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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity

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SEP 08 2015

Case No. 2013-CP-3131

SC Court of Appeals

J Dub Holdings, LLC.....Appellant,

v.

SBK Investments, L.P., and
Beaufort County, South Carolina,.....Respondents.

INITIAL BRIEF OF J DUB HOLDINGS, LLC

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STATEMENT OF ISSUES

- I(a) & (b).** Did the trial court err in granting summary judgment to SBK Investments, L.P. by disregarding the evidence or weighing conflicting evidence and inferences in favor of SBK when the record shows more than a scintilla of evidence in opposition to SBK Investments, L.P.'s motion?

- II.** Did the trial court err in placing an affirmative obligation on Beaufort County to conduct due diligence over and above what is required by relevant statutes and case law?

- III.** Did the trial court err in that application for and acceptance of the tax overage funds from the Beaufort County Treasurer did not constitute a waiver, estoppel or ratification of the tax sale?

- IV.** Did the trial court err in failing to address Appellant's claim for interest earned on a voided tax sale and unjust enrichment claims against SBK Investments, LP?

STATEMENT OF THE CASE AND FACTS

SBK Investments, L. P. (hereinafter, SBK”) acquired title to an unimproved parcel of real property known as Lot 30, Phase I, The Daufuskie Island Club, located on Daufuskie Island, South Carolina by deed recorded December 1, 2003 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 1878 at page 795 (hereinafter, the “Subject Property”). The deed which was prepared by SBK’s attorney contained a typographical error in the mailing address for SBK by listing such address as 929 Lullwater Parkway, NE, Atlanta, Georgia 30307-1235 instead of the correct address 925 Lullwater Parkway, NE.¹ Spencer B. King is a partner and agent of SBK.² SBK did not pay Beaufort County Property Taxes for 2010 and the subject property went to tax sale on October 3, 2011.³ Appellant, J Dub Holdings, LLC (hereinafter, “J Dub”) purchased the subject property at the October 3, 2011, Beaufort County tax sale for the sum of Forty Thousand and no/100 (\$40,000.00) Dollars.⁴ The Subject Property was not redeemed from the tax sale during the one year redemption period following the tax sale.⁵ The tax sale of the Subject Property generated an overage in the amount of Twenty One Thousand Eight Hundred Seventy and no/100 (\$21,870.25) Dollars.⁶ Following the expiration of the one year redemption period, Beaufort County, South Carolina, issued a deed for the Subject Property to J Dub and said deed was recorded on December 3, 2012 in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 3195 at Page 1356.⁷ On December 7, 2012, SBK, by and through Spencer B. King, executed and forwarded a Tax Sale

¹ Affidavit of Spencer B. King, page 2, paragraph 5. ROA ____.

² Certificate of Limited Partnership of SBK Investments, L.P. ROA ____.

³ Affidavit of Spencer B. King, page 3, paragraph 7. ROA ____.

⁴ Temporary Tax Receipt. ROA ____.

⁵ Beaufort County Treasurer-Property Redemption dated November 9, 2012. ROA ____.

⁶ Notice of Tax Sale Overage dated November 1, 2012. ROA ____.

⁷ Tax Title RB 3195 P. 1356. ROA ____.

Overage Request form to Beaufort County.⁸ Beaufort County mailed the tax sale overage funds to SBK.⁹ SBK deposited the tax sale overage funds into an account controlled by it on or about April 1, 2013.¹⁰

J Dub sought to quiet and confirm title to the parcel by filing its Complaint with the Beaufort County Clerk of Court on December 13, 2013.¹¹ Beaufort County filed its Answer on December 18, 2013, and SBK filed its Answer and Counterclaim on January 3, 2014, alleging defects in the procedure utilized by Beaufort County in conducting the tax sale including using an incorrect address for SBK.¹² J Dub filed its Reply to Counterclaim on January 8, 2014.¹³ SBK filed a Motion to Deposit Disputed Funds with Court on January 16, 2014.¹⁴

Discovery commenced with J Dub serving its Request to Admit on SBK on January 15, 2014, SBK serving its Request for Production and Interrogatories to Beaufort County dated January 31, 2014, and to J Dub dated February 6, 2014, and.¹⁵ J Dub filed its Return to Motion to Deposit Funds on March 11, 2014.¹⁶

On March 24, 2014, an Order of the Honorable Donald B. Hocker was filed granting SBK's motion to deposit the disputed overage funds with the Clerk of Court, and such funds were subsequently deposited with the Clerk by SBK.¹⁷ On March 25, 2014, J Dub filed its

⁸ Am. Answers to Req. for Admissions, #s 3, 4 and 7; Tax Sale Overage Request Form. ROA____.

⁹ Am. Answers to Requests for Admissions, #10; Check dated Mar. 17, 2013. ROA____

¹⁰ Am. Answers to Requests for Admissions, #12. ROA____

¹¹ Complaint dated Dec. 13, 2013 ROA____

¹² Beaufort County Answer dated Dec. 13, 2013; SBK Answer and Counterclaim dated Jan. 3, 2014 ROA____

¹³ Reply to Counterclaim dated Jan. 8, 2014 ROA____

¹⁴ Motion dated Jan. 16, 2014 ROA____

¹⁵ Request to Admit dated Jan. 15, 2014; Requests to County dated Jan. 31, 2014; Requests to J Dub dated Feb.5, 2014. ROA____

¹⁶ Return to Motion dated Mar. 11, 2014 ROA____

¹⁷ March 24, 2014, Order of Hon. David Hocker. ROA____.

Motion for Summary Judgment.¹⁸ The case was referred to Marvin H. Dukes, III, Master in Equity for Beaufort County, South Carolina by a Consent Order of Reference filed April 7, 2014.¹⁹ SBK filed its Motion for Summary Judgment on May 27, 2014.²⁰ J Dub served its Request for Production and Interrogatories on Respondent on June 2, 2014.²¹

SBK filed its First Amended Motion for Summary Judgment on August 1, 2014.²² The Hon Marvin H. Dukes issued an Order dated and filed March 4, 2015 denying summary judgment to J Dub and granting summary judgment in favor of SBK.²³ J Dub filed a Motion to Reconsider on March 18, 2015.²⁴ SBK filed its Memorandum in Opposition to Motion to Reconsider on May 14, 2015.²⁵ Judge Dukes filed an Amended Order on June 2, 2015, denying J Dub's Motion to Reconsider.²⁶ J Dub received notice of the Amended Order on June 8, 2015. The Notice of Appeal was filed on July 2, 2015.²⁷

I. The trial court granted SBK's motion for summary judgment despite the fact that the record includes more than a scintilla of evidence in opposition to SBK's motion.

APPLICABLE STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394

¹⁸ Motion for Summary Judgment filed Mar. 25, 2014 ROA _____

¹⁹ Consent Order of Reference. ROA _____

²⁰ Motion for Summary Judgment of SBK dated May 27, 2014 ROA ____.

²¹ Request for Production and Interrogatories dated June 2, 2014 ROA ____.

²² Amended Motion for Summary Judgment of SBK dated August 1, 2014. ROA ____.

²³ Order dated March 4, 2015. ROA ____.

²⁴ Motion to Reconsider dated March 18, 2015. ROA ____.

²⁵ Memorandum in Opposition of SBK dated May 14, 2015. ROA ____.

²⁶ Amended Order dated June 2, 2015 ROA ____.

²⁷ Notice of Appeal. ROA ____.

(1994). In a case such as this where the “preponderance of the evidence” burden of proof is applicable, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management. Company*, 381 S.C. 326, 673 S.E.2d 801 (2009).

I (a) There is more than a scintilla of evidence in the record in opposition to Motion of Summary Judgment of SBK. The Trial Court disregarded the evidence, or weighed the conflicting evidence and inferences drawn therefrom in favor of SBK.

In this case, it is undisputed that SBK, did not pay the property taxes imposed on the Subject Property after 2009.²⁸ It is undisputed that SBK received information from a realtor, Tom C. Jackson, who advised that Beaufort County was holding “tax overage funds” and advised as to how to contact Beaufort County to collect the “2011 tax overage funds”.²⁹ It is undisputed that SBK’s agents contacted Beaufort County and obtained a “Tax Sale Overage Request Form.”³⁰ It is undisputed that Spencer B. King, as principal of SBK, executed and delivered to Beaufort County, South Carolina, a document entitled “Tax Sale Overage Request Form”.³¹ It is undisputed that the text of the “Tax Sale Overage Request Form” states that the funds being requested are overage resulting from a tax sale, identifies the property that was sold and includes the following text immediately above Spencer B. King’s notarized signature:

The undersigned states and confirms, under penalty of law, that he/she was the owner of the record described above immediately before the expiration of the redemption period and is entitled to the tax sale overage pursuant to SC 12-51-130. The undersigned acknowledges payment shall be made in the name(s) in which the property was sold.³²

²⁸ Amended Order dated May 28, 2015 P. 10, ¶ 14. ROA ____.

²⁹ Affidavit of Tom C. Jackson ¶¶ 4 and 5; and Exhibit “5”; Affidavit of Spencer B. King, page 4, ¶ 8. ROA ____.

³⁰ Affidavit of David Fisher, ¶ 4. ROA ____.

³¹ Affidavit of Spencer B. King P. 4, ¶11 and Exhibit 11(a). ROA ____.

³² Tax Sale Overage Form; Affidavit of Spencer B. King p.4, #11; Exhibit 11(a) to Spencer B. King Affidavit. ROA ____.

It is undisputed that Beaufort County delivered the sum of Twenty One Thousand Eight Hundred Seventy and 25/100 (\$21,870.25) Dollars to SBK, and that SBK deposited the money into its account.³³

In the face all of the above undisputed evidence, the Trial Court made the following findings of fact in granting summary judgment to SBK:

That SBK first became aware that his property was sold at a tax sale in September of 2013,³⁴ and that SBK's principal Spencer B. King and his spouse Gail King were under the impression that the "Tax Sale Overage Funds" were not funds resulting from the tax sale of the Subject Property, but rather were a "refund" or "rebate" of taxes, "found money", or a "Christmas Present". The Court also found that the Tax Sale Overage Request Form, in spite of the express language of it, "does not clearly set forth to a layman the source of the funds, and contains no language that receipt of the funds relinquishes any and all claims or objections to the tax sale process".³⁵ The Trial Court, in the face of the express language of the Tax Sale Overage Request Form found "that SBK had no idea that it had just lost its valuable ocean-front lot in a tax sale."³⁶ The undisputed facts outlined above clearly constitute at a bare minimum the necessary scintilla of evidence contrary to the findings of fact made by the Trial Court.

To reach make its findings, the Trial Court either disregarded such evidence in opposition to SBK's motion, or weighed it against the affidavits proffered by SBK, and found both the evidence and the inferences that can be drawn from the evidence in favor of the moving party, SBK.

³³ Affidavit of Spencer B. King p. 5, ¶12 ROA _____

³⁴ Order dated May 28, 2015 p. 13 ¶28. ROA _____

³⁵ Order dated May 28, 2015 p. 15 ¶33. ROA _____

³⁶ Order dated May 28, 2015 p. 17 ¶38. ROA _____

There is more than a scintilla of evidence supporting an inference to be drawn from it, that in December of 2012, SBK did know the property taxes had not been paid by it for 3 years, that the Subject Property had been sold at a tax sale, and that it was demanding and accepting the overage from the tax sale instead of challenging the tax sale that preclude the Trial Court's grant of summary judgment to SBK. Rather than acknowledge the existence of the scintilla of evidence, and deny SBK's motion, the Trial Court made factual findings that Spencer B. King's, testimony as to his belief that money falls out of the sky and his claimed failure to comprehend the plain language of the Tax Sale Overage Form is entitled to more weight than: (a) the failure of SBK to pay its property taxes for a period of years; (b) the plain language of the "Tax Sale Overage Request Form" that SBK sought out, executed and delivered to Beaufort County; and, (c) SBK's acceptance and deposit of the tax sale overage funds.

The same error infects the Trial Court's findings and conclusions with respect to J Dub's claims of waiver, estoppel and ratification.³⁷ The Trial Court weighed the conflicting evidence,

³⁷ In addition, the Trial Court makes a specific finding that one of the elements of estoppel cannot be met because SBK paid the overage money to Clerk of Court under Judge Hocker's, March 20, 2014 Order. This finding is in contravention to the language of Judge Hocker's Order, which was based on a representation to the Court by SBK, as follows:

The Plaintiff has not shown that it will suffer any prejudice by the deposit of said funds into the Clerk of Court at this time, with the **express understanding that the deposit of said funds does not alter the fact that SBK actually received the same from the Beaufort County Treasurer.** The Plaintiff has raised various claims of waiver and estoppel claims relating to the receipt by SBK of the Surplus Funds.

Counsel for SBK confirms that it is **not his client's intention to attempt to "un-ring the bell" as to these past events,** but to simply place the disputed funds with the Court, pending further Order of the Court.

Despite the language of Judge Hocker's Order, and the representation SBK made to the Court set out in the Order, SBK argued, and the Trial Court found as a matter of fact that no issue of fact exists on the estoppel claim because the tax sale overage money was paid to the Clerk of Court. The Trial Court's disregard of Judge Hocker's Order undoes his finding of fact on this point.

and found that SBK's principal, Spencer B. King had neither ratified the sale, waived his right to contest the sale, or was estopped to do so, because of Spencer B. King's testimony that he didn't know the property had been sold at a tax sale, and he didn't comprehend that taking the overage funds instead of challenging the tax sale could affect his right to do so.³⁸ In the face of the undisputed facts that SBK hadn't paid the taxes for 3 years prior to seeking out, executing and delivering the "Tax Sale Overage Form" to Beaufort County, and taking the tax sale overage there is, at a minimum, a scintilla of evidence that SBK waived its right to contest the tax sale, is estopped to contest the tax sale, or ratified the tax sale.

I (b) There is more than a scintilla of evidence in the record showing that Beaufort County exercised due diligence in attempting to locate a better address for SBK than the address that SBK provided.

In the Amended Order, the Trial Court found as a matter of fact that the County took "absolutely no additional steps to locate a better address" than the erroneous address that SBK itself is responsible for.³⁹ There is at least scintilla of evidence that is contrary to the Trial Court's finding on this point.⁴⁰

There is testimony in the record that Beaufort County took additional steps prior to the sale, after the sale and during the redemption period to find a valid address for SBK.⁴¹

Among other things, Beaufort County hired a third party law firm to perform a title search of the Beaufort County Records (including Assessor records, Register of Deeds records

³⁸ Order dated May 28, 2015 p. 17 #37. ROA _____

³⁹ Amended Order dated May 28, 2015 p. 6. ROA _____.

⁴⁰ See argument 1(a) above, there is also a scintilla of evidence that SBK waived its right to challenge the tax sale, is estopped to challenge the tax sale, or ratified the tax sale by claiming the tax sale overage.

⁴¹ The deposition testimony of Doug Henderson cited in the Amended Order is out of context. The lines quoted are in discussion of the County's attempt to find an alternate address **after** the Final Notice Ending Redemption Period mailing was returned. The Order does not address what steps the County took before that final notice was returned. Transcript of Deposition of Doug Henderson, p. 76-79. ROA ____.

and Clerk of Court records) in an attempt to locate and identify all interested parties to the parcel.⁴²

There is at least a scintilla of evidence that Beaufort County exercised due diligence in its effort to locate a better address than the one provided by SBK, and the Trial Court's grant of summary judgment based on its finding that Beaufort County did not exercise due diligence should be reversed for that reason.

II. The trial court erred in placing an affirmative obligation on Beaufort County to conduct due diligence over and above what is required by relevant statutes and case law.

S.C. Code Ann. §12-51-40 (Supp. 2015), which governs pre-sale notices, states in pertinent part:

“After the county treasurer issues his execution against a defaulting taxpayer in his jurisdiction, ... directed to the officer authorized to collect delinquent taxes, assessments, penalties, and costs, ... the officer to which the execution is directed shall:

(a) On April first or as soon after that as practicable, mail a notice of delinquent property taxes, penalties, assessments, and costs to the defaulting taxpayer and to a grantee of record of the property, whose value generated all or part of the tax. The notice must be mailed to the **best address available, which is either the address shown on the deed conveying the property to him, the property address, or other corrected or forwarding address of which the officer authorized to collect delinquent taxes, penalties, and costs has actual knowledge....**

(b) If the taxes remain unpaid after thirty days from the date of mailing of the delinquent notice, or as soon thereafter as practicable, take exclusive possession of the property necessary to satisfy the payment of the taxes, assessments, penalties, and costs. In the case of real property, exclusive possession is taken by mailing a notice of delinquent property taxes, assessments, penalties, and costs to the defaulting taxpayer and any grantee of record of the property **at the address shown on the tax receipt or to an address of which the officer has actual knowledge**, by "certified mail, return receipt requested-restricted delivery" pursuant to the United States Postal Service "Domestic Mail Manual Section S912"....

(c) If the "certified mail" notice has been returned, 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

⁴² Transcript of Deposition of Kimberly Chesney, p.17-20,22-23,27-28,38-39,44, 73, ll. 3-10; 19-24; p. 74 ll., 8-16 and 19-25. ROA ____.

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, or by taking exclusive possession of personalty...

(d) The property must be advertised for sale at public auction. The advertisement must be in a newspaper of general circulation within the county or municipality, if applicable, and must be entitled "Delinquent Tax Sale". It must include the delinquent taxpayer's name and the description of the property, a reference to the county auditor's map-block-parcel number being sufficient for a description of realty. The advertising must be published once a week before the legal sales date for three consecutive weeks for the sale of real property...,” (emphasis added)

S.C. Code Ann. §12-51-120 (Supp. 2015), which governs post-sale notice of the approaching end of the one year redemption period, states in pertinent part:

“The notice must be mailed to the best address of the owner available to the person officially charged with the collection of delinquent 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.**” (emphasis added)

The Amended Order voided the subject tax sale on the grounds that the County Treasurer, who utilized the identical mailing address provided by SBK which contained a scrivener’s error unbeknownst to the Treasurer resulting in the notices being undeliverable, failed to exercise due diligence in attempting to determine the best address available for the taxpayer when the tax notices required under S. C. Code Ann. § 12-51-120 (Supp. 2014), were returned undeliverable.

In making that determination, the Court relied on *Good v. Kennedy*, 291 S.C. 204, 352 S.E.2d 708 (1997); *Benton v. Logan*, 323 S.C. 338, 474 S.E.2d 446 (1996); and *Reeping v. Jebbco*, 402 S.C. 195, 740 S.E.2d 504 (2013).

Each of these three (3) cases is distinguishable as they are based on facts that are materially different from the facts in this case. *In Good v. Kennedy, supra.*, the Court found: “After the deed was recorded, the Tax Assessor for Chester County caused to be prepared a “property card” showing Good’s correct mailing address. Sometime later, however, for reasons

not apparent in the record, the Tax Assessor changed Good's mailing address to the address of the property. Good testified that he did not authorize this change of address. The Tax Assessor had no idea who may have authorized the change or the source of the information giving rise to the change." Therefore, the Court found the Assessor had unilaterally and without any apparent justification changed the mailing address in its records from the correct mailing address of the taxpayer to the property address at which the owner had never resided, thereby resulting in the owner never receiving any notices. This affirmative inappropriate act of the County, with no apparent inappropriate act by the taxpayer, is entirely lacking in this case, where it is SBK that recorded the deed with an incorrect address which ultimately led to the tax notices being undeliverable.

Benton v. Logan, supra., involved a tax payer who moved into a nursing center. The grandson paid the 1990 tax bill and "testified he put with the check used to pay Benton's 1990 tax payment a note that highlighted Benton's change of address to his personal residence"; however, the County continued to send notices to the old address. Accordingly, in Benton there was evidence in the record the County was on actual notice of the better correct address. Furthermore, the Court also specifically noted "whether the authorized person had exercised diligence depends on the particular circumstance of each case."

Reeping v. Jebbco, supra., also involves a case where the Treasurer was on actual notice as to a better address for the taxpayer. Specifically, the Court found "Mrs. Reeping testified her husband included a handwritten post-it note to inform the taxing authority their address had changed. The Treasurer's office subsequently issued a tax receipt and negotiated the check." Furthermore, the Court found "the certified envelope sent by the County to the taxpayer was also hand marked with the Reepings' new 911 street address. This handwritten address correction appeared both on the face of the envelope and also on the reverse side on the certified mail green

card.” The Court found the treasurer “was put on actual notice the Reepings were not receiving mail at their former rural route address and were provided with their new address on a returned envelope that twice noted the new 911 address.”

The present scenario is distinguishable from each of the above cases because 1) the tax payer’s actual correct mailing address never changed from what was initially reported to the County and on the face of the deed to the property, all of which was provided by SBK; and 2) the County was not on actual notice of any better or alternate address for the SBK. SBK provided an incorrect address and never took any action to correct the error in the time since taking ownership in 2003. The County had no knowledge that this was not the correct address as it had appeared that the previous tax notices were delivered to this address, and the taxes paid until the return mailings related to the unpaid 2010 taxes. The returned mailings provided no alternate address by which the County could verify. It was at this time the County performed its due diligence by having a title search performed on the property by a third-party which yielded no alternate address. In addition to performing a title search, the County, as required, posted Notice on the property and advertised the property for sale in a newspaper of general circulation.

It should be noted that S. C. Code Ann. § 12-51-40(b)(Supp. 2014), the section providing for notice of delinquent taxes due, has been amended twice subsequent to the *Good v. Kennedy, supra.*, and *Benton v. Logan, supra.*, decisions. Prior to 1998, this section only required the requisite notice to be sent to “the address shown on the tax receipt or to a more correct address known to the officer”. In 1998, the statute was amended to clarify “or to an address of which the officer has actual knowledge.” (1998 South Carolina Laws Act 285, H.B. 3908). Constructive knowledge was no longer effective under the statute. Accordingly, the Court in those two (2) decisions was not bound by the actual notice standard set forth in the current statute, and the *Reeping* decision involve facts of actual notice by the County.

The lower Court suggests that examples of actions the County could have taken in locating another address for SBK would include, but is not limited to, one of more of the following:

- 1) Attempt to review and retrieve the checks by which SBK paid taxes on the subject property from 2004-2009, all of which reflected the current mailing address of SBK.
- 2) Make an attempt to contact Christopher T. Graham, the out of state attorney who prepared the deed into SBK containing the scrivener' error.
- 3) Check the free, online database of the Georgia Secretary of State for the current address of SBK.

As to the first action of reviewing old checks, the only evidence in the record is that the County did not retain copies of old cleared checks or old tax receipts. The Amended Order itself even contains a finding that checks used to pay taxes on the property in years prior to the tax sale were scanned by Beaufort County and destroyed. Yet, the Amended Order suggests the County could have found the information in the destroyed checks.

Furthermore, there is no evidence or recitation of applicable law in the record that the County is required to retain copies of old checks or that it was inappropriate for it to not have retained such documents. There is simply no way the County could or should have consulted documents or records that it neither had in its possession nor had the ability or obligation to have or acquire. The fact that Beaufort County received checks in the past from SBK with an address differing from that shown in their records is of no consequence absent some directive or notification from SBK to the County to change the records.

As to the second suggested action of contacting the out of state attorney who prepared the deeds conveying the property to SBK in 2003, there is no reason for the County to presume such attorney represented the grantee SBK, much less that he still represented such entity seven (7) years later. In addition, there is evidence in the record that the attorney had moved to a different

law firm at a different address than that shown on the deed over five (5) years before the subject tax sale and that such attorney is not licensed to practice law in South Carolina.

As to the third suggested action of utilizing the records of the Georgia Secretary of State, it is noteworthy that SBK failed to register itself as a foreign limited partnership with the South Carolina Secretary of State, which registration would have put notice in the South Carolina Secretary of State records as to the registered address and agent for SBK. The Order suggests the County had an obligation to track down SBK via the Georgia Secretary of State; however, it was SBK which had a statutory obligation to register with the South Carolina Secretary of State. S. C. Code Ann. §33-42-1620 (Supp. 2014), provides “Before transacting business in this State, a foreign limited partnership shall register with the Secretary of State.” In addition, S. C. Code Ann. §33-42-1670 (Supp. 2014), provides “A foreign limited partnership transacting business in this State may not maintain any action, suit, or proceeding in any court of this State until it has registered in this State.”

Other states as well as the United States Supreme Court have addressed this issue. The United States Supreme Court has held in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) that “What is reasonable in response to new information depends on what that information reveals.” *Id* at 234. In *Jones*, the Court undertook to address the question of what the government’s duties are prior to the sale of property once it learns its mailed notice to the landowner has been returned.

“Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones’ mail marked “unclaimed” did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address especially when the State obligates the taxpayer to keep his address updated with the tax collector, see Ark.Code Ann. §26-35-705

(1997)-imposes burdens on the State significantly greater than the several relatively easy options outlined above.” (Emphasis added) *Id* at 235.

“While “[i]t is not our responsibility to prescribe the form of service that the [government] should adopt,” Greene [v. Lindsey], 456 U.S., at 455,n. 9, 102 S.Ct. 1874, **if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.**” (Emphasis added) *Id* at 234.

A similar scenario was addressed in *Plemons v. Gale*, 396 F.3d (Ct. App 2005) wherein a correct address for the defaulting taxpayer could not be located. The district court’s Order outlined three other methods of finding a “better address” for the defaulting taxpayer. The Court of Appeals however rejected this argument stating:

“In this case, the district court considered several possible follow-up efforts.... Instead, the court pointed to three other methods it believed Advantage reasonably could have, but did not, pursue to obtain Plemons' address after receiving the returned mailings: consulting the telephone directory, asking the tenants at the Echo Road property, or making inquiries of the mortgagee bank. **We do not agree that reasonable follow-up compelled such efforts in this case.** ...Moreover, contacting the Echo Road tenants seems an **unreasonable burden** here.” (Emphasis added) *Id Plemons* at 577.

The Court of Appeals relied on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Akey v. Clinton County*, 375 F.3d 231, (2d Cir. 2004) in its Opinion regarding the extent of what constitutes “reasonable diligent efforts”.

“However, **a tax sale need not be set aside in every case in which initial attempts at mailed notice have failed and no further mailed notice is sent.** Mullane instructs that “all the circumstances” of a case, including its “practicalities and peculiarities,” must be considered in determining the constitutional sufficiency of notice. 339 U.S. at 314, 70 S.Ct. 652. **There may be instances when reasonable follow-up efforts would yield no different address; and the Constitution only requires reasonable efforts, given all of the circumstances of a particular case, not receipt of actual notice.**”(Emphasis added) *Plemons v. Gale*, 396 F.3d 569 (Ct.App 2005)

...Accordingly, **reasonable diligence required Advantage to search all publicly available COUNTY records** once the prompt return of the mailings made clear that its initial examination of the title to the Echo Road property had not netted Plemons' correct address.” (Emphasis added) *Id Plemons* at 578.

The Amended Order recites and suggests that the County took “absolutely no additional steps to locate a better address” when the opposite is true as is set forth in Argument I(b) above. The reality is that there are an unlimited number of things the County *could* do, but it is only required to take “reasonable additional steps”. No Court in South Carolina has determined what exactly those “reasonable additional steps” are. While it would appear the reasonability of such steps would be case-specific, the three (3) proposed actions suggested by the lower Court are unreasonable and impractical for the reasons stated above, and the actions actually taken by the County satisfy the criteria set forth in the above-referenced cases.

III. The trial court erred in ruling that application for and acceptance of the tax overage funds by SBK from the Beaufort County Treasurer did not constitute a waiver, estoppel or ratification of the tax sale.

J Dub argues that SBK should be estopped from or has waived its rights from asserting any objection to the tax sale due to its request for and acceptance of the tax sale overage money, and that acceptance of the money deems the tax sale ratified.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (S.C. 1992).

As related to a party claiming an estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. *Janasik, supra*.

Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent. To ratify is to sanction or affirm, to give validity to something done for one by another. *Brazell Brothers Contractors v. Hill*, 245 SC 69, 138 S.E.2d 835 (S. C. 1964).

In this case, the undisputed facts demonstrating ratification are:

1. Beaufort County, South Carolina, sold the Subject Property at the 2011 tax sale to pay the 2010 real estate tax debt of SBK.
2. Following the expiration of the redemption period, SBK, submitted a "Tax Sale Overage Request" to Beaufort County, South Carolina.
3. The Tax Sale Overage Request, *on its face*, identifies the Subject Property, states that there has been a tax sale of it, includes a statement that SBK was the "owner of record immediately prior to the expiration of the redemption period" and that SBK is "entitled to the tax sale overage pursuant to SC 12-51-130".

SBK argues that it was ignorant of the fact that its property had been sold at the tax sale and that the money it sought and received from Beaufort County, South Carolina, was the overage resulting from the tax sale.⁴³ Even if one were to accept that anyone who read and signed the Tax Sale Overage Request could have been ignorant of what had transpired, SBK, in the exercise of any diligence at all, would have been able to find out.

A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Regions Bank v. Schumach* 354 S.C. 648; 582 S.E.2d 432 (2003) (citations omitted) One cannot complain of fraud in misrepresentation of contents of written instrument signed by her when the truth could have been discovered by reading the instrument. *Id* at 673 citing *Outlaw v. Calhoun Life Ins. Co.*, 236 S.C. 272, 276, 113 S.E.2d 817, 819 (1960).

⁴³ SBK Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment pp. 3-4

SBK admits that the copy of the Tax Sale Overage Request that is attached to the Requests for Admissions filed by J. Dub Holdings, LLC, is a true, accurate and complete copy of the Tax Sale Overage Request that was sent to Beaufort County, South Carolina, by SBK.⁴⁴ The Tax Sale Overage Request form signed by Spencer B. King, as agent of SBK, expressly references a “tax sale” six (6) times, and further contains another reference that “the property was sold.” SBK’s agent Julia Paparelli affirmatively contacted the County regarding the tax sale overage and was able to get on the County website and confirm the overage amount.⁴⁵ The only way to find out any tax sale overage information pertaining to a specific taxpayer or property on the County Treasurer’s website is to click either the “Tax Sale” or “Tax Sale Overage” link.⁴⁶

There is no documentation in the record whatsoever suggesting, or supporting the conclusion, that the tax sale overage funds were a refund or rebate of previously paid taxes, despite the fact that both Dr. King and Gail King’s affidavits recite they were “informed and believed” and “under the impression” of that.⁴⁷ To the contrary, the Tax Sale Overage Request form unequivocally recites that the property had been sold. At the time SBK signed the Tax Sale Overage Request form in December of 2012, SBK had not paid taxes for 2010, 2011 or 2012, so it is impossible for it to have been receiving a refund from those taxes it had not paid. To the extent it thought the \$21,870 overage constitutes a refund amount from prior years, it is noteworthy the overage is 2.7 times higher than any single tax bill for years 2008-2010.

The Tax Sale Overage Request submitted by SBK to Beaufort County, South Carolina, demonstrates that SBK had actual knowledge of its rights and of all the material facts upon which those rights depended. The text of the “Tax Sale Overage Request” is sufficient to put one

⁴⁴ Request for Admissions Ex. A; Amended Answers to Requests for Admissions ¶8.

⁴⁵ Amended Order p. 13, ¶26

⁴⁶ Exhibit B to J Dub Motion to Reconsider

⁴⁷ Affidavit of Spencer King p. 4 ¶ 8; Affidavit of Gail King p. 2 ¶8

on notice that a tax sale has occurred, and that the money being sought by the person submitting the document is the overage from the tax sale. If, however, a person does not understand the plain text of the document, then that person has a duty to inquire and find out prior to submitting the document and taking receipt of the money.

This nature of this duty and the consequence for failing to undertake it are stated in *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) “It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests.” (citation omitted) *Id King* at 312 Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. *Mobley v. Quattlebaum*, 101 S.C. 221, 85 S.E. 585 (1915). A party must avail himself of the knowledge or means of knowledge open to him. *Id* at 589 citing *Montgomery v. Scott*, 9 S.C. 35, 30 Am. Rep. 1). The court will not protect the person who, with full opportunity to do so, will not protect himself. *J.B. Colt Company v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924).”

Respondent had relied on information regarding the origin of the overage monies provided to him by a third party, a realtor. SBK then instructed its financial advisor, David Fisher, to inquire about the overage monies, and failed to question or inquire any further with the County as to where that money actually came from. No representative of the County ever told anyone related to this action, nor did SBK ever prove, that the overage monies were a refund from overpaid taxes. Respondent had every opportunity to fully investigate this matter yet failed to investigate and protect its interests, and instead chose to rely on advice and information given by a person unaffiliated with the County. The County cannot be held responsible for a person's failure to inquire further, nor should Appellant be punished for the Respondent's lack of diligence.

While this may be a novel issue of first impression in South Carolina, and there do not appear to be any reported South Carolina case that has addressed the legal ramifications (waiver, estoppel or otherwise) of a taxpayer's receipt of overage funds one way or the other, the principal of ratification has been upheld in previous South Carolina cases not involving tax sales. The mere fact that a case involves a novel issue does not render summary judgment inappropriate. *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E 2d 747 (2004).

There are also, reported cases from other states along with jurisprudence containing findings as to these ramifications. Throughout the country, Courts have held that acceptance of the proceeds from a tax sale, even when the defaulting taxpayer had knowledge of or participated in the tax sale, constitutes ratification of that sale and estoppel from challenging the validity of the sale. The United States Court of Appeals for the Fourth Circuit held in *Johnson v. Gartlan*, 470 F.2d 1104, 31 A.F.T.R. 2d 73-562 (Ct.App.1973) (cert denied) "We find that this case comes within the general rule, adhered to in Virginia, that acceptance of proceeds from a contested sale constitutes ratification of the sale." (citations omitted) *Id Johnson* at 1106

In *Johnson*, the land of a defaulting taxpayer, Johnson, was seized by the IRS to satisfy its lien. The property was sold at tax sale and a deed issued to the purchaser, Manderfield, in 1964. Interest in the property was subsequently transferred to Gartlan. In January of 1963, the IRS returned to Johnson a \$100 money order which he had sent to the IRS as partial payment for the delinquent taxes, although though there is nothing in opinion suggesting that Johnson ever received the returned money order or even knew his property had been sold. The following year, the IRS sent a check in the amount of \$13,636.35 to Johnson, who endorsed the check and kept the money. Johnson never questioned nor contested the tax sale. After his death, his heirs subsequently filed suit to quiet title to the property. The Court upheld the tax sale reasoning that

Johnson ratified the sale by accepting and cashing the IRS check, *despite the fact that the record did not indicate that any explanation for what the check was for accompanied the check and the IRS failed to follow statutory sale procedure*. “Although the IRS failed to comply with the strict statutory regulations, Johnson's subsequent ratification served to validate the tax sale.” *Id Johnson* at 1106. The Court went on to find “it strains our imagination to believe Johnson did not know that was the reason for the payment. No honest man pockets over \$13,000 if he does not know what it is for, without asking the drawer for an explanation.” *Id* at 1106.

Similarly, in *Behr v. Burge*, 940 P.2d 1084 (Co. 1997), the defaulting taxpayer, Sanders, cashed the surplus proceeds check, despite her knowledge and involvement in the tax sale (Sanders was present at the tax sale). Sanders argued that because she did not apply for the proceeds, and that there was no explanation included with the check as to what the proceeds were for, she could not have ratified the tax sale. The Court disagreed citing *Johnson, supra* and *Lawrence v. Beaman* 90-2 U.S.T.C. ¶ 50,514, 1990 WL 157523 (D.Mass.1990)(tax sale ratified by party's prior knowledge of sale and informed acceptance of surplus proceeds check). *Id Behr* at 1087.

Other cases supporting the long standing principle of ratification and estoppel of a tax sale are below:

In *Proctor v. Nance*, 119 S.W. 409 (Missouri1909) the Court stated “Plaintiff pleads that Hall at the time he gave the order for said surplus had no knowledge that the sale was void, and that Hall was an uneducated person, and did not intend to ratify said sale by receiving said surplus; but the very character of the transaction of taking the surplus of the sale necessarily advised Hall that his land had been sold, and that this was a part of the purchase money paid by the defendant at the execution sale. It carried notice upon its face, or at least was of that unequivocal nature that it put Hall upon inquiry as to the source of that surplus, and why it was

there in the treasury for him, and it must be held that he had notice that his land had been sold for the taxes under the tax judgment. He had the option to refuse to take down this surplus, and bring his action to remove the cloud from his title, or he could ratify the sale, even though it was not a void judgment, and thereby estop himself from disputing the validity of the proceedings under which the land had been sold.”

Clyburn v. McLaughlin, 17 S.W. 692 (Missouri 1891) held “It is a well-recognized principle of the law of estoppel that ‘no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit.’” “And it has been held in the application of this principle, that it makes no difference whether the proceedings under which the sale occurs are voidable, or wholly void, in consequence of the want of jurisdiction.” SBK argues in its Memorandum in Opposition to Motion to Reconsider that *Clyburn* is distinguishable from the instance case because the plaintiff in *Clyburn* had full knowledge of the sale and still accepted the proceeds, then attempted to challenge the validity of the sale. While the details of the case may be somewhat distinguishable, the reasoning is not. *Clyburn* held “Being of the opinion that the acceptance of the balance of the purchase price from the sheriff constituted a ratification and affirmance of the sale, it becomes unnecessary to consider questions discussed regarding the validity of the sale and deed...” *Id Clyburn* at 693.

SBK knew, or should have known, that its property had been sold at a tax sale, did not assert the existence of any defect in the 2011 tax sale or take any action to set aside the 2011 tax sale. Rather, it opted to claim the overage. In fact, SBK enjoyed the benefits of the sale overage money for a year. This act by SBK sanctions and affirms the tax sale, and is an adoption of the acts undertaken by Beaufort County, South Carolina, in the conduct of the tax sale. This act is

inconsistent with a challenge to the validity of the tax sale, but is consistent with an abandonment of the right to challenge the tax sale.

Allowing SBK to claim the benefit of Beaufort County, South Carolina's conduct of the 2011 tax sale of the subject property, and at the same time, challenge Beaufort County, South Carolina's actions is contrary to equity. In *International Paper Company v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000), while factually different in that it describes an effort to enforce a contract while at the same time denying that the other party has any right to enforce it; the principal is the same. SBK cannot seek to avoid the consequences of Beaufort County, South Carolina's conduct of the tax sale while claiming benefits arising from it.

As stated by our Supreme Court in *Palmer v. Sovereign Camp, W.O.W.*, 197 S.C. 379, 15 S.E.2d 655 (1941), "The principle of estoppel in equity stands upon the very foundations of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect ... to their actions which ... justice dictate[s]." *Id* at 391. *American Jurisprudence* 2d §943 defines Estoppel to deny validity of title as "The principles of equitable estoppel in paid may be invoked against the owner of land which has been sold for taxes when he or she seeks to attack the title of the purchaser at the tax sale. Thus, if the owner, with full knowledge of the facts, accepts from the officer who conducted the tax sale the excess of the price received over the taxes and charges of sale, he or she will be estopped from subsequently contesting the validity of the sale."

Here, it is undisputed that SBK submitted the "Tax Sale Overage Request" to Beaufort County, South Carolina. It is also undisputed that Beaufort County, South Carolina, upon receiving the "Tax Sale Overage Request" delivered the sum of Twenty One Thousand Eight Hundred Seventy and no/100 (\$21,870.25) Dollars to SBK. There is no method by which

Beaufort County, South Carolina, could ever have known that SBK had any intention other than that which is expressed on the face of the “Tax Sale Overage Request”. Beaufort County, South Carolina, did (1) rely on the representations of SBK, and did (2) change its position to its detriment, as is shown by the fact that it delivered the tax sale overage money to SBK. As for the third element in proving estoppel, J Dub bore the brunt of the prejudice in the change of position in that, in reliance that SBK has requested and received the tax sale overage money, it believed that it in fact had good title to the property and proceeded accordingly to institute a quiet title action. The trial court’s ruling was based on a finding that SBK did not know or understand that the property was sold; however the “Tax Sale Overage Request” was sufficient to put SBK on notice of the sale. During this time, J Dub paid the 2012 and 2013 taxes, constituting over \$14,000, on the property, paid Association dues and utility fees on the property, and was deprived use of the \$40,000 tax sale bid money.

It is J Dub’s position that request for and acceptance of the tax sale overage funds ratifies the tax sale and prevents SBK from claiming any defect in the sale. For this reason, the grant of summary judgment to SBK should be overturned.

IV. The trial court erred in failing to address Appellant’s claim for interest earned on a voided tax sale and unjust enrichment claims against SBK Investments, LP.

The Amended Order finds that J Dub is entitled only to the interest actually earned on the on the purchase price of \$40,000 from the date of the tax sale to the date of the issuance of the overage check by the County pursuant to S. C. Code Ann. §12-51-150 (Supp. 2014). This interest calculated to a mere \$382.94, a rate of less than 1%.

SECTION 12-51-150. Official may void tax sales.

If the official in charge of the tax sale discovers **before a tax title has passed** that there is a failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid, plus interest in the amount actually earned by the county on the amount refunded, to the successful

bidder. If the full amount of the taxes, assessments, penalties, and costs have not been paid, the property must be brought to tax sale as soon as practicable. (Emphasis Added)

This Code section authorizes the treasurer to void a tax sale and refund the amount paid, plus interest actually earned, if the official discovers before the tax sale that there is a failure of any action required to be properly performed. That section is not applicable to the present scenario because 1) It applies to the sales set aside during the 1 year redemption period only and 2) it applies to the County discovering its own error.

The logical distinction for allowing interest to be paid once the tax title transfers and the sale is set aside judicially is that once the redemption period ends and record title passes, the tax sale purchaser becomes the **legal record owner** of the property with all rights and liabilities associated therewith. The purchaser at that point becomes liable for property owners assessments, future taxes, water and sewer utility charges and any other liabilities associated with the property. The risk that the County will set aside the tax sale due to its own error is gone. The purchaser is reasonably justified to begin making material expenditures of time and money as to the property once record title passes, particularly when the defaulting tax payer claims and enjoys the benefit of the overage.

In the current case, the county tax official did not discover any error in procedure. To the contrary, such procedure was vigorously defended by the County; however, the Amended Order found that the County's entire procedure was improper.

If the legislature had intended for the County's obligation to only pay actual interest accrued to continue past the one year redemption period, as limited in S.C. Code Ann. §12-51-150, it could have easily adopted such language in 2006. Since such statute is not applicable here, the Court is free to fashion an equitable remedy.

It should be noted that S.C. Code Ann. §12-51-90, which provides for the procedures for redemption of the property, grants the purchaser at tax sale up to 12% interest. It provides no procedure for calculating interest if the property is taken away from the purchaser after title has passed. So, in essence, the statutes provide a better equitable outcome for the purchaser if the property is redeemed, rather than if the property is taken away after title has transferred. The purchaser not only loses the property, he has no equitable remedy for the time, expenses and duties of having owned the property and the loss of interest he may have earned on the bid money if it had been in his possession. “A court may grant equitable relief where there is no adequate remedy at law.” *Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). “An adequate remedy at law is one which provides the plaintiff with “the full end and justice of the case. It is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity.” *Chisolm v. Pryor*, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945).

Although there appears to be no South Carolina law or case which specifically addresses what interest rate a tax sale purchaser should be paid if a tax sale is set aside after the year redemption period has passed and a tax deed has been issued, the July 30, 2013, nonbinding Attorney General Opinion of *Elinor V. Lister* concluded that a review of the decisions of courts in other jurisdictions seems to indicate that interest should be paid to the purchaser at the post-judgment rate for each year since the property was sold. The opinion noted that the court in *H & K Specialists v. Brannen*, 340 S.C. 585, 532 S.E.2d 617 (Ct. App. 2000) held that the setting aside of a tax sale and return of property constitutes a redemption which requires the interest to be paid. The Amended Order recites that the relevant section of § 12-51-150 was adopted by the legislature post *H & K Specialists* however, as stated above, 12-51-150 only applies to sales being set aside by the County prior to a tax deed being issued.

The circumstances of this case are similar to those in *H & K Specialists, supra*. In *H & K Specialists*, the defaulting taxpayer, Brannen, failed to redeem the property within the redemption period and title passed to H & K Specialists. The sale was set aside, after title had passed to H & K, based on improper notice to the taxpayer. H & K only received the return of its purchase price from the County, no interest, which outcome was upheld by the Master in Equity in the suit filed by H & K. The Court of Appeals, however, reversed the Master in Equity's order and ruled

“We view the return of the property to the Brannens as the ultimate redemption and hold that section 12-51-100 applies. It is inconceivable to this court that the General Assembly would require the taxing entity to “expeditiously refund[] the purchase price” to the tax sale purchaser when the property is redeemed during the redemption period, but not require the entity to do so when a tax sale is set aside. In our view, this would constitute an absurd result and one that could not have been intended by the General Assembly.³[footnote 3 reads in part “In the present case, however, the tax sale was set aside, which is tantamount to a redemption, and the defaulting taxpayer, not the purchaser, received title to the realty.”] *Id* at 588.

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) in discussing *H & K Specialists, supra*, held “On the contrary, the Court of Appeals merely [] held that the setting aside of the tax sale was tantamount to a redemption which triggered section 12–51–100 **and the remedy contained therein.**” (Emphasis Added) *Id* Key at 679.

It is clear the Court of Appeals believes that the setting aside of a tax sale, after title passes to the tax sale purchaser, triggers the remedies provided for in S.C. Code Ann. §12-51-100 and §12-51-90. Those remedies include interest at a rate of up to 12%. Being that the property was held in J Dub's name from December 3, 2012 to June 2, 2015, the date the Amended Order was filed voiding the tax sale, the rate of 12% would be the appropriate rate.

The denial of anything other than nominal interest to J Dub disregards the fact that J Dub was denied the use of and the interest it would have gained on its \$40,000 tax sale bid money for

almost three and a half years since the October 2011 tax sale *through no fault of its own*. Furthermore, there was a period of almost one (1) year between when the tax sale overage money was released by the County to SBK to when SBK re-deposited the overage funds with the Clerk of Court. During that one year, no interest was earned by the County because the County was holding no money, yet SBK held the money in its own bank account and earned interest on it.

To deny the J Dub any interest whatsoever during that time period is wholly inequitable. The Amended Order makes the finding that allowing anything above actual interest to be paid would be violative of public policy as it would encourage tax sale purchasers to draw out litigation in hopes of gaining larger interest awards. There, however, is nothing in the record to support this finding. Appellant argues that the bigger threat to public policy, however, is the County knowing that the only repercussion of having its tax sale set aside after tax title passes *due to its own wrongful act or procedure* is to pay nominal interest only. Such a result leaves the County with little incentive to ensure that sale procedure is accurate or that tax sale overage requests are properly or accurately processed.

Actually, the County is even rewarded under the Amended Order because the interest period was tolled for the period of time the County held no money, due to its release of the overage funds claimed by SBK. The Amended Order recites that “the ruling encouraged by JDUB places all the risk on the Treasurer’s public funds in attempting to execute the ministerial function of the office,”⁴⁸ however, the reality is the ruling in the Order shifts **all** of the risk of performing such sale and releasing the overage funds correctly and in compliance with applicable law, to J Dub, who is the one party who, arguably, followed all statutory procedure.

⁴⁸ Amended Order p. 22, ¶46

The Amended Order makes the finding that the purchaser is made whole with the benefit of whatever interest the County was able to earn while holding the purchase price. The reality is that under the Amended Order, (1) J Dub lost the property and was denied use of \$40,000 tax sale bid money and any interest that would have been earned on it for over three years; (2) the County was rewarded by only paying actual interest earned (less than 1%) to J Dub, not interest at the redemption interest rates set forth in *S.C. Code Ann.* §12-51-90 and not having to pay interest for the time period the County did not hold the money; and (3) rewarding SBK by allowing it to retain the interest it earned on the tax sale overage money during the 11 months it held it and the return of the property.

The actual interest awarded to J Dub in the amount of \$382.94 reflects that the interest accrued at a rate of less than 1%, resulting in a truly nominal recovery to J Dub which hardly makes J Dub whole. In fact, it unjustly enriches SBK. “Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff” *Regions Bank v. Wingard Properties, Inc.*, 374 S.C. 241, 715 S.E.2d 348 (2011) (citations omitted) “A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another.” *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687 (2013).

“Restitution is a remedy designed to prevent unjust enrichment. *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984). To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, [] Inc.*, 296 S.C. 530, 374 S.E.2d 507

(Ct.App.1988).” *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 581 S.E.2d 161 (2003).

Clearly the elements of unjust enrichment are met in this scenario. Respondent SBK was unjustly enriched by J Dub’s expenditures for taxes, property owner assessments and utility fees totaling over \$18,000 between 2012 and 2014. Although the Amended Order requires SBK to reimburse J Dub the sum of \$36,262.04 in expenditures it made, it is silent on the interest SBK earned while holding the \$21,870.25 tax sale overage money. A tax payer has no statutory remedy at law when a tax sale is set aside after the tax deed is issued, and the lower court was free to fashion an equitable remedy in such case; however, its ruling leaves the County paying only nominal interest and SBK paying none.

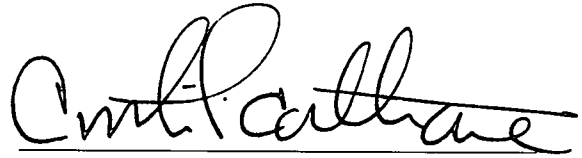
“Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff.” *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988)

It appears wholly inequitable that if the SBK had redeemed the property just prior to the sale, J Dub would have been entitled to up to 12% interest on its bid amount, yet if the tax sale is set aside judicially due to procedural error of the County J Dub is awarded less than 1% interest on its tax sale bid amount, a mere \$382.94.

CONCLUSION

J Dub Holdings, LLC respectfully requests this Court review all aspects of this case and, for all the foregoing reasons, reverse the trial court's grant of summary judgment to SBK Investments, L.P.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Curtis L. Coltrane". The signature is written in a cursive style with a horizontal line drawn across the bottom of the letters.

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September 2, 2015