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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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. THE TAX SALE WAS VOID BY VIRTUE OF THE COUNTY'S FAILURE TO COMPLY WITH S.C. CODE ANN. §12-51-120, THEREBY RENDERING THE STATUTES OF LIMITATION INAPPLICABLE.

II. S.C. CODE ANN. §§12-51-160 AND 12-51-90 ARE INAPPLICABLE UNDER THE FACTS OF THIS CASE.

III. THE LIMITATION PERIOD UNDER S.C. CODE ANN. §§12-51-160 AND 90 DOES NOT BEGIN TO RUN UNTIL THE PURCHASER IS PUT IN POSSESSION OF THE SUBJECT PROPERTY.

IV. TREASURER'S MOTION TO DISMISS SOUGHT ONLY THE DISMISSAL OF THIS CASE "AS TO TREASURER FOR MARLBORO COUNTY," AND THE ORDER OF DISMISSAL IMPROPERLY DISMISSED THE CASE IN ITS ENTIRETY.

V. IT WAS IMPROPER TO DISMISS APPELLANT'S CAUSE OF ACTION FOR CONVERSION, WHICH HAS NO DIRECT CONNECTION WITH THE TAX SALE OR WITH S.C. CODE ANN. §§12-51-160 AND 90, AND AS TREASURER FOR MARLBORO COUNTY HAD NO STANDING WHATSOEVER TO SEEK DISMISSAL OF THE CONVERSION CAUSE OF ACTION.

STATEMENT OF THE CASE

This case involves a tax sale conducted by the Treasurer for Marlboro County or the Delinquent Tax Collector for Marlboro County (hereinafter "Treasurer"), on November 5, 2018, at which the subject real property, owned by Appellant, R. S. & A. Piping, Inc., was sold.

Appellant's suit, the primary purpose of which was to overturn the tax sale under S.C. Code Ann. §12-51-120 and to set aside the tax deed dated April 29, 2020, was filed on May 17, 2021. Respondents deny that the tax sale should be overturned.

Said statute reads as follows:

§12-51-120. Notice of approaching end of redemption period.

> Neither more than forty-five days nor less than twenty days before the end of the redemption period for real estate sold for taxes, the person officially charged with the collection of delinquent taxes shall mail a notice by "certified mail, return receipt requested – restricted delivery" as provided in Section 12-51-40(b) to the defaulting taxpayer and to a grantee, mortgagee, or lessee of the property of record in the appropriate public records of the county. The notice must be mailed to the best address of the owner available to the person officially charged with the collection of delinquent taxes that the real property described on the notice has

> been sold for taxes and if not redeemed by paying taxes, assessments, penalties, costs, and interest at the applicable rate on the bid price in the total amount of ____________________ dollars on or before ________ (twelve months from the date of sale) (date)________________________, a tax title must be delivered to the successful purchaser at the tax sale. Pursuant to this chapter, the return of the certified mail "undelivered" is not grounds for a tax title to be withheld or to be found defective and ordered set aside or cancelled of record.

On June 15, 2021, Treasurer filed a Motion to Dismiss, wherein he sought "an order dismissing the above captioned matter as to Treasurer for Marlboro County." The grounds for the Motion were: (1) that the Marlboro County Delinquent Tax Collector, rather than Treasurer for Marlboro County, was the proper party; and (2) that the statutes of limitation (set forth below) barred Appellant's attempt to contest the tax sale.

Said statutes read as follows:

> **§12-51-160. Deed as evidence of good title; statute of limitations.**
>
> In all cases of tax sale the deed of conveyance, whether executed to a private person, a corporation, or a forfeited land commission, is prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with. An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale as provided in Section 12-51-90(C).
>
> **§12-51-90. Redemption of real property; assignment of purchaser's interest.**
>
> (A) The defaulting taxpayer, any grantee from the owner, or any mortgage or judgment creditor may within twelve months from the date of the delinquent tax sale redeem each item of real estate by paying to the person officially charged with the collection of delinquent taxes, assessments, penalties, and costs, together with interest as provided in subsection (B) of this section. If prior to the expiration of the redemption period, the purchaser assigns his interest in any real property purchased at a delinquent tax sale, the grantee from the successful bidder shall furnish the person officially charged with the collection of delinquent taxes a conveyance, witnessed and notarized. The person officially charged with the collection of delinquent taxes shall replace the successful bidder's name and address with the grantee's name and address in the delinquent tax sale book.
>
> (B) The lump sum amount of interest due on the whole amount of the delinquent tax sale based on the month during the redemption period the property

is redeemed and that rate relates back to the beginning of the redemption period according to the following schedule:

Month of Redemption Period Imposed Property Redeemed	Amount of Interest
First three months	three percent of the bid amount
Months four, five, and six	six percent of the bid amount
Months seven, eight, and nine	nine percent of the bid amount
Last three months	twelve percent of the bid amount

However, in every redemption, the amount of interest due must not exceed the amount of the bid on the property submitted on behalf of the forfeited land commission pursuant to Section 12-51-55.

(C) If the defaulting taxpayer, grantee from the owner, or mortgage or judgment creditor fails to redeem the item of real estate sold at the delinquent tax sale within the twelve months provided in subsection (A) and after the passing of an additional twelve months, the tax deed issued is incontestable on procedural or other grounds.

At the hearing on said Motion, which was held before Honorable Roger E. Henderson, Presiding Judge, on August 31, 2021, both sides discussed an unpublished decision, to wit: *Leake v. Ethridge*, which case involved the County's failure to comply with S.C. Code Ann. §12-51-120 and the applicability of S.C. Code Ann. §§12-51-160 and 12-51-90.

The *Leake* case was identified, and a copy thereof was offered to Judge Henderson, by counsel for Kirbys and Williams. (R.pp. 39-41)

Said Respondents' counsel described the *Leake* case as "exactly on point" and "most certainly on point," agreeing with Appellant's counsel in that regard. (R.p. 39) Said Respondents' counsel actually stated that the *Leake* case "shows how the appellate courts would look at that analysis" (i.e. "whether the 25 (sic) to 45 day time period is jurisdictional"). (R.p. 40)

Said Respondent's counsel also stated that *Leake* "shows how the appellate courts would look at . . . whether the statute of limitations applies first." (R.pp. 39-40)

Judge Henderson requested and received a copy of the *Leake* case. (R.p. 41) Following the motion hearing, Judge Henderson issued an Order of Dismissal, which was filed on November 4, 2021. (R.p. 1)

Appellant served Plaintiff's Motion to Reconsider and Plaintiff's Memorandum (In Support of Motion to Reconsider Order of Dismissal), which were filed on November 12, 2021. (R.p. 10) A complete copy of *Leake v. Etheridge* was attached to Plaintiff's Memorandum. (R.p. 23)

The *Leake* case was also discussed at length at the second motion hearing. (R.pp. 54-55, 68-69, 73-74) Judge Henderson issued an Order Denying Motion to Reconsider, which was filed on November 21, 2022. (R.p. 4)

On December 19, 2022, Appellant served its Notice of Appeal, which was filed on December 19, 2022. (R.p. 103)

On December 20, 2022, Judge Henderson issued and filed an Order to Substitute Marlboro County Delinquent Tax Collector in Place of Treasurer for Marlboro County. (R.p. 5)

STANDARD OF REVIEW

An action to set aside a tax deed is in equity. *S.C. Fed. Sav. Bank v. Atl. Land Title Co., Inc.*, 314 S.C. 292, 294, 442 S.E.2d 630, 631 (Ct.App. 1994). Therefore, this Court may take its own view of the preponderance of evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976).

STATEMENT OF FACTS

The subject real property (assigned Marlboro County Tax Map No. 003-01-01-062) was, at all relevant times prior to the recording of the Tax Deed, owned of record by Appellant, which

acquired title from Tommy Leviner by deed 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.105)

The real property taxes on said property were not paid for tax year 2017, and Treasurer levied on the property on June 5, 2018, by mailing a notice to Appellant, which notice was returned as undelivered. The property was posted on October 5, 2018. When the taxes remained unpaid, Treasurer scheduled a tax sale of the property on November 5, 2018, and advertised the tax sale. The tax sale resulted in the purchase of the property by Jerry Lewis with a high bid of $3,800.00.

Treasurer purportedly attempted to notify Appellant of the right of redemption by a notice dated August 27, 2019.[1] (R.p. 104) This notice was purportedly mailed to Appellant on September 19, 2019, as stated in the Tax Deed (R.p. 107) and as reflected on the Certified Mail Receipt in Treasurer's tax sale file. (R.p. 104) The actual date of mailing of said notice was not specifically denied in any responsive pleading, and it was confirmed by Treasurer's counsel at both motion hearings. (R.pp. 41, 60)

For convenience, a calendar reflecting the time frame involved is set forth below. The actual date is designated in the top right corner of each box (day), and each day before the end of the redemption period, counting backward, is highlighted in each box.

September 2019

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				19 Notice Mailed (47, 48)	20 (46, 47)	21 (45, 46)
22 (44, 45)	23 (43, 44)	24 (42, 43)	25 (41, 42)	26 (40, 41)	27 (39, 40)	28 (38, 39)
29 (37, 38)	30 (36, 37)					

[1] This notice was purportedly issued by Treasurer pursuant to S.C. Code Ann. §12-51-120.

October 2019

Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1 (35, 36)	2 (34, 35)	3 (33, 34)	4 (32, 33)	5 (31, 32)
6 (30, 31)	7 (29, 30)	8 (28, 29)	9 (27, 28)	10 (26, 27)	11 (25, 26)	12 (24, 25)
13 (23, 24)	14 (22, 23)	15 (21, 22)	16 (20, 21)	17 (19, 20)	18 (18, 19)	19 (17, 18)
20 (16, 17)	21 (15, 16)	22 (14, 15)	23 (13, 14)	24 (12, 13)	25 (11, 12)	26 (10, 11)
27 (9, 10)	28 (8, 9)	29 (7, 8)	30 (6, 7)	31 (5, 6)		

November 2019

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1 (4, 5)	2 (3, 4)
3 (2, 3)	4 (1, 2)	Last day to redeem[2] 5 (1)	Last day to redeem[2] 6			

The property was not redeemed from the tax sale. Jerry Lewis assigned his bid to Backwoods, LLC, and Treasurer issued to Backwoods, LLC a Tax Deed to the property, which deed was dated April 29, 2020, and was recorded in the Office of the Clerk of Court for Marlboro County on May 13, 2020, in Book 733 at page 53. (R.p. 107)

[2] Per the end of redemption notice to Appellant from Marlboro County Delinquent Tax Office dated August 27, 2019, mailed on September 19, 2019, the final date to redeem is on or before November 6, 2019. (R.p. 104) Since this notice alters the actual deadline (November 5, 2019), the number of the days "before the end of the redemption period" can differ by one day. For that reason, the count starts on November 4 and on November 5 and runs back to the date the notice was mailed (September 19, 2019), resulting in the end of redemption notice being mailed either 47 or 48 days before the end of redemption period.

Backwoods, LLC subsequently conveyed the property to Danny T. Williams (hereinafter "Williams") by Quit Claim Deed dated June 1, 2020, and recorded in the Office of the Clerk of Court for Marlboro County on June 4, 2020, in Book 733 at page 233. (R.p. 109) Thereafter, Williams conveyed the property to Respondents, Ronald D. Kirby and Dylan T. Kirby (hereinafter collectively "Kirbys"), by Quit Claim Deed dated February 15, 2021, and recorded in the Office of the Clerk of Court for Marlboro County on February 24, 2021, in Book 747 at page 137. (R.p. 113)

As asserted by Appellant in its Complaint, Williams took possession of the property in or about June 2020; Williams began removing and/or disposing of Appellant's personal property; Kirbys took possession of the property in or about February 2021; and Kirbys continued removing and/or disposing of Appellant's personal property.

Appellant further asserted in the Second Cause of Action (Conversion) of its Complaint that Williams and Kirbys converted Appellant's personal property to their own uses and benefit and that such conversion involved, at least, the following list of personal property owned by Appellant, to wit:

2- miller welding machines - $2,000.00 each
1 – Lincoln mig welder - $2,000.00
2 48" industrial fans - $300.00/each
1 10" vice - $1,800.00
1 – hog head for pipe machine - $800.00
and shaft drive - $300.00
1 – victrailic groover - $1,500.00
1 – steel table - $500.00
1 – air compressor - $1,500.00
1 – Dewalt drill - $150.00
1 – game box on wheels - $400.00
1 – tripod - $200.00
2 – pipe jack stands - $75.00/each
1 – Dewalt electric drill - $50.00
1 – air hose reel - $150.00
1,000 ft. lead (welding) - $3,000.00

Bolt bin - $1,200.00 – 1,500.00
Conveyor belt drive motor - $400.00
Hammer drill - $150.00
1 – mobile job trailer with shelves (18 wheeler trailer) $6,500.00
1 large job box - $500.00
1 – 535 pipe machine - $800.00
2 – 4" gas valves (Honeywell) - $450.00/each
1 – oxy acetylene torch- $300.00
1 – 3 ton chain full - $300.00
1 – 1 ton chain full - $225.00
1 – man bracket - $500.00
100 ft. ¾" stainless steel all-thread - $600.00
2 – industrial spray guns - $500.00/each
2 – 4" gas valves - $400.00/each
All types/sizes of galvanized, stainless-steel valves, strainers, clamps, tees, unims, complings, phalanges, bolts, nuts, of which the following are estimates:
(15) 1" ss/sv – 90 - $31.00/each
(10) 1" ss/sv – 45 - $28.00/each
(15) 1" ss/se – flg. - $45.00/each
(8) 1" ss/sv – tee - $42.00/each
(6) 1" ss/sv – unims. - $28.00/each Business records - $5,000.00
Personal and household items (pots, pans, dishes, glasses, towels, sheets, Christmas decorations, party supplies, lights, lamps, etc.) - $1,000.00

Appellant further asserted in its Complaint that the conversion by Williams and Kirbys was willful, wanton and in conscious disregard of Appellant's rights in its personal property and that Williams and Kirbys had an obvious and direct financial interest in the conversion.

ARGUMENTS

I. The notice requirement of S.C. Code Ann. §12-51-120 is jurisdictional, and the failure to give the required notice is a fundamental defect.

II. The statutes of limitation did not preclude Appellant's claims, as the failure to give proper notice rendered the tax sale void.

III. The statutes of limitation did not intend to bar the taxpayer's right to contest the tax sale until he had two years to bring an action after there was a person on the land withholding possession from him.

IV. It was improper to dismiss Appellant's suit based upon Treasurer's Motion to Dismiss, when the Motion only requested "an order dismissing the above captioned matter as to Treasurer for Marlboro County" and when Treasurer had no standing to contest Appellant's cause of action for conversion.

I. THE NOTICE REQUIREMENT OF S.C. CODE ANN. §12-51-120 IS JURISDICTIONAL, AND THE FAILURE TO GIVE THE REQUIRED NOTICE IS A FUNDAMENTAL DEFECT.

As discussed in the following cases, the requirement that the taxpayer be properly notified of the end of the redemption period is generally regarded as jurisdictional, and the failure to give such notice, in accordance with S.C. Code Ann. §12-51-120, is a fundamental defect, which renders the proceedings absolutely void.

A. In *Good v. Kennedy*, 291 S.C. 202, 207, 352 S.E.2d 708, 711 (Ct. App. 1987), which also involved S.C. Code Ann.§12-51-120, the Court, reversing the trial court, held that the Treasurer did not exercise diligence in notifying the owner of his right of redemption, finding as follows:

> Numerous authorities have held that while statutory provisions which are intended merely for the convenience of taxing officers in the conduct of sales need not be strictly complied with, see, Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1993), the law is otherwise as to provisions intended for the protection of the taxpayer. (citations omitted)
>
> Although we can locate no South Carolina case dealing with the point raised in this appeal, the general law is that where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is "generally regarded as **jurisdictional**, and therefore, the owner's right of redemption cannot be cut off unless the required notice is given." (emphasis added)
>
> . . . [T]he general law is that where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is 'generally regarded as **jurisdictional**, and therefore, the owner's right of redemption cannot be cut off unless the required notice is given.' 72 Am. Jur. (2d) *State and Local Taxation 1010* (1974); accord C.J.S. *Taxation* Section 859 (1954). (emphasis added)

B. *Manji v. Blackwell*, 323 S.C. 91, 93-94, 473 S.E.2d 837, 838 (Ct. App. 1996), also involved S.C. Code Ann. §12-51-120. In selling the property, the Treasurer mailed the final redemption notice to the owner by certified mail, but the notice was not sent restricted delivery. The

trial court declared the tax sale of the property **null and void** and set aside the resulting tax deed, ". . . because the delinquent Treasurer failed to properly notify [the owner] of the end of the redemption period pursuant to S.C. Code Ann. §12-51-120 (Supp. 1995)." (emphasis added) In affirming the trial court, the Court held:

> Because notice to the landowner as required by the tax sale statutes is constructive rather than actual, the court requires strict compliance with these statutes.
>
> The sound view is that 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.
>
> ("While statutory provisions which are intended merely for the convenience of taxing officers in the conduct of sales need not be strictly complies with, . . . the law is otherwise as to provisions intended for the protection of the taxpayer.")
>
> Where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is 'generally regarded as **jurisdictional**, and therefore, the owner's right of redemption cannot be cut off unless the required notice is given.' (emphasis added)

C. In *Rives v. Bulsa*, 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct. App. 1996), the Court concluded that the Treasurer failed to comply with the statutory requirements of the tax sale under §12-51-40(a) and (b) and that the deed was, therefore, **void**, finding that:

> [T]he general law is that where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to redeem, such a requirement is generally regarded as **jurisdictional**, and therefore, the owner's right of redemption cannot be cut off unless the required notice is given. (emphasis added)
>
> Failure to give the required notice is a **fundamental defect** in the tax proceedings which renders the proceedings absolutely **void**. (emphasis added)

D. In *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007), the Court affirmed the trial court's decision that the taxpayers met their burden to show that the county tax office failed to properly post on the property the notice mandated by §12-51-40, holding that, since

the property was not properly posted, the law mandated that the sale be set aside. The Court found that:

> 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.' (citation omitted)
>
> [T]he failure to give the required statutory notice renders the tax sale **invalid.** (citation omitted) (emphasis added)

E. In *Taylor v. Taylor*, 419 S.C. 639, 656, 799 S.E.2d 919, 927-28 (Ct. App. 2017), which involved tax sales conducted in 1995 and 1997, many years prior to the suit to quiet title filed in 2011, the Court reversed the trial court holding that, due to an inexplicable switch of the parcel locations resulting in the County using inaccurate property descriptions,

> . . . section 12-51-160 did not preclude a tax sale challenge because a failure to give the owners 'proper notice rendered the tax sale **void'**. . . Accordingly, we find the master erred by determining [owners] could not challenge the tax sales because more than two years had passed from the date of the tax sales. (emphasis added)

II. THE STATUTES OF LIMITATION DID NOT PRECLUDE APPELLANT'S CLAIMS, AS THE FAILURE TO GIVE PROPER NOTICE RENDERED THE TAX SALE VOID.

In South Carolina, there are several cases refusing to apply the statutes of limitation, notwithstanding that the wording of S.C. Code Ann. §§12-51-160 and 90(C) appears to mandate that a tax sale may be contested only by a suit to recover the real property sold at a tax sale, which suit is instituted "within two years from the date of sale." The cases discussed below make it clear that, if there was a fundamental or jurisdictional defect in the tax sale proceedings, this defect negates altogether the applicability of the said statutes of limitation.

A. *Donohue v. Ward*, 298 S.C. 75, 82-83, 378 S.E.2d 261, 265-66 (Ct. App. 1989), involved a tax sale wherein the Treasurer failed to list, levy upon and sell the property in the name

of the true owner. The Court found:

> [S]ince this defect is **jurisdictional**, the bar of the statute of limitations does not apply. (emphasis added)
>
> It is stated '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.' (citations omitted)
>
> [W]e therefore hold that failure to give the required notice is a **fundamental defect** in the tax proceedings which renders the proceedings absolutely **void.** (emphasis added)

B. In *Corbin v. Carlin,* 366 S.C. 187, 194, 620 S.E.2d 745, 749 (Ct. App. 2005), the buyer at the tax sale claimed that the action was barred by the statutes of limitation, as the suit was filed nine years after the tax sale. The Court concluded that, due to confusion over the multiple tracts of land and the actual owners thereof receiving erroneous tax sale notices, "[t]he legislature intended to create a time limit for anyone who lost title to property through a tax sale, after proper notice, may attempt to regain title. In this case, Corbin never lost title to the property, as the tax sale should never have occurred."

C. In *Reeping v. Jebbco, LLC,* 402 S.C. 195, 199-202, 740 S.E.2d 504, 506 (Ct. App. 2013), the Court reversed the trial court's decision that the action was barred by the statutes of limitation. The notices mailed to the taxpayer were returned undeliverable, but the Treasurer was informed on the face of the returned mail of the taxpayer's correct address, which address was never used to notify the taxpayer of the tax sale proceedings. The Court concluded that the failure of the Delinquent Tax Office to use the best address of the taxpayer violated the notice requirements. The Court held that:

> [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.
>
> [T]he statute of limitations did not preclude the [owner's] claim in this case as the

> failure to give proper notice rendered the tax sale **void.** (emphasis added)
>
> This court considered a notice issue in [*Donohue, supra*] and determined it was the kind of **jurisdictional defect** that rendered the statute of limitations inapplicable. (emphasis added)
>
> [F]ailure to give the required notice is a **fundamental defect** in the tax sale proceedings which renders the proceedings absolutely **void.** (emphasis added)

D. In *Forfeited Land Comm'n of Bamberg Cty. v. Beard*, 424 S.C. 137, 146-148, 817 S.E.2d 801, 806 (Ct. App. 2018), which involved a tax sale in 2007 and a suit to set aside a tax deed filed in 2010, and it expressly involved S.C. Code Ann. §12-51-160, the Court reversed the trial court, finding that:

> 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. (emphasis added)
>
> Failure to give the required notice is a **fundamental defect** in the tax sale proceedings which renders the proceedings absolutely **void.** (emphasis added)
>
> [T]he statute of limitations did not preclude the [property owner's] claim where the failure to give proper notice rendered the tax sale **void.** (emphasis added)
>
> 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. (emphasis added)
>
> [T]he failure to provide the required statutory notice is the type of **jurisdictional defect** contemplated in *Leysath* that renders the tax sale **void** and the statute of limitations inapplicable. (emphasis added)
>
> [T]he statute of limitations did not run because the tax sale was **void** from the onset. (emphasis added)

Not citing, as a part of Appellant's foregoing Arguments, the unpublished case discussed in depth at the lower court should not be taken as an abandonment of said case by Appellant. Appellant believes that, since counsel for Respondents Kirbys and Williams opened the door by disclosing this case, Appellant should be allowed to argue the case, which is precisely on point and would be dispositive; but Appellant simply does not want to violate Appellate Court Rules.

In summary, South Carolina case law, cited in Arguments I and II, is quite clear that the failure to comply with the notice requirements mandated by S.C. Code Ann. §12-51-120 is a fundamental, jurisdictional defect, which renders the proceedings absolutely void such that the statutes of limitation did not run.

III. THE STATUTES OF LIMITATION DID NOT INTEND TO BAR THE TAXPAYER'S RIGHT TO CONTEST THE TAX SALE UNTIL HE HAD TWO YEARS TO BRING AN ACTION AFTER THERE WAS A PERSON ON THE LAND WITHHOLDING POSSESSION FROM HIM.

Another legal theory that suspends the running of the statutes of limitation also applies. The subject Tax Deed was dated April 29, 2020, and recorded on May 13, 2020. (R.p. 107) The property was, therefore, not titled in the purchaser's name until less than 13 months before the filing of the present suit on May 17, 2021. None of the Defendants, nor any predecessor in title, could have been put into possession of the subject property before becoming the owner thereof by the Tax Deed or a subsequent deed. Therefore, based upon the following cases, the statutes of limitation could not possibly have run in this case before the filing date of the present suit.

A. *Glymph v. Smith,* 180 S.C. 382, 389, 185 S.E. 911, 914 (1936), involves a two-year statute of limitations,[3] which is similar to the current statutes of limitation. Between the tax sale in 1927 and this decision (1936), the owner had never been dispossessed of the property. The Court reversed the trial court, holding that, ". . . the two-year limitation provided for in this section does not begin to run, where the sheriff did not take possession of the land before tax sale, until the purchaser is put in possession by the sheriff."

B. In *Leysath v. Leysath,* 209 S.C. 342, 348, 40 S.E.2d 233 (1946), the Court found

3 Section 2859 of the 1932 Code reads, in relevant part, as follows: ". . . 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."

that "[i]t has been held that the two-year limitation . . . is 'a mere limitation on the assertion of a right of action existing at common law and independent of the statute' . . . which does not begin to run until the purchaser is put into possession." (citations omitted)

C. In *Scott v. Boyle*, 271 S.C. 252, 255-6, 246 S.E.2d 887 (1978), the Court reversed the trial court, finding that "the purchaser at the tax sale was never put into possession of the property at any point in time" . . . [and holding that] "the statute of limitations is not a bar to this action and the dismissal of the complaint was in error."

D. In *Dibble v. Bryant*, 274 S.C. 481, 485-487, 265 S.E.2d 673, 677 (1980), which involved a 1974 tax sale of abandoned property, the Court found that, "the requirements of notice to the owner and possession by the executing officer to be of universal application, notwithstanding the particular circumstances of a case." The Court held that, "[t]he statute did not intend to bar the taxpayer's right until he had two years within which he could bring his action. He could not bring his action until there was a person on the land withholding possession from him."

E. In *King v. James,* 388 S.C. 16, 26, 694 S.E.2d 35, 40 (Ct. App. 2010), the Court affirmed the Master in Equity's finding that S.C. Code Ann. §12-51-160 was inapplicable to the owner's 2006 suit to set aside the 1999 tax sale, as the owner "brought her action within two years of the buyer coming into possession."

The Court recognized that the case law involving tax sales is divergent regarding if and when the statute of limitations begins to run, finding as follows:

> On the one hand, we find case law that says when notice to the homeowner is not in strict compliance with the statute, such a defect is "jurisdictional," and the statute of limitations does not run at all. See *Donohue v. Ward*, 298 S.C. 75, 82, 378 S.E.2d 261, 265 (1989) (holding where a defect in notice is jurisdictional, such a defect "invalidates the tax proceeding and prevents the running of the limitations statute"); *Good v. Kennedy*, 291 S.C. 204, 207, 352 S.E.2d 708, 711 (1987) (holding "the general law is that where a statute requires as a condition precedent to foreclosing a taxpayer's rights in property sold for taxes that he be given notice of his right to

> redeem, such a requirement is generally regarded as jurisdictional. . . ") (internal quotations omitted).
>
> On the other hand, we also find case law in which our courts interpreted previous versions of section 12-51-160 as saying even if the notice is defective, the statute of limitations still applies, but only begins to run when the purchaser comes into possession. See *Dibble v. Bryant*, 274 S.C. 481, 487, 265 S.E.2d 673, 677 (1980) (holding previous version of section 12-51-160 "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") (emphasis added); *Glymph v. Smith*, 180 S.C. 382, 384, 185 S.E. 911, 914 (1936) (holding even though the plaintiff brought the action six years after the tax sale, the two-year statute of limitations never began 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 (1902) (holding the two-year statute of limitations would only begin to run if and when the purchaser took possession).

In summary, under South Carolina case law, it's clear that, until the owner has been dispossessed (ousted) from his property following a tax sale and the purchaser at the subject tax sale has been put in possession, the aforesaid statutes of limitation do not commence to run. Here, even if a purchaser had claimed to have been put in possession immediately after the delivery of the Tax Deed, this suit was filed less than 13 months thereafter – so the two-year limitation period could not have run. Therefore, the Orders dismissing the suit must be reversed.

IV. IT WAS IMPROPER TO DISMISS APPELLANT'S SUIT BASED UPON TREASURER'S MOTION TO DISMISS, WHEN THE MOTION ONLY REQUESTED "AN ORDER DISMISSING THE ABOVE CAPTIONED MATTER AS TO TREASURER FOR MARLBORO COUNTY" AND WHEN TREASURER HAD NO STANDING TO CONTEST APPELLANT'S CAUSE OF ACTION FOR CONVERSION.

While the focus in this case has been primarily on the tax sale and, specifically, on the effect of the statute establishing the notice requirements and the statutes of limitation, the Court must be mindful that it is Treasurer's Motion to Dismiss (R.p. 7) upon which Judge Henderson must, if at all, base his dismissal of Appellant's suit. The Motion expressly sought a limited

Order: "an order dismissing the above captioned matter as to Treasurer for Marlboro County." (emphasis added)

Importantly, Treasurer's Motion to Dismiss does not mention Appellant's Second Cause of Action (Conversion), and there was no mention of it at the hearing on this Motion. In fact, the first mention of "conversion" was in the Order of Dismissal, which was prepared by, or upon instructions from, Treasurer's counsel.

Notwithstanding the limited relief sought by Treasurer's Motion, the Order of Dismissal expressly dismissed Appellant's entire suit based exclusively on the tax sale statutes of limitation. (R.p. 1) Appellant's Motion to Reconsider specifically calls attention to the Judge's error in dismissing the cause of action for Conversion. (R.p. 10)

Treasurer lacked standing to contest Appellant's Second Cause of Action (Conversion). Treasurer admitted in his Answer that "County is without sufficient knowledge and information to admit or deny [the Second Cause of Action]" (R.p. 93), and his lack of standing is likely the reason why Treasurer's Motion did not seek the dismissal of Appellant's Second Cause of Action (Conversion) or, for that matter, the entire Complaint. Appellant's Motion to Reconsider specifically calls attention to Treasurer's lack of standing. (R.p. 11)

To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest. *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Anchor Point Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992). Treasurer clearly had no personal stake or real interest in the subject matter of Appellant's Second Cause of Action

personal stake or real interest in the subject matter of Appellant's Second Cause of Action (Conversion).

Notwithstanding the outcome of this appeal with regard to the statutes of limitation, as Treasurer's Motion to Dismiss sought limited relief and did not mention Appellant's cause of action for conversion, the decision to dismiss Appellant's suit in its entirety was improper. Therefore, the Orders dismissing the cause of action for conversion must be reversed.

CONCLUSION

The lower court erred in dismissing this case. The decision is controlled by substantial errors of law. The subject Orders should be reversed, and the case should be remanded to the lower court.

Respectfully submitted,

July 19, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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

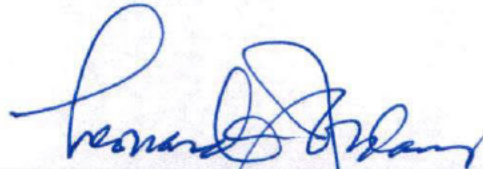
RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., ... Appellant,

v.

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

SCACR RULE 211(b) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent hereby certifies that the Brief of Appellant complies with SCACR Rule 211(b).



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