § 1. As relevant here, that requires states to provide property owners "'notice and an opportunity to be heard'" before a property can be sold for nonpayment of taxes. *Dusenbery*, 534 U.S. at 167 (quoting *United States v. Jones Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)); accord *Linn Farms & Timber Ltd. P'ship v. Union Pac. R.R. Co.*, 661 F.3d 354, 357–58 (8th Cir. 2011). But "[d]ue process does not require that a property owner receive actual notice before the government may take his property." *Jones v. Flowers*, 547 U.S. 220, 223 (2006) (citing *Dusenbery*, 534 U.S. at 170). Nor does it require Herculean "or heroic efforts" to notify owners. *Dusenbery*, 534 U.S. at 170–71; accord *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). "Rather," the Supreme Court has explained, "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.'" *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314).

Reflecting that standard, the Supreme Court has also made clear that the government may not rely on an attempted notice that it knows or "had good reason

Appendix 7a

to suspect” has failed. *Id.* at 230. So, for instance, while “mailed notice of a pending tax sale” is generally “constitutionally sufficient,” *Dusenbery*, 534 U.S. at 170, that is not the case “when the government becomes aware prior to the taking that its attempt at notice has failed.” *Jones*, 547 U.S. at 227; *see also Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (where the relevant party’s “name and address are reasonably ascertainable[,]” mailed notice is virtually “certain to ensure actual notice”). Instead, as in *Jones*, when a mailed notice is returned undelivered and the government knows the owner is “no better off than if the notice had never been sent,” the government is required to “take further reasonable steps if any [are] available.” *Jones*, 547 U.S. at 230 (quoting *Malone v. Robinson*, 614 A.2d 33, 37 (D.C. 1992)). Indeed, due process requires the government to do what a reasonable person would do before taking and selling an owner’s property—and taking “no further action is not what someone ‘desirous of actually informing’ [the owner] would do.” *Id.*

2. Applying that standard here, the undisputed facts demonstrate that the Commissioner did not violate BAS’s due process rights when it took and sold the Paragould property for nonpayment of taxes. The circuit court erred in concluding otherwise.

Start with the circuit court’s conclusion that a genuine dispute of material facts precluded summary judgment. It did not identify any such disputes, and on this record, even viewing the evidence in the light most favorable to BAS, we are unable to identify any. On the contrary, the record demonstrates and the parties agree that: (1) in August 2021, the Commissioner sent a notice via certified mail, return receipt requested, to the Tarzana address on the

Appendix 8a

Paragould property deed; (2) BAS did not conduct business at that address, but one of its members had previously resided there; (3) the Commissioner never received a physical return receipt; (4) the Commissioner obtained USPS tracking data indicating that the notice had been delivered to a front desk, reception area, or mailroom at the Tarzana address; and (5) the Commissioner did not know or investigate whether the Tarzana address has such an area.

Given that, as best as we can tell, the circuit court appears to have concluded—not that factual disputes remained but—that the parties disputed whether the facts showed a due process violation. But whether those facts add up to a due process violation is a legal question that does not preclude summary judgment. *See Stauch v. City of Columbia Heights*, 212 F.3d 425, 431 (8th Cir. 2000) (“[D]ue process is a question of law for the court to determine.”); *see also Norton v. Hinson*, 337 Ark. 487, 490, 989 S.W.2d 535, 536 (1999) (“[S]ummary judgment . . . [does] not involve any factual findings.”). The circuit court erred in suggesting otherwise.

Next, the merits. Accepting, as we must, those undisputed facts as true, we conclude that the Commissioner’s August 2021 mailing was “reasonably calculated to reach the intended recipient” and inform it of an upcoming tax sale. *Jones*, 547 U.S. at 226. That notice was sent via certified mail to the property owner’s last known address in Tarzana. The Commissioner had identified that address using BAS’s recorded deed; he did so because BAS had violated state law by failing to register its mailing address with the county. Nothing in the record suggests the Commissioner knew—or had any reason to suspect—the Tarzana address was not accurate

Appendix 9a

and up to date. Against that backdrop, BAS does not seriously dispute the reasonableness of that attempt to provide notice and that, if that is all we knew, the Commissioner's effort would satisfy due process. Nor could it. *Cf. Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) ("the State *knew* that appellant was not at the address to which the notice was mailed" (emphasis added)).

BAS claims instead that, as in *Jones*, subsequent facts and circumstances should have alerted the Commissioner that his mailing had failed and that he needed to take additional steps to notify BAS of the tax sale. In particular, BAS argues that the lack of a physical return receipt and absence of a mailroom at the Tarzana address should have alerted the Commissioner that there was a problem. That argument badly misses the mark.

Consider the missing receipt. BAS's argument wrongly conflates not receiving a physical, signed returned receipt with a notice being returned undelivered. The two are not equivalent. Returned mail has not been delivered, and "when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so." *Jones*, 547 U.S. at 230. By contrast, a missing return receipt does not show that notice failed—it merely shows the receipt has not been returned. That could be true because the receipt, as opposed to the notice itself, has gone awry. So at worst, the lack of a return receipt arguably raises a question about delivery. And if the Commissioner had failed to follow up, there might very well have been a due process problem here.

But that is not the case. Rather, the record demonstrates that, lacking a return receipt, the

Appendix 10a

Commissioner examined USPS tracking data and confirmed the notice “was delivered to the front desk, reception area, or mail room at 1:02 pm on August 24, in Tarzana, CA 91356.” Hence, far from neglecting the issue, the Commissioner did what anyone in his situation would have done: he checked the presumptively reliable tracking data. BAS does not really dispute that.

Instead, faced with that reasonable effort, BAS attempts to shift the inquiry and argues that the Commissioner was required to take another step and verify that the Tarzana address had a front desk, reception area, or mail room. As BAS sees it, if the Commissioner had expanded his investigation, he would have known the Tarzana address was a residential address without any such facilities, and this would have prompted him to reattempt notice. Yet BAS never explains why the Commissioner should have second-guessed the USPS tracking data. Nor does the record reveal any facts that would give him a reason to do so. As a result, BAS’s attempt to analogize this case to *Jones*, where the State knew the notice had failed, falls flat. *See Jones*, 547 U.S. at 234 (“What [additional] steps are reasonable in response to the new information depends upon what the new information reveals.”).

To be sure, the Commissioner could have done more here. He could have used Google Street View to investigate the Tarzana address and that might, as BAS argues, have prompted him to question whether what appears to be a residential address has a front desk, reception area, or mail room. He could have sent more than one mailing, including regular mail, to the same address. *See id.* at 235. He could have posted notice on the property, especially since his decision to

Appendix 11a

mail notice to the property itself was returned undelivered.¹ *Id.* He could have conducted “[a]n open-ended search for a new address,” *id.* at 236, or contacted the California Secretary of State to obtain an alternative address for BAS. That is what the third-party purchasers in the companion quiet-title case did, and BAS’s actual notice of that action suggests that would have been a better approach.

But it is not for us to decide whether the process could have been better as the constitution does not require the state to employ every conceivable means to provide notice. *See Dusenbery*, 534 U.S. at 170. Nor would such an approach be practical since there will always be something else the government *could* have done. Rather, due process requires the government to act “as one desirous of actually informing” the property owner of the impending tax sale. *Mullane*, 339 U.S. at 315. And faced with USPS tracking data indicating that the Commissioner’s notice had been delivered, we cannot say that due process required the Commissioner to do more or that his efforts were a mere “gesture.” *Id.*

Ultimately, while due process requires a fact-intensive analysis to determine whether notice was reasonable “under all the circumstances,” *id.* at 314, BAS was still required to identify facts demonstrating that the Commissioner acted unreasonably. It has not done so. We conclude that the August 2021 notice was “reasonably certain to inform” BAS of the tax sale. *Jones*, 547 U.S. at 226. The Commissioner therefore

¹ BAS does not argue that the return of the June 2022 mailing required the Commissioner to take additional steps. It merely argues that second mailing itself was not a reasonable additional step.

Appendix 12a

did not violate BAS's due process rights, and BAS's claims premised on such a violation fail as a matter of law. Thus, on this record, BAS has failed to plead an unconstitutional or illegal act that would overcome sovereign immunity, and the circuit court should have granted the Commissioner's motion for summary judgment.

C. Takings Claim

BAS's attempt to recast its due process claim as a takings claim does not alter the analysis. BAS's takings claims rely on the argument that—under *Jones*—a tax sale without proper notice constitutes a taking under both the Fifth Amendment and the Arkansas Constitution. See Oral Argument at 37:20 https://arkansas-sc.granicus.com/MediaPlayer.php?view_id=4&clip_id=1700 (May 8, 2025), archived at <https://perma.cc/9VA6-PHXA>. *Land v. BAS*, 2025 Ark. ____ (No. CV-24-645). Even assuming BAS's characterization of *Jones* is correct, that would not help BAS. On the contrary, those claims too would fail as a matter of law because the undisputed facts establish that the Commissioner provided BAS with adequate notice before conducting the tax sale. See *supra* at _____. So as above, those claims do not establish an illegal act that allows BAS to overcome sovereign immunity.

Yet that is hardly the only problem with BAS's argument. Rather, it fails for an even more fundamental reason: *Jones* involved a procedural due process claim—not a takings claim. While *Jones* does say that notice is required “[b]efore a State may take property,” 547 U.S. at 223, it did not use the term “take” in the manner contemplated by either the Fifth Amendment or article 2, section 22 of the Arkansas Constitution. Nor could it since tax sales represent a

Appendix 13a

“mandated ‘contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords.’” *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 637 (2023) (quoting *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1881)) (alterations in original).

That makes sense because takings clauses are “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* at 647 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); accord *Bagley v. Castile*, 42 Ark. 77, 85 (1883) (“[T]he forfeiture and sale of lands by summary process, for the purpose of enforcing the payment of taxes, have not been considered by most courts as that deprivation of property which our and similar constitutions meant to prohibit.”). A tax sale does the opposite; it ensures individuals do not avoid their share of the public burden. *See Bagley*, 42 Ark. at 85 (“The twenty-second section simply regards the exercise of the right of eminent domain, which is something wholly different in nature from the taxing power.”).

We therefore hold that BAS’s attempt to recast its due process claim as a takings claim likewise fails as a matter of law; it has failed to allege or offer evidence of an unconstitutional or illegal act that would overcome sovereign immunity; and the Commissioner is entitled to summary judgment.

D. Supremacy Clause Claim

One loose end remains. Recognizing the weakness of its claims on the merits, BAS tries to sidestep the sovereign immunity issue altogether. It suggests

Appendix 14a

that—whatever our constitution says—the federal Supremacy Clause requires us to review his federal claims. That argument, which BAS does not fully develop in its briefing, fares no better than its other arguments.

Begin with basic principles. As *Alden v. Maine* explains, “history, practice, precedent, and the structure of the Constitution” establish that “[s]tates retain immunity from private suit in their own courts.” 527 U.S. 706, 754 (1999). Indeed, as the ratification debates demonstrate, a state’s “right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.” *Id.* at 741. And had the states not “retain[ed] a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of [the federal] sovereign immunity doctrine. [*Ex parte Young*, 209 U.S. 123 (1908)].” *Id.* at 748.

To be sure, the Supreme Court has recognized narrow exceptions to the general rule—like where “[t]he States have consented” to be sued “pursuant to the plan of the Convention or to subsequent constitutional Amendment.” *Id.* at 755. For instance, “[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.” *Id.* And perhaps most relevant here, *Reich v. Collins*, 513 U.S. 106 (1994), held that “despite its immunity from suit in federal court, a State that holds out what plainly appears to be ‘a clear and certain’ postdeprivation remedy for taxes collected in violation of federal law” can be subject to suit in state court. *Id.* at 740.

Appendix 15a

Yet even assuming BAS meant to invoke that exception here, it would not change the analysis. The undisputed record here demonstrates that the Commissioner provided constitutionally sufficient notice before it proceeded with the challenged tax sale. So BAS cannot plausibly claim that Arkansas law has prevented it from vindicating its federal rights—only that it has required BAS, like any litigant, to present evidence of a viable legal claim to proceed. And nothing in the federal constitution suggests BAS is entitled to press claims that fail as a matter of federal law. *Cf. Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 380 (1990) (“A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make.”). Indeed, far from “regularly . . . entertain[ing] analogous suits,” our constitution expressly prohibits our courts from hearing suits against the State where there is no evidence the state has acted unlawfully. *See Haywood v. Drown*, 556 U.S. 729, 739-40 (2009) (finding Supremacy Clause violation where state law barred state courts of general jurisdiction from hearing certain suits based on content rather than “concerns of power over the person and competence over the subject matter”). So we reject BAS’s claim that the Supremacy Clause somehow entitles it to pursue meritless claims.

Appendix 16a

III. *Conclusion*

Nothing in this case turns on the wisdom of the current notice statutes. Whether that current statutory scheme strikes the best cost-benefit balance, could be marginally improved, or could be tweaked to provide better options is beyond the purview of this case and is for the “legislature to resolve.” *Standridge v. Fort Smith Pub. Schs.*, 2025 Ark. 42, at 11, 708 S.W.3d 773, 781. Instead, our role is limited to deciding whether the Commissioner’s actions here were constitutionally sufficient. On this record, the undisputed facts show that the Commissioner’s August 2021 notice—sent by certified mail to BAS’s last known address—was reasonably calculated to inform BAS of the impending tax sale. BAS’s claims therefore fail as a matter of law; BAS has not overcome sovereign immunity; and the Commissioner is entitled to summary judgment.

Reversed.

WEBB, J., concurs.

BAKER, C.J., concurring in part and dissenting in part.

HUDSON and WOMACK, JJ., dissent.

KAREN R. BAKER, Chief Justice, concurring in part and dissenting in part. I agree with the majority’s decision to reverse with regard to the state claims; however, I write separately for the reasons stated in my dissent in *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12, at 13, 535 S.W.3d 616, 624, and its progeny.

In the present case, the majority states that “[w]e have recognized an exception for ‘lawsuits seeking declaratory or injunctive relief or injunctive relief

Appendix 17a

against state officials committing ultra vires, unconstitutional, or illegal acts.’ *Osage Creek Cultivation, LLC v. Arkansas Dep’t of Fin. & Admin.*, 2023 Ark. 47, at 6, 660 S.W.3d 843, 847.” The majority ultimately reverses the circuit court’s denial of summary judgment and concludes that BAS “failed to allege an illegal or unconstitutional act that would overcome sovereign immunity, and the Commissioner is entitled to summary judgment.” However, this position conflicts with the broad language of *Andrews*, 2018 Ark. 12, 535 S.W.3d 616. Article 5, section 20 of the Arkansas Constitution provides that “[t]he State of Arkansas shall never be made defendant in any of her courts.” In my view, the state claims must be reversed and dismissed on the basis of this court’s precedent established in *Andrews*, in which the majority held,

[W]e interpret the constitutional provision, “The State of Arkansas shall never be made a defendant in any of her courts,” precisely as it reads. The drafters of our current constitution removed language from the 1868 constitution that provided the General Assembly with statutory authority to waive sovereign immunity and instead used the word “never.” *See* Ark. Const. of 1868, art. 5, § 45; Ark. Const. art. 5, § 20. The people of the state of Arkansas approved this change when ratifying the current constitution.

2018 Ark. 12, at 10–11, 535 S.W.3d at 622. In other words, the majority held that “never means never,” and *Andrews* did not identify exceptions, exemptions, or the like. *See Banks v. Jones*, 2019 Ark. 204, at 11, 575 S.W.3d 111, 118 (Baker, J., concurring); *see also Ark. Oil & Gas Comm’n v. Hurd*, 2018 Ark. 397, at 18,

Appendix 18a

564 S.W.3d 248, 258 (Baker, J., dissenting). Thus, because *Andrews* has not been overruled, the state claims are barred under its broad language. In sum, I would reverse and dismiss the state claims.

However, sovereign immunity under the Arkansas Constitution cannot serve as a bar to federal claims. Therefore, as noted in Justice Hudson’s dissenting opinion, issues of material fact remain, and I would affirm as to the federal claims.

Accordingly, I concur in part and dissent in part.

COURTNEY RAE HUDSON, Justice, dissenting. I would affirm the circuit court’s order denying the Commissioner’s motion for summary judgment, in which he alleged entitlement to sovereign immunity. Sovereign immunity is not applicable when, as here, a plaintiff alleges unconstitutional state action and seeks only injunctive relief, not damages. Further, there remain issues of material fact or inferences from the facts that are determinative of BAS’s claims. Therefore, I respectfully dissent.

As the majority acknowledges, we have recognized an exception to sovereign immunity for “lawsuits seeking declaratory or injunctive relief against state officials committing ultra vires, unconstitutional, or illegal acts.” *Osage Creek Cultivation, LLC v. Ark. Dep’t of Fin. & Admin.*, 2023 Ark. 47, at 6, 660 S.W.3d 843, 847. Here, we have a somewhat atypical intersection of our doctrine of sovereign immunity and the denial of a motion for summary judgment—not a motion to dismiss. The majority has made a determination regarding the merits of the lawsuit to find that the Commissioner is entitled to sovereign immunity. But summary judgment is not appropriate if, under the evidence, reasonable minds might reach

Appendix 19a

different conclusions from the same undisputed facts. *See Cannady v. St. Vincent Infirmary Med. Ctr.*, 2018 Ark. 35, at 6, 537 S.W.3d 259, 263. This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Due process is a fact-intensive inquiry. The Commissioner concedes that he had no knowledge of the signed receipt (by an unknown recipient) prior to the tax sale. He argues that this fact is inconsequential because further steps are required only if mail is returned unclaimed. But this is too narrow a reading of *Jones v. Flowers*, 547 U.S. 220 (2006). It is true that in *Jones* the tax-sale notice was returned unclaimed. But the issue was whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. To use the Supreme Court's example in *Jones*, "[i]f 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." *Jones*, 547 U.S. at 229. The Supreme Court stated that failure to follow up under such circumstances would not be reasonable, "despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." *Id.*

In the present case, the circuit court found as follows:

[T]he central issue is whether the Commissioner's steps were "reasonably calculated" to give

Appendix 20a

notice “under all the circumstances” which include the nature and process of certified mail delivery, the content of the USPS tracking report and the inferences that can be drawn. What is and is not reasonably calculated and what are all the circumstances are matters to be determined by the finder of fact. This Court declines to find as a matter of law that the efforts of the Commissioner were reasonably calculated to provide notice.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Here, there are unresolved issues of fact regarding the lack of the requested return receipt, how USPS COVID protocols might have affected delivery, and whether or to what extent the Commissioner relied on the USPS online tracking. All these factors potentially go to whether the Commissioner became aware prior to the tax sale that its attempt at notice had failed.

On this record, BAS has pleaded an unconstitutional or illegal act that, if proved, would overcome sovereign immunity, and the circuit court correctly denied the Commissioner’s motion for summary judgment. Therefore, I would affirm the circuit court’s order holding that the Commissioner is not entitled to sovereign immunity.

I respectfully dissent.

SHAWN A. WOMACK, Justice, dissenting. This case exemplifies how messy this court’s sovereign immunity jurisprudence is. The court should retreat from its misguided approach and return to the text and original public meaning of article 5, section 20 of the Arkansas Constitution. That is, absent an express

Appendix 21a

constitutional provision to the contrary, the State shall never be made a defendant in any of its courts.

¹Here, however, there is an express constitutional provision to the contrary that provides an exception to sovereign immunity for BAS's state law claims: article 2, section 22 of the Arkansas Constitution. And under a proper understanding of article 5, section 20, *Haywood v. Drown* ties this court's hands on BAS's federal claims.² Accordingly, Land is not entitled to summary judgment at this stage.

For purposes of this appeal, Land moved for summary judgment on the grounds that sovereign immunity barred BAS's claims against him as a state actor.³ In doing so, Land argued "that BAS cannot state an exception to sovereign immunity[.]" But he is wrong. The only true exceptions to article 5, section 20 are those that are found in the Arkansas Constitution or, as explained later, are imposed by the Supreme Court of the United States. There is no textual basis for the exceptions of unconstitutional, illegal, or ultra vires acts that this court has created from whole cloth.⁴ The past reliance on *Ex Parte Young* as some

¹ Ark. Const. art. 5, § 20; *Thurston v. League of Women Voters of Ark.*, 2022 Ark. 32, at 17, 639 S.W.3d 319, 327 (Womack, J., dissenting).

² 556 U.S. 729 (2009).

³ See Ark. R. App. P.–Civ. 2(a)(10) (allowing interlocutory appeals of "[a]n order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official"); see *Muntaqim v. Hobbs*, 2017 Ark. 97, at 2, 514 S.W.3d 464, 466 (explaining that the denial of a motion for summary judgment is typically not a final order and, therefore, not immediately appealable).

⁴ See, e.g., *Ark. Dep't of Fin. & Admin. v. Carpenter Farms Med. Grp., LLC*, 2020 Ark. 213, at 7, 601 S.W.3d 111, 117 (wrongly claiming that

Appendix 22a

shield for this court's analysis is misplaced.⁵ The Supreme Court did not decide *Ex Parte Young* until well after Arkansas ratified article 5, section 20 in 1874; the concept of such a theory was completely foreign to anyone involved in the drafting or ratification of our current constitution.

That being said, article 2, section 22 of the Arkansas Constitution provides an express and constitutionally based exception to sovereign immunity. In full, article 2, section 22 provides that “[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.” Because the right to property is “*before and higher than any constitutional sanction*,” sovereign immunity, a constitutional sanction, cannot be an obstacle to a claim of this right.⁶ Therefore, sovereign immunity cannot defeat BAS's state law claims against Land regarding the taking of its property.

Of course, the State, like any other defendant, could move for summary judgment on the grounds that there are no disputed material facts and it is entitled to summary judgment as a matter of law. But when there is a constitutionally based exception to sovereign immunity—as there is here—that should be the end of the analysis when the appeal is brought under Rule 2(a)(10). With this court's current approach to sovereign immunity, the State, unlike any other defendant in Arkansas, gets a free opportunity

article 5, section 20 “allow[s] actions that are illegal, unconstitutional or ultra vires to be enjoined”) (internal quotation marks omitted).

⁵ 209 U.S. 123 (1908).

⁶ Ark. Const. art. 2, § 22 (emphasis added).

Appendix 23a

to appeal the denial of summary judgment beyond what Rule 2(a)(10) contemplates.

For BAS's federal claims, *Haywood v. Drown* prohibits this court from kicking them solely because of sovereign immunity. In *Haywood*, the Supreme Court held that states cannot “shut the courthouse door to federal claims that [they] consider[] at odds with [their] local policy”—i.e., article 5, section 20.⁷ According to the Supreme Court, this “invocation of ‘jurisdiction’ as a trump” to end federal claims in state court is unconstitutional under the Supremacy Clause.⁸ Under a proper reading of article 5, section 20, this is exactly what sovereign immunity does to BAS's federal claims.⁹ Because of *Haywood*, Land is not entitled to claim sovereign immunity as a shield from BAS's federal claims at this stage. As with the state claims, however, Land may eventually prevail on summary judgment if there are no disputed material facts, and he is entitled to judgment as a matter of law. But, if the circuit court denies such a motion, then Land must go to trial—as would be the case with any other defendant.

For these reasons, I respectfully dissent and would affirm the circuit court's order.

Tim Griffin, Att’y Gen., by: *Lisa Wiedower*, Ass’t Att’y Gen.; and *Julius J. Gerard*, Ass’t Att’y Gen., for appellant.

Quattlebaum, Grooms & Tull PLLC, by: *Joseph R. Falasco* and *Laura L. O’Hara*, for appellee BAS, LLC.

⁷ *Haywood*, 556 U.S. at 740.

⁸ *Id.* at 741.

⁹ See *League of Women Voters of Ark.*, 2022 Ark. 32, at 17, 639 S.W.3d at 327 (Womack, J., dissenting).

Appendix 24a

Bryan E. Hosto, for appellee Banyan Capital Investments, LLC.

Stephen Whitwell, for appellee Parcel Strategies, LLC.

Francis J. “Frank” Cardis, for appellees Parcel Strategies, LLC; and Banyan Capital Investments, LLC.

Appendix 25a

ELECTRONICALLY FILED
Greene County Circuit Court
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28CV22-388
C02D02: 4 Pages

**IN THE CIRCUIT COURT OF
GREENE COUNTY, ARKANSAS
CIVIL DIVISION**

BAS, LLC **PLAINTIFF**
VS. **No. 28CV-22-388**
TOMMY LAND, IN HIS OFFICIAL CAPACITY
AS ARKANSAS COMMISSIONER OF STATE
LANDS **DEFENDANT**
PARCEL STRATEGIES, LLC and
BANYAN CAPITAL INVESTMENTS, LLC
INTERVENORS

“REVISED” ORDER DENYING MOTION FOR
SUMMARY JUDGMENT

A pre-trial was held in the above case on Thursday, August 29, 2024. Among the matters addressed at the hearing was the *Motion for Summary Judgment* of Defendant Tommy Land in his capacity as Commissioner of State Lands for the State of Arkansas filed August 2, 2024. Land contends the claims of Plaintiff BAS, LLC are barred by the doctrine of sovereign immunity. From its amended complaint forward, BAS has sought both monetary damages and injunctive relief. The monetary damage sought by BAS was the fair market value of the property at the

Appendix 26a

time it was “taken.”¹ The injunctive relief sought is to have the tax sale of the property set aside.

Near the conclusion of oral arguments on Land’s motion, counsel for BAS announced that BAS is electing to pursue injunctive relief only, waiving its claim for monetary damages. Given the waiver of monetary damages, the issue remaining for the Court to decide is whether the claim of BAS for injunctive relief is barred by the doctrine of sovereign immunity.²

In his *Brief in Support of Motion for Summary Judgment*, Land acknowledged that the Arkansas Supreme Court has recognized exceptions of sovereign immunity where the State has allegedly acted unconstitutionally. (BIS, p. 11, citing *Ark. Game & Fish Comm’n v. Eddings*, 2011 Ark. 47, 378 S.W.3d 694, 697 (2011)). When arguing the point related specifically to claims for monetary damages, Land rightly drew a distinction between such claims and those for injunctive relief. (BIS, p. 11, Citing *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, 515. This Court agrees with Land that as a state official acting in his official capacity, he is entitled to sovereign immunity against any claim for monetary damages in such cases as this one. However, that issue is moot here as BAS has waived its claim for such damages.

¹ Land denies that forfeiture for unpaid taxes is a “taking” by the State.

² Though Land’s motion and brief discussed the matter of the State’s compliance with A.C.A. § 26-37-301, the Court ruled as a matter of law that the statutory requirements were met. (*Order Denying the Summary Judgment Motion of BAS and Granting in Part and Denying in Part the Counter-Motions of Parcel Strategies and Banyan* entered 1/29/24.)

Appendix 27a

As to injunctive relief, the Court finds BAS is entitled to proceed against Land in his official capacity if it can show that one of the three recognized exceptions to the doctrine of sovereign immunity applies. BAS alleges it was denied due process of law under the constitutions of the State of Arkansas and the United States. Specifically, BAS alleges that Land did not provide it with notice reasonably calculated, under all the circumstances, to apprise BAS of its tax delinquency and the future tax sale. See *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006). Thus, these allegations of due process violations, if proven, bring this action for injunctive relief squarely within a recognized exception to sovereign immunity. *Harmon v. Payne*, 2020 Ark. 17, 592 S.W. 3d 619.

This Court in its January 29, 2024 precedent (*Order Denying the Summary Judgment Motion of BAS and Granting in Part and Denying in Part the Counter-Motions of Parcel Strategies and Banyan*) held that there are issues of fact which must be resolved in order to determine whether notice provided by Land met due process requirements. A number of these factual issues are set forth on page six of the January 29th order which is incorporated herein. What is and is not “reasonably calculated” and the nature of “all the circumstances” and inferences which can be drawn therefrom are matters to be determined by the trier of fact. Consequently, the Court cannot at this juncture hold as a matter of law that the exception does not apply and that Land is entitled to sovereign immunity.

As noted herein, BAS has waived monetary damages and elected the remedy of injunctive relief setting aside the tax sale. Consequently, the Court is

Appendix 28a

now the trier of fact in this case. That said, in an order entered August 1, 2024, the Court stated it would employ the use of an advisory jury pursuant to Rule 39(c) of the Arkansas Rules of Civil Procedure.

In reaching the decision set forth above, the Court is NOT ruling that Ark. Code Ann. § 26-37-301 setting out the procedures for giving to notice to property owners is unconstitutional. The statutory notice procedures are not unconstitutional. The question in this case is whether the execution of those procedures under all circumstances was sufficient to meet constitutional due process requirements. The answer to that question turns upon the resolution of the issues of fact.

For all the reasons articulated herein, the *Motion for Summary Judgment* of Land is denied.

IT IS SO ORDERED this 5 day of September, 2024.

s/Richard Lusby
RICHARD LUSBY,
Circuit Judge

cc: Court File
Frank J. Cardis
Joseph R. Falasco
Laura O'Hara
Stephen E. Whitwell
Bryan E. Hosto
Lisa Wiedower

Appendix 29a

OFFICE, OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

SEPTEMBER 4, 2025

RE: SUPREME COURT CASE NO. CV-24-645
TOMMY LAND, IN HIS CAPACITY AS
COMMISSIONER OF STATE LANDS FOR
THE STATE OF ARKANSAS V. BAS, LLC;
PARCEL STRATEGIES, LLC; AND BANYAN
CAPITAL INVESTMENTS, LLC

THE ARKANSAS SUPREME COURT ISSUED
THE FOLLOWING ORDER TODAY IN THE ABOVE
STYLED CASE:

“APPELLEES’ PETITION FOR REHEARING IS
DENIED. HUDSON AND WOMACK, JJ., WOULD
GRANT.”

SINCERELY,
s/Kyle E. Burton
KYLE E. BURTON,
CLERK

CC: JOSEPH R. FALASCO AND LAURA L. O’HARA
LISA WIEDOWER AND JULIUS J. GIRARD,
ASSISTANT ATTORNEYS GENERAL
GREENE COUNTY CIRCUIT COURT
(CASE NO. 28CV-22-388)

Appendix 30a

FILED on March 6, 2024

IN THE CIRCUIT COURT OF GREENE COUNTY,
ARKANSAS
SECOND DIVISION

BAS, LLC
v. Case No. 28CV-22-388
TOMMY LAND, in his capacity as Commissioner for
the State of Arkansas Commissioner of State Lands
PLAINTIFF
DEFENDANT

PARCEL STRATEGIES, LLC and
BANYAN CAPITAL INVESTMENTS, LLC
PLAINTIFFS
Case No. 28CV-22-380

BAS, LLC, *et al.* DEFENDANTS

FIRST AMENDED COMPLAINT

BAS, LLC (“BAS”), for its first amended complaint against Tommy Land, in his capacity as Commissioner for the State of Arkansas Commissioner of State Lands (“Commissioner”), states:

PARTIES AND JURISDICTION

1. BAS is a California limited liability company with its principal place of business in Beverly Hills, Los Angeles County, California. BAS is the rightful owner of the real property that is the subject of this action.

2. The Arkansas Commissioner of State Lands (“COSL”) is an Arkansas government agency. Tommy Land is the acting Commissioner and the chief executive officer of the COSL. The COSL is headquartered at the State Capitol Building, 500

Appendix 31a

Woodlane St., Suite 109, Little Rock, Arkansas 72201, and may be served through any of its officers or employees, and by mailing a copy of this lawsuit to Land via certified mail, return receipt requested, and restricted delivery.

3. This is an action filed pursuant to Ark. Code Ann. § 26-37-202 to contest the validity of a tax sale and to challenge the constitutionality of the notice provisions found in the Arkansas Tax Code for sales or forfeitures of real property. Ark. Code Ann. §§ 26-37-101 *et seq.* and 26-37-301. This action is timely filed. Ark. Code Ann. § 26-37-203(b)(1).

4. The real property that is the subject of this action is located in Green County, Arkansas, identified as Parcel No. 1002-25430-006 (“the Property”). The Property is more particularly described as follows:

TRACT A AS SHOWN ON PLAT OF LOT SPLIT
FILED FOR RECORD IN SURVEY BOOK QQ,
PAGE 7, RECORDS OF GREENE COUNTY,
ARKANSAS, DESCRIBED AS:

A TRACT OF LAND BEING A PART OF THE
SOUTHWEST QUARTER OF THE SOUTH-
EAST QUARTER OF SECTION 25, TOWNSHIP
17 NORTH, RANGE 5 EAST, GREENE
COUNTY, ARKANSAS, BEING MORE
PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT A FOUND MAG NAIL
BEING THE NORTHEAST CORNER OF THE
SOUTHWEST QUARTER OF THE SOUTH-
EAST QUARTER OF SECTION 25, TOWNSHIP
17 NORTH, RANGE 5 EAST, GREENE
COUNTY, ARKANSAS, THENCE SOUTH 89
DEGREES 25 MINUTES 47 SECONDS WEST,

Appendix 32a

ALONG THE NORTH LINE OF SAID QUARTER SECTION, 240.34 FEET TO A POINT ON THE WEST RIGHT OF WAY LINE OF UNITED STATES HIGHWAY 49; THENCE SOUTH 21 DEGREES 10 MINUTES 32 SECONDS WEST, 5.51 FEET TO A POINT; THENCE SOUTH 23 DEGREES 43 MINUTES 16 SECONDS WEST, 9.63 FEET TO AN AHTD MONUMENT, SAID POINT BEING THE POINT OF BEGINNING; THENCE, ALONG THE WEST RIGHT OF WAY LINE OF UNITED STATES HIGHWAY 49, SOUTH 23 DEGREES 38 MINUTES 18 SECONDS WEST, 259.14 FEET TO A POINT; THENCE, LEAVING SAID RIGHT OF WAY LINE, NORTH 68 DEGREES 59 MINUTES 08 SECONDS WEST, 18.98 FEET TO A POINT THENCE NORTH 19 DEGREES 48 MINUTES 36 SECONDS EAST, 143.59 FEET TO A POINT ON THE SOUTH RIGHT OF WAY LINE OF COUNTRY CLUB ROAD; THENCE ALONG SAID SOUTH RIGHT OF WAY LINE THE FOLLOWING COURSES: NORTH 88 DEGREES 53 MINUTES 19 SECONDS EAST, 36.64 FEET TO A POINT; NORTH 88 DEGREES 53 MINUTES 19 SECONDS EAST, 79.22 FEET TO A FOUND AHTD MONUMENT; NORTH 89 DEGREES 32 MINUTES 25 SECONDS EAST, 195.79 FEET BACK TO THE POINT OF BEGINNING, SAID TRACT CONTAINING 56,631 SQUARE FEET OR 1.300 ACRES MORE OR LESS (the "Property").

5. This Court has jurisdiction of the subject matter and parties and venue is proper pursuant to Ark. Code Ann. § 16-60-101.

Appendix 33a

FACTUAL BACKGROUND

6. On or about October 5, 2016, PB General Holdings executed and delivered a Special Warranty Deed in favor of BAS. The Special Warranty Deed was recorded on October 5, 2016, as Document No. 201607221 with the Ex Officio Recorder for Green County, Arkansas. **Exhibit 1, BAS Deed.**

7. During BAS's ownership of the Property, the Property was certified by the Green County Clerk/Collector to the COSL for non-payment of taxes.

8. Tommy Land, the Commissioner of State Lands for the State of Lands of Arkansas (the "Commissioner") did a Records and Lien Search Request for the Property related to the certification from the Green County Clerk. **Exhibit 2, Records and Lien Search Request.**

9. The Records and Lien Search Request showed the BAS was the record owner of the Property and that BAS's address was 3735 Winford Drive, Tarzana, California, 91356. **Exhibit 2.**

10. The search also showed that the Property's physical address was 1100 Country Club, Paragould, Arkansas, 72450. **Exhibit 2.**

11. The Records and Lien Search Report used an incomplete property description: PT SW1/4 SE1/4 (BEING TRACT AS SHOWN ON SVY QQ-7) (56,631 SF or 1.3 AC) AS DESCRIBED IN DEED 201607221. Section: 25 Township: 17N Range: 05E Acreage: 1.3 Lot: Bock: City: Addition: SD: S1P C. **Exhibit 2.**

12. On August 17, 2021, pursuant to Ark. Code. Ann. § 26-37-301, the Commissioner sent a notice of delinquency and future tax sale to BAS at the

Appendix 34a

Tarzana, California address (“August 2021 Notice”).
Exhibit 3, August 2021 Notice.

13. The August 2021 Notice stated that the Property would be sold on August 2, 2022, if BAS did not pay all taxes, penalties, interest, and costs prior to that date. **Exhibit 3.**

14. The August 2021 Notice was sent via certified mail with return receipt requested. **Exhibit 4, Commissioner Deposition, at 36:10-22.**

15. Certified mail, whether sent with return receipt requested or otherwise, requires a signature from the intended recipient. **Exhibit 4, at 34:8-35:7.**

16. The August 2021 Notice was allegedly delivered to a front desk, reception area, or mail room of the Tarzana address on August 24, 2021. **Exhibit 4, 2021 USPS Tracking Records.**

17. The Tarzana, California address is a residence and does not have a front desk, reception area, or mail room. **Exhibit 5, Affidavit of Gary Solnit, at ¶ 8.**

18. Neither BAS nor its representatives resided at the Tarzana, California address at the time of the purported notice. **Exhibit 5, Affidavit of Gary Solnit, at ¶ 6.**

19. BAS did not receive the August 2021 Notice that was allegedly delivered to a non-existent front desk, reception area, or mail room. **Exhibit 5, Affidavit of Gary Solnit, at ¶ 7.**

20. Though it had requested one, the Commissioner never received a return receipt for the August 2021 Notice. **Exhibit 4, at 35:2-36:22.**

21. There is no record showing that the mail carrier delivered the August 2021 Notice to the intended

Appendix 35a

recipient and received a signature. **Exhibit 4, at 35:2-36:22.**

22. The Commissioner knew that it had requested a return receipt for the August 2021 Notice but that some error had prevented the completion of the certified mail process. **Exhibit 4, at 35:9-37:25.**

23. The Commissioner knew or should have known that BAS did not receive the August 2021 Notice.

24. On June 27, 2022, the Commissioner sent by certified mail a notice of delinquency and future tax sale to the Property's physical address in Paragould, Arkansas ("June 2022 Notice"). **Exhibit 6, June 2022 Notice.**

25. The June 2022 Notice did not comply with statutory notice requirements. **Exhibit 4, at 45:4-48:8.**

26. The June 2022 Notice did not accomplish actual notice. Its return receipt and USPS tracking number showed that the June 2022 Notice was returned to sender as "ATTEMPTED—NOT KNOWN UNABLE TO FORWARD." **Exhibit 6, June 2022 Notice.**

27. BAS did not receive the June 2022 Notice. **Exhibit 5, Affidavit of Gary Solnit, at ¶ 11.**

28. The Commissioner knew or should have known that BAS did not receive the June 2022 Notice because it was returned to the Commissioner as undelivered. **Exhibit 6, June 2022 Notice.**

29. The Commissioner took no additional steps to effect notice of the impending tax sale of the Property after (1) being on notice that there had been an error with delivery of the August 2021 Notice and (2) receiving the June 2022 Notice return receipt

Appendix 36a

showing that the certified letter had not been delivered. **Exhibit 4, at 88:20-89:7.**

30. Instead, the Commissioner proceeded with the sale of the Property on August 2, 2022. **Exhibit 7, Post-Sale Notice.**

31. On or about August 2, 2022, a public auction of the Property was conducted. Parcel Strategies, LLC, and Banyan Capital Investments (collectively “Parcel-Banyan”) were the prevailing bidders at the auction.

32. On or about August 22, 2022, the Commissioner executed and delivered Limited Warranty Deed No. 22868 (“Deed 1”) in favor of Parcel-Banyan for the Property. Deed 1 was recorded on September 2, 2022, as Document No. 2022007044 with the Ex Officio Recorder for Green County, Arkansas. **Exhibit 8, Deed 1.**

33. Deed 1 contained the same incomplete property description the Commissioner had been using throughout the certification, notice, and sale process. **Exhibit 8, Deed 1.**

34. On or about September 19, 2022, the Commissioner executed and delivered a second Limited Warranty Deed No. 228682 (“Deed 2”) in favor of Parcel-Banyan for the Property. Deed 2 was recorded on September 22, 2022, as Document No. 2022007596 with the Ex Officio Recorder for Greene County, Arkansas, and was intended to correct the incomplete legal description in Deed 1. **Exhibit 9, Deed 2.**

CLAIM I –SETTING ASIDE TAX SALE

35. Paragraphs 1 through 34 are incorporated herein by reference as if set forth word for word.

Appendix 37a

36. When the Commissioner receives tax-delinquent land, Arkansas Code Annotated § 26-37-301(a)(1) requires the Commissioner to notify the owner at the owner's last known address, by certified mail, of the owner's right to redeem the land.

37. If the notice by certified mail is returned undelivered for reason other than being unclaimed or refused, then the Commissioner shall send a second notice to the owner at "any additional address reasonably identifiable through the examination of the real property records properly filed and recorded in the office of the county recorder where the tax-delinquent land is located[.]" Ark. Code Ann. § 26-37-301(a)(4).

38. The Fifth Amendment of the United States Constitution says no person shall be "deprived of . . . property without due process of law."

39. The Due Process Clause of the Fourteenth Amendment requires the government to provide owners "notice and opportunity for hearing appropriate to the nature of the case" before it may take property as a result of unpaid taxes.

40. The notice must be "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." See *Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.*, 661 F.3d 354, 358 (8th Cir. 2011).

41. The Commissioner failed to make a reasonably calculated inquiry to notify all parties with an interest in the Property, including BAS, of the alleged tax delinquency as required by law.

Appendix 38a

42. The Commissioner violated BAS's Due Process rights and the tax sale should be set aside or otherwise cancelled.

CLAIM II –SECTION 1983 VIOLATION OF 5TH AND 14TH AMENDMENTS

43. Paragraphs 1 through 42 are incorporated herein by reference as if set forth word for word.

44. The Commissioner, under color of statute, ordinance, or custom subjected BAS to the deprivation of rights, privileges, and immunities secured by the United States Constitution and laws, including but not limited to: (a) a violation of the Fifth Amendment's prohibition against deprivation of property without due process; and (b) a violation of BAS's due process rights under the Fourteenth Amendment of the United States Constitution.

45. The elements of a Section 1983 claim are: "(1) the defendants acted under color of state law, and (2) the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." 42 U.S.C. § 1983.

46. The Commissioner deprived BAS of property without due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

47. Due process requirements supersede any state statutory notice requirements and compliance with state statutory notice requirements is not a guarantee of due process. *See Linn Farms*, 661 F.3d 354.

48. The due process analysis centers on the government's knowledge and intent. When the government knows that its attempt to notify a property owner of an impending tax sale has failed,

Appendix 39a

due process requires the government to do something more before real property may be sold at a tax sale. *See Jones*, 547 U.S. 220, 227, 126 S.Ct. 1708, 164 L.Ed 415 (2006).

49. “[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.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (2006).

50. The State is required to act as one who truly wants to accomplish notice and to abandon notice only when no reasonable method of accomplishing notice remains available. *Jones*, 547 U.S. at 229.

51. Where the State knows that notice has not been accomplished, due process requires it to “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*, 547 U.S. at 225.

52. The Commissioner knew that it had not completed notice on BAS of the impending tax sale of the subject property because the Commissioner did not receive a return receipt for its August 2021 Notice and knew that the notice purportedly had been left in a mail room, unsigned for by any person.

53. The Commissioner knew it had not completed notice on BAS of the impending tax sale of the subject property because the June 2022 Notice was returned to the Commissioner undelivered.

54. Despite knowing that it had not completed notice on BAS of the impending tax sale of the subject property, the Commissioner took no additional reasonable steps to ensure notice to BAS and therefore violated BAS’s due process rights under the

Appendix 40a

Fourteenth Amendment of the United States Constitution.

55. The Commissioner violated the Fifth and Fourteenth Amendments by depriving BAS of due process when it failed to take the steps required by law to notify BAS of the impending tax sale.

56. As a result of the Commissioner's violations, BAS suffered damages in the amount of the fair market value of the Property as of the day of the taking.

57. BAS is entitled to the fair market value of the Property as of the day of the taking.

58. BAS is entitled to costs and attorneys' fees. *See* 42 U.S.C. § 1983.

COUNT III – VIOLATION OF FIFTH AMENDMENT TAKINGS CLAUSE

59. Paragraphs 1 through 58 are incorporated herein by reference as if set forth word for word.

60. The Fifth Amendment of the United States Constitution states that private property shall not be taken for public use without just compensation.

61. BAS, a private entity, owned the Property.

62. The Commissioner took the Property when it certified the Property for non-payment of taxes and sold it at a public tax auction without due process.

63. The Commissioner did not compensate BAS justly when it took BAS's private property.

64. By taking BAS's private property without just compensation, the Commissioner violated the Fifth Amendment's taking clause.

65. BAS is entitled to the fair market value of the Property as of the day of the taking.

Appendix 41a

**COUNT IV – VIOLATION OF ARTICLE 2 OF
THE ARKANSAS CONSTITUTION**

66. Paragraphs 1 through 65 are incorporated herein by reference as if set forth word for word.

67. Article 2, Section 22 of the Arkansas Constitution provides that “[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefore.”

68. The Commissioner took the Property when it certified the Property for non-payment of taxes and sold it at a public auction without due process.

69. The Commissioner did not compensate justly BAS when it took BAS’s private property.

70. By taking BAS’s private property without just compensation, the Commissioner violated Article 2, Section 22 of the Arkansas Constitution.

71. BAS is entitled to the fair market value of the Property as of the day of the taking.

JURY TRIAL

72. BAS demands a jury trial on all issues triable before a jury.

WHEREFORE, BAS, LLC prays that the Court enter an order setting aside the tax sale and limited warranty deed issued by Tommy Land, Commissioner of State Lands, to Parcel Strategies, LLC and Banyan Capital Investments, LLC, finding a violation of BAS’s due process rights under the Fifth and Fourteenth Amendments of the United States Constitution, finding that the Commissioner effected a taking of BAS’s property in violation of the Fifth Amendment of

Appendix 42a

the United States Constitution and Article 2 of the Arkansas Constitution, and awarding BAS LLC its costs, attorneys fees and all other just and equitable relief to which BAS is entitled.

QUATTLEBAUM, GROOMS
& TULL PLLC

111 Center Street, Suite 1900

Little Rock, Arkansas 72201

Telephone: (501) 379-1700

Facsimile: (501) 379-1701

E-Mail: jfalasco@qgtlaw.com

lohara@qgtlaw.com

By: /s/ Joseph R. Falasco

Joseph R. Falasco (2002163)

Laura L. O'Hara (2021150)

Attorneys for BAS, LLC

* * *

Appendix 43a

IN THE CIRCUIT COURT OF GREENE COUNTY,
ARKANSAS
SECOND DIVISION

BAS, LLC PLAINTIFF
v.

CASE NO. 28CV-22-388

TOMMY LAND, IN HIS DEFENDANT
OFFICIAL CAPACITY
AS ARKANSAS
COMMISSIONER OF
STATE LANDS

PARCEL STRATEGIES, INTERVENORS
LLC, and BANYAN
CAPITAL
INVESTMENTS, LLC

30(b)(6) DEPOSITION OF:

DR. GARY SOLNIT

(Taken July 19, 2024, at 9:05 a.m.)

[Excerpts of Pages 653-55, 659, 664, 679, 682, and
717-18 of the Record on Appeal.]

APPEARANCES

ON BEHALF OF THE INTERVENORS:

FRANK J. CARDIS, ESQUIRE
Hosto & Buchan, PLLC
701 West 7th Street
Little Rock, Arkansas 72201
Phone: (501) 320-0217

Appendix 44a

ON BEHALF OF THE DEFENDANT:

LISA WIEDOWER, ESQUIRE
Assistant Attorney General
Office of Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Phone: (501) 682-2503

ON BEHALF OF THE PLAINTIFF:

JOSEPH R. FALASCO, ESQUIRE
LAURA O'HARA, ESQUIRE
Quattlebaum Grooms Tull, PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Phone: (501) 379-1776

ON BEHALF OF THE INTERVENOR PARCEL
STRATEGIES, LLC:

STEPHEN E. WHITWELL, ESQUIRE
Hurley & Whitwell, PLLC
2900 Percy Machin Drive
North Little Rock, Arkansas 72114
Phone: (501) 801-1111

ON BEHALF OF THE INTERVENOR BANYAN
CAPITAL INVESTMENTS, LLC:

BRYAN E. HOSTO, ESQUIRE
Hosto & Buchan, PLLC
701 West 7th Street
Little Rock, Arkansas 72201
Phone: (501) 320-0217

Appendix 45a

ALSO PRESENT:

Dr. Jay Solnit, Corporate Representative,
BAS, LLC

* * *

EXAMINATION

BY MR. CARDIS:

* * *

Q And with respect to BAS, LLC, what is your relationship to that entity?

A Well, I am 50 percent owner of BAS, LLC, with my brother, Jay, who's here. We're partners.

Q And the BAS, is that an acronym for anything specific or just initials?

A It is an acronym. It's -- well, actually it's my mother's initials, Barbara Arlene Solnit.

Q And what was the reason for forming that entity, sir?

A We formed the entity to help my mother with her inheritance. And when she gave us power of attorney in 2009, we decided -- and since her health was failing, we decided that we needed to make her money work for her to try to help her with her health needs and her care.

* * *

Q What actions did BAS, LLC, take to correct the address that was on that title information?

A Unfortunately, nothing after that, or this whole mess wouldn't have gotten this far.

Q Did BAS, LLC, contact any government official in Greene County, Arkansas, to change the address?

A No, BAS, LLC, did not contact the county.

Appendix 46a

Q Can you describe what items of mail were received at the 3735 Winford Drive from Greene County, Arkansas?

A Sometime in early 2017, I did receive a property tax statement at 3735.

Q And after receiving that 2017 property tax statement, what action did you take?

A I immediately forwarded it to my lawyer at the time, asking him if Dollar General was responsible for paying the property taxes, as we had been led to believe, and nothing ever happened after that.

Q What actions did you take to follow up with your attorney on the issue?

A After that email, I did not follow up with my attorney.

* * *

Q With respect to the Paragould property where the Dollar General store is located, could you explain how BAS became aware of that potential investment?

A Yes. We hired a commercial broker from Caldwell Banker named Art Pfefferman, P-F-E-F-F-E-R-M-A-N, and he found this Dollar General in Paragould for us.

Q Were you specifically searching the Paragould, Arkansas, market when you found that investment?

A No, we were not specifically searching Arkansas, we were searching all over the United States for something that we could afford.

Q And what about that particular property did BAS find attractive for investment purposes?

A Well, the price, number one, was what we could afford to buy, and the location being on a busy street.

Appendix 47a

Other than that, we trusted our broker to help us make these decisions.

Q Was the presence of the Dollar General store on that Paragould property a factor also that made the property attractive for investment?

A Yes, it was the Dollar General that made it attractive.

* * *

Q I believe in your previous -- in your testimony a little bit earlier, you stated that the address of 3735 was mistakenly recorded by your closing agent, is that correct, even though you had asked for it not to be; is that correct?

A Yes.

Q If I understand that.

A I believe that the address --

Q Can you explain that a little bit?

A I'm sorry, I didn't get the last part of your --

Q I said, Can you explain what you meant by that?

A Yes. The address, the 3735 address was recorded by the title agent, and I don't know how he decided to use that address. And when I saw that that address was recorded on title, I asked for it to be changed by emailing my lawyer.