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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2014-000823

Robert C. Schivera, Executor of the Estate of Fed J. Hughes, III.....Respondent

Vs.

C. Russell Keep, III, Esquire and Rhonda Mitchell, Jasper County Tax Collector of which C. Russell Keep, III, Esquire is the.....Appellant.

Petition for Rehearing

The Appellant petitions this Court to rehear and/or reconsider, reverse or modify its decision in the appeal of this case. The reasons the Appellant believes this Opinion is in error is because the Court of Appeals has misapprehended, overlooked, or failed to correctly rule on the following:

1. THE TAX SALE WAS IN STRICT COMPLIANCE WITH STATUTORY REQUIREMENTS. THE APPELLATE COURT FAILED TO CONSIDER CASE LAW (*KING V. JAMES*) AND ANY STATUTORY LAW WHATSOEVER.

In *King v. James.*[1], "the certified mail notice was returned undelivered" to King, the tax payer and land owner. The tax deed was set aside in *King* for four (4) reasons which can be distinguished from the case at hand;

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[1] 388 S.C. 16, 22, 694 S.E. 2d 35, 38 (Ct. App. 2010)

First: "In the present case, the Master held, and we agree, the County *failed* to establish by a preponderance of the evidence that it *took "exclusive possession" of the Property by posting, as is required under section § 12-51-40(c)* (italics added)"[2].

Second: Beaufort County in *King* did not take photos of the posting, unlike Co-Defendant Jasper County.

Third: The *King* Court found that the two (2) year statute of limitations of **Section § 12-51-160** was inapplicable to King's action because King remained in possession of the property at all times. Unlike the case at hand, King "used the Property as her primary residence.[3]" The Respondent, Mr. Hughes' property herein is raw land with no building on it.

Fourth: It should be noted that *King* is an Appellant's nightmare;

> Moreover, neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements. Therefore, this ruling is the law of the case. *See ML-Lee Holding Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holing an unappealed ruling, right or wrong, becomes the law of the case). Accordingly, we affirm the Master's finding as to the invalidity of the tax sale and tax deed[4].

The *King* decision affirms that the Jasper tax sale herein must be sustained because Co-Defendant Jasper County (unlike Beaufort County in *King*) proved it "took exclusive possession" of the property "by posting" as required under **code section § 12-51-40(c)**." This "exclusive possession by posting" is an **"Alternative Procedure"** sanctioned by **South Carolina Code Chapter 51, Alternative Procedure For Collection Of Property Taxes § 12-51-40(c)** "when the exclusive possession taken by mailing" as contemplated by **§ 12-51-40** fails;

§ 12-51-40(c) Alternative Procedure for Collection of Property Taxes

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[2] ibid at S.C. 27, S.E. 2d 40
[3] ibid at S.C. 21, S.E. 2d 38
[4] ibid at S.C. 25, S.E. 2d 37

> *If the "certified mail" notice has been returned* (italics added), take exclusive physical possession of the property against which the taxes, assessments, penalties, and costs were assessed *by posting* a notice at one or more conspicuous places on the premises, in the case of real estate, reading: "Seized by person officially charged with the collection of delinquent taxes of (name of political subdivision) to be sold for delinquent taxes", *the posting of the notice is equivalent to levying by distress, seizing, and taking exclusive possession of it (italics added).*

The Respondent waited more than two years to sue after the tax sale. The Co-Defendant Jasper County took "exclusive physical possession of the property" "by posting," when the "certified mail" notice was "returned," so the tax sale is "uncontestable on procedural or other grounds" pursuant to **South Carolina Code Sections**;

> **§ 12-51-90(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* (italics added).
>
> **§ 12-51-160** *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* (italics added). 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) .

The Court of Appeals is asked to overrule the Trial Court because, 1. the Co-Defendant Jasper County "took exclusive possession" of the property "by posting" as required under Section § 12-51-40(c)" as an **Alternative Procedure For Collection Of Taxes** 2. the Plaintiff did not use the property as his residence 3. the posting was photographed.

2. THE TAX SALE WAS CONDUCTED IN STRICT COMPLIANCE WITH STATUTORY REQUIREMENTS. THE TREASURER SENDING THE TAX NOTICE IN THE NAME OF "ANDREW R. DEEN AND HENRY G. DEEN C/O FRED J. HUGHES, III" WAS A MERE IRREGULARITY.

This is one of a pair of "mere irregularities[5]" - as is the wrong street address (which will be addressed next in part 3). In *Leysath*, the taxpayer owner challenged the validity of the tax sale on several grounds including that the tax collector or rather assistant tax collector "did not seize and take exclusive possession of the property[6]." The *Leysath* court found the defects;

> were serious enough to have required the court to set aside the tax deed in an action seasonally begun, we do not think that they can be properly classified as jurisdictional defects .:. but rather are among the irregularities which the Statute in question was framed to cover and set at rest[7].
> It is important to note that a tax sale may be overturned for "mere irregularities," however, a lawsuit to do so must be brought within the two year statute of limitations[8].
> This was not done. It is uncontested that the Respondent waited more than 2 years from

the tax sale to sue. The Court of Appeals is asked to address whether a "c/o" placed in front of a tax payer's name is a "mere irregularity" after two years of inaction in light of *Leysath.*

3. A LANDOWNER IS ONLY REQUIRED TO GET CONSTRUCTIVE NOTICE, NOT ACTUAL NOTICE.

The Code has an **"Alternative"** cure for tax notices that are returned "undelivered" - it is called "posting" which is constructive notice. The issue of the wrong address on the tax notice (causing it to be returned "undelivered") is a red herring. "constructive notice by the levy, advertisement and sale in the owners' name is deemed sufficient," *Dibble v. Bryant*[9]. The Court in *Dibble* stated that actual notice to the tax payer is not required, only constructive notice;

> In *Osborne v. Vallentine*[10], *supra*, and most recently in *Aldridge v. Rutledge*[11], *supra*, non-compliance by failure to levy and sell the property in the name of the real owner demanded invalidation of tax deeds. In *Osborne*, we stated;
> It is a well-established principle that due process of law requires some sort of notice to a landowner before he is deprived of his property. *It is an anomalous situation that the statutes of this State require actual notice to a mortgagee of*

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[5] Leysath v. Leysath, 209 S.C. 342, 40 S.E. 2d 233, 236 (SC Sup. Ct. 1946)
[6] ibid at S.C. 343 S.E. 2d 234
[7] ibid at S.C. 344 S.E. 2d 235
[8] Hayes, Tax Sales of Real Property and Mobile Homes in South Carolina, SC Bar publication, Page 29
[9] 265 S.E. 2d 675, 274 S.C. 481 (SC Sup. Ct. 1980)
[10] 196 S.C. 90, 12 S.E. 2d 856 (SC Sup. Ct. 1941)
[11] 269 S.C 475, 238 S.E 2d 165 (SC Sup. Ct. 1977)

land about to be sold for taxes, and make no such requirement for actual notice to the owner. It would appear that the constructive notice provided by the levy, advertisement and sale in the owner's name is deemed sufficient. Such notice to the owner, as required by the tax sale statutes, being *constructive* rather than actual, the court requires strict compliance therewith (italics added) *Dibble, supra*, Note 10.

Sending the tax notice to the wrong address is not a "jurisdictional defect," *Leysath, supra* (unless the tax notice is sent to the mortgagee, who must get actual notice). In fact, **Chapter 51, Alternative Procedure for Collection of Property Taxes** (please note the word "**Alternative**") **§ 12-51-90(c), 160 and 120** anticipates tax notices will be mailed to the wrong address and provides the defaulter with ample protection;

1. Posting (as an "**alternative**" to taking "possession by mailing," which was done in the case herein).

2. "constructive notice by levy, advertisement and sale in the owner's name," *Dibble, supra*, which occurred in the case herein.

3. The tax payer is given a full 2 years to discover the sale and take appropriate action, which he did not herein.

The Statutory Law is very clear;

§ 12-51-120 Alternative Procedure for the Collection of Property Taxes;

* * * *

Pursuant to this chapter, the return of the certified mail "undelivered" is not grounds for a tax title to be withheld or be found defective and ordered set aside or canceled of record (italics added).
Indeed, Tax Sales, *supra*, at page 29, elaborates;
Section § 12-51-120 states: *"Pursuant to this chapter, the return of the certified mail "undeliverable" is not grounds for a tax title to be withheld or be found defective and ordered set aside or canceled of record." This language seems to create a presumption that a sale won't be voided on the grounds the certified mail is returned "undelivered."* Tax Sales, *supra* note 8 at page 28.

In short, under the **"Alternative Procedure"** of Chapter 51 of the Code, "the return receipt of the certified mail notice is equivalent to levying by distress" (§ 12-51-40(b)) "if exclusive possession is (NOT) taken by mailing" (§ 12-51-40(b)) and if the "certified mail has been returned" the County may "take exclusive physical possession of the property" "by posting" (§ 12-51-40(c)) "the posting of the notice is equivalent to levying by distress, seizing and taking exclusive possession" (§ 12-51-40(c)) and "constructive notice by the levy, advertisement and sale in the owner's name is deemed sufficient," *Dibble, supra.* The Court of Appeals is asked to overrule the trial Court because the constructive notice by the posting levy, advertisement and sale in the owner's name is sufficient when the certified mail was returned undeliverable.

4. THE TAX SALE WAS CONDUCTED IN STRICT COMPLIANCE WITH STATUTORY REQUIREMENTS. THE APPELLATE COURT RELIED ON A MISREADING OF *RIVES V. BULSA.*

> *Rives v. Bulsa*[12] states;
>
> In both *Osborne* and *Aldridge*, our Supreme Court held that noncompliance by failure to levy and sell the property in the name of the real owner demanded the invalidation of tax deeds.
>
> ... this cannot circumvent the requirement that *the levy, advertisement and sale must be made in the name of the true owner.* Without strict compliance with the statutory requirements, a tax sale may not be upheld.
>
> It is clear from the record that no notice of the tax sale was given to Brian and Karen Rives, the true owners of the property. It is also evidence that the property was *not assessed, advertised, levied upon or sold* in their names. Accordingly, we hold the tax collector failed to comply with the strict statutory requirement of a tax sale. The order of the master setting aside the tax deed is therefore affirmed (italics added).

The land herein was "assessed, advertised, levied upon and sold," *Rives, supra,* in the name of Fred J. Hughes, III. There is a presumption in the absence of proof to the contrary that

[12] 325 S.C. 287, 291, 487 S.E. 2d. 878, 880 (Ct. App. 1996)

public officers have properly discharged the duties of their office,[13].

> In Wilson v. Cantrell, 40 S.C. 114, 18 S. E. 517, 525, the court had under consideration a tax deed. The plaintiff was the purchaser at the tax sale. The court stated: "*** the sheriff's deed is only prima facie evidence of the regularity of the tax proceedings prior to its execution, and may be attacked. But, while this is so, the burden is upon the defendant to prove that one or more of the essential requirements of the law have not been complied with, and that the tax proceedings have not been regular, which the defendant in this case has failed to do[14]."
> The Order(s) Appealed also states;
> All of the requisite notices required by statute (1. the original tax notice; 2. the notice of delinquency; 3. the notice of tax sale; 4. the notice of the redemption period; 5. the notice of the expiration of time to redeem the property from the tax sale; and 6. the notice that the tax sale had become final) were all sent to the address of the former owner of the property and not the Plaintiff.
> This may be all true but it has no significance. These are all a "mere irregularities,"

Leysath, supra and for which the Statute provides an **Alternative** procedure.

> **§ 12-51-120, Notice of Approaching End of Redemption Period,** states;
>
> * * * *
>
> Pursuant to this chapter, the return of the certified mail "undeliverable" is *not* grounds for a tax sale to be withheld and found to be defective and ordered set aside or cancelled or returned (italics added).
> Likewise an error in;
> 1. the original tax notice;
> 2. the notice of delinquency;
> 3. the notice of the tax sale;

are all cured by levying, advertising and by posting. Actual notice by mail is not required; "*constructive notice* by the levy, advertisement and sale in the owners' name is deemed sufficient (italics added)," *Dibble, supra.* This was all done in Fred J. Hughes, III's name.

Fred J. Hughes, III, was given sufficient "constructive notice" by levying, advertising and posting and that, pursuant to *Rives*, "the levy, advertisement and sale were made in the name of the true owner" - Fred J. Hughes, III. The Appellate Court erred when it ruled that the tax sale

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[13] Fisher v. Bennett, 202 S.C. 541, 25 S.E. 2d 746 (SC Sup. Ct. 1943) see also revised § 12-51-160 which states "in all cases of tax sale the deed of conveyance is prima facia evidence of a good title in the name of the holder."

[14] Quoted with approval in Osbourne v. Valentine, 196 S.C. 90, 12 S.E. 2d 856 (SC Sup. Ct. 1941)

was not conducted in strict compliance with the statutory requirements including **§ 12-51-40(C) and §12-51-90(C).**

5. *REEPING V. JEBBCO, LLC,* IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

Reeping[15] is not applicable to all of the facts of this case. The Issue of levying, advertising and posting ("equivalent to levying by distress, seizing, and taking exclusive possession of it"[16]) was not before the *Reeping* court. The *Reeping* decision does not address the issue of whether the County took the corrective action of taking "exclusive possession of it" by posting, pursuant to **South Carolina Code Section § 12-51-40 (c)** after the "certified mail notice" was "returned."

Reeping, supra, is in conflict with the South Carolina Supreme Court's prior decisions[17] wherein the South Carolina Supreme Court declared "[O]nce two years have passed after the sale, the sale is not a cloud on the property's title." This argument will be furthered developed in part 8.

6. THE APPELLATE COURT IGNORED LEGISLATIVE INTENT AND REVISED STATUTORY LAW.

To determine the application of the **revised** (in 2006) **§ 12-51-160 and §12-51-90(C)** on the present case, the Court must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature[18]." "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the

[15] 402 S.C. 195, 740 S.E. 2d 504 (Ct. App. 2013)
[16] S.C. Code Ann. § 12-51-40(c)
[17] Federal Finacial Company v. Hartley 380 S.C. 65, 66, 688 S.E. 2d 410, 411, Wilson v. Mosley, 327 S.C. 144, 145, 488, S.E. 2d 862, 863 (SC Sup. Ct. 1997)
[18] Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003)

light of the intended purpose of the statute[19].". "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers[20]."

Tax Sales, *supra*, at note 8, at page 27, 28, states;

> In two cases, the South Carolina Supreme Court has narrowly construed the application of this statute of limitations and has permitted the defaulting taxpayer to maintain the action even though the action was brought after two years from the date of sale. However, it should be noted that these cases were decided before the 1985 revisions to the Code. After the 1985 revisions, the Court of Appeals, in *Corbin v. Carlin*[21], held that an action to quiet title and set aside a tax sale and tax deed fell outside the provisions of Section § 12-51-160. There was some confusion in *Corbin* regarding the descriptions and locations of the real property, and the Court determined there was nothing to put *Corbin*, the delinquent taxpayer, on notice of the delinquency.
>
> *The Corbin decision was filed on October 3, 2005. Less than six months later, on March 15, 2006, revisions to Sections § 12-51-160 took effect, and these revisions appear to make it more difficult to avoid the bar of the two-year statute of limitations. Section § 12-51-90 was revised to include a paragraph (C), which states*: "If the defaulting taxpayer, grantee from the owner, or mortgage or judgment creditor fails to redeem the item of real estate sold at 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." Section § 12-51-160 was revised to add the reference to Section § 12-51-90(C) in the statement: "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)." There have been no recorded cases construing these revises statutes (italics added).

Since publication of this excellent book by Mr. Hayes, Esq., *King, supra*, note 1, was decided by the Court of Appeals on April 20, 2010. The Court of Appeals found the time started to run from the date when the county or the tax sale purchaser took "possession" of the property.

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[19] City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812) 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998)

[20] TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (SC Sup. Ct. 1998).

[21] 366 S.C. 187, 620 S.E. 2d. 745 (2005)

"Possession" is a term of art. The Court of Appeals found the County can "take exclusive possession" "by making" the notice required by **§ 12-51-40(b)**, and if that tax notice is returned "undelivered," by "posting" the property as required by **§ 12-51-40(c)**. In *King*, the Court of Appeals ruled the County failed to prove it posted the property (Beaufort County did not take a picture of postings at that time unlike Co-Defendant Jasper County), therefore the statute did not start to run.

The legislature, in the wake of the *Corbin* decision (October 3, 2005), revised **§ 12-51-160** and **§ 12-51-90(C)**, taking effect March 15, 2006.

Revised SC Code Section § 12-51-160;

> *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)* (italics added).

Revised SC Code Section § 12-51-90(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* (italics added).

A tax deed, after two years from the tax sale, is "uncontestable on procedural or other grounds."[22] The **Revised § 12-51-90(c), 160** evidenced an intent by the legislature to bar recovery of the land after two (2) years of inaction on the part of the Respondent.

[22] South Carolina Code Ann. § 12-51-90(C).

7. THERE ARE "DIVERGENT DECISIONS" REGARDING IF AND WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN AND THE APPELLATE COURT CHOSE THE WRONG DIVERGENT DECISION.

The Court in *King, supra* note 1 at S.C. 26, S.E. 2d 39, found that;

> This court has held the purpose of the statute of limitations as set forth in section 12-51-160 is "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." *Corbin v. Carlin,* 366 S.C. 187, 194, 620 S.E.2d 745, 749 (Ct.App.2005). *A review of case law in this area reveals somewhat* **divergent decisions** *(bold added) regarding if and when the statute of limitations begins to run in situations such as this* (italics added).
>
> *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* (italics added). *See Donohue v. Ward*[23], 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*[24], 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).
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> *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* (italics added). *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)* (italics added); *Gardner v. Reedy,* 62 S.C. 503, 503, 40 S.E. 947, 947 (1902) (holding the two-year statute of limitations would only

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[23] In Donohue, the property was not listed, assessed, levied upon, advertised and sold in *the name of the true owner,* unlike the case herein.

[24] In Good, the issue of posting was not before the Court unlike the case herein. It should also be noted that both Donohue and Good were decided before 2005 when § 12-51-160, 90 were revised - "these revisions appear to make it more difficult to avoid the bar of the two year statute of limitations." Tax Sales, *supra* note 8, at page 28.

begin to run if and when the purchaser took possession)[25].

Since there are "divergent decisions" (according to *King, supra)* the Appellate Court erred when it sided with the irrelevant *Good* (posting issue not before the court) and *Donohue* (property not listed, assessed, levied upon, advertised and sold in the name of the true owner) and not *Dibble / Glymph / Gardner* especially as it is uncontested that the Appellant, the purchaser, was put into possession of the land.

8. **REVISED** (2006) **§ 12-51-160, 90(c)** ARE STATUTES OF REPOSE.

The **revised** (2006) **§ 12-51-160 and § 12-51-90(c)** are Statutes of Repose depriving the Court of jurisdiction to hear this case.

As previously noted, Respondent's suit is a statutory cause of action to set aside a tax deed. The rights asserted in this cause of action were created in **Code of Laws of South Carolina § 12-51-160** and **§ 12-51-90(C)**, each of which provide 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 holder, that all proceedings have been regular and that all legal requirements have been complied with. *An action for 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)* (emphasis supplied).

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[25] It should be noted that King is a tax purchaser's procedural nightmare; "Moreover, neither of the Appellants has appealed the Master's finding that the tax sale was not conducted in strict compliance with statutory requirements. Therefore, this ruling is the law of the case. *See* ML-Lee Holding Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case). Accordingly, we affirm the Master's finding as to the invalidity of the tax sale and tax deed."

§ 12-51-90 Redemption of real property; assignment of purchaser's interest.

* * * *

(C) If the defaulting taxpayer, grantee from the owner, or mortgages or judgment creditor fails to redeem the item of real estate sold at the delinquent tax sale within 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* (emphasis supplied).

The italicized language reflects the intention of the Legislature that as of the specified date (that is to say, two (2) years after the sale), "the tax deed issued is incontestable on procedural or other grounds" and no action "for the recovery of land sold" may be maintained. The language creates a jurisdictional limitation rather than a statute of limitations. The difference is that " a true statute of limitations extinguishes only the right to enforce the remedy and not the substantive right itself, [while] the limitation of time for commencing an action under a statute creating a new right enters into and becomes a part of the right of action itself and is a limitation, not only of the remedy, but of the right also[26]; . . . ".

Considering the language of **revised § 12-51-90(C)**, the South Carolina Supreme Court has ruled in 2008 that "[o]nce two years have passed after the sale, the sale is not a cloud on the property's title" *Federa, supra* note 17. It is hard to overemphasize the importance of this South Carolina Supreme Court decision. If a tax sale is not a cloud on the property's title, then a Quiet Title Action is no longer needed because the tax deed is "uncontestable," as it is in the case before this Court. Appellant is not entitled to judgment pursuant to *Federal, supra*. In as much as on November 1, 2012, no pleadings had been served on Co-Defendant Jasper County and/or the Appellant, the statutory rights asserted in this action to raise questions of title were dissolved and

[26] See generally 51 Am. Jur. 2nd (Limitation of Actions) § 30 (footnotes omitted)

ceased to exist and the tax deed issued on November 1, 2010, no longer had a cloud on it and it became and is "incontestable. " In fact, our SC Supreme Court has referred to the two year period for tax deeds as a "Statute of Repose" for over 60 years, in *Leysath, supra* note 5 at S.C. 345, S.E. 2d 235;

> If the two year limitation does not apply to defects of the character now under consideration, what purpose does it serve? If it only applies where the tax proceedings are regular in every respect, the purchaser would have no need of this protection which this limitation was designed to give. A **Statute of Repose** is not needed in favor of purchasers at valid tax sales. The very purpose of such Statute is to shut off inquiry into such defects as are now complained of, and confirm the tax deed in spite of them, and unless it does this it is nugatory (bold added).

Ninety Two (92) years ago, our SC Supreme Court ruled;

> Another consideration moves us to sustain in the appeal in this case. The revenue of a municipal corporation is its lifeblood. The assurance of securing this revenue is in the efficiency of the ultimate remedy. This efficiency is strengthened by the presumption of regularly regularity created by section 474 and by the limitation of two years within which an action to recover must be brought. Even if the remedy provided by this section be not exclusive, it is clear to permit an action such as the one at bar, after the lapse of more than three years, the purchaser in the meantime being in possession, would be to practically annul the limitation provided herein[27].

§ 12-51-160 and **90** are Statutes of Repose, which utterly deny Respondent of any Right of Action.

The Legislature passed Section **§ 12-51-90** and **§ 12-51-160** as an absolute bar to recovery after two whole years. The medical malpractice six year absolute bar to recovery is analogous. South Carolina Code **§ 15-3-545 Actions for Medical Malpractice** evidences the Legislature's impatience with those who sleep on their rights. The language concerning notice or lack thereof in the malpractice statute of limitations is similar to the revised **§ 12-51-90, 160**; "three years from the date of discovery or when it is reasonably ought to have been discovered, *not to exceed six years from the date of occurrence...*"

[27] Wilson v. Dove, 118 S.C. 256, 257, 110 S.E. 390, 391 (SC Sup. Ct. 1922)

It is clear that the legislature and the South Carolina Supreme Court in *Federal*, *supra*, meant for the two year time bar in **§ 12-51-90(c), 160** to be absolute.

Conclusion

This Court should rehear, reconsider and reverse its initial opinion, vacate the judgment, and enter judgment for the Defendant/Appellant.

Respectfully submitted,

July 31st, 2015

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2014-000823

Robert C. Schivera, Executor of the Estate of Fed J. Hughes, III.....Respondent,

Vs.

C. Russell Keep, III, Esquire and Rhonda Mitchell, Jasper County Tax Collector of which C. Russell Keep, III, Esquire is the.....Appellant.

PROOF OF SERVICE

In accordance with SCRAP 203 (d) (2) (B) (i), I certify that I have served the Petition for Rehearing on the Respondent and Rhonda Mitchell by depositing a copy of it in the United States Mail, postage prepaid, on July 31, 2015 addressed to their attorney of record, Thayer Rivers, Jr., Esq., Post Office Box 668, Ridgeland, SC 29936 and Marvin Jones, Esq., Post Office Box 420, Ridgeland, SC 29936.

July 31, 2015

Kim Marie Muggeo

Kim Muggeo, Paralegal to
C. Russell Keep, III, Esq.
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C. RUSSELL KEEP, III

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July 31, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29201

Re: Robert Schivera, Respondent
Versus
C. Russell Keep, III, Appellant
Civil Action Case No. 2012-CP-27-00760
Court of Appeals Case No. 2014-000823

Dear Ms. Kitchings,

Enclosed for filing are the original and six (6) copies of my Petition for Rehearing with Proof of Service and a check in the amount of $25 as required for the filing fee.

Please kindly return a time-stamped copy of this letter in the in the SASE provided.

By copy of this letter, I am providing all counsel with a copy of the Petition for Rehearing. Should you have any questions regarding this filing, I would appreciate you contacting me.

With warmest, personal regards, I remain

Very truly yours,

C. RUSS KEEP, III

CRK/kmm
enclosures
cc: Thayer Rivers, Esq. w/ enclosure
cc: Marvin Jones, Esq. w/ enclosure