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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Presiding Judge

Case No. 2021-CP-34-00150

Appellate Case No. 2022-001791

RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., ... Appellant,

v.

Ronald D. Kirby, Dylan T. Kirby, Treasurer for Marlboro County and Danny T. Williams,.. Respondents.

INITIAL REPLY BRIEF
(REPLYING TO BRIEF OF RESPONDENT TREASURER FOR MARLBORO COUNTY)

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ARGUMENTS

I. According to Respondent Treasurer, the purpose of the amendment to Section 12-51-160 is to stop protecting the taxpayer when the county fails to give proper notice to the taxpayer in compliance with tax sale requirements.

II. The case law cited in the Brief of Appellant is not "outdated" or "obsolete."

III. The statutes, as amended, constitute a statute of limitations, not a statute of repose.

IV. The construction of the amended statutes, as argued by Respondent Treasurer, would be unconstitutional as depriving Appellant of property without due process of law.

V. The dismissal of Appellant's conversion claim, upon motion of Respondent Treasurer, was improper.

I. ACCORDING TO RESPONDENT TREASURER, THE PURPOSE OF THE AMENDMENT TO SECTION 12-51-160 IS TO STOP PROTECTING THE TAXPAYER WHEN THE COUNTY FAILS TO GIVE PROPER NOTICE TO THE TAXPAYER IN COMPLIANCE WITH TAX SALE REQUIREMENTS.

Notwithstanding the arguments of Respondent Treasurer, the amendment to Section 12-51-160 did not change the primary purpose of the tax sale procedure, which this Court has declared many times to be the protection of the taxpayer.

The following wording: "**All requirements of the law leading up to tax sales that are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded as mandatory and are to be strictly enforced**," is found (precisely) in all of the following cases (discussed individually below), each of which was decided after the subject statutory amendments:

Scott v. McAlister
Halsey v. Simmons
Forfeited Land Comm'n of Bamberg Cty. v. Beard
Reeping v. Jebbco, LLC
King v. James
Smith v. Barr

The purpose of the foregoing quote is to show that, since 2006, this Court routinely starts

its evaluation of a disputed tax sale by acknowledging, first and foremost, that the taxpayer's interest was to be protected, that the statutory notice requirements were to be strictly enforced and that, if the notices were defective, the tax sale would be invalid. This statement of the law has been quoted consistently for decades.

In *Scott v. McAlister*, 436 S.C. 324, 335, 871 S.E.2d 620 (Ct. App. 2021), this Court quoted from *Tanner v. Florence County Treasurer*, 336 S.C. 552, 563, 521 S.E.2d 153 (1993), wherein the Supreme Court found that,

> **'All requirements of law leading up to tax sales are intended for the protection of the taxpayer against surprise or the sacrifice of his property and are regarded as mandatory and are strictly enforced.** *Dibble v. Bryant*, 274 S.C. 481, 265 S.E.2d 673 (1980). Failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void. *Donohue v. Ward*, 298 S.C. 75, 378 S.E.2d 261 (Ct. App. 1989). This Court will set aside sales where section 12-51-40 has not been complied with by public officials.' See *Snelgrove v. Lanham*, 298 S.C. 302, 379 S.E.2d 904 (1989). (emphasis added)

In *Halsey v. Simmons*, 429 S.C. 385, 395, 837 S.E.2d 919 (Ct. App 2019) (reversed on due process grounds), this Court found as follows:

> **'The sound view is that all requirements of law leading up to the tax sales [that] are intended for the protection of the tax payer (sic) against surprise or the sacrifice of his property are to be regarded as mandatory and are to be strictly enforced.'** *Rives v. Bulsa,* 325 S.C. 287, 292-93, 478 S.E.2d 878, 881 (Ct. App. 1996) (emphasis added) Even 'the fact that the defaulting taxpayer has actual notice of the impending tax sale 'is insufficient to uphold a tax sale absent strict compliance with statutory requirements.' *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 36, 577 S.E.2d 202, 205 (2003) (quoting *In Re Ryan Inv. Co.*, 335 S.C. at 395, 517 S.E.2d at 693).

In *Forfeited Land Comm'n of Bamberg Cty. v. Beard*, 424 S,C, 137, 145, 817 S.E.2d 801 (Ct. App. 2018), this Court found as follows:

> 'This [c]ourt has consistently held the enforcing agencies of government to strict compliance with all legal requirements surrounding tax sales.' *Dibble v. Bryant*, 274 S.C. 481, 483, 265 S.E.2d 673, 675 (1980). **'[A]ll requirements of the law leading up to tax sales [that] are intended for the protection of the taxpayer**

> **against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced.**' *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 161, 265 (Ct. App. 1989) (citing *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). (emphasis added)

In *Reeping v. Jebbco, LLC*, 402 S.C. 195, 199, 201, 740 S.E.2d 504 (Ct. App. 2013), this Court found as follows:

> 'Tax sales must be conducted in strict compliance with statutory requirements.' *In re Ryan Inv. Co.,* 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999) (citing *Dibble v. Bryant,* 274 S.C. 481, 483, 265 S.E.2d 673, 675 (1980)). '**[A]ll requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced.**' *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (citing *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). 'Failure to give the required notice is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void.' *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996) . . . It is stated 'all requirements of law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are the be regarded mandatory and are to be strictly enforced.' *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941); according, *Leysath v. Leysath*, 209 S.C. 342, 40 S.E.2d 233 (1946). (emphasis added)

In *King v. James*, 388 S.C. 16, 25, 694 S.E.2d 325 (Ct. App. 2010), this Court found as follows:

> 'Tax sales must be conducted in strict compliance with statutory requirements.' *In Re Ryan*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999). (citing *Dibble*, 274 S.C. at 483, 265 S.E.2d at 675). '**[A]ll requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory and are to be strictly enforced.**' *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (citing *Osborne v. Valentine*, 196 S.C. 90, 94, 12 S. E.2d 856, 858 (1941)). 'Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." *Ryan Inv. Co..*, 335 S.C. at 395, 517 S.E.2d at 693. "Failure to give the required notice [of a tax sale] is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void.' *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996). (emphasis added)

In *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486 (Ct. App. 2007), this Court found as follows:

> In South Carolina, '**all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded mandatory and are to be strictly enforced**.' *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct. App. 1989) (internal citations and quotations omitted). Additionally, the failure to give the required statutory notice renders the tax sale invalid. *Rives*, 325 S.C. at 293, 478 S.E.2d at 881. (emphasis added)

Respondent Treasurer stated, "[t]he General Assembly clarified with the 2006 amendments that Section 12-51-160 and the newly adopted Section 12-51-90(C) make a tax sale 'incontestable' two years after the date of the tax sale, regardless of whether there was 'proper notice.'" (R. Brief, p. 8) Respondent Treasurer further stated, "[i]t is apparent that the General Assembly was acting in response to the *Corbin* decision . . . [wherein] this Court opined that the pre-2006 version of Section 12-51-160 was intended by the legislature 'to create a time limit during which one who lost title to property through a tax sale, *after proper notice*, may attempt to regain title,' and "[t]he General Assembly sought to correct the italicized language which judicially creates an exception to the two-year limitations period." (R. Brief, p. 8) The legislature failed, however, to make it clear that the statutes, as amended, applied **regardless of whether or not there was 'proper notice'** (R. Brief, p. 8) (i.e. regardless of whether or not there was a jurisdictional defect in the tax sale). If the legislature intended to clarify that "proper notice" was no longer mandatory, it could have done so (subject to there being no constitutional limitations).

Respondent Treasurer construes the amendments to eliminate altogether the primary purpose of the tax procedure: protecting the taxpayer, in favor of eliminating the county's duty to do its job correctly. Under this construction, if a county fails (negligently or intentionally) to comply with statutory requirements, and the taxpayer <u>does not receive proper notice</u> and, therefore, does not take steps (or even know that it must take steps) to protect itself from being deprived of its property, the county's failure to comply with notice requirements will lead to no adverse

consequences to anyone other than the taxpayer, if no action to overturn the tax sale is filed within twelve months.[1] There is no evidence in the amendments that the legislature intended that result. It is inconceivable that the legislature's purpose was to overhaul the law of tax sales in order to "protect the county" while ignoring altogether the property interests of the taxpayer – especially without its clarifying that this was its purpose.

At twelve months (or even at two years), the limitation period is quite short. It has, in fact, been called a "short statute of limitations." Following recent precedent, a short statute of limitations does not apply if there is a jurisdictional or fundamental defect in the proceedings. As quoted in *Beard*, supra, at 147-48, and in *Reeping*, at 200-01,

> It appears to be the general rule that a short statute of limitation[s] of the kind under consideration does not apply where, by reason of some jurisdictional defect, the tax deed is absolutely void upon its face; and perhaps the majority of the courts hold that the bar of the statute does not apply if there are jurisdictional or fundamental defects in the tax proceedings which render such proceedings absolutely void. (emphasis added)

Respondent Treasurer seems to believe that, since a tax sale doesn't involve a court, the county (tax authority) need not protect a taxpayer. In exchange for being allowed to sell properties using a non-judicial procedure rather than having to file foreclosure-like litigation with a court, and having to acquire jurisdiction by service of a Summons, South Carolina counties are charged with only three or four simple requirements to perform correctly in conducting a successful (i.e., they must comply with the specific notice requirements imposed by statute). Unfortunately, counties often have difficulty complying with these few requirements. However, instead of expecting the counties to perform this relatively-simple job correctly, the amended statutes, as

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1 Section 12-51-90(C) makes it clear that the limitation period of "two years from the date of sale" (Section 12-51-160) is actually only twelve months running after the tax sale is final (after the expiration of the redemption period).

construed by Respondent Treasurer, effectively absolve the counties altogether from complying with the tax sale requirements, after the short limitation period.

Respondent Treasurer argues, that ". . . the 'jurisdictional defect' language was *erroneously* used years ago by the Supreme Court and has remained in the jurisprudence ever since." (R. Brief, p. 9) Respondent Treasurer also argues that the construction or application of Section 15-12-160 is "*absurd and meaningless*." (R. Brief, p. 11) Appellant submits that, over the decades, the appellate courts have consistently made clear their stance on, and rationale for, declaring defective tax sales (due to a lack of proper notice) to be void. (See case law cited in Argument II, infra.)

II. THE CASE LAW CITED IN THE BRIEF OF APPELLANT IS NOT "OUTDATED" OR "OBSOLETE."

Contrary to the Brief of Respondent Treasurer, which states, ". . . the Appellant makes two arguments based upon outdated case law: first, the limitations bar does not apply where there is a jurisdictional defect in the tax sale, and second, that the limitations bar begins to run when the defaulting taxpayer is ousted from possession" (R. Brief, p. 5) (emphasis added), the case law cited in the Brief of Appellant is clearly **not** outdated. Respondent Treasurer declares that both positions, which are based upon proper precedent of this Court, *lack merit.* (R. Brief, p. 5) Also, contrary to said Brief, which describes Appellant's argument as "based entirely on obsolete pre-2006 case law and is patently inconsistent with the language in Section 12-51-90(C)" (R. Brief, p. 14) (emphasis added), the case law cited by Appellant is also clearly **not** obsolete.

The following quote from *Beard*, supra, at 146-47, which was decided twelve years after the subject statutes were amended, cites most of the cases cited in the Brief of Appellant, and more:

> A number of courts have indicated that when a tax sale is not held in strict compliance with the statute, such a defect is jurisdictional and the statute of limitations may not run at all. *See In re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E. 2d 692, 693 (1999) ("Even actual notice is insufficient to uphold a tax sale absent

> strict compliance with statutory requirements."); *Aldridge v. Rutledge*, 269 S.C. 475, 478, 238 S.E.2d 165, 166 (1977) ("Without strict compliance with the statutory requirements, a tax sale may not be upheld."); *Donohue v. Ward*, 298 S.C. at 83, 378 S.E.2d at 265 ("[F]ailure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void."); *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S. E.2d 878, 881 (Ct. App. 1996) ("Failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void."); *Smith v. Barr*, 375 S.C. at 164, 650 S.E.2d at 490 ("[T]he failure to give the required statutory notice renders the tax sale invalid."); *Reeping v. Jebbco, LLC*, 402 S.C. 195, 202, 740 S.E.2d 504, 507 (Ct. App. 2013) ("[T]he statute of limitations did not preclude the [property owner's] claim . . . as the failure to give proper notice rendered the tax sale void.").
>
> There are also cases in which our courts have suggested that even in the absence of strict compliance, the statute of limitations will begin to run when the purchaser at a tax sale comes into possession. *See Dibble v. Bryant*, 274 S.C. at 487, 265 S.E.2d at 677 ("The statute [of limitations] was intended to bar a defaulting and ousted taxpayer from maintaining an action to defeat the title of the tax sale purchaser and recover the land if brought more than two years from the date the purchaser came into possession."); *Scott v. Boyle*, 271 S.C. 252, 256, 246 S.E.2d 878, 889 (1978) (finding the statute of limitations did not bar an action to set aside a tax deed brought six years after the sale because there was insufficient evidence the purchaser had been in possession of the property in excess of two years); *Glymph v. Smith*, 180 S.C. 382, 384, 185 S.E. 911, 914 (1936) (holding the twoyear (sic) statute of limitations did not begin to run because the sheriff never took possession of the subject property, and the purchaser was never put into possession following the execution of the tax deed); *Gardner v. Reedy*, 62 S.C. 503, 503, 40 S.E. 947, 947-48 (1902) (finding a taxpayer "could not bring his action until there was a person on the land withholding possession from him.").

Taylor v. Taylor, 419 S.C. 639, 656, 799 S.E.2d 919 (Ct. App. 2017), which was decided eleven years after the amendments, and which also authorizes a challenge of a tax sale instituted in excess of two years after the tax sale, made the following findings:

> With regard to the master's finding that section 12-51-160 of the South Carolina Code (2014) prohibited a challenge to the tax sales, we find the master erred. Due to the inexplicable switch of the parcel locations, the true owners of parcel five did not receive notice of the tax sales, and Beaufort County used inaccurate property descriptions... Under these circumstances, Appellants could challenge the tax sales in excess of the two year statute of limitations in section 12-51-160. See *King v. James*, 388 S.C. 16, 25, 694 S.E.2d 35, 39 (Ct. App. 2010) (noting counties must conduct tax sales "in strict compliance" with the statute); *Reeping v. Jebbco, LLC*, 402 S.C. 195, 199, 740 S.E.2d 504, 506 (Ct. App. 2013) ("Failure to give the required notice is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void." (quoting *Rives v. Bulsa*, 325 S.C. 287, 293, 478

> S.E.2d 878, 881 (Ct. App. 1996) (per curiam)); id. at 202, 740 S.E.2d at 507 (concluding section 12-51-160 did not preclude a tax sale challenge because a failure to give the owner "proper notice rendered the tax sale void"). Accordingly, we find the master erred by determining Appellants could not challenge the tax sales because more than two years had passed from the date of the tax sales.

It should be noted from the quote immediately above that this Court, in 2017, refers to the amended Section 12-51-160 as "the two-year statute of limitations in section 12-51-160" rather than as a statute of repose. See Argument III, infra, for a further discussion on statutes of repose.

Reeping, supra, at 200-02, which was decided seven years after the amendments, quotes the current version of Section 12-51-160 in its entirety, and then refers to it as "the statute of limitations" and a "short statute of limitation." This Court then concluded that, ". . . the statute of limitations did not preclude the [taxpayer's] claim in this case as the failure to give proper notice rendered the tax sale void." (emphasis added)

King, supra, at 27, which was decided four years after the amendments, and which, while discussing the policy behind statutes of limitation and statutes of repose, refers to Section 12-51-160 many times as "the statute of limitations" and "the two-year statute of limitations," and held that ". . . the two year statute of limitations of section 12-51-160 does not bar [the taxpayer's] action to set aside the tax sale in this case," because the taxpayer instituted suit within two years after the buyer came in possession.

Obviously, at least in 2018, this Court believes that the case law cited above is anything but outdated and obsolete. It is simply **not** the case that this Court is regularly citing outdated, obsolete cases as precedent in support of its decisions.

The cases mentioned above, and many others, make it clear that the failure to give proper notice renders the tax sale void. This precedent is applicable in this case, as the redemption notice provided by the Delinquent Tax Collector was admittedly contrary to the notice requirements in

Section 12-51-120, as the "redemption notice was mailed on a Thursday (too early) rather than the following Monday."[2] (Ind. R. Brief, p. 5) (R.p. ___) (Tr.pp. 14-15). This admitted fact is important, as Section 12-51-120 specifically provides that the notice (required therein) **shall not be mailed ". . . more than forty-five days . . . before the end of the redemption period for real estate sold for taxes . . . ."** (emphasis added)

Respondent Treasurer claims that ". . . none of the decisions of this Court that have been issued since the 2006 Act have analyzed the changes in Section 12-51-160 that were enacted in 2006." (R. Brief, p. 5) The implication of that claim is that the 2006 version of Section 12-51-160 was ignored by this Court. While this Court has not made the same arguments about the amended statute as made by Respondent Treasurer, there is no reason to conclude that the Court has failed ". . . to give proper effect to the 2006 amendments, together with an infusion of some common sense and logic . . . ." Id.

III. THE STATUTES, AS AMENDED, CONSTITUTE A STATUTE OF LIMITATIONS, NOT A STATUTE OF REPOSE.

If, as claimed by Respondent Treasurer, the purpose of the 2006 amendment of Code Sections 12-51-160 and 90(C) was to create a statute of repose (R. Brief, p. 8), why then does Section 12-51-160 still reflect in its title (heading) that it is a "statute of limitations"?[3]

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[2] The Brief of Respondent Treasurer, in discussing this statutory requirement, states that, "[t]he Appellant concedes that the redemption notice was sent two or three days early . . . and that act is a "technicality at worst." (R. Brief, p. 5). The poor timing of the notice is not for Appellant to concede, but it, from the outset, has been the basis of Appellant's claim that the tax sale was jurisdictionally defective. Appellant contests Respondent Treasurer's comment that it concedes that this is a "technicality at worst." At the second hearing, Appellant's argument was that this failure to comply with the statutory notice requirement is "a major technicality" and that "[t]echnicalities matter." (R.p. ____) (Tr.pp. 5-6)

[3] Appellant acknowledges Respondent Treasurer's argument that Section 2-13-175 instructs that the heading must not be used to construe the statute, which Respondent Treasurer cited before proceeding to argue that the heading in 2006 Act No. 238, §3 should be used to construe legislative intent.

According to Respondent Treasurer, " . . . the General Assembly . . . amended Section 12-51-160 and adopted Section 12-51-90(C) precisely to adopt a statute of repose . . . ." (R. Brief, p. 11). If that is the case, which Appellant denies, why was the "incontestable" provision inserted into a statute (Section 12-51-90) which only dealt with redeeming property from a tax sale, and why wasn't a new statute created under Article 5, Chapter 3, Title 15, with the other statutes of repose?

Within the aforesaid Article 5, the following statutes of repose are found:

Section 12-3-545. Actions for medical malpractice.

Section 12-3-580 and 590. Actions by motor carriers for charges and overcharges.

Section 15-3-600. Actions for other relief.

Section 15-3-640. Actions based upon defective or unsafe condition of improvement to real property; right to contract for guarantee of structure for extended period

The statutes of repose cited above, including, most importantly, medical malpractice and contractor or developer contracts, address situations involving civil damages, such as contract liability and tort liability. These are areas which the state could find a reasonable basis to afford a protection against delayed litigation. These areas are distinguishable from tax sales, which involve the enforcement by counties (governmental entities) of liens for unpaid taxes, such as in this case, upon real property.

Langley v. Pierce, 315 S.C. 401, 403-04, 438 S.E.2d 242 (1993), which was cited by Respondent Treasurer (R. Brief, p. 8), quoted from decisions by the Fourth Circuit Court of Appeals as follows:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action . . . A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) (emphasis added)

The Court held, further, that 'a statute of repose is typically an absolute time limit

> beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.' *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) (emphasis added)

From the foregoing, it appears that, in general, statutes of repose have a purpose of protecting a defendant from a damages claim (i.e., from "liability") after an absolute time limit. "Liability" is not an issue in tax sale litigation.

Respondent Treasurer also cited *Leysath v. Leysath*, 209 S.C. 342, 40 S.E.2d 233 (1946) (*not outdated or obsolete*?), in support of his arguments regarding Section 12-51-160 and specifically lobbying for its being declared to be a statute of repose. (R. Brief, p. 11). That case applied the predecessor of Section 12-51-160[4] after determining that, with regard to the defects in the tax sale complained of, ". . . we do not think that they can be properly classified as jurisdictional defects within the purview of the rule which we have stated, **but rather are among the irregularities which the statute in question was framed to cover and set at rest.**" (pp. 349-50) (emphasis added) Such rule is: (1) "It has been uniformly held in this State that all requirements of the law leading up to tax sales are to be regarded as mandatory and strictly enforced. They are intended for the protection of the taxpayer against surprise or the sacrifice of his property;" and (2) "It appears to be the general rule that a short statute of limitation of the kind under consideration does not apply where, by reason of some jurisdictional defect, the tax deed is absolutely void upon

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4 The statute addressed in *Leysath* is quoted as follows:

> In all cases of sale the sheriff's deed of conveyance, whether executed to a private person, a corporation or the sinking fund commission, shall be held and taken as prima facie evidence of a good title in the holder, and that all proceedings have been regular, and all requirements of the law have been duly complied with. No action for the recovery of land sold by the sheriff under the provisions of this article, or for the recovery of the possession thereof, shall be maintained unless brought within two years from the date of said sale. Section 2827 of the 1942 Code. See *Leysath* at 347.

its face." (pp. 348-49) (emphasis added) Note how much of the 1942 version of the current Section 12-51-160 still survives today. The two statutes will be compared in detail below.

The Court in *Beard*, supra, at 148, concluded that, "[w]e find that the failure to provide the statutory notice is the type of jurisdictional defect contemplated in *Leysath* that renders the tax sale void and the statute of limitations inapplicable . . . [and] we find the statute of limitations did not run because the tax sale was void from the onset." (emphasis added)

The point is not that the tax sale in the present case was flawless and technically sound, which Appellant has not argued, contrary to the Brief of Respondent Treasurer. (R. Brief, p. 10) The point is that the tax sale was jurisdictionally defective.

Contrary to the Respondent Treasurer's argument that, ". . . a statute of repose is needed in cases where a tax sale is contestable" (R. Brief, p. 11), the cases that assert (and prove) a claim that there is a jurisdictional defect (i.e. that the tax sale is void) are the cases that most require the protection of the taxpayer in preference to a desire to "call time" on the litigation. (See the case law cited in Argument II, supra).

The Court should look closely at the changes to Section 12-51-160 over eight decades. The following is a comparison of Section 2827 of the 1942 Code,[4] which is a predecessor of Section 12-51-160, to the current version of the statute. The **bold** wording is the precise wording of this statute from the 1942 Code. The lined-through and underlined words are the amendments made to this statute in 2006.

> **In all cases of** tax **sale the** ~~**sheriff's**~~ **deed of conveyance, whether executed to a private person, a corporation, or** ~~**the sinking fund**~~ a forfeited land **commission,** ~~**shall be held and taken as**~~ is **prima facie evidence of a good title in the holder,** ~~**and**~~ **that all proceedings have been regular**~~**,**~~ **and** that **all** legal **requirements** ~~**of the law**~~ **have been complied with.** ~~**No**~~ An **action for the recovery of land sold** ~~**by the sheriff**~~ pursuant to this chapter ~~**under the provisions of this article** chapter~~ **or for the recovery of the possession** ~~**thereof, shall**~~ must not **be maintained unless brought within two years from the date of** ~~**said**~~ **sale** as provided in §12-

51-90(C).

As can be seen above, the wording "prima facie evidence of a good title in the holder" and "maintained unless brought within two years from the date of sale" has not been changed (this wording has, in fact, been perpetuated for eight decades or more.)

So, what is the difference between shall not or must not "be maintained unless brought within two years from the date of sale" (from Section 12-51-160) and "the tax deed is incontestable" after twenty-four months after the tax sale (from Section 12-51-90(C))? It boils down to: **an action to contest a tax sale must be brought within two years (pre-2006) vs. a tax deed cannot be contested after two years (2006).** Basically, the pre-2006 statute and the current statute say the same thing. There is certainly no indication whatsoever from the wording of the current (amended) statute that the legislature intended thereby to reject many decades of jurisprudence, to eliminate exceptions carved-out to protect the taxpayer and/or to convert the statute from a statute of limitations to a statute of repose.

Responding to Respondent Treasurer's comment that *Corbin v. Carlin*, 366 S.C. 187, 620 S.E.2d 745 (Ct. App. 2005), suggested in a footnote (at p. 194, n. 2) that Section 12-51-160 "appears to operate as a statute of repose" (R. Brief, p. 7), Appellant would show that, in the same footnote, this Court also pointed-out that "[t]he statute itself, however, is entitled "Deed as evidence of good title; statute of limitations."

As the amended statutes did not address this legal question, and the amended Section 12-51-160 calls itself a statute of limitations, it does appear that the legislature removed any uncertainty about it being a statute of limitations. If as stated by Respondent Treasurer, "[i]t is apparent that the General Assembly was acting in response to the *Corbin* decision with the enactment of 2006 Act No. 238." (R. Brief, p. 8), then by maintaining the same title (heading) and,

in general, the same wording, Section 12-51-160, as amended, must be taken to mean what it says: it is a statute of limitations.

Contrary to Respondent Treasurer's argument that the 2006 amendment ". . . removed any uncertainty and specifically declared as public policy that . . . clearly made the provision a statute of repose" (R. Brief, p. 8), if that were the case, there wouldn't be numerous post-2006 decisions that have held just the opposite. (See Argument II, supra.) If the legislature had intended to override court precedent, it seems that its intent would have been expressed with clarity in the amended statutes. The 2006 amendments provided no clarity.

There has been no effort – even in response to *Corbin* (as Respondent Treasurer claims) (R. Brief, p. 8) – to revise the statute to reject or otherwise address the judicial exceptions, which have become entrenched over the decades. For decades, the Supreme Court and this Court have addressed effectively the same statute over-and-over-again and have concluded that, notwithstanding the two year-limitation period, when there is a jurisdictional defect, the tax sale is absolutely void, and the statute of limitations does not bar a taxpayer's action instituted more than two years after the tax sale and does not run until the buyer came in possession of the property. (See Argument II, supra, for a discussion of relevant post-2006 case law; and see Argument I of the Brief of Appellant for a discussion of relevant case law, which includes pre-2006 cases.)

IV. THE CONSTRUCTION OF THE AMENDED STATUTES, AS ARGUED BY RESPONDENT TREASURER, WOULD BE UNCONSTITUTIONAL AS DEPRIVING APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

S.C. Const. Ann. Art. I, §3 provides as follows:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

The Plaintiff became the owner, in fee simple, of the subject property by deed from Tommy Leviner dated February 23, 1998, and recorded in the Office of the Clerk of Court for Marlboro County on February 23, 1998, in Book 373 at page 240. (R.p. ___) This derivation of title is also reflected as a part of the legal description in the subject Tax Sale Deed. (R.p. ___) The acquisition of the subject property by Appellant pre-dated, by many years, the enactment of the 2006 amendment.

Gatewood v. S.C. Dep't of Corr., 416 S.C. 304, 323-24, 785 S.E.2d 600 (Ct. App. 2016), cited *Durham v. Davis*, 229 S.C. 29, 91 S.E.2d 716 (1956), for its holding that

> 'retroactive application of a statute relaxing the stringency of a tax sale procedure to [taxpayer], whose rights in certain real property vested prior to the statute's enactment 'would be clearly unconstitutional as depriving them of property without due process of law.''

As Appellant acquired the property well prior to the 2006 amendments which, according to Respondent Treasurer's position, modified the statutes to provide less protection to Appellant, and as Appellant has, for now, been deprived of its property, such statutory change would be <u>unconstitutional</u> as depriving Appellant of its property <u>without due process of law</u>.

In *Durham,* <u>id</u>., at 35-36, which involved (to some extent) S.C. Code §65-2779 (1952) (a predecessor to Section 12-51-160), which was codified from Act No. 259 of the 1947 Acts of the General Assembly, the Court determined that this <u>statute was not applicable</u> as the tax deed was invalid as the <u>tax sale was void</u>, quoting from 51 Am. Jur., Taxation, p. 935, Section 1075, holding as follows:

> The power of the legislature when not otherwise restricted by special constitutional limitation to enact curative legislation remedying tax titles invalidated or subject to be invalidated by reason of defects and irregularities in tax sale proceedings prior or subsequent to the tax sale depends in general upon whether the defects sought to be cured are jurisdictional defects, or merely irregularities in failing to comply with directory matters. **It may not, however, by way merely of curative legislation, cut off all rights to attack a tax deed or tax title for failure to comply with**

> **requirements of a jurisdictional nature constituting essential prerequisites to the validity of the title or deed.** (emphasis added)

According to *Kurschner v. City of Camden Planning Comm'n,* 376 S.C. 165, 171, 656 S.E.2d 346 (2008),

> [p]rocedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. (citations omitted) (emphasis added)

V. THE DISMISSAL OF APPELLANT'S CONVERSION CLAIM, UPON MOTION OF RESPONDENT TREASURER, WAS IMPROPER.

In his Brief, Respondent Treasurer acknowledged that:

a) "The conversion claim is not directed at the Delinquent Tax Collector." (p. 1);

b) "The Respondent Delinquent Tax Collector is not a party to the Appellant's conversion cause of action . . . ." (p. 15, n. 4); and

c) His motion to dismiss was based ". . . on two grounds: (1) that the Treasurer for Marlboro County is not a proper party, and (2) that the Appellant's action to set aside the tax sale was filed more than two years after the date of the tax sale and was time-barred by operation of Sections 12-51-160 and 12-51-90(C) of the South Carolina Code of Laws." (pp. 1-2)

Respondent Treasurer did not move to dismiss Appellant's conversion cause of action and was, in any event, without standing to do so. The lower court nevertheless improperly dismissed said cause of action. For an additional discussion on these points, see Argument IV in the Brief of Appellant (pp. 16-18) and Argument IV in the Appellant's Reply Brief (Replying to Brief of Individual Respondents Ronald D. Kirby, Dylan T. Kirby and Danny T. Williams) (p. 7).

CONCLUSION

The amendments made to Sections 12-51-160 and 90(C) did not convert the statutes from a statute of limitations to a statute of repose.

The law in South Carolina remains clear. The failure to give a required notice to a taxpayer, like the defect in the tax sale procedure complained of by Appellant, is a jurisdictional defect. For that reason, the tax sale and tax deed are absolutely void, and the statute of limitations is inapplicable.

Respectfully submitted,

June 30, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Presiding Judge

Case No. 2021-CP-34-00150

Appellate Case No. 2022-001791

RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., ... Appellant,

v.

Ronald D. Kirby, Dylan T. Kirby, Treasurer for Marlboro County and Danny T. Williams,.. Respondents.

PROOF OF SERVICE

I, Leonard R. Jordan, Jr., attorney for the Appellant, RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., hereby certify that I have this 30th day of June, 2023, served the Initial Reply Brief (Replying to Brief of Respondent Treasurer for Marlboro County) upon Andrew F. Lindemann, Esquire, Attorney for Respondent, Treasurer for Marlboro County, and J. Rene Josey, Esquire, Attorney for Respondents, Ronald D. Kirby, Dylan T. Kirby and Danny T. Williams, by e-mailing a copy thereof to each of them at the addresses indicated below:

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