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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-000030

Shawonder Scott,

Appellant,

vs.

Curtis McAlister, Acquana McAlister,
Norma L. Cyrus, Tax Collector for
Williamsburg County, the County of
Williamsburg, an Unincorporated
Subdivision of the State of South Carolina,
Hartwell Pendergrass, Sr., and
Hattie S. Pendergrass, Defendants,

Of whom Norma L. Cyrus, Tax Collector
For Williamsburg County, and the County
of Williamsburg, an Unincorporated
Subdivision of the State of South Carolina,
are

Respondents.

FINAL BRIEF OF APPELLANT

Dwight C. Moore, SC Bar No. 63008
Moore Law Firm, L.L.C.
26 North Main Street
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for Appellant

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STATEMENT OF THE ISSUE ON APPEAL

Whether or not the Circuit Court Judge erred in granting Respondents' Motion for Summary Judgment based upon the Court's determination that the Appellant lacks standing and is not owed any duty from the Respondents under S.C. Code Ann. § 12-51-40 (1976) as amended

STATEMENT OF THE CASE

In 1998 the Appellant and Defendant Curtis McAlister entered into a Contract for the sale and purchase of residential real estate (hereinafter referred to as the "Contract"); said real estate being located in Williamsburg County at 196 Gausetown Road, Kingstree, South Carolina 29556, identified as Tax Map Parcel Number 45-200-016 (hereinafter referred to as the "Property") and being described as follows:

All that certain lot of land situate in King Township, County of Williamsburg, State of South Carolina, bounded and measuring on the North by an access road, a distance of 2.22 chains; East by Carrie F. Pressley, a distance of 2.25 chains; South by Mary F. Fulton, a distance of 2.22 chains; on the West by Willie B. Scott, et al., a distance of 2.25 chains. All of which will more fully appear on a map of said lot made by J. D. Brockington, R.L.S., on February 25, 1971, and recorded in the Office of the Clerk of Court for Williamsburg County in Plat Book 19, at Page 16.

The consideration agreed upon for the sale of the property was Thirty-Five Thousand and No/100 (\$35,000.00) Dollars payable in a down payment of Four Thousand and No/100 (\$4,000.00) Dollars and the balance to be paid in monthly installments. The Appellant paid the down payment of \$4,000.00 and took possession of the property. Thereafter, she paid monthly installments in the amount of Three Hundred and No/100 (\$300.00) Dollars per month for seven (7) years. With the consent of Defendant Curtis McAlister, the Appellant then paid installments in the amount of Two Hundred and No/100 (\$200.00) Dollars per month until the balance was paid off.

The first year of the Contract, Defendant Curtis McAlister paid the taxes on the property. The second year he told the Appellant that he needed her to pay the taxes. Thereafter, Defendant Curtis McAlister would either give the tax notices to the Appellant or tell her when the taxes were due, and she would pay the taxes directly to the Williamsburg County Treasurer's office.

After she finished paying for the property, Appellant requested Defendant Curtis McAlister to give her a deed to the property. He refused to provide the deed and alleged that Appellant had not finished paying the Contract price.

In 2007, Defendant Curtis McAlister commenced eviction proceedings in the Williamsburg County Magistrate Court under Case Number 0108312 against the Appellant alleging that she had failed to make payments under her lease agreement and obtained an Order of Ejectment. The Appellant appealed the Order to the Circuit Court on the grounds that she and Defendant Curtis McAlister had entered into a purchase agreement for the property. On June 10, 2010, the Circuit Court Judge issued an Order Vacating the Magistrate's Eviction Order.

In 2010 Defendant Acquana McAlister delivered a document to the Appellant entitled "Lease, Basic Rental Agreement Or Residential Lease" and requested that the Appellant execute the document. The purported Lease reflected Curtis McAlister as Landlord and Shawonda Scott Sabb as Resident for rental of the property in the amount of \$500.00 per month commencing May 1, 2010, until November 1, 2010, and thereafter on a month-to-month tenancy. Payments were to be made at 405 Belle Claire Drive, Columbia, SC, to Acquana McAlister or Rosalind McAlister Najee. Appellant denied that she was renting or leasing the property and refused to sign the document.

Pursuant to the request of Defendant Acquana McAlister, on or about October 20, 2010, Respondents Cyrus and Williamsburg County changed the property's mailing address on the

County's tax records from 196 Gausetown Road, Kingstree, SC 29556 to 2520 Carroll Drive, Columbia SC 29204. The Appellant was not made aware of the change of address. She did not receive notice of the tax delinquency, or subsequent correspondence, if any, between the Tax Collector and Defendants Curtis McAlister and Acquana McAlister.

On November 12, 2010, Defendant Curtis McAlister again filed an Application for Ejectment in the Magistrate Court in Case Number 2010-CV-45-10101078 on the grounds that Appellant had failed and refused to pay rent when due or demanded. Appellant retained counsel who filed an Answer to the Rule to Vacate contesting the jurisdiction of the Magistrate Court on the basis that she and Defendant Curtis McAlister had entered into a purchase agreement, not a lease. The matter was scheduled for a bench trial on January 7, 2011.

On September 9, 2014, Defendant Williamsburg County, by its Tax Collector, Respondent Norma L. Cyrus, executed a Tax Deed conveying the Property to Hattie S. Pendergrass for the sum of \$800.00 for delinquent taxes for the period 2011. Appellant alleges that Respondents Cyrus, Tax Collector, and the County of Williamsburg did not comply with the statutory requirements concerning notice of delinquent taxes, levy and the impending sale.

Appellant alleges collusion and a conspiracy among Defendants Curtis McAlister, Acquana McAlister, Hattie S. Pendergrass and Hartwell Pendergrass, Sr., in that they combined, conspired and colluded for the purpose of breaching the Contract between the Appellant and Defendant Curtis McAlister in order to deprive the Appellant of the benefits of the Contract. The aim of said conspiracy was accomplished by refusing to pay the taxes on the property, failing to inform the Appellant that Defendant Curtis McAlister had not paid the taxes, failing to request that the Appellant pay the taxes, as was his custom, concealing notice of the delinquency from the Appellant, allowing the property to be sold at auction to a third party, and thereby

divesting the Appellant of the interest in and title to the property she acquired by virtue of the Contract.

Appellant asserts that Hattie S. Pendergrass is in wrongful possession of the Property. Furthermore, due to her complicity in the scheme to deny the Appellant title to the property, Defendant Hattie S. Pendergrass should be restrained and enjoined from exercising the rights and responsibilities of a lawful owner of the premises pending a judicial resolution of the controversies at issue.

Under cover of a certified letter dated July 6, 2015, and received by Appellant on July 13, 2015, Defendants Hartwell Pendergrass, Sr., and Hattie S. Pendergrass made an offer, as landlords, to rent the Property to the Appellant for \$400.00 per month and enclosed a document entitled "Basic Rental Agreement or Residential Lease containing the terms of the offer. The letter informed the Appellant that her failure to execute the Rental Agreement will constitute a revocation of the offer and the letter will then in turn, act as a thirty (30) day notice for Appellant to vacate the premises. The thirty day time to vacate began to toll upon receipt of the letter.

On August 5, 2015, the Appellant instituted this action with the filing of a Summons and Complaint seeking, *inter alia*, judgment voiding the sale of the property by Respondents for delinquent taxes and setting aside the tax deed to Hattie S. Pendergrass. The Appellant also filed a Lis Pendens and a Motion for Injunction for Temporary and Permanent Relief. On April 26, 2016, the Circuit Court judge issued his Order granting an injunction and required the Appellant to pay into court \$300.00 per month as a security deposit pending final disposition of the litigation. On September 3, 2016, Respondents filed their Answer asserting a general denial and requested that the action be dismissed.

On June 28, 2018, Respondents filed a Motion for Summary Judgment based upon the pleadings, depositions, and evidence provided, pursuant to Rule 56, SCRPC, the South Carolina public duty doctrine, South Carolina Tort Claims Act, § 15-78-10, *et seq.*, applicable South Carolina case law to be incorporated in the forthcoming Defendants' Memorandum in Support for Summary Judgment.

On July 7, 2018, Appellant filed her Reply to Respondents' Motion for Summary Judgment: Respondents' Memorandum in Support of Summary Judgment was filed July 9, 2018.

On July 9, 2018, at 12:44 P.M., Respondents filed a Motion to Amend their Answer to assert the South Carolina Tort Claims Act, § 15-78-10, *et seq.*, as an affirmative defense. The record does not reflect that the Motion to Amend Respondent's Answer was considered, heard or granted. However on July 9, 2018, at 12:44 P.M., Respondents filed an Amended Answer in which they pled the affirmative defense and immunities available to them pursuant to the South Carolina Tort Claims Act, § 15-78-10, *et seq.*, with regard to Appellant's Fifth Cause of Action (Violation of Statute).

Respondent's Motion for Summary Judgment came on for hearing before The Honorable George M. McFaddin, Jr., on September 27, 2018.

STANDARD OF REVIEW

"On review of an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRPC. Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In an appeal from an order granting

summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party." Joseph v. South Carolina Department of Labor, Licensing And Regulation, et al, 417 S.C. 436, 790 S.E.2d 763 (2016) Reh'g Denied Dec. 7, 2016. (Internal Cites Omitted)

ARGUMENT

Whether or not the Circuit Court Judge erred in granting Respondents' Motion for Summary Judgment based upon the Court's determination that the Appellant lacks standing and is not owed any duty from the Respondents under S.C. Code Ann. § 12-51-40 (1976) as amended

The Order of the Circuit Court Judge states that the Appellant asserts that Respondents Norma L. Cyrus and County of Williamsburg are liable to her for violating S.C. Code § 12-51-40 by not providing her with notice of the delinquent taxes, the sale of the property and the opportunity to redeem the subject property located at 196 Gausetown Road, Kingstree, South Carolina. Citing Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999), the Circuit Court Judge noted that the notice provision of S.C. Code § 12-51-40 creates a special duty to the owner of property so as to provide him or her with notice to protect the taxpayer against surprise or the sacrifice of his or her property. The Court determined that the Appellant does not fall under the public duty exception, nor is she owed this special duty because she is not the defaulting taxpayer of record, nor the owner of record, nor the grantee of record in regards to the subject property; therefore she lacks standing and is not owed any duty from the Respondents under § 12-51-40.

Appellant respectfully contends that the Circuit Court Judge erred in granting summary judgment because when viewed in the light most favorable to her, the ambiguities, conclusions, and inferences arising in and from the pleadings, depositions, answers to interrogatories, documents

produced in discovery, and admissions on file show that summary judgment is not appropriate in this case.

With regard to standing, the unique circumstances in this case gives Appellant standing in light of the manner in which she acquired her interest in the real property. Furthermore, Appellant is owed a duty under § 12-51-40 because she falls within the special duty exception to the public duty doctrine. In *Tanner, supra*, the South Carolina Supreme Court drew the following distinction between the South Carolina Tort Claims Act, S. C. Code Ann. § 15-78-10 (1976), and the public duty doctrine:

Immunity is an affirmative defense which must be pleaded and can be waived. One who pleads immunity conditionally admits the plaintiff's case, but asserts immunity as a bar to liability. In contrast, the public duty rule is a negative defense which denies an element of the plaintiff's cause of action - the existence of a duty of care to the individual plaintiff. The burden is on the plaintiff to show a duty of care was owed to him. In the context of a negligence action, the public duty rule may be stated as follows: a statute prescribing the duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties.

Tanner, 336 S.C. at 561, 521 S.E.2d at 157 (*Internal Cites Omitted*)

"Under South Carolina law, however, a "special duty" to particular individuals may be created by such a statute when:

- (1) an essential purpose of the statute is to protect against a particular kind of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;
- (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and

(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office."

Tanner, 336 S.C. at 562, 521 S.E.2d at 158

Respondents Norma L. Cyrus and the County of Williamsburg's duty to the Appellant under the six-factor test is set forth in the enabling legislation which provides for them to act in the circumstances involved here. The pertinent portion of the Code Section governing these Respondents at the time of the 2012 Tax Sale is as follows:

After the county treasurer issues his execution against a defaulting taxpayer in his jurisdiction, as provided in Section 12-45-180, signed by him or his agent in his official capacity, directed to the officer authorized to collect delinquent taxes, assessments, penalties, and costs, requiring him to levy the execution by distress and sale of the defaulting taxpayer's estate, real or personal, or both, or property transferred by the defaulting taxpayer, the value of which generated all or part of the tax, to satisfy the 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 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. The notice must specify that if the taxes, penalties, assessments, and costs are not paid, the property must be advertised and sold to satisfy the delinquency. (*Emphasis supplied*)

(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". If the addressee is an entity instead of an individual the notice must be mailed to its last known post office address by certified mail, return receipt requested, as described in 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 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. ...*(Emphasis supplied)*

(d) The property must be advertised for sale at public action. The advertisement must be in a newspaper of general circulation with the county 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, and two consecutive weeks for the sale of personal property. All expense of the levy, seizure, ad sale must be added and collected as additional costs, and must include, but not be limited to, the expenses of taking possession of real or person property, advertising, storage, identifying the boundaries of the property, and mailing certified notices. ...

S. C. Code Ann. § 12-51-40 (2000)

Appellant and Defendant Curtis McAlister had an arrangement whereby the tax notices came to the address of the subject property and for Appellant to pay the taxes to the Respondents.

(Deposition of Curtis McAlister, (R. p. 173, line 13 – p 174, line 21; p. 180, line 12 – p. 181, line

7) When the tax notice mailing address was changed by the Respondents from the property address to the Columbia address, the Appellant did not receive the notices and correspondence.

Likewise, Defendant Curtis McAlister did not receive the correspondence because the mail addressed to him was returned to the Respondents by the United States Postal Service; thereby putting the Respondents on notice that they were not in compliance with the applicable statutory requirements.

Respondents owed a public duty to the Appellant as established by the six-factor test due to her position as taxpayer in fact and her relationship with the Defendant Curtis McAlister. The

evidence establishes at this juncture in the proceedings that these Respondents failed, at the least, to comply with the notice provision. The Appellant asserts that she received no notice from these Respondents either prior to or after the sale, that she lived on the premises, and that no notice was placed on the property as required by statute. By virtue of her interest in the real estate acquired under her contract of sale, she was entitled to notice of delinquent taxes, an impending sale by auction, and the right of redemption after the sale.

“Tax sales must be conducted in strict compliance with statutory requirements.” Moreover, “failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings absolutely void”. *Baker v. Denton*, 37 F. Supp.3d 794, U.S. District Ct., DSC, Charleston Div. 2014.

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence. A plaintiff alleging negligence on the part of a governmental actor or entity may rely either upon a duty created by statute or one founded on the common law. When the duty is created by statute, we refer to this as a “special duty,” whereas when the duty is founded on the common law, we refer to this as a legal duty arising from “special circumstances.”

Platt v. CSX Transportation, Inc., 388 S.C. 441, 445, 697 S.E.2d 575, 577 (2010)

Discovery material in the record, including a letter dated October 29, 2014, addressed to Norma Cyrus, Tax Collector, from Doward Keith Harvin, Esquire, Appellant's attorney at that time, refer to the contract for the sale of the subject property to the Appellant by Defendant Curtis McAlister, the fact that the Appellant occupied the subject premises at the time and the allegation that no notice was posted on the property as required by law. The letter also discusses the unauthorized change of address, while Defendant Curtis McAlister was hospitalized, made by Defendant Acquana McAlister to have tax notices mailed to Defendant Curtis McAlister at an

address in Columbia, SC. (*Letter dated October 29, 2014, from Doward Keith Harvin to Norma Cyrus, Tax Collector, R. p. 444*)

Respondent Cyrus responded to Mr. Harvin through W. L. Jenkinson, III, Esquire, one of her current attorneys in this action, by letter dated December 18, 2014. Of particular relevance in considering summary judgment is the following statement by Mr. Jenkinson: "As we see it, the only remedy your client has is to file a suit against Mrs. Pendergrass, the current owner, alleging that the tax deed should be set aside. Williamsburg County and Mrs. Cyrus, as Tax Collector, would (*sic*) necessary parties, even though they will take no serious position one way or another other than to relate the facts from their file." (*Letter dated December 18, 2014, from W.E. Jenkinson, III, to Doward Harvin, Esquire, R. p. 445*)

Concerning the unauthorized change of address, the Respondent's Residential Appraisal Card for Tax Map Number 45-200-016 for Curtis McAlister 2520 Carroll Dr Columbia SC 29204 shows in the Remarks & Description section shows the notation "10/20/10 Change of Address requested by his daughter Acquana McAlister" (*Residential Appraisal Card for Tax Map Number 45-200-016 for Curtis McAlister 2520 Carroll Dr Columbia SC 29204, R. p. 446*) The record contains an Address Change form dated 06/29/11 requested by Defendant Acquana McAlister by phone and another Address Change Form dated 10/20/10 by Defendant Acquana McAlister and the Date of Change as 10-21-10. (*Address Change form dated 06/29/11 requested by Defendant Acquana McAlister by phone, R. p. 449; Address Change Form dated 10/20/10 requested by Defendant Acquana McAlister showing the Date of Change as 10-21-10, R. p. 448*)

The statutorily delinquent tax and sale notices sent to Defendant Curtis McAlister at the address on the address change forms were returned to the Respondents. (*USPS Certified Mail Number 7100 5868 2454 5112 6759 from Norma L. Cyrus Williamsburg County Tax Collector*

addressed to McAlister Curtis 2520 Carroll Dr, Columbia SC 29204 bearing stamp dated 8/28/12 and marked "Return To Sender – Unclaimed – Unable to forwarded" containing a handwritten notation "8/31/12," R. p. 452; USPS Form 3811, Restricted Delivery Certified Mail receipt Number 7100 5868 2454 5112 6759 addressed to McAlister Curtis 2520 Carroll Dr, Columbia SC, R. p. 453; USPS Certified Mail Receipt 7013 1710 0000 0096 8966 addressed to McAlister Curtis 2520 Carroll Dr. Columbia, SC 29204, R. p. 454; USPS Certified Mail No. 7013 1710 0000 0096 8966 from Norma L. Cyrus, Delinquent Tax Collector addressed to McAlister Curtis 2520 Carroll Dr. Columbia, SC 29204 containing notation "Return To Sender Temporarily Away Unable to Forward" bearing handwritten notation "12/28/13", R. p. 456)


The Circuit Court Judge erred in holding that the Respondents are entitled to summary judgment because there is evidence in the record that they have failed to discharge their duty owed to the Appellant imposed upon them by statute which question is for disposition by a jury. The Complaint, Appellant's Motion for Injunction, Depositions, testimony at the hearing on September 27, 2018, and notations on the records of Respondents indicate that the ad valorem taxes on the subject property had, at times, been paid by the Appellant. In this case there are genuine issues of material fact which warrant consideration by a jury. "Generally, at the pleadings stage, the factual allegations made by the plaintiff in regards to his claim are taken as true." *Tanner*, 336 S.C. at 560, 321 S.E.2d at 157.

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to issue its opinion ordering that the Order of the Circuit Court judge granting summary judgment in favor of Respondents be reversed and allow the case to be tried by a jury.

Respectfully submitted,

MOORE LAW FIRM, L.L.C.



Dwight C. Moore, SC Bar No. 63008
26 North Main Street 29150
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone (803) 778-6520
Fax (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for Appellant

June 26, 2019

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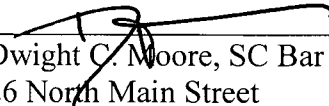
Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule
211(b), SCACR.

June 26, 2019.

MOORE LAW FIRM, L.L.C.



Dwight C. Moore, SC Bar No. 68003
26 North Main Street (29150)
Post Office Box 1229
Sumter, South Carolina 29151-1229
Telephone: (803) 778-6520
Fax: (803) 775-6365
Email: moorelawfirm@ftc-i.net
Attorney for Appellant