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THE PROPERTY HAS BEEN SOLD FOR TAXES: What does that mean and what should you do?

Paul H. Greenwood and M. Lee Johnsey

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Code of Ala. § 40-10-82 (2014)

§ 40-10-82. Statute of limitations.

No action for the recovery of real estate sold for the payment of taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor; but if the owner of such real estate was, at the time of such sale, under the age of 19 years or insane, he or she, his or her heirs, or legal representatives shall be allowed one year after such disability is removed to bring an action for the recovery thereof; but this section shall not apply to any action brought by the state, to cases in which the owner of the real estate sold had paid the taxes, for the payment of which such real estate was sold prior to such sale, or to cases in which the real estate sold was not, at the time of the assessment or of the sale, subject to taxation. There shall be no time limit for recovery of real estate by an owner of land who has retained possession. If the owner of land seeking to redeem has retained possession, character of possession need not be actual and peaceful, but may be constructive and scrambling and, where there is no real occupancy of land, constructive possession follows title of the original owner and may only be cut off by adverse possession of the tax purchaser for three years after the purchaser is entitled to possession.

HISTORY: Acts 2009, No. 09-508, § 1, Sept. 1, 2009.

NOTES: 2009 amendments.

The 2009 amendment, effective September 1, 2009, in the first sentence, deleted "nor" following "the state" and substituted "or to cases" for "nor shall they apply to cases" following "to such sale"; added the second and third sentences; and made stylistic changes.

NOTES TO DECISIONS

Construction with other law. Equity. Evidence -- Insufficient. Evidence -- Sufficient. Redemption barred. Requirements. Running of statute. Title. Tolling of statute. When applicable. Where applicable. Illustrative cases. Miscellaneous.

Construction with other law.

When the requirements of § 40-10-122 have been complied with, there is no time limit to an exercise of the right to redeem. The short statute of limitations, three years, of this section is not an extension of the time in which a statutory redemption may be had. *Heard v. Gunn, 262 Ala. 283, 78 So. 2d 313, 1955 Ala. LEXIS 426 (1955).*

Equity.

This section has application when a party comes into equity to quiet title, where the land was brought in by and later purchased from the state, and where the tax sale was void. *MacQueen v. McGee, 260 Ala. 315, 70 So. 2d 260, 1954 Ala. LEXIS 603 (1954).*

Evidence -- Insufficient.

Discussion of the insufficiency of the evidence to establish that the lot in dispute had been sold for taxes and that title, therefore, was not established under this section. *Moorer v. Macon, 273 Ala. 66, 134 So. 2d 181, 1960 Ala. LEXIS 556 (1960).*

Tax purchaser's evidence of adverse possession for the statutory three-year period following the state's issuance of the tax deed held not to be so conclusive and of such weight as to mandate a judgment in favor of the purchaser against one exercising a redemption right. *Rabren v. Osmon, 613 So. 2d 390, 1993 Ala. LEXIS 111 (1993).*

Evidence -- Sufficient.

Adverse possession of wild land discussed. *Moorer v. Malone, 248 Ala. 76, 26 So. 2d 558, 1946 Ala. LEXIS 180 (1946).*

There was sufficient evidence to support the decree to quiet title, in that the essential elements of adverse possession and the use or exercise of such dominion over it as in its present state it is reasonably adapted to were established, where complainant filed cross bill and claimed a right of redemption. *MacQueen v. McGee, 260 Ala. 315, 70 So. 2d 260, 1954 Ala. LEXIS 603 (1954).*

Discussion of the sufficiency of the evidence to sustain a finding of adverse possession in surface land where the adverse party had an invalid tax deed and together with his successor had paid taxes on the property for ten years. *Pierson v. Case, 272 Ala. 527, 133 So. 2d 239, 1961 Ala. LEXIS 505 (1961).*

Discussion of the sufficiency of the evidence to sustain a finding that the tax title holders had adverse possession for more than the period of time required under this section. *Myers v. Moorer, 273 Ala. 18, 134 So. 2d 168, 1961 Ala. LEXIS 546 (1961).*

Redemption barred.

A claimant is barred from redeeming the property sold at a tax sale where the purchaser was in continuous adverse possession for three years after he became entitled to demand a tax deed from the probate judge. *Cowden v. Hughes, 353 So. 2d 505, 1977 Ala. LEXIS 2152 (1977).*

Three years of continuous adverse possession of the lands by a tax sale purchaser, measured from the date that he becomes entitled to demand a tax deed thereto, will bar an action by the former owner except in those instances mentioned in this section. *Trehern v. Wilkerson, 356 So. 2d 1185, 1978 Ala. LEXIS 2169 (1978).*

In order for the "short statute of limitations" of this section to bar redemption under section 40-10-83, the tax purchaser must prove continuous adverse possession for three years after he is entitled to demand a tax deed. *Stallworth v. First Nat'l Bank, 432 So. 2d 1222, 1983 Ala. LEXIS 4383 (1983).*

Requirements.

It was not necessary to show that the person purchased the property from the state of Alabama, actually took possession of the property himself; it is sufficient if he took possession through an agent or through a licensee. *Hanna v. Ferrier, 265 Ala. 450, 91 So. 2d 700, 1956 Ala. LEXIS 556 (1956).*

As between a bona fide purchaser for value of property with an incorrect description in the deed and a purchaser at a tax sale for unpaid taxes, in equity, the bona fide purchaser for value should prevail. This section did not control, as the defendant (the tax sale purchaser) contended, as the evidence tended to show that he was not in exclusive possession of the property for three years, after he was entitled to demand a tax deed. *Snuggs v. Stabler, 598 So. 2d 884, 1992 Ala. LEXIS 475,* 26 Ala. B. Rep. 3066 (1992).

In order for the period of this section to bar redemption under this section, the tax purchaser must prove continuous adverse possession for three years after he is entitled to demand a tax deed; here taxpayer corporation was in possession of the property when the purchasers began their acts of possession in June, 1994, and the corporation sought to redeem

in August, 1994, well before adverse possession period had run. *Ervin v. Amerigas Propane, 674 So. 2d 543, 1995 Ala. Civ. App. LEXIS 379 (Civ. App. 1995).*

Running of statute.

The statute of limitations under this section begins to run in favor of a purchaser at a tax sale, or the purchaser's vendee in actual possession, on the day when the purchaser becomes entitled to demand a deed therefor. *Bedsole v. Davis, 189 Ala. 325, 66 So. 491, 1914 Ala. LEXIS 142 (1914).*

The statute of limitations does not begin to run in favor of the purchaser at a tax sale until the purchaser is in actual adverse possession of the land and until the day when the purchaser is entitled to demand a deed therefor. *Postell v. Postell, 248 Ala. 312, 27 So. 2d 477, 1946 Ala. LEXIS 227 (1946).*

This section does not begin to run until the purchaser takes adverse possession of the land and is entitled to demand a deed therefor. *Bell v. Pritchard, 273 Ala. 289, 139 So. 2d 596, 1962 Ala. LEXIS 348 (1962).*

The three year statute of limitations against recovery of land sold for taxes does not begin to run until purchaser is in adverse possession and has become entitled to demand a deed to it from the judge of probate. *Tanner v. Case, 273 Ala. 432, 142 So. 2d 688, 1962 Ala. LEXIS 391 (1962).*

Actual possession of minerals is not required to start the running of the statute of limitations under this section. *Nelson v. Teal, 293 Ala. 173, 301 So. 2d 51, 1974 Ala. LEXIS 941 (1974).*

The "short statute of limitations," which states that the redemption action must be filed within three years from the date when the purchaser became entitled to demand a deed for the property, does not begin to run until the purchaser is in adverse possession of the land and has become entitled to demand a deed to the land. *Williams v. Mobile Oil Exploration & Producing Southeast, Inc., 457 So. 2d 962, 1984 Ala. LEXIS 4651 (1984).*

Title.

The grantee named in a void tax deed acquires only the right to be reimbursed by one who had a right to redeem from the sale. Thus, the grantee does not have a claim to title under the void tax deed. *Hames v. Irwin, 253 Ala. 458, 45 So. 2d 281, 1949 Ala. LEXIS 250 (1949),* aff'd, *256 Ala. 319, 54 So. 2d 293, 1951 Ala. LEXIS 56 (1951).*

The defendant who claims title under a tax deed from the state and makes no proof of regularity and validity of the tax title under which he claims, must show adverse possession for the statutory period in connection with his tax title in order to prevail. *Thomas v. Rogers, 256 Ala. 53, 53 So. 2d 736, 1951 Ala. LEXIS 40 (1951).*

A tenant in common who acquires land from buyer at tax sale can get title under the short statute of limitations, if his possession is adverse to other tenants in common for three years. *Bell v. Williams, 256 Ala. 298, 54 So. 2d 582, 1951 Ala. LEXIS 81 (1951).*

A purchaser at tax sale, even though the proceedings were irregular, acquires an interest in land, a right to take possession of the land and hold it for three years, and thereby acquire title even though there was no evidence that purchaser took actual possession; and when he made the deed to the grantee, that interest and right were conveyed to the grantee who took possession, and, having held possession of the land for the required time, had the right to claim the benefit of the short statute of limitations. *Pfaffman v. Case, 259 Ala. 411, 66 So. 2d 890, 1953 Ala. LEXIS 326 (1953).*

Tolling of statute.

Under the authority of Soldiers' and Sailors' Civil Relief Act of 1940, the statute of limitations was tolled during the period of military service of owner whose land was sold for the assessments. *MacQueen v. McGee, 260 Ala. 315, 70 So. 2d 260, 1954 Ala. LEXIS 603 (1954).*

When applicable.

The short statute does not begin to run until actual adverse possession is taken under it, and the short statute has no application, if defendant fails to show adverse possession under his tax deed for three years before this suit was instituted. *Lathem v. Lee, 249 Ala. 532, 32 So. 2d 211, 1947 Ala. LEXIS 417 (1947).*

This section does not come into operation until adverse possession is shown. *Ellis v. Stickney, 253 Ala. 86, 42 So. 2d 779, 1949 Ala. LEXIS 198 (1949).*

This section applies to cases where land is purchased from the state as well as instances where the purchase is made from the tax collector. *Merchants Nat'l Bank v. Lott, 255 Ala. 133, 50 So. 2d 406, 1951 Ala. LEXIS 270 (1951).*

Although tax sale of realty made by the state may have been void by reason of noncompliance with statutory requirements, this did not render three year statute of limitations for recovery of realty inapplicable. *Finerson v. Hubbard, 255 Ala. 551, 52 So. 2d 506, 1951 Ala. LEXIS 368 (1951).*

The three year "short statute of limitation" did not apply to bar owner's suit to redeem land sold at tax sale where nothing in the evidence justified a conclusion that the purchasers of the land were in the actual adverse possession of it. *Quinn v. Hannon, 262 Ala. 630, 80 So. 2d 239, 1955 Ala. LEXIS 483 (1955).*

This section applies to proceedings in equity as well as in ejectment actions; it applies to void tax sales as well as to valid sales; it applies when the land is purchased from the state as well as in instances where the purchase is made from the tax collector. *Bell v. Pritchard, 273 Ala. 289, 139 So. 2d 596, 1962 Ala. LEXIS 348 (1962).*

Statute of limitations never runs against remainderman or reversioner during existence of life estate, nor can there be any adverse possession as to him. *Monte v. Montalbano, 274 Ala. 6, 145 So. 2d 197, 1962 Ala. LEXIS 462 (1962).*

For purposes of determining whether a void tax deed provided purchasers with color of title, the proper statute of limitations to apply to determine the effect on the tax deed of the landowners' failure to bring a timely action for recovery of the property was the statute in effect at the time suit was brought, not the statute in force at the time of the tax sale. *Green v. Dixon, 727 So. 2d 781, 1998 Ala. LEXIS 164,* 32 Ala. B. Rep. 2755 (1998).

Where applicable.

Where the tax sale was void and insufficient to convey title to the lands, and where the assessment was made in the name of and against a person who had no interest in the land, the short statute of limitation is operative and effective. *Postell v. Postell, 248 Ala. 312, 27 So. 2d 477, 1946 Ala. LEXIS 227 (1946).*

Illustrative cases.

Although no houses were built on the disputed land, where the defendant purchased them at a tax sale and then turpentined the trees and logged the property for five years, notice of occupancy was given, the action for ejectment was barred. *Bedsole v. Davis, 189 Ala. 325, 66 So. 491, 1914 Ala. LEXIS 142 (1914).*

Right of redemption in cases where valid tax titles have been made, and the original owner remains in possession is not subject to the two year limitation of Code of 1923, § 3109. *Burdett v. Rossiter, 220 Ala. 631, 127 So. 202, 1930 Ala. LEXIS 83 (1930).*

A defendant in a statutory suit for ejectment is not entitled to the protection of this section where he was not a purchaser at a tax sale, but merely redeemed premises from a sale to satisfy taxes which he had failed to pay. *Miller v. Cook, 252 Ala. 564, 42 So. 2d 239, 1949 Ala. LEXIS 487 (1949).*

Under the facts in this case, the interest which the plaintiff owned in the suit property at the time of the tax sale was subject to redemption and, hence, the trial court erred in denying her the relief for which she prayed and in dismissing the bill; her deed conveying a part of her interest in the suit property was not subject to cancellation on the ground that she had no interest to convey. *Chastang v. Washington Lumber & Turpentine Co., 267 Ala. 390, 102 So. 2d 899, 1958 Ala. LEXIS 346 (1958).*

Record supported trial court's finding that appellants in quiet title action were barred by this section. *Grice v. Taylor, 273 Ala. 591, 143 So. 2d 447, 1962 Ala. LEXIS 431 (1962).*

Under the facts in this case the record title holder was entitled to redeem the property. *Giardina v. Williams, 512 So. 2d 1312, 1987 Ala. LEXIS 4388 (1987).*

A tax purchaser of property is not in adverse possession of the property where her only act of ownership is the payment of taxes. *Craig v. Willcox, 655 So. 2d 1002, 1994 Ala. Civ. App. LEXIS 578 (Civ. App. 1994).*

Landowners were entitled to redeem their property from the purchaser at a tax sale because their application was timely where it was filed within three years of the tax sale and the tax purchaser had not taken any steps to establish adverse possession. *Mcleod v. White, 45 So. 2d 360, 2010 Ala. Civ. App. LEXIS 55* (Feb. 26, 2010).

Miscellaneous.

This section is but a short statute of limitation, applicable on the grounds of public policy to an action for recovery of real estate sold for payment of taxes. *Laney v. Proctor, 236 Ala. 318, 182 So. 37, 1938 Ala. LEXIS 168 (1938).*

A tenant buying at a tax sale does so to save his possessory right and such a purchase operates as a payment of the taxes for the landlord, which the tenant may charge to his landlord by way of set-off. *Brunson v. Bailey, 245 Ala. 102, 16 So. 2d 9, 1943 Ala. LEXIS 71 (1943).*

Invalidity of the tax sale is immaterial if adverse possession is proved for the three-year period. *Hand v. Stanard, 392 So. 2d 1157, 1980 Ala. LEXIS 3295 (1980).*

Whether a property owner who lost his house in a tax sale was in possession at the time he filed suit is immaterial under the rule that the former owner's right of action is not extinguished until the tax purchaser has retained adverse possession for three years, or the owner's claim of redemption was barred by the rule of repose. *Karagan v. Bryant, 516 So. 2d 599, 1987 Ala. LEXIS 4593 (1987).*

Statute of limitations does not begin to run until the purchaser of the property at a tax sale has become entitled to demand a deed to the land; and the tax purchaser is entitled to "quiet title" relief only after being in exclusive, adverse possession for the statutory three-year period. *Reese v. Robinson, 523 So. 2d 398, 1988 Ala. LEXIS 157 (1988).*

Trial court's order granting a corporation's request to redeem title to real property that an association bought at a tax sale, pursuant to *Ala. Code § 40-10-82 (1975)*, was improperly certified as a final order, pursuant to Ala. R. Civ. P. 54(b), because the association also claimed title by adverse possession, and the appellate court dismissed the association's appeal because the appeal was taken from a nonfinal judgment. *Point Clear Landing Ass'n v. Point Clear Landing, Inc., 864 So. 2d 369, 2003 Ala. Civ. App. LEXIS 335 (Civ. App. 2003).*

Cited in

Grayson v. Muckleroy, 220 Ala. 182, 124 So. 217, 1929 Ala. LEXIS 419 (1929); Timms v. Scott, 248 Ala. 286, 27 So. 2d 487, 1946 Ala. LEXIS 230 (1946); Bobo v. Edwards Realty Co., 250 Ala. 344, 34 So. 2d 165, 1947 Ala. LEXIS 535 (1947); Lindsey v. Atkison, 250 Ala. 481, 35 So. 2d 191, 1948 Ala. LEXIS 597 (1948); Daniels v. Hogg, 250 Ala. 661, 35 So. 2d 684, 1948 Ala. LEXIS 648 (1948); Merchants Nat'l Bank v. Morris, 252 Ala. 566, 42 So. 2d 240, 1949 Ala. LEXIS 489 (1949); Wylie v. Lewis, 263 Ala. 522, 83 So. 2d 346, 1955 Ala. LEXIS 695 (1955); Clark v. Case, 267 Ala. 229, 100 So. 2d 747, 1957 Ala. LEXIS 506 (1957); McGhee v. Walker, 268 Ala. 521, 108 So. 2d 433, 1958 Ala. LEXIS 531 (1958); Family Land & Inv. Co. v. Williams, 273 Ala. 273, 138 So. 2d 696, 1961 Ala. LEXIS 589 (1961); Turnham v. Potter, 289 Ala. 685, 271 So. 2d 246, 1972 Ala. LEXIS 1131 (1972); Riley v. Depriest, 295 Ala. 68, 322 So. 2d 713, 1975 Ala. LEXIS 1367 (1975); Almon v. Champion Int'l Corp., 349 So. 2d 15, 1977 Ala. LEXIS 1803 (1977); English v. Brantley, 361 So. 2d 549, 1978 Ala. LEXIS 1903 (1978); O'Connor v. Rabren, 373 So. 2d 302, 1979 Ala. LEXIS 2957 (1979); Van Meter v. Grice, 380 So. 2d 274, 1980 Ala. LEXIS 2630 (1980); Gulf Land Co. v. Buzzelli, 501 So. 2d 1211, 1987 Ala. LEXIS 4091 (1987); Bendor v. Murry, 611 So. 2d 1100, 1992 Ala. Civ. App. LEXIS 532 (Civ. App. 1992); Daugherty v. Rester, 645 So. 2d 1361, 1994 Ala. LEXIS 210 (1994); Tabor v. Certain Lands, 736 So. 2d 622, 1999 Ala. Civ. App. LEXIS 230 (Civ. App. 1999); McGuire v. Rogers, 794 So. 2d 1131, 2000 Ala. Civ. App. LEXIS 588 (Civ. App. 2000).

RESEARCH REFERENCES

Evans: Property Rights.

§ 10.3(g), n. 103.

TAB 2

Positive
As of: Dec 04, 2014

Warren S. Reese, Jr. v. Lela Pearle G. Robinson

No. 87-173

Supreme Court of Alabama

523 So. 2d 398*; *1988 Ala. LEXIS 157

April 1, 1988, Filed

PRIOR HISTORY: [**1] Appeal from Montgomery Circuit Court, Charles Price, Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant tax purchaser sought review of a judgment of the Montgomery County Circuit Court (Alabama), which granted appellee taxpayer's Ala. R. Civ. P. 60(b) motion to set aside a final judgment that had quieted title in the purchaser of title to land purchased at a tax sale and a subsequent judgment awarding the taxpayer the property.

OVERVIEW: The purchaser bought three lots of residential property at a public sale for taxes, costs, and expenses. Three years later, the purchaser received an executed tax deed from a county probate judge stating that the time for redemption of the property by the taxpayer had lapsed. Four years later, the purchaser filed a complaint to quiet title. Service was attempted on the taxpayer, but returned. Judgment was eventually entered for the purchaser, with no appearance by the taxpayer. The taxpayer later appeared and moved the trial court to set aside the judgment. She argued that the purchaser was not in exclusive possession and, therefore, had not been in actual adverse possession of the property, as required by *Ala. Code § 40-10-82 (1975)*, for the requisite three-year period so as to cut off her right of redemption. The trial court granting the motion. On appeal, the court held that the trial court properly set aside the judgment. *Section 40-10-82* gave the taxpayer a meritorious defense to the purchaser's quiet title action. Further, the trial court did not abuse its discretion in ruling on the merits of the taxpayer's defense in her favor.

OUTCOME: The court affirmed the judgment of the trial court.

COUNSEL: Eugene W. Reese, Montgomery, Attorney for Appellant.

H. Dean Mooty, Jr., of Capell, Howard, Knabe & Cobbs, Montgomery, Attorney for Appellee.

JUDGES: Torbert, C. J., and Jones, Shores, Adams, and Steagall, JJ., concur.

OPINION BY: PER CURIAM

OPINION

[*399] Warren S. Reese, Jr., appeals from the Montgomery County Circuit Court's grant of Lela G. Robinson's Rule 60(b), A.R.Civ.P., motion to set aside a final judgment that had quieted in Reese the title to land purchased at a tax sale in Montgomery County and its subsequent judgment awarding Robinson that property.

In May 1978, Reese purchased three lots of residential property at a public sale by the Montgomery County tax collector for taxes, costs, and expenses. At that time, the owner of the property was Lela G. Robinson, as reflected by county tax assessment records. In June 1981, Reese received an executed tax deed from the county probate judge, which stated that the time for redemption of the property by its owner, Robinson, had lapsed.

Reese filed a complaint to quiet title to the property on July 30, 1985; service attempted on Robinson was returned as "attempted--not known." The court ordered service [**2] by publication, and Reese published notice in a Montgomery newspaper of general circulation for four successive weeks, as required by Rule 4.3, A.R.Civ.P. A guardian ad litem was appointed by the court to represent any and all minors, persons of unsound mind, persons in the armed forces, and unknown heirs and parties. Judgment was entered on January 8, 1986, quieting title to the property in Reese; Robinson had not made an appearance.

On December 9, 1986, however, Robinson appeared and moved the court to set aside its judgment of January 8. She argued that Reese, as the purchaser at the tax sale, was not in "exclusive" possession and, therefore, had not been in actual adverse possession of the property, as required by *Code 1975, § 40-10-82*, for the requisite period of three years so as to cut off her right of redemption. The court agreed and set aside its judgment quieting title in Reese. Reese appeals.

The only issue before this Court is the propriety of the order setting aside of the judgment quieting title in Reese. While we recognize that the decision to grant or deny a motion for relief from a judgment is within the discretion of the trial court, and that the standard of our [**3] review is whether the trial court abused its discretion, this discretion is not unbridled. *Chambers County Comm'rs v. Walker, 459 So. 2d 861 (Ala. 1984)*. A strong presumption of correctness, however, attaches to the trial court's ruling on a Rule 60(b) motion. *Ex parte Dowling, 477 So. 2d 400 (Ala. 1985)*.

[*400] *Code 1975, § 40-10-82*, states that no action for the recovery of land sold for the payment of taxes "shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor." [1] Robinson successfully argued to the trial court that this Code section required that Reese, in order to cut off Robinson's right of redemption, possess the property exclusively and adversely for a three-year period, and that, according to undisputed evidence, he had not done so. *Section 40-10-82* has been construed as a "short" statute of limitations (*Williams v. Mobil Oil Exploration & Producing Southeast, Inc., 457 So. 2d 962 (Ala. 1984)* [2]), and does not begin to run until the purchaser of the property at a tax sale has become entitled to demand a deed to the land; and the tax purchaser is entitled to "quiet title" relief only after being [**4] in exclusive, adverse possession for the statutory three-year period. *Gulf Land Co. v. Buzzelli, 501 So. 2d 1211 (Ala. 1987)*.

1 A tax purchaser is entitled to demand a tax deed three years after the tax sale. *Code 1975, § 40-10-29*.

2 This case was mistakenly published as "*Mobile* Oil Exploration, etc." It should have been "*Mobil* Oil Exploration, etc."

Additionally, this limitations period has been held to bar an action by the tax purchaser to recover property sold for the payment of taxes, unless the tax purchaser brought the action within three years from the date he was entitled to demand a tax deed. *Grayson v. Muckleroy, 220 Ala. 182, 124 So. 217 (1929)*. Also, if the taxpayer/landowner has remained in possession of the property for three years after the date when the tax purchaser became entitled to demand a tax deed, this statute would vest title in the taxpayer/landowner and protect him from any action brought by the tax purchaser to recover the property. *Johnson v. Stephens, 240 Ala 419, 199 So. 828 (1941)*; and *Sherrill v. Sandlin, 232 Ala. 389, 168 So. 426 (1936)*.

In order for Robinson to obtain Rule 60(b) relief, she must allege and prove one [**5] of the grounds set out under the rule and a meritorious defense to the action. *Raine v. First Western Bank, 362 So. 2d 846, 848 (Ala. 1978)*. Although Robinson must show at least presumptively that she has a defense, the showing of a meritorious case does not guarantee a victory. The rule of our cases is summarized in 49 C.J.S. *Judgments* § 349 (1947):

"It is enough to present facts from which it can be ascertained that the complaining party has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding; it suffices to establish good faith and to tender a seriously litigable issue."

We believe that *§ 40-10-82* gives Robinson a meritorious defense to Reese's complaint to quiet title. If Reese is called upon to prove continuous adverse possession of the property for three years after his entitlement to demand a tax deed, then Robinson, at the very least, has presented a litigable issue under *§ 40-10-82*.

Thus, our inquiry is whether Robinson's Rule 60(b) motion is based upon "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) is an extraordinary remedy, permitted only in exceptional circumstances [**6] when the party can show the court sufficient equitable grounds for relief. *Textron, Inc. v. Whitfield, 380 So. 2d 259, 260 (Ala. 1979)*. We will not disturb the decision of the trial court on a 60(b) motion, however, unless we find one of the following: An absence of reasonable cause; that the rights of others subsequently arising would be adversely affected; or that the trial court's decision is unjust. *Textron, supra, at 260*, citing *Nunn v. Stone, 356 So. 2d 1212 (Ala.Civ.App. 1978)*. [3]

3 In passing on an attack upon a judgment, the court is given wide discretion, but, absent a substantive attack on the judgment, Rule 60(b) cannot be used. See *Ex parte Osborn, 375 So. 2d 467 (Ala. 1979)*.

In the record of this case, we find none of these exceptions. Evidence and testimony presented to the trial court show that Robinson continued to pay municipal assessments on the property through December 1984; in October 1986, Robinson [*401] was assessed more than $ 300 for sewer projects affecting the property; and the tax department of the City of Montgomery mailed municipal assessment notices to Robinson at her home address in Maryland, an address that Reese was unable to locate [**7] prior to the filing of his complaint. Moreover, the decided weight of the evidence on the merits supports the trial court's findings of fact and conclusions of law. Therefore, we find no abuse of the trial court's exercise of its discretion in granting the Rule 60(b)(6) motion to set aside its earlier adjudication or in granting Robinson's request for relief on the merits.

Reese submits that the trial court committed error when it granted Robinson relief from the judgment and then entered judgment in her favor pursuant to *§ 40-10-82*. Reese argues that he was denied an opportunity to present evidence in support of his legal right to claim title to the property, and that the trial court should have determined only whether Robinson was entitled to relief from the previous judgment. In light of what we have said above about the applicability of equitable principles to Rule 60(b) motions, we cannot agree.

The trial court vacated its judgment against Robinson, as was its right; subsequently, in order to accomplish justice and to place the parties in status quo (see C. Wright and A. Miller, *Federal Practice & Procedure: Civil* § 2864 (1973)), it awarded the property to Robinson and ordered [**8] her to pay Reese the taxes, costs, and expenses he had incurred and paid in the purchase of the property. The record reflects that, prior to its order awarding the property to Robinson, the trial court, contrary to Reese's assertion on appeal, received testimony, affidavits, evidence, and briefs as to each party's claim of legal right to the property's title. In the exercise of its obligation to do equity, the trial court did not abuse its discretion or otherwise err in reaching and ruling on the merits of the case. See *Blackwell v. Adams, 467 So. 2d 680 (Ala. 1985)*, and *Chambers County Comm'rs v. Walker, supra.*

AFFIRMED.

Torbert, C. J., and Jones, Shores, Adams, and Steagall, JJ., concur.

TAB 3

1 of 1 DOCUMENT

*** Current through 2012 Regular Session ***
*** (Acts 2012, No. 12-567) ***

TITLE 40 Revenue and Taxation
CHAPTER 10 Sale of Land
Article 5 Redemption of Land Sold for Taxes

Go to the Alabama Code Archive Directory

Code of Ala. § 40-10-120 (2012)

§ 40-10-120. Statute of limitations.

(a) Real estate which hereafter may be sold for taxes and purchased by the state may be redeemed at any time before the title passes out of the state or, if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his or her heirs, or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor or other creditor having a lien thereon, or on any part thereof; and an infant or insane person entitled to redeem at any time before the expiration of three years from the sale may redeem at any time within one year after the removal of the disability; and such redemption may be of any part of the lands so sold, which includes the whole of the interest of the redemptioner. If the mortgage or other instrument creating a lien under which a party seeks to redeem is duly recorded at the time of the tax sale, the party shall, in addition to the time herein specified, have the right to redeem the real estate sold, or any portion thereof covered by his or her mortgage or lien, at any time within one year from the date of written notice from the purchaser of his or her purchase of the lands at tax sale served upon such party, and notice served upon either the original mortgagees or lienholders or their transferee of record, or their heirs, personal representatives, or assigns shall be sufficient notice.

(b) If any real property has been sold for taxes and is subject to redemption from the sale as set forth in subsection (a) and has also been sold in one or more subsequent sales for taxes, then any party entitled to redeem such sale for taxes may redeem such sale if the redemptioner simultaneously redeems his or her sale and all subsequent sales. In the event of a redemption of successive sales, the redemption amount shall be ascertained by applying the provisions of *Sections 40-10-121* and *40-10-122*. Redemption amounts computed pursuant to *Section 40-10-121* shall be paid as stated therein. Redemption amounts computed pursuant to *Section 40-10-122* shall be paid as stated therein if the purchaser had the right to redeem pursuant to subsection (a) or was the owner of the then current tax certificate or tax title. Otherwise, those funds shall be disposed of as set forth in *Section 40-10-28* and paid to such purchaser or his or her assignee only as set forth in *Section 40-10-28*, with the time limits for such application computed utilizing the sale date when the purchaser's interest was sold for taxes.

HISTORY: Acts 2009, No. 09-508, § 1, Sept. 1, 2009.

NOTES: 2009 amendments.

The 2009 amendment, effective September 1, 2009, added the (a) designation; added (b); and made stylistic changes.

Cross references.

Redemption of property after sale, *§ 11-51-23*.

NOTES TO DECISIONS

Attorney fees. Authority of shareholders. Burden of proof. Compliance. Construction with other law. Findings. Notice. Requirements. Tenant. Time limitations. When applicable. Illustrative cases. Miscellaneous.

Attorney fees.

Under *§ 40-10-83*, the plaintiff may collect a reasonable attorney fee; under *§§ 40-10-120* and *40-10-122* he may not. *Daugherty v. Rester, 645 So. 2d 1361, 1994 Ala. LEXIS 210 (1994).*

Authority of shareholders.

A shareholder of a corporation, whether extant or defunct, has a sufficient "equitable interest" in the real property of a corporation which would enable him to redeem under this section; the redemption must be for the benefit of the shareholders as a whole or for the corporation as the case may be. *Reuter v. Mobile Bldg. & Constr. Trades Council, 274 Ala. 614, 150 So. 2d 699, 1963 Ala. LEXIS 509 (1963).*

In the case of an extant corporation, legal title to all property is vested in the corporation, but the shareholders have an equitable interest in all corporate assets, which is sufficient to enable the shareholders to redeem real property sold for taxes. *Reuter v. Mobile Bldg. & Constr. Trades Council, 274 Ala. 614, 150 So. 2d 699, 1963 Ala. LEXIS 509 (1963).*

Where a corporation has been dissolved and there has been no distribution of corporate assets, title to realty becomes vested in the shareholders as tenants in common; this interest is sufficient to allow a redemption from a tax sale provided all other statutory requisites are met. *Reuter v. Mobile Bldg. & Constr. Trades Council, 274 Ala. 614, 150 So. 2d 699, 1963 Ala. LEXIS 509 (1963).*

Burden of proof.

In a suit to enforce the right of redemption in specified property under the statute, complainant must aver and prove the facts essential to his relief. *Farmer v. Hill, 243 Ala. 543, 11 So. 2d 160, 1942 Ala. LEXIS 331 (1942).*

Compliance.

In view of the fact that one holding tax title to land under a recorded deed had previously sold a part of the property and conveyed the same, and had received a conveyance back from his grantee also of record, but refused to execute and deliver deed conveying title to mortgage holder, such mortgage holder was entitled to pay amount required to redeem. *Moore v. Laird, 250 Ala. 285, 33 So. 2d 890, 1948 Ala. LEXIS 540 (1948).*

The trial court did not abuse its discretion in determining that the defendant, who bought the property at a tax sale, no longer had any interest in the subject property after the original owner redeemed it where the defendant failed to file an action challenging the redemption or seeking to quiet title to the subject property. *Washington v. Orix Credit Alliance, Inc., 825 So. 2d 828, 2001 Ala. Civ. App. LEXIS 303 (Civ. App. 2001).*

Construction with other law.

The limitations period in *§ 11-48-55*, which extends the period of redemption to a maximum period of six years, and not the limitations period in this section applies to bar a complainant's action to redeem property sold at a foreclosure sale for the satisfaction of local improvement assessments more than six years after the date of the sale, despite the fact that the complainant was an infant at the time of the sale, because this section does not apply to actions where the liability is against the property affected and not against the owner or former owner. *Hill v. Di Beneditto, 253 Ala. 229, 43 So. 2d 819, 1950 Ala. LEXIS 212 (1950).*

When the requirements of *§ 40-10-122* have been complied with, there is no time limit to exercise the right to redeem. The short statute of limitations, three years pursuant to *§ 40-10-82*, is not an extension of the time in which a statutory redemption may be had. *Heard v. Gunn, 262 Ala. 283, 78 So. 2d 313, 1955 Ala. LEXIS 426 (1955).*

Where original bill alleged heirship and prayed for declaratory judgment or decree declaring decree of sale void, and the decree made to respondent pursuant to sale under said void decree was later amended by addition of an averment that complainants were in peaceful possession of the land, and prayer that the tax title under which respondent claimed be removed as a cloud on title to said property of complainants, the bill remained essentially one to redeem land under this section rather than one to quiet title under *§ 6-6-540. Turnham v. Potter, 289 Ala. 685, 271 So. 2d 246, 1972 Ala. LEXIS 1131 (1972).*

Purchaser at tax sale asserting that owner did not redeem property within three years of purchase as required by this section, did not prevail because court found that owner retained possession under *§ 40-10-83. Tabor v. Certain Lands, 736 So. 2d 622, 1999 Ala. Civ. App. LEXIS 230 (Civ. App. 1999).*

Findings.

The title of the grantees of a purchaser at a tax sale who did not take title until after the period to redeem the property had expired was superior to the title of the mortgagee (original owner) even though no notice was given to the mortgagee as to his right to redeem and the grantees knew that the mortgage, through a mistake, failed to include land that should have been included. *Hester v. First Nat'l Bank, 237 Ala. 307, 186 So. 717, 1939 Ala. LEXIS 179 (1939).*

Notice.

This provision is intended to relieve a mortgagee or his assignee of record, holding an outstanding mortgage, from keeping a lookout for tax sales foreclosing the paramount lien of the state and county by proceedings against the mortgagor, who for tax purposes is the owner of the lands, and the mortgage treated as a lien security for the debt. *Alabama Mineral Land Co. v. McFry, 236 Ala. 632, 184 So. 192, 1938 Ala. LEXIS 408 (1938).*

This section which is intended specially to protect non-resident mortgagees is fully complied with by delivery of proper notice through the mails. *Alabama Mineral Land Co. v. McFry, 236 Ala. 632, 184 So. 192, 1938 Ala. LEXIS 408 (1938).*

Nothing in this section looks to postponement of the date provided for by the statutory deadlines for executing the tax deed by the judge of probate for the purpose of examining records or recording evidence of giving notice to a mortgagee; the extended time for redemption for a mortgagee under this section, running into the indefinite future so far as the statute goes, rests upon written notice known only to the mortgagee and the purchaser at the tax sale. *Alabama Mineral Land Co. v. McFry, 236 Ala. 632, 184 So. 192, 1938 Ala. LEXIS 408 (1938).*

A mortgagee who forecloses on property is not entitled to the extended time for redemption as a transferee of mortgage of record under this section, but rather, a mortgagee who purchases the property at a foreclosure sale during the two-year redemption period is subject to the same limitation which applies to the owner in that he is charged with notice of tax sales and the rights of purchasers at such sales and the lack of a written notice to the mortgagee under these circumstances is without any effect on mortgagee's right to redeem. *Alabama Mineral Land Co. v. McFry, 236 Ala. 632, 184 So. 192, 1938 Ala. LEXIS 408 (1938).*

The failure of the grantees of a purchaser of land at a tax sale to give the mortgagee notice to redeem and their knowledge that the mortgage failed to include land that should have been included was immaterial where the grantees did not take title to the land until after the period for redemption had expired and there was no showing that the purchaser at the tax sale had knowledge of the error in the mortgage. *Hester v. First Nat'l Bank, 237 Ala. 307, 186 So. 717, 1939 Ala. LEXIS 179 (1939).*

If written notice is not given as provided in this section, the right to redeem by a mortgagee or his transferee of record would be cut off only by adverse possession. *Almon v. Sixty St. Francis St., Inc., 368 So. 2d 24, 1979 Ala. LEXIS 2764 (1979).*

One who has actual knowledge of an adverse claim to real property is not entitled to compensation for improvements made to the property after he acquired such knowledge. A tax deed owner had such actual knowledge of a bank's interest when he received a letter notifying him of the bank's right of redemption, even though the letter did not indicate that the bank intended to exercise its right. As long as one has a right to redeem, he may exercise that right at any time. *McCloud v. AmSouth Bank, 540 So. 2d 75, 1989 Ala. Civ. App. LEXIS 16 (Civ. App. 1989).*

Requirements.

Where a mortgagor has sold and conveyed his mortgage interest and has none left in him when the mortgage is made, the mortgagee obtains no interest in the land which will entitle him to redeem from a valid tax sale; if the tax sale was invalid, all that the purchaser has is a right to be reimbursed by one who has a right to redeem for such amounts as the law allows. *Hester v. First Nat'l Bank, 237 Ala. 307, 186 So. 717, 1939 Ala. LEXIS 179 (1939).*

Tenant.

A tenant buying at a tax sale does so to save his possessory right and such a purchase operates as a payment of the taxes for the landlord, which the tenant may charge to his landlord by way of set-off. *Brunson v. Bailey, 245 Ala. 102, 16 So. 2d 9, 1943 Ala. LEXIS 71 (1943).*

Time limitations.

In action to quiet title to lands, where cross bill alleging that title to property was based on sale of lands at tax sale showed on its face that the lands had not been abandoned by the owner or his estate and that the time within which due effort by the taxpayer-owner could have accomplished redemption had not expired, and that the alleged purchaser or owner failed to comply with the conditions precedent to redemption, which prevented the judge from making a valid tax deed, tax sale purchaser did not acquire good title. *Heath v. Scarborough, 246 Ala. 509, 21 So. 2d 438, 1945 Ala. LEXIS 257 (1945).*

It is only after the period of time indicated for redemption has expired, and due steps have been taken by the person having the right to the conveyance, that the judge of probate may make a deed upon the purchaser's production to that official of certificate of due tax sale, and the payment of the required fee. *Heath v. Scarborough, 246 Ala. 509, 21 So. 2d 438, 1945 Ala. LEXIS 257 (1945).*

Bill is properly filed for redemption by taxpayer who has remained in possession, though scrambling possession, if time fixed for redemption under this section has expired. *Standard Contractors Supply Co. v. Scotch, 247 Ala. 517, 25 So. 2d 257, 1946 Ala. LEXIS 54 (1946).*

The one-year provision in this section is not a statute of limitations that forecloses a mortgagee's right to redeem within the three-year redemptive period. It is an exception to the three-year period that, in fact, allows a mortgagee to redeem within one year of receiving notice of the tax sale, in some instances even after the three-year period has run. *Jim Walter Homes, Inc. v. Blake, 544 So. 2d 161, 1989 Ala. LEXIS 256 (1989).*

Phrase "three years from the date of the sale" means three years from the date of the sale at the courthouse and the issuance of the certificate of purchase, and not three years from the issuance of the tax deed. *Daugherty v. Rester, 645 So. 2d 1361, 1994 Ala. LEXIS 210 (1994).*

When applicable.

Mortgagee may redeem, from a tax sale, property upon which he holds a mortgage. *Bonner v. Johnson, 276 Ala. 137, 159 So. 2d 840, 1964 Ala. LEXIS 285 (1964).*

Illustrative cases.

No tax deed was ever issued to the plaintiffs, or to their predecessors, and the record contained no evidence that the plaintiffs or their predecessors exercised continuous adverse possession for the requisite time period. The trial court found that neither the plaintiffs nor their predecessors exercised sufficient possession over the property to defeat the defendant's right of redemption. Therefore, the judgment of the trial court was affirmed. *Geier v. Smallwood, 647 So. 2d 754, 1994 Ala. Civ. App. LEXIS 437 (Civ. App. 1994).*

To recover their loss from defendant, the plaintiffs had to establish that he owed a duty to notify someone of the tax notices. In Alabama, the ultimate test of the existence of a duty to use due care is found in the foreseeability that harm may result if care is not exercised. *Thomas v. Jim Walter Homes, Inc., 918 F. Supp. 1498, 1996 U.S. Dist. LEXIS 3004 (M.D. Ala. 1996).*

Miscellaneous.

The purpose of this section is to protect the property rights of a mortgagee whose mortgage is of record by safeguarding his right of redemption from tax sales, and specified notice of tax sales must be given to the mortgagee, else his right of redemption is not cut off by the three year limitation. *Farmer v. Hill, 243 Ala. 543, 11 So. 2d 160, 1942 Ala. LEXIS 331 (1942).*

Cited in

Downing v. Russellville, 241 Ala. 494, 3 So. 2d 34, 1941 Ala. LEXIS 131 (1941); Moore v. McLean, 248 Ala. 9, 26 So. 2d 96, 1946 Ala. LEXIS 158 (1946); Hinkle v. Posey, 258 Ala. 314, 63 So. 2d 809, 1953 Ala. LEXIS 233 (1953); O'Connor v. Rabren, 373 So. 2d 302, 1979 Ala. LEXIS 2957 (1979); Van Meter v. Grice, 380 So. 2d 274, 1980 Ala. LEXIS 2630 (1980); Nolte v. Wynn, 392 So. 2d 802, 1980 Ala. LEXIS 3220 (1980); Thomas v. Benefield, 494 So. 2d 452, 1986 Ala. Civ. App. LEXIS 1437 (Civ. App. 1986); Karagan v. Bryant, 516 So. 2d 599, 1987 Ala. LEXIS 4593 (1987); Patterson v. Porter, 555 So. 2d 750, 1989 Ala. LEXIS 999 (1989); Baldwin County Fed. Sav. Bank v. Central Bank, 585 So. 2d 1279, 1991 Ala. LEXIS 670 (1991); Roberts v. M & R Properties, Inc., 612 So. 2d 432, 1992 Ala. LEXIS 1561 (1992).

TAB 4

LexisNexis®

Howard Ross v. Shauli Rosen-Rager and Rene Rosen-Rager

1080721

SUPREME COURT OF ALABAMA

67 So. 3d 29*; *2010 Ala. LEXIS 152

August 27, 2010, Released

SUBSEQUENT HISTORY: As Amended August 12, 2011.
Release for publication May 9, 2011.
Released November 24, 2010 as modified on denial of rehearing.
Rehearing overruled by *Ross v. Rosen-Rager, 2010 Ala. LEXIS 285 (Ala., Nov. 24, 2010)*

PRIOR HISTORY: [**1]
Appeal from Madison Circuit Court. (CV-06-2097). James P. Smith, Trial Judge.

DISPOSITION: AFFIRMED IN PART AND AFFIRMED CONDITIONALLY IN PART. *

* Note from the reporter of decisions: The Supreme Court?s docket sheet indicates that on September 2, 2010, the appellees filed an acceptance of the remittitur, and on December 2, 2010, following the denial of the application for rehearing, filed a restated acceptance of the remittitur.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff property owners brought an action against defendants, a tax sale purchaser and his tenants, alleging trespass, wantonness, interference with business relationships, and ejectment. The Madison Circuit Court (Alabama) entered a default judgment against the tenants and granted partial summary judgment in favor of the owners. The trial court denied the purchaser's motion for new trial. The purchaser appealed.

OVERVIEW: First, the trial court did not err in entering summary judgment for the owners on their claim of wanton trespass. The purchaser lost his interest in the property when he failed timely to challenge a certificate of redemption. The loss foreclosed his defenses against any trespass claim. Second, the purchaser did not properly object to the testimony of a probate office accountant clerk and, therefore, he was not entitled to a reversal based on the trial court's allegedly improper admission of the clerk's testimony. Third, the trial court did not exceed its discretion in shielding the jury from the text of the redemption and tax-sale statutes because the admission of the statutes would merely have invited the jury to nullify the partial summary judgment, which had correctly resolved in the owners' favor the issue whether, as a matter of law, the purchaser was justified to any degree. Finally, the appellate court concluded that a $ 120,000 punitive-damages award was sufficient to punish the purchaser and to deter similar further conduct, without compromising his due-process rights.

OUTCOME: The court affirmed the partial summary judgment. It conditionally affirmed the judgment on the punitive-damages verdict, on the condition that the owners filed with the appellate court, within 21 days, a remittitur of the punitive-damages award; otherwise, the judgment was reversed and the cause remanded for a new trial on the issue of punitive damages.

LexisNexis(R) Headnotes

Real Property Law > Deeds > Types > Tax Deeds
Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Statutory Redemption
[HN1] See *Ala. Code § 40-10-128.*

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
[HN2] The manner in which the summary-judgment movant's burden of production is met depends upon which party has the burden of proof at trial. If the movant is the plaintiff with the ultimate burden of proof, his proof must be such that he would be entitled to a directed verdict, now referred to as a judgment as a matter of law, *Ala. R. Civ. P. 50*, if this evidence was not controverted at trial. The first prerequisite for a summary judgment in favor of a movant who asserts a claim is that the claim be valid in legal theory, if its validity be challenged. The second prerequisite for a summary judgment in favor of such a movant, who necessarily bears the burden of proof, is that each contested element of the claim be supported by substantial evidence. The third prerequisite for a summary judgment in favor of such a movant is that the record be devoid of substantial evidence rebutting the movant's evidence on any essential element of the claim. Substantial rebutting evidence would create an issue of fact to be tried by the finder of fact and therefore would preclude a summary judgment. Summary judgment in favor of the party who asserts the claim is not appropriate unless all three of these prerequisites coexist.

Real Property Law > Torts > Trespass to Real Property
[HN3] Wantonness in a trespass action is established by the mere knowledge on the part of the defendant of his invasion of the plaintiff's rights. Although good faith is not a defense to a claim of trespass, a showing of good faith may refute the charge of wantonness.

Real Property Law > Deeds > Types > Tax Deeds
[HN4] See *Ala. Code § 40-10-74.*

Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Statutory Redemption
[HN5] See *Ala. Code § 40-10-122(a), (c)(1)-(2).*

Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > Statutory Redemption
[HN6] A certificate of redemption is prima facie evidence of redemption. *Ala. Code §§ 40-10-127, 12-13-1(c).*

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN7] In Alabama, circuit courts have a general superintendence over the probate courts. *Ala. Code § 12-11-30(4).* Encompassed in this superintendence is the power to review certain judgments and orders of the probate court, either through direct appeal or by petition for an extraordinary writ. *Ala. Code §§ 12-22-2*, -20 authorize appeals from final judgments of a probate court to either the circuit court or the Alabama Supreme Court. The appellate jurisdiction of the circuit court can also be invoked by a petition for an extraordinary writ. *Ala. Const. art. VI, § 142(b).* Orders as to which no statute grants appellate jurisdiction are reviewed on petitions for writ of certiorari, mandamus, or prohibition.

Real Property Law > Deeds > Types > Tax Deeds
Real Property Law > Financing > Mortgages & Other Security Instruments > Redemption > General Overview
[HN8] Redemption divests a tax-sale purchaser of a possessory interest in the property.

Civil Procedure > Sanctions > Contempt > Civil Contempt
[HN9] If the credibility of court orders and the integrity of the judicial system are to be maintained, a litigant cannot ignore court orders with impunity. A party ignores a valid order of court at its own peril.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Evidence > Procedural Considerations > Rulings on Evidence
[HN10] A trial court's ruling on the admission or exclusion of evidence will be reversed only if it is shown that the trial court exceeded its discretion in so ruling.

Civil Procedure > Appeals > Reviewability > Preservation for Review
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections
[HN11] A specific objection is a condition precedent to appellate review while a general objection is a waiver of appellate review. A general objection to evidence is one which does not definitely and specifically state the ground upon which it is based so that the court may intelligently rule on it. This rule applies unless the evidence is patently illegal and cannot be made legal for any purpose. An objection on the ground that the proffered evidence is irrelevant is a general objection. The party who lodges a general objection at trial may not expand the objection on appeal by including specific grounds.

Evidence > Relevance > Relevant Evidence
[HN12] Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Ala. R. Evid. 401.*

Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review
Torts > Damages > Punitive Damages > Award Calculations > Factors
[HN13] An appellate court has a duty to conduct a de novo review of a punitive-damages award. In reviewing a punitive-damages award, the appellate court applies the Green Oil factors, within the framework of the Gore guideposts. The Gore guideposts are: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The Green Oil factors, which are similar, and auxiliary in many respects, to the Gore guideposts, are: (1) the reprehensibility of the defendant's conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from the defendant's conduct; (3) the defendant's profit from his misconduct; (4) the defendant's financial position; (5) the cost to the plaintiff of the litigation; (6) whether the defendant has been subject to criminal sanctions for similar conduct; and (7) other civil actions the defendant has been involved in arising out of similar conduct.

Torts > Damages > Punitive Damages > Award Calculations > Factors
[HN14] Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.

Real Property Law > Deeds > Types > Tax Deeds
[HN15] The purchasing of tax-sale property is, in itself, a laudable practice, one to be encouraged, rather than discouraged. Hence, the Alabama legislature has enacted statutes favoring the sale of land to secure payment of delinquent taxes.

Torts > Damages > Punitive Damages > Award Calculations > Factors

[HN16] If the wrongful conduct was profitable to a defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss. The financial position of the defendant is also relevant.

COUNSEL: For Appellant: William E. Shreve, Jr., Lyons, Pipes & Cook, P.C., Mobile; Patrick Jones, Huntsville.

For Appellees: Richard L. Morris, Sirote & Permutt, P.C., Huntsville.

JUDGES: WOODALL, Justice. Cobb, C.J., and Lyons, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur.

OPINION BY: WOODALL

OPINION

[*31] WOODALL, Justice.

Howard Ross appeals from a partial summary judgment awarding Shauli Rosen-Rager and Rene Rosen-Rager $ 13,343.47 in compensatory damages and from a judgment entered on a jury verdict awarding the Rosen-Ragers $ 350,000 in punitive damages in the Rosen-Ragers' action against Ross and others alleging, [*32] among other things, trespass and ejectment. We affirm in part and affirm conditionally in part.

I. Factual and Procedural Background

On May 9, 2003, property owned by Margie Campbell in Huntsville was sold by the tax collector of Madison County for the collection of *ad valorem* taxes, which remained delinquent from the previous year. Ross, the winning bidder, paid $ 750 for the property, for which he received a "certificate of land sold for taxes." Ross purchased insurance on the property, paying a total of $ 1,178 in premiums. He also made improvements totaling $ 1,195.

At the time Ross purchased the property, there was a mortgage on the property held by Mortgage Electronic Registration [**2] Systems, Inc. ("MERS"). Campbell defaulted on the debt secured by the mortgage, and, on July 3, 2003, MERS purchased the property at a foreclosure sale, for which it received a foreclosure deed. On September 28, 2004, MERS paid into the Madison County Probate Court $ 1,612.93 to redeem the property, pursuant to *Ala. Code 1975, § 40-10-120 et seq.* The payment included Ross's original tax-purchase price of $ 750, plus subsequent taxes paid by Ross, and interest calculated at 12%. In return, the probate court issued MERS a "certificate of redemption," pursuant to *Ala. Code 1975, § 40-10-127*. MERS's payment did not include any amount for the insurance Ross had purchased or for the improvements he had made to the property.

The certificate of redemption was duly recorded in the probate office, and, for all that appears, Ross was provided with notice of the issuance of the certificate of redemption as required by *Ala. Code 1975, § 40-10-128*, which provides:

> [HN1] "If the lands redeemed were bid in by any person other than the state, the redemption money must be deposited by the judge of probate in the county treasury and there kept separate and apart from the general funds of the county, and *the* [**3] *judge of probate shall notify the purchaser of such deposit by mailing notice to the residence or place of business of such purchaser*, or to such address as the purchaser may furnish the judge of probate at the time he secures his certificate of purchase; and, upon the demand of the purchaser, his legal representative or assignee and the surrender of the certificate of purchase, the judge of probate must give him an order on the treasury for the same."

(Emphasis added.)

Ross does not assert that he was *not* notified of the issuance of the certificate of redemption. In fact, on December 22, 2004, Ross caused to be recorded a "verified statement of a lien" on the property for "materials, repair, and improvements to the dwelling for the title holder of the property," namely, MERS. Ross declined to collect the $ 1,612.93 that MERS had paid into the probate court.

On February 7, 2005, Ross leased the property to Ron Fletcher, who went into possession. On May 13, 2005, MERS, incorrectly believing *Campbell* was residing on the property, filed in the Madison Circuit Court a "complaint for ejectment" against Campbell. *MERS v. Campbell*, CV-05-917. As soon as MERS learned the identity of Ross's tenant,

[**4] it amended its complaint to add Fletcher as a defendant. Still later, on December 9, 2005, MERS again amended its complaint to add Ross as a defendant.

Meanwhile, on November 5, 2005, Ross sued Fletcher in the Madison District Court for unlawful detainer. *Ross v. Fletcher*, DV-05-2689. On December 14, 2005, the district court dismissed the action, stating: "[Ross] does not own clear [*33] title to the property that is the subject of this law suit, and therefore, has no standing to bring this action."[1]

1 Although Fletcher eventually vacated the premises, the time and circumstances of his departure are unclear and, in any case, are irrelevant to this appeal.

MERS was unable to effect service of process on Ross. Its unserved civil summons was returned with the notation: "Avoiding Service." In February 2006, however, Ross and MERS exchanged correspondence regarding payment for the insurance and improvements and about the ongoing litigation. For example, on February 4, 2006, Ross addressed the following letter to MERS's attorney:

> "Re: Redemption of -- S. Westdale Court, Huntsville Alabama 35805
>
> "Tenants have informed me that you plan to redeem the above reference[d] property. If so, the following [**5] is a statement of additional lawful charges that must be paid to me under the provisions of *Code of Alabama § 40-10-122(b)-(e)* in order to effect the redemption:

"1. Paint Interior	$ 700.00
"2. Carpet 2 bedrooms	$ 165.00
"3. Dishwasher Repair	$ 30.00
"4. Remove Trash and Clean	$ 150.00
"5. Clean and mow yard	$ 50.00
"6. Section and remove fallen tree	$ 100.00
"7. State Farm Insurance	$ 1,178.00
"TOTAL	$ 2,373.00"

On February 13, 2006, MERS's attorney sent Ross the following response:

> "Thank you for your letter of February 4, 2006. As I'm sure you are aware, *the court set this for a hearing February 24, 2006*, and, reviewing your itemization costs, in light of *§ 40-10-122*, it would appear that the reasonable and necessary expenses would be limited to $ 1,195. If you are willing to accept this without a hearing, we will notify the court that the case can be settled without a hearing. Please advise me if this will be acceptable."

(Emphasis added.)

Ross's response to that information was another letter to MERS's counsel on April 28, 2006. That letter stated:

> "This letter is to notify you that you have yet to *complete the redemption* of the above referenced property. I have not received payment in the amount [**6] of two thousand three hundred and seventy three dollars ($ 2,373.00) for preservation improvements which I have made, and *my rights to the property have not been terminated.*"

(Emphasis added.)

Meanwhile, on March 14, 2006, the trial court in CV-05-917 entered a summary judgment in favor of MERS, thereby ejecting Ross from the property. The same day, the court issued a "writ of possession" in favor of MERS and against Ross, Campbell, and Fletcher. On July 24, 2006, MERS sent Ross a letter apprising him of, among other things, the fact that the court had given it the right to take possession of the property. Two days later, on July 26, 2006, MERS executed a "special warranty deed" conveying the property to the Rosen-Ragers.

On August 1, 2006, the Rosen-Ragers entered into an agreement with RPM Realty, Inc. ("RPM"), whereby RPM agreed to manage the property for the Rosen-Ragers to produce rental income. RPM contracted with other entities, including Carpet Crafters, Inc., to clean the residence and to install new carpet. While RPM was thus engaged, Ross leased the property to Charles Hurt and Sharon Baxter. When Carpet Crafters arrived to install the carpet, its workers discovered Hurt and [**7] Baxter in the residence. Carpet [*34] Crafters immediately notified RPM, which dispatched its manager Suzanne Tomlinson to investigate. An altercation ensued, prompting an appearance by the Huntsville Police Department, with Baxter defending her right to possession as Ross's tenant.

Subsequently, Tomlinson posted on the property a notice of termination of a possessory interest and a "notice to vacate" on September 19, 2006, and October 5, 2006, respectively, which Hurt and Baxter ignored. During this time, according to Baxter, Ross told Baxter simply "to disregard papers that anybody was bringing [her]."

On October 24, 2006, the Rosen-Ragers sued Hurt, Baxter, and Ross in the Madison Circuit Court. [2] The complaint alleged, among other things, that Ross had trespassed on the property by "wantonly inducing" Hurt and Baxter to "enter into possession of the property" under "circumstances of insult and contumely." It alleged that the defendants had "maliciously, willfully, oppressively, and/or wantonly interfered with the Rosen-Ragers' exclusive possession of the property." The complaint also contained a claim of intentional interference with business or contractual relations and a claim for ejectment, [**8] by which the Rosen-Ragers sought a judgment ordering the defendants "to vacate the property." In April 2007, the circuit court entered a default judgment against Hurt and Baxter for $ 13,402.52 in compensatory damages and $ 26,805.04 in punitive damages. This appeal involves no issue as to the correctness of that judgment.

2 In a separate action commenced by the Rosen-Ragers in the Madison District Court against Hurt and Baxter (DV-06-2950), the court entered an "unlawful detainer judgment" against Hurt and Baxter and in favor of the Rosen-Ragers.

On October 29, 2007, the Rosen-Ragers moved for a partial summary judgment against Ross on the issues of liability and compensatory damages. Ross filed a cross-motion for a partial summary judgment, contending that MERS's purported redemption did not comply with *§ 40-10-122* and was therefore legally ineffective to divest Ross of his possessory interest in the property. On December 19, 2007, the circuit court entered a partial summary judgment in favor of the Rosen-Ragers on their claims, including (1) trespass, (2) wantonness, (3) interference with business or contractual relations, and (4) ejectment. It awarded the Rosen-Ragers $ 13,343.47 [**9] in compensatory damages, but it reserved for a jury trial the issue of Ross's liability for punitive damages.

The essential issue at trial was whether Ross's conduct warranted the imposition of punitive damages. Ross took the position that his conduct was justified by MERS's failure to pay the amount of money he had expended for improvements and insurance premiums. More specifically, Ross testified that the statutory scheme allowed him to remain in possession until he had received payment for those expenditures. However, the circuit court would not allow Ross to *read* from the statutes or to introduce them into evidence. At the close of the trial, the court instructed the jury on the law of wantonness but did not instruct the jury on the relevance, if any, of the statutes on which Ross purported to rely. The jury awarded $ 350,000 in punitive damages.

The circuit court entered a final judgment on the damages awards on October 24, 2008. That same day, the circuit court scheduled a hearing for review of the punitive-damages award in accordance with this Court's decisions in *Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)*, and *Green Oil Co. v. Hornsby, 539 So. 2d 218* [*35] *(Ala. 1989)* [**10] (hereinafter referred to as "the *Hammond* hearing").

On November 18, 2008, Ross filed a motion for a new trial, which was denied. In a separate order, the circuit court also declined to remit the punitive-damages award. Ross appealed. The issues on appeal involve (1) whether the partial summary judgment was proper, (2) whether the trial was infected with evidentiary errors, and (3) whether the punitive-damages verdict was excessive.

II. Discussion

A. Partial Summary Judgment

"To prevail on [their] claims," says Ross, "the Rosen-Ragers had to show that they and not Ross owned and had the right to possess the property. Otherwise, Ross committed no trespass, much less a wanton trespass, and the Rosen-Ragers were not entitled to ejectment ...." Ross's brief, at 23. We agree.

[HN2] ""[T]he manner in which the [summary-judgment] movant's burden of production is met depends upon which party has the burden of proof ... at trial."" *Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1195 (Ala. 2002)* (quoting *Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999)*, quoting in turn *Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989)* (Houston, J., concurring specially)). If the movant is the plaintiff [**11] with the ultimate burden of proof, his "'proof must be such that he would be entitled to a directed verdict [now referred to as a judgment as a matter of law, see *Rule 50, Ala. R. Civ. P.*] if this evidence was not controverted at trial.'" *Ex parte General Motors, 769 So. 2d at 909* (quoting *Berner, 543 So. 2d at 688*).

> "The first prerequisite for [a summary judgment] in favor of a movant who *asserts* a claim ... is that the claim . . . be valid in legal theory, if its validity be challenged. *See Driver v. National Sec. Fire & Cas. Co., 658 So. 2d 390 (Ala. 1995)*. The second prerequisite for [a summary judgment] in favor of *such a movant*, who necessarily bears the burden of proof, *American Furniture Galleries v. McWane, Inc., 477 So. 2d 369 (Ala. 1985)*, *McKerley v. Etowah-DeKalb-Cherokee Mental Health Board, Inc., 686 So. 2d 1194 (Ala. Civ. App. 1996)*, and *Oliver v. Hayes International Corp., 456 So. 2d 802 (Ala. Civ. App. 1984)*, is that each contested element of the claim ... be supported by substantial evidence. *See Driver, supra*, and *McKerley, supra.* The third prerequisite for [a summary judgment] in favor of such a movant is that the record be devoid of substantial evidence rebutting the movant's [**12] evidence on any essential element of the claim .... *See Driver, supra*, and *First Fin. Ins. Co. v. Tillery, 626 So. 2d 1252 (Ala. 1993)*. Substantial rebutting evidence would create an issue of fact to be tried by the finder of fact and therefore would preclude [a summary judgment]. *See Driver, supra*, and *First Financial, supra*. [Summary judgment] in favor of the party who *asserts* the claim ... is not appropriate unless all three of these prerequisites coexist. *See Driver, supra*, and *First Financial, supra*, *McKerley, supra*, and *Oliver, supra.*"

Ex parte Helms, 873 So. 2d 1139, 1143 (Ala. 2003).

The circuit court essentially held, as a matter of law, that Ross had *wantonly trespassed* on the Rosen-Ragers' property. [HN3] "Wantonness in a trespass action is established by the mere knowledge on the part of the defendant of his invasion of the plaintiff's rights." *Cummans v. Dobbins, 575 So. 2d 81, 82 (Ala. 1991)*; *Calvert & Marsh Coal Co. v. Pass, 393 So. 2d 955, 957 (Ala. 1980)*. Although good faith is not a [*36] defense to a claim of trespass, a showing of good faith may "refute the charge of ... wantonness." *Ramos v. Fell, 272 Ala. 53, 58, 128 So. 2d 481, 484-85 (1961)*. Thus, the dispositive question is whether [**13] there was substantial evidence that when Ross induced Hurt and Baxter to enter into possession of the property, the Rosen-Ragers had lawful possession of the property, and, if they did, whether there was substantial evidence that Ross placed Hurt and Baxter on the property with a good-faith belief that he had the right of possession.

Ross's arguments are based on *Ala. Code 1975, § 40-10-74* (tax purchaser's right of possession) and *§ 40-10-122* (process for redemption of land from tax sale). *Section 40-10-74* provides, in pertinent part:

> [HN4] "*Any purchaser of lands at a tax sale* other than the state or anyone claiming under him *shall be entitled to possession of said lands immediately upon receipt of certificate of sale from the tax collector*; and, if possession is not surrendered within six months after demand therefor is made by said purchaser or his assignee, the said purchaser or his assignee may maintain an action in ejectment or a statutory real action in the nature of ejectment, or other proper remedy for the recovery of the possession of the lands purchased at such sales and shall be entitled to hold the possession thereof on recovery, *subject, however, to all rights of redemption provided* [**14] *for in this title.*"

(Emphasis added.) At the time of the events made the basis of this action, *§ 40-10-122* provided, in pertinent part:

> [HN5] "(a) In order to obtain the redemption of land from tax sales where the same has been sold to one other than the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest payable at the rate of 12 percent per annum from date of sale, and, on the portion of any excess bid that is less than or equal to 15 percent of the market value as established by the county board of equalization, together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records in the office of the tax collector, or other tax collecting of-

ficial, with interest on said payment at 12 percent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if said taxes are due which may be ascertained by consulting the tax collector or other tax collecting official of the county, the probate judge shall also require the party desiring to redeem [**15] said land to pay the tax collector or other tax collecting official the taxes due on said lands which have not been paid by the purchaser before he or she is entitled to redeem the same. In all redemptions of land from tax sales, the party securing the redemption shall pay all costs and fees as herein provided for due to officers and a fee of $ .50 to the judge of probate for his or her services in the matter of redemption. This application and payment may be executed by an on-line transaction via the Internet or other on-line provision.

"....

"(c) *With respect to property which contains a residential structure at the time of the sale* regardless of its location, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

" (1) *All insurance premiums paid or owed by the purchaser for casualty* [*37] *loss coverage on the residential structure* with interest on the payments at 12 percent per annum.

" (2) The *value of all preservation improvements made on the property determined in accordance with this section* with interest on the value at 12 percent per annum."

(Emphasis added.) [3]

3 *Section 40-10-122* [**16] was most recently amended in 2009.

According to Ross, redemption does not occur until the redemptioner complies *fully* with *§ 40-10-122(a)* and *(c)(1)-(2)*, more specifically, until the tax-sale purchaser receives not only the amounts set forth in *subsection (a)*, but also the amounts set forth in *subsection (c)(1)-(2)*, [4] namely, the "insurance premiums" and the "value of all preservation improvements" made on the property at the statutory rate of interest. Ross insists that he acquired the right of possession as the tax-sale purchaser, which right, he argues, continues until the property is redeemed in conformity with *§ 40-10-122*. Ross contends that, because he was never paid for improvements and insurance, *§ 40-10-122* was never triggered, the property *was never actually redeemed*, and he never lost the right of possession.

4 *Subsection (c)* is relatively new. It was added in 2002 by Act No. 2002-426, Ala. Acts 2002.

In response, the Rosen-Ragers state:

"[The payments set forth in *§ 40-10-122(c)*] are *in addition* to those payments required ' in order to obtain the redemption' by *subsection (a)*. Nothing in the plain language of the statute indicates that the requirements of [*subsection (c)*] extend [**17] to the tax sale purchaser an ongoing ability to possess the redeemed property or interfere with the legal owner's possession. Rather, they create a right of monetary relief which the tax sale purchaser may pursue. Ross's pursuit of any right to monetary relief from MERS does not concern the [Rosen-Ragers] .... Whether or not Ross is entitled to additional payment from MERS *is simply not a title issue*."

Rosen-Ragers' brief, at 50-51 (some emphasis added).

Moreover, they state that Ross's "argument must fail as a statutory Certificate of Redemption, evidencing redemption, was issued by the Madison County Judge of Probate on September 28, 2004." Rosen-Ragers' brief, at 47-48. We need not decide whether the failure of the redemptioner to make the payments set forth in *subsection (c)*, standing alone, affects the tax-sale purchaser's right to possession, because, in any case, a tax-sale purchaser may not simply ignore a certificate of redemption as Ross did in this case.

Ross concedes, as he must, that [HN6] a certificate of redemption is *prima facie* evidence of redemption. Ross's brief, at 34. See *Ala. Code 1975, § 40-10-81* ("the books and records belonging to the office of the judge of probate ... [**18] shall be prima facie evidence of the facts stated therein"); *§ 40-10-127* (to be evidence of redemption, the certificate must be signed); see also *Ala. Code 1975, § 12-13-1(c)*("All orders, judgments and decrees of probate courts shall be accorded the same validity and presumptions which are accorded to judgments and orders of other courts of general jurisdiction.")

The certificate of redemption was not void on its face. If it was issued erroneously, Ross should have challenged the certificate judicially. Ross does not allege that there was no vehicle by which to [*38] challenge the correctness of the certificate of redemption. Indeed, this Court has said:

> [HN7] "In Alabama, circuit courts have 'a general superintendence' over the probate courts. *Ala. Code 1975, § 12-11-30(4)*. Encompassed in this superintendence is the power to review certain judgments and orders of the probate court, either through direct appeal or by petition for an extraordinary writ. See *Helms v. McCollum, 447 So. 2d 687 (Ala. 1984)*. *Sections 12-22-2* and *12-22-20, Ala. Code 1975*, authorize appeals from final judgments of a probate court to either the circuit court or the Supreme Court.
>
> "....
>
> "The appellate jurisdiction of the circuit [**19] court can also be invoked by a petition for an extraordinary writ. *Ala. Const. of 1901, [§ 142](b)*. Orders as to which no statute grants appellate jurisdiction are reviewed on petitions for writ of certiorari, mandamus, or prohibition. *Town of Flat Creek v. Alabama By-Products Corp., 245 Ala. 528, 17 So. 2d 771 (1944)*."

Franks v. Norfolk Southern Ry., 679 So. 2d 214, 216 (Ala. 1996). See *Boyd v. Holt, 62 Ala. 296 (1878)* (refusal of the probate judge to issue a certificate of redemption for land sold for taxes was reviewable in the circuit court by a petition for a writ of mandamus).

[HN8] Redemption divests the tax-sale purchaser of a possessory interest in the property. *Washington v. ORIX Credit Alliance, Inc., 825 So. 2d 828 (Ala. Civ. App. 2001)*. Here, the unchallenged certificate of redemption, issued in September 2004, divested Ross of his possessory interest in the property. Nevertheless, Ross thereafter *leased* the property, first to Fletcher, then to Hurt and Baxter. Thus, Ross caused, as a matter of law, his tenants to trespass on the property.

On the issue of wantonness, it is undisputed that, rather than mount a judicial challenge to the certificate of redemption, Ross simply ignored [**20] it and treated the property as though he still had a possessory interest. Although Ross was not formally served with process in *MERS v. Campbell*, CV-05-917, which involved his interest in the property, there was evidence indicating that he knew that that litigation was pending, at least as early as February 13, 2006, that is, before the March 14, 2006, judgment entered in that case, but chose to ignore that litigation and also instructed his tenants not to respond to notices involving the property.

[HN9] "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." *Kihl v. Pfeffer, 94 N.Y.2d 118, 123, 722 N.E.2d 55, 58, 700 N.Y.S.2d 87, 90 (1999)*. "A party ignores a valid order of court at its own peril." *United Servs. Auto. Ass'n v. Strasser, 492 So. 2d 399, 402 n.1 (Fla. Dist. Ct. App. 1986)*.

Regardless of the whether the provisions of *§ 40-10-122* were properly applied, Ross was not excused or justified in ignoring the judicial orders and processes involving this property. From September 2004 until the commencement of this action on October 24, 2006, at the least, Ross sought to occupy the property [**21] by proxy without any justifiable claim of right. There was substantial evidence that Ross induced Hurt and Baxter to enter into possession of the property with knowledge that he had no right of possession, and there was not substantial evidence that Ross acted in good faith or with any justification in so doing. Indeed, Ross's interpretation of the applicable statutes is so wholly lacking in any foundation in law as [*39] to admit of no other conclusion than that he acted with a state of mind consistent with wantonness as a matter of law.

Ross also argues that the Rosen-Ragers were not *bona fide* purchasers of the property. Specifically, he states:

> "As a result of MERS's failure to redeem, and because the Rosen-Ragers were not *bona fide* purchasers, they acquired the property subject to Ross's interest. ... As a result, Ross continued to have the right to possess and rent the property. Therefore, the Rosen-Ragers failed to prove elements essential to all of their claims, and they were not entitled to summary judgment on *any* claim."

Ross's brief, at 44-45 (emphasis in original). In response, the Rosen-Ragers contend that their "status as *bona fide* purchasers is *irrelevant*, as Ross possessed no claim [**22] in the property against which [they] must assert their status as *bona fide* purchasers." Rosen-Ragers' brief, at 55 (emphasis added). We agree with the Rosen-Ragers.

Ross lost his interest in the property when he failed timely to challenge the certificate of redemption. The loss foreclosed Ross's defenses against any trespass claim that might have been brought by MERS, as well as his defenses against the Rosen-Ragers, regardless of whether they were *bona fide* purchasers of MERS's interest. Consequently, the circuit court did not err in entering a summary judgment for the Rosen-Ragers on their claim of wanton trespass.

B. Evidentiary Issues at Trial

Ross raises two issues relating to the admissibility of evidence during the trial of the case, which errors are reviewed to determine whether the circuit court exceeded its discretion. *Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 71 (Ala. 2001)*. According to Ross, some evidence was improperly admitted, while some evidence was improperly excluded. [HN10] "A trial court's ruling on the admission or exclusion of evidence will be reversed only if it is shown that the trial court exceeded its discretion in so ruling." *Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 7 (Ala. 2007)*.

1. [**23] *Admission of Evidence of Defendant's Wealth*

First, Ross contends that the circuit court improperly allowed the Rosen-Ragers to place before the jury evidence of Ross's financial condition. Specifically, the Rosen-Ragers presented evidence indicating that, including the $ 1,612.93 MERS had paid to redeem the property -- which money Ross refused to collect -- the Madison County Probate Court was holding approximately $ 150,000 that Ross was refusing to collect in other such cases for similar reasons. According to Ross, he "had acquired a number of tax-sale properties" for which he had not been reimbursed for insurance and improvements, and he was refusing payment as in this case, "because he was concerned that accepting the probate money might be construed as ratification of an incomplete redemption." Ross's brief, at 53.

The Rosen-Ragers contend that the evidence that Ross was refusing to collect money held for him by the probate court was admissible to show that Ross's refusal to relinquish possession of the property in this case was part of a systematic scheme or practice calculated to deny the rights of "legal title holders to peacefully possess their property," Rosen-Ragers ' brief, [**24] at 61, and that, in any case, Ross did not properly object to the evidence when proffered. In connection with the non-preservation argument, the following colloquy occurred at trial during the testimony of Jan [*40] Dismuke, an accountant clerk at the Madison County Probate Office:

> "Q. [By the Rosen-Ragers' counsel:] Did Mr. Ross ever come and pick that money up?
>
> "A. [By Dismuke:] No, sir.
>
> "Q. How much redemption money are you holding for Howard Ross that he has not come and picked up?
>
> "[By Ross's counsel:] *Objection, Judge, that's irrelevant.*
>
> "[The court:] Overruled.
>
> "Q. [By the Rosen-Ragers' counsel:] You may answer.
>
> "A. One hundred and forty-nine thousand, two hundred and thirty-seven dollars and fifty-nine cents.
>
> "Q. No more questions."

(Emphasis added.)

It is well settled that [HN11] a "specific objection is a condition precedent to appellate review while a general objection is a waiver of appellate review. ... A general objection to evidence is one which does not definitely and specifically state the ground upon which it is based so that the court may intelligently rule on it." II Charles W. Gamble & Robert J. Goodwin, *McElroy's Alabama Evidence* § 426.01(7), at 2125 (6th ed. 2009) (hereinafter referred [**25] to as "*McElroy*"). This rule applies "unless the evidence is patently illegal and cannot be made legal for any purpose." *Harris v. Martin, 271 Ala. 52, 53, 122 So. 2d 116, 118 (1960)*. An objection on the ground that the proffered evidence is "irrelevant" is a general objection. *Few v. State, 518 So. 2d 835, 837 (Ala. Crim. App. 1987)*; *Manson v. State, 349 So. 2d 67, 81 (Ala. Crim. App. 1977)*. "The party who lodges a general objection at trial may not expand the objection on appeal by including specific grounds." *McElroy, supra*, at 2125.

Dismuke's testimony was not patently inadmissible and illegal for every purpose. It bore a logical relationship to the ultimate question--whether Ross had consciously or deliberately engaged in oppression or wantonness with regard to the Rosen-Ragers. [HN12] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Rule 401, Ala. R. Evid.* Indeed, Ross essentially concedes that evidence of multiple, similar instances of ignoring certificates of redemption would have been admissible for that purpose. In this Court, [**26] Ross states: "The Rosen-Ragers could have made their point simply by asking the probate clerk *how many* other tax-sale properties Ross owned as to which he had not picked up funds deposited for redemption. The *amount* of funds deposited was ... inadmissible evidence of Ross's financial condition." Ross's reply brief, at 27-28 (emphasis in original). This is an argument that should have been made to the circuit court at the time of the proffer, not for the first time in this Court. Because Ross did not properly object to Dismuke's testimony, he is not entitled to a reversal based on its allegedly improper admission.

2. Exclusion of the Tax-Sale and Redemption Statutes

During the trial, Ross attempted to read to the jury, or otherwise to place in evidence, portions of the redemption and tax-sale statutes, which, he alleged, gave him the right to place tenants on the property after, and despite, the issuance of the certificate of redemption. After an objection by the Rosen-Ragers' counsel, Ross's counsel stated to the circuit court:

> "If we can read certain aspects of the statute .... That gives us an opportunity to show our primary defense of justification. [*41] If we are not able to discuss the specific [**27] statute and what it states and his understanding of it at all, then I think that entirely eliminates our ... defense.
>
> "...
>
> ".... If there is *no degree* that Mr. Ross would have *any justification*, then, obviously, the [punitive] damages could be higher. If there is *complete justification* for the actions that he has done, even though you determined they're wrong previously, there would be no damages, conceivably."

(Emphasis added.)

The circuit court disallowed Ross's proffer. Ultimately, it charged the jury solely on wantonness as a basis for punitive damages. Ross objected to the charge on the ground that it did not contain an instruction on reliance on the statutes as "justification." That objection was overruled. Ross now argues that the judgment entered on the jury's verdict must be reversed, because, he says, "[e]xcluding the statutes deprived the jury of information vital to assessing [his] conduct and determining whether and what punishment was appropriate." Ross's brief, at 57.

We disagree with this argument. The partial summary judgment finding Ross liable for wantonness being proper as discussed above, Ross's alleged understanding of the statutes was irrelevant. The admission of the statutes [**28] into evidence would merely have invited the jury to *nullify* the partial summary judgment, which had correctly resolved in the Rosen-Ragers' favor the issue whether, as a matter of law, Ross was justified to *any* degree. Consequently, the circuit court did not exceed its discretion in shielding the jury from the text of the statutes.

C. Review of the Punitive-Damages Award

Finally, Ross contends that the punitive-damages award is excessive, and he seeks a substantial remittitur. [HN13] This Court has a duty to conduct a *de novo* review of a punitive-damages award. *Acceptance Ins. Co. v. Brown, 832 So. 2d 1 (Ala. 2001)*. According to Ross, the amount of the jury's verdict "far exceeds" the amount that, as stated in *Green*

Oil Co. v. Hornsby, 539 So. 2d at 222, "'will accomplish society's goals of punishment and deterrence.'" Ross's brief, at 60.

In reviewing a punitive-damages award, we apply the factors set forth in *Green Oil,* within the framework of the "guideposts" set forth in *BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)*, and restated in *State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)*. See *AutoZone, Inc. v. Leonard, 812 So. 2d 1179, 1187 (Ala. 2001)* [**29] (*Green Oil* factors remain valid after *Gore*).

The *Gore* guideposts are: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell, 538 U.S. at 418*. The *Green Oil* factors, which are similar, and auxiliary in many respects, to the *Gore* guideposts, are:

> "(1) the reprehensibility of [the defendant's] conduct; (2) the relationship of the punitive-damages award to the harm that actually occurred, or is likely to occur, from [the defendant's] conduct; (3) [the defendant's] profit from [his] [*42] misconduct; (4) [the defendant's] financial position; (5) the cost to [the plaintiff] of the litigation; (6) whether [the defendant] has been subject to criminal sanctions for similar conduct; and (7) other civil actions [the defendant] has been involved in arising out of similar conduct."

Shiv-Ram, Inc. v. McCaleb, 892 So. 2d 299, 317 (Ala. 2003) (paraphrasing the *Green Oil* factors).

1. *Gore Reprehensibility Guidepost and Green Oil Factors (1),* [**30] *(2), (5), and (7)*

"[HN14] Perhaps the most important *indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, 517 U.S. at 575*. The circuit court's *Hammond* order is instructive on this point; it states, in pertinent part:

> "Ross is an anathema upon the court system and the public. He has engaged in a pattern and practice of ignoring and actively avoiding the authority of the courts himself, while using hyper-technical or distorted interpretations of the law that suit him against others. The harm Ross causes in the process is substantial, not only to the private parties directly involved, but also to the integrity of the law and the integrity of society.
>
> "In this case, Ross purchased the tax interest in the property at issue. [MERS], holding a pre-existing mortgage on the property, foreclosed upon and then redeemed the property from the tax sale by payment to the Madison County Judge of Probate, receiving a Certificate of Redemption. Ross began negotiation with [MERS] for further payment to him for purported improvements he made to the property. Simultaneously, [MERS] instituted Court proceedings to remove Ross's tenants from [**31] the property. Ross's knowledge of and involvement with those proceedings is evident, as is his avoidance of legitimately having his entitlement to any payments finally determined through such proper channels. Ross made considerable effort to keep his right to additional payments a live issue, giving him, in his mind, a colorable claim to possess the property, while actively avoiding any action he might be required to admit resolved the issue. Ross also, during the relevant time, unsuccessfully sued [Fletcher] for failing to pay him rent on the involved property and received a judgment indicating he was not entitled to collect rent from tenants on that property *[Ross v. Fletcher*, DV-05-2689].
>
> "Despite . . . court rulings that provided Ross ample notice of his tenuous position, Ross persisted in possessing the property and renting it to tenants. [MERS], having received a final order of the Madison County Circuit Court ejecting Ross's tenants, informed Ross of that Court action and conveyed the property to the [Rosen-Ragers]....
>
> "....
>
> "Ross's conduct in this case cannot be viewed in isolation. This Court previously adjudicated the case of *Cindy L. Schrock v. Howard Ross*, CV 06-900. In that case, [**32] Ross also purchased the tax

interest in a property. That property was redeemed by a mortgage company after foreclosing on the property. That property was sold to an innocent third party, Cindy Schrock. Ms. Schrock entered into her new property and evidenced her possession. When Ms. Schrock was away from her property on vacation, Ross moved tenants in and fought to keep them in the property. This Court, after a full trial, restored possession to Ms. Schrock and ordered Ross to pay damages of $ 16,639.

"....

[*43] "The scope of Ross's enterprise, as well as his general way of doing business, is further evidenced by the fact that the Madison County Judge of Probate holds approximately $ 150,000 for Ross. When the property at issue in this case was redeemed by a payment of approximately $ 1,600 to the Probate Judge, Ross did not collect the redemption money, to which he was entitled, as the tax sale purchaser. According to Ross's testimony, he purposely failed to collect the funds for concern that his claims to possession of the property would thereby be diminished. Similar evidence was presented in Ms. Schrock's case. Ross's approach to these funds is further evidence of the reprehensible gamesmanship [**33] he applies to his enterprise. The accumulation of these funds to approximately $ 150,000 evidences the vastness of his scheme. Finally, that Ross would deny himself possession of such a sum to further his scheme is evidence of its profitability and Ross's resources.

"Any citizen owning one of the numerous properties represented by the $ 150,000 in redemption proceeds held for Ross by the Probate Judge must beware. Ross avoids collecting those funds to aid his articulation of an excuse for possession of those properties. Ross has demonstrated that, if he can find those properties vacant due to an owner's holiday vacation, renovation or otherwise, he will lease them. He will lease them after a court rules his tenants cannot possess them. He will lease them after a court rules he is not entitled to collect rent on them. Every month he can lease them equals another rental payment received. He will not prosecute a resolution of his articulated excuses for possessing the properties or collect redemption payments due him, because to do so would alleviate excuses for possession and collecting further rent.

"Ross's tactics are of great concern. Each time Ross places tenants in a home belonging [**34] to another (whether the homeowner be on vacation or absent for other reasons), he places tenants and homeowners at great risk for dangerous confrontation. Each time he displays to a homeowner his ability to, in fact, place tenants in their home and collect rent in the face of deeds, certificates of redemption, court orders and other protections in which our society vests faith, he erodes confidence in our society and encourages the worst of behavior. Ross challenges those in his path to navigate the Court system and laws (with which he is quite experienced) and stop him if they can.

"The purpose of a punitive damages award is to deter conduct. Many court rulings should have deterred Ross before the punitive damages award in this case. Ross, however, is persistent."

The circuit court correctly noted that this case cannot be considered in a vacuum. Although it is unrefuted that service of process was never formally effected upon Ross in *MERS v. Campbell*, CV-05-917, in which he could have resolved the precise issue regarding his possessory interest in this property, he had actual notice of ongoing litigation as early as February 13, 2006, when MERS informed him of an imminent hearing involving [**35] his claim to the itemized expenses. Also, as the trial court's *Hammond* order reveals, *Schrock v. Ross*, CV-06-900, was another civil action involving similar conduct in which an identical substantive issue was litigated to a conclusion adverse to Ross. (*Green Oil* factor (7).) Ross appealed the judgment entered in that case, and this Court affirmed the judgment without an opinion on December 7, 2007. *Ross v. Schrock, 25 So. 3d 1204* [*44] *(Ala. 2007)* (table). Although the trial court's final judgment in *Schrock* was not entered until December 22, 2006, that is, approximately two months after the Rosen-Ragers sued Ross, *Schrock* is still evidence of similar conduct, though not necessarily of Ross's knowledge of wrongdoing.

With regard to the cost of litigation (*Green Oil* factor (5)), the Rosen-Ragers submitted the affidavit of their attorney, which stated that the Rosen-Ragers had already paid attorney fees totaling $ 9,880.41 and had incurred other expenses totaling $ 6,247.21. In lieu of the further payment of attorney fees on an hourly basis, the Rosen-Ragers agreed to pay their counsel an undisclosed percentage of any sums ultimately collected from Ross. Notwithstanding this contingency-fee [**36] arrangement, the Rosen-Ragers' counsel computed the hours expended by the legal professionals

employed as if billed at the regular hourly rates and arrived at $ 82,000 as the value of costs, expenses, and legal fees attributable to the prosecution of this case.

To be weighed against these observations is the fact that [HN15] the purchasing of tax-sale property is, in itself, a laudable practice, *one to be encouraged*, rather than discouraged. Hence, "[t]he Alabama legislature ... has enacted statutes *favoring* the sale of land to secure payment of delinquent taxes." William R. Justice, *Redemption of Real Property Following Tax Sales in Alabama*, 11 Cumb. L. Rev. 331, 331 (1980) (emphasis added). Ross testified that if the punitive-damages verdict is upheld, it will "effectively put [him] out of business regarding properties that [he] could afford to buy at tax sales," and he will simply stop purchasing tax-sale properties. Because such a result would be counterproductive, the goal must be not to discourage Ross from engaging in the practice *per se*, but essentially to dissuade him from ignoring probate court orders and certificates. He has already been required to pay $ 16,639 in the *Schrock* [**37] case.

2. *Civil-Penalties Guidepost in Gore*

The parties do not discuss this guidepost or direct us to any evidence or authority related to its application.

3. *Gore Guidepost of Disparity Between the Damage and the Award and Green Oil Factors (3) and (4)*

The final *Gore* guidepost we will consider is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." *Campbell, 538 U.S. at 418*. The Rosen-Ragers' complaint does not include claims based on personal injury. There is only the *potential* for personal injury each time Ross's practice of deliberately ignoring certificates of redemption brings competing claimants for the same property into direct physical contact.

Also, [HN16] "'[i]f the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss. ... The financial position of the defendant [is also] relevant.'" *Green Oil, 539 So. 2d at 223* (quoting *Aetna Life Ins. Co. v. Lavoie, 505 So. 2d 1050, 1062 (Ala. 1987)* (Houston, J., concurring specially)(factor (3))). Ross profits from this scheme by keeping tenants on properties until they are [**38] evicted by judicial action, in some cases, long after the issuance of the certificates of redemption. In this case, Hurt and Baxter paid Ross approximately $ 1,000 in rent.

Although Ross values his assets at $ 1,167,000, his testimony at the *Hammond* hearing regarding his financial condition was confusing, at best, and failed to establish anything definitive regarding his status. [*45] (*Green Oil* factor (4).) In that connection, the circuit court stated: "Ross has not provided this court credible evidence upon which to fully judge his financial condition." Indeed, the evidence he *did* offer as to his financial condition was referable only to the *time of trial and later*, rather than to the "time of the occurrence made the basis of the suit," as required by *Ala. Code 1975, § 6-11-21(c)*, to establish the specific damages limitations provided in *§ 6-11-21(b)* for "a small business."

Viewing these factors *in toto*, including the limited objective to be achieved and the absence of any actual personal injury, we conclude that a $ 120,000 punitive-damages award is sufficient to punish Ross and to deter further conduct similar to that evidenced in this case, without compromising his due-process rights.

III. [**39] *Conclusion*

In conclusion, the partial summary judgment is affirmed. The judgment entered on the jury's punitive-damages verdict is affirmed, on the condition that the Rosen-Ragers file with this Court, within 21 days, a remittitur of the punitive-damages award to $ 120,000; otherwise, the judgment will be reversed and the cause remanded for a new trial on the issue of punitive damages.

AFFIRMED IN PART AND AFFIRMED CONDITIONALLY IN PART.

Cobb, C.J., and Lyons, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur.

TAB 5

1 of 1 DOCUMENT

*** Current through 2012 Regular Session ***
*** (Acts 2012, No. 12-567) ***

TITLE 40 Revenue and Taxation
CHAPTER 10 Sale of Land
Article 5 Redemption of Land Sold for Taxes

Go to the Alabama Code Archive Directory

Code of Ala. § 40-10-122 (2012)

§ 40-10-122. Deposit of funds; amount.

(a) In order to obtain the redemption of land from tax sales where the same has been sold to one other than the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest payable at the rate of 12 percent per annum from date of sale, and, on the portion of any excess bid that is less than or equal to 15 percent of the market value as established by the assessing official, together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records in the office of the tax collector, or other tax collecting official, with interest on the payment at 12 percent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if the taxes are due which may be ascertained by consulting the tax collector or other tax collecting official of the county, the probate judge shall also require the party desiring to redeem the land to pay the tax collector or other tax collecting official the taxes due on the lands which have not been paid by the purchaser before he or she is entitled to redeem the same. In all redemptions of land from tax sales, the party securing the redemption shall pay all costs and fees as herein provided for due to officers and a fee of $.50 to the judge of probate for his or her services in the matter of redemption. This application and payment may be executed by an on-line transaction via the Internet or other on-line provision.

(b) With respect to property located within an urban renewal or urban redevelopment project area designated pursuant to Chapters 2 or 3 of Title 24, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on insurable structures with interest on said payments at 12 percent per annum.

(2) The value of all permanent improvements made on the property determined in accordance with this section with interest on said value at 12 percent per annum.

(c) With respect to property which contains a residential structure at the time of the sale regardless of its location, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on the residential structure with interest on the payments at 12 percent per annum.

(2) The value of all preservation improvements made on the property determined in accordance with this section with interest on the value at 12 percent per annum.

(d) As used herein, "permanent improvements" shall include, but not be limited to, all repairs, improvements, and equipment attached to the property as fixtures. As used herein, "preservation improvements" shall mean improvements made to preserve the property by properly keeping it in repair for its proper and reasonable use, having due regard for the kind and character of the property at the time of sale. The proposed redemptioner shall make written demand upon the purchaser of a statement of the value of all permanent or preservation improvements as applicable made on the property since the tax sale. In response to written demand made pursuant to this subsection, within 10 days from the receipt of such demand, the purchaser shall furnish the proposed redemptioner with the amount claimed as the value of such permanent or preservation improvements as applicable; and within 10 days after receipt of such response, the proposed redemptioner either shall accept the value so stated by the purchaser or, disagreeing therewith, shall appoint a referee to ascertain the value of such permanent or preservation improvements as applicable. The proposed redemptioner shall in writing (i) notify the purchaser of his or her disagreement as to the value; and (ii) inform the purchaser of the name of the referee appointed by him or her. Within 10 days after the receipt of such notice, the purchaser shall appoint a referee to ascertain the value of the permanent or preservation improvements as applicable and advise the proposed redemptioner of the name of the appointee. Within 10 days after the purchaser has appointed his or her referee, the two referees shall meet and confer upon the award to be made by them. If they cannot agree, the referees shall at once appoint an umpire, and the award by a majority of such body shall be made within 10 days after the appointment of the umpire and shall be final between the parties.

(e) If the proposed redemptioner fails or refuses to nominate a referee as provided in subsection (d), he or she must pay the value put upon the improvements by the purchaser. If the purchaser refuses or fails to appoint a referee, as provided in subsection (d), the purchaser shall forfeit his or her claim to compensation for such improvements. The failure of the referees or either of them to act or to appoint an umpire shall not operate to impair or forfeit the right of either the proposed redemptioner or the purchaser in the premises and in the event of failure without fault of the parties to affect an award, the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable and enforce the redemption accordingly.

HISTORY: Acts 1988, 1st Ex. Sess., No. 88-824; Acts 2002, No. 02-426; Acts 2009, No. 09-508, § 1, Sept. 1, 2009.

NOTES: 2009 amendments.

The 2009 amendment, effective September 1, 2009, substituted "the assessing official" for "the county board of equalization" in the first sentence of (a) and made stylistic changes.

Editor's notes.

Acts 2002, No. 02-426, §§ 3 and 4: "Notwithstanding any provisions of law to the contrary, the provisions of this act shall not apply to any transaction that began prior to the effective date of this act.

"This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law, and shall apply prospectively only to tax sales after the effective date of this act and shall in no way affect tax sales made prior to the effective date of the act." The act was approved by the Governor on April 18, 2002 and became effective on July 1, 2002.

NOTES TO DECISIONS

Application. Attorney fees. Construction with other law. Duty of tax collector. Itemization of expenses.

Application.

Summary judgment for a bank in its action to be declared the owner of certain real property it alleged it redeemed from a tax sale was improper, as a purchaser had no duty under *Ala. Code § 40-10-122* to respond to the bank's demand by providing the amount of insurance premiums the purchaser paid on the property, whereas the bank did have a duty to reimburse the purchaser. *Ross v. Deutsche Bank Nat'l Trust Co., -- So. 3d --, 2010 Ala. Civ. App. LEXIS 247* (Aug. 27, 2010).

Attorney fees.

Under *§ 40-10-83*, the plaintiff may collect a reasonable attorney fee; under *§ 40-10-120* and this section he may not. *Daugherty v. Rester, 645 So. 2d 1361, 1994 Ala. LEXIS 210 (1994).*

Construction with other law.

When the provisions of this section are not complied with, the only right to redeem is by virtue of *§ 40-10-83*. *Heard v. Gunn, 262 Ala. 283, 78 So. 2d 313, 1955 Ala. LEXIS 426 (1955).*

When the requirements of this section have been complied with, there is no time limit to an exercise of the right to redeem. The short statute of limitations, three years pursuant to *§ 40-10-82*, is not an extension of the time in which a statutory redemption may be had. *Heard v. Gunn, 262 Ala. 283, 78 So. 2d 313, 1955 Ala. LEXIS 426 (1955).*

Because plaintiff taxpayer challenged defendant county's demand for excess funds under *Ala. Code § 40-10-122(a)* upon his redemption of his real property after a tax sale, the challenge to the state's tax sale procedures fell under the Tax Injunction Act, *28 U.S.C.S. § 1341*, and the case was dismissed without prejudice. *Deshazo v. Baldwin County, -- F. Supp. 2d --, 2006 U.S. Dist. LEXIS 51118* (S.D. Ala. July 25, 2006).

In a wanton trespass and ejectment action, the trial court did not err in entering summary judgment for the property owners on their claim of wanton trespass because a tax-sale purchaser lost his interest in the property when he failed timely to challenge a certificate of redemption and the loss foreclosed his defenses against any trespass claim. *Ross v. Rosen-Rager, -- So. 3d --, 2010 Ala. LEXIS 152* (Aug. 27, 2010).

Duty of tax collector.

State is not authorized to purchase property at a sale for the purpose of satisfying tax liens due a municipal corporation. *Opp v. Brogden, 236 Ala. 180, 181 So. 752, 1938 Ala. LEXIS 128 (1938).*

Itemization of expenses.

Trial court did not exceed its discretion in refusing to grant the land company's postjudgment motion on the basis of the owner's failure to request an itemization of expenses the company incurred to improve the property. As such, the court would not reverse the trial court's on the basis that the owner failed to comply with *Ala. Code § 40-10-122*. *Espinoza v. Rudolph, -- So. 2d --, 2010 Ala. LEXIS 48* (Mar. 19, 2010).

Cited in

Jim Walter Homes, Inc. v. Blake, 544 So. 2d 161, 1989 Ala. LEXIS 256 (1989); Patterson v. Porter, 555 So. 2d 750, 1989 Ala. LEXIS 999 (1989).

RESEARCH REFERENCES

Alabama Law Review.

Survey of 2002 Alabama Legislation. *54 Ala. L. Rev. 1473 (2003).*

TAB 6

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL DIVISION / BIRMINGHAM

RAYMOND C. WINSTON,	)	
DEBRA LOONEY,	)	
LEO LOONEY, each individually and for a class of similarly situated individuals or entities,	)	
	)	
Plaintiffs	)	
v.	)	**CIVIL ACTION NO.:**
	)	**CV 07-2297-MGG**
JEFFERSON COUNTY, ALABAMA;	)	
J.T. SMALLWOOD, TAX COLLECTOR OF JEFFERSON COUNTY, ALABAMA;	)	
BARRY STEPHENSON, TREASURER OF JEFFERSON COUNTY, ALABAMA.	)	
Defendants		

ORDER:

ON DEFENDANT'S MOTION TO ALTER, AMEND OR VACATE JUDGMENT,

and,

CLARIFYING & AMENDING ORDER ENTERED AUGUST 28, 2008

On August 28, 2008, this Court entered its Order in this matter entitled ORDER: CONFIRMING RULLINGS MADE IN OPEN COURT; ON PENDING MOTIONS; and, ON MOTIONS FOR SUMMARY JUDGMENT [hereinafter, ***"the August 28 / 08 Order"***]. Said Order concluded by directing the parties herein to confer on issues remaining, primarily the mechanical aspects of administering the measures necessary to identify the members of the WINSTON CLASS and distribute the funds that the Order required be disbursed. On September 8, 2008, Defendants filed their MOTION TO ALTER, AMEND OR VACATE JUDGMENT.

Thereafter, the parties did indeed confer, and then jointly submitted revisions to the August 28/08 Order that address the items the Court directed them to address, as well as clarify certain parties and issues addressed in the August 28/08 Order. As such, Defendants MOTION TO ALTER, AMEND OR VACATE JUDGMENT is **GRANTED** in part, and, **DENIED** in part. It is the opinion of the undersigned that the clearest and most efficient way for the Court to address said Motion is to essentially "re-enter" the August 28/08 Order, however, "revised" and "clairfied" as stated above. Accordingly, it is hereby **ORDERED, DIRECTED** and **ADJUDGED** that the Order of this Court entered August 28, 2008, in this matter, is hereby **CLARIFIED** and **REVISED** to read in full as follows:

I. INTRODUCTION

This matter is a class action, filed June 29, 2007, and certified by Order of the undersigned entered January 7, 2008, and amended on January 17, 2008. In this class action litigation, Plaintiffs assert a variety of allegations concerning violations of 42 U.S.C. §1983 and seek both declaratory and injunctive relief regarding certain practices in Jefferson County, Alabama, as undertaken by the Jefferson County Tax Collector and Jefferson County Treasurer, of accepting and retaining excess funds realized at ad valorem tax sales, all of which is discussed in detail, below. All Defendants, to-wit: JEFFERSON COUNTY, ALABAMA; JEFFERSON COUNTY TAX COLLECTOR [J. T. Smallwood]; and, JEFFERSON COUNTY TREASURER [Barry Stephenson or Kenneth Gomany] deny these allegations and maintain that their collective practices in these regards do not violate any Alabama, or, United States, law. Hereinafter:

- any reference to the ***"County"*** shall specifically refer to Defendant JEFFERSON COUNTY, ALABAMA;
- any reference to the ***"Tax Collector"*** shall specifically refer to Defendant JEFFERSON COUNTY TAX COLLECTOR; and,
- any reference to the ***"Treasurer"*** shall specifically refer to Defendant JEFFERSON COUNTY TREASURER.

During the course of this litigation, the undersigned has conducted numerous conferences with the parties and counsel, and, more than one formal hearing. Further, the undersigned has entered various rulings, determinations and orders during the course of one or more hearings that were made on the record with a court reporter present. However, some of these rulings and orders have not been reduced to a separate paper Order. This Order will, therefore, memorialize said prior rulings and orders and do so with particularity and specificity. Further, this Order will address all pending Motions, and, Cross-Motions for Summary Judgment.

II. GENERAL OVERVIEW OF FACTS AND CLAIMS

Defendant Jefferson County, Alabama, by and through Defendant Jefferson County Tax Collector [presently, J. T. Smallwood], conducts yearly tax sales of real property in Jefferson County, Alabama, to satisfy past due ad valorem taxes owed by the real property owners. These

sales are generally held in May or June of the year following the year for which the taxes were due. The express purpose of these sales, as statutorily authorized, is to satisfy outstanding taxes, interest, penalties and costs. The Tax Collector is directed by statute to sell only so much land as may be necessary to pay the taxes, attendant interest, and costs which are then owed by the owners. See, ALA. CODE §40-10-16 (1975). [Hereinafter, all such references to statutes by section (§) and number are to the *Code of Alabama, 1975.*]

Once the real estate is sold by the Tax Collector, Alabama statutes provide a framework for redemption by the owner for up to three years following the tax sale. *See,* §40-10-120. Redemption by the owner within three years following the tax sale requires the property owner to pay the County *"the amount of money for which the lands were sold"*, plus 12% interest thereon, plus all taxes due since the sale, plus 12% interest thereon, plus all costs and fees. [Emphasis added.] *See,* §40-10-121. After three years following the tax sale, the purchaser at the tax sale is entitled to a tax deed. *See,* §40-10-29. Redemption by the owner after the issuance of a tax deed to the purchaser is also protected so long as the owner has remained in possession. *See,* §40-10-83.

For a number of years, tax sales conducted in Jefferson County have produced very large amounts of money over and above the amount actually due for past taxes, interest and costs [hereinafter, ***"Excess Funds"***]. In the last several years, when an owner seeks redemption of the real estate sold at tax sale, the Jefferson County Tax Collector has consistently followed a policy of requiring 12% interest on the excess funds, as well as on the taxes owed. Despite the consistency of the Tax Collector's policy and practice in accepting excess bids, the Tax Collector, prior to a tax sale, provides no notice to the owner of the real property to be sold that:

- excess funds may be accepted at the sale for amounts over and above the tax and costs due; or,
- in order to redeem his real estate, the owner will be required to pay 12% interest on any excess funds paid at the tax sale in addition to the tax, penalties, costs and interest on tax itself; or,
- that any excess funds paid on the sale of their real estate are available to be paid to the owner; or,
- that any excess funds paid on the sale of the owner's real estate will be held by the County at interest.

Instead, at the date of the tax sale, the Tax Collector takes possession of all the proceeds, i.e., any

excess funds paid by the purchaser over and above the taxes, penalties, interest and costs owed by the owner of the property, and then issues a tax certificate to the purchaser. The Jefferson County Tax Collector takes the money from each tax sale and pays it over to the Jefferson County Treasurer who holds those excess funds at interest [hereinafter, ***"the Redemption Fund"***].

Defendants Jefferson County, Jefferson County Tax Collector and Jefferson County Treasurer have historically interpreted and applied §40-10-28 [popularly, and hereinafter, referred to as the ***"Alabama Excess Funds Statute"***] so that after conducting a tax sale any excess funds are retained in the Jefferson County Treasury. The real property owner is never given notice that these excess funds are in the Treasury nor are they told that they are entitled to these excess funds resulting from the sale of their real estate. The excess funds are not paid to the owner of the real estate at the time of the tax sale nor are those funds made available to the owner at any point by these Defendants unless the owner redeems the property. Even at the point of redemption, historically, Defendants have not paid the owner the interest earned on the excess funds while retained by the Jefferson County Treasurer.

If an owner redeems the real estate within the first three years after the tax sale, said owner is required to pay (in addition to the taxes, penalties, costs and interest thereon at 12%), interest at 12% on the excess funds as well; yet, said redeeming owner is given no credit toward this payment for the interest earned on the excess funds while on deposit with the Jefferson County Treasurer. Instead, on redemption, the Tax Collector collects these sums from the redeeming owner and then remits them to the purchaser at the tax sale who receives the benefit of this interest on the excess finds.

If the owner desires to redeem his or her real estate *after three years* and the issuance of the tax deed, he or she is first required to acquire the interest of the holder of the tax deed. This requires the owner to first pay that purchaser the excess funds and interest thereon at 12% (in addition to all taxes paid, penalties costs and interest thereon at 12%). If the owner can buy that interest, he will typically be given a quitclaim deed by the purchaser. If the owner complies with all of this, then the Tax Collector directs the Treasurer to pay the owner the net excess funds it has been holding but with no interest thereon. Without redemption, however, Defendants have not historically allowed the owner to have the excess funds which were paid at the sale of the owner's real estate.

III. FINDINGS and RULINGS PREVIOUSLY MADE IN OPEN COURT

Earlier this year, Plaintiffs and Defendants each filed several different motions and/or responses regarding the Redemption Fund, which had a balance at that time in excess of $37,000,000.00 [See, Exh. 2, Ptfs' MSJ], to-wit:

- on February 5, 2008, Plaintiffs filed their MOTION FOR LIMITED STANDSTILL INJUNCTIVE RELIEF, seeking an Order restraining and enjoining Defendants from making any transfers from the Redemption Fund except in the normal course of the real property redemption process so as to protect the *Winston Class* by maintaining the *status quo*;

- on February 15, 2008, at 10:35 a.m., Plaintiffs filed their MOTION TO SEGREGATE THE REDEMPTION FUND, seeking an Order: restraining and enjoining Defendants from failing to separate and segregate the Redemption Fund from any and all other funds held by the Treasurer; appointing a receiver over the Redemption Fund; and, directing that an accounting of the Redemption Fund be conducted;

- on February 15, 2008, at 4:16 p.m., Defendants filed their OPPOSITION TO MOTION TO SEGREGATE FUNDS;

- on February 20, 2008, Plaintiffs filed their RESPONSE to Defendants' OPPOSITION;

- on February 29, 2008, Plaintiffs filed their EX PARTE APPLICATION / SHOW CAUSE FOR PRELIMINARY INJUNCTION and MOTION FOR TRO with respect to Plaintiffs' prior request to segregate the Redemption Fund.

This Court entered an Order on February 29th granting a TRO directing Defendants to segregate the Redemption Fund at Regions Bank [as Interim Receiver] and prohibiting Defendants from cumulating and/or comingling the segregated Redemption Fund with any assets held by Jefferson County, Alabama. Said Order further declared that the Redemption Fund was considered not to be held in any manner by Defendant JEFFERSON COUNTY, ALABAMA, and also set a hearing for March 6, 2008, for Defendants to show cause why the requested Preliminary Injunction should not issue. Said hearing was held on March 6th, and, on March 7th this Court entered its Order declining to dissolve the TRO entered February 29th, and set a further hearing on March 13, 2008, to further consider Plaintiffs February 5th MOTION FOR LIMITED STANDSTILL INJUNCTIVE RELIEF, Plaintiffs' February 15th MOTION TO SEGREGATE THE REDEMPTION FUND, and, Plaintiffs' February 29, 2008, EX PARTE APPLICATION / SHOW CAUSE FOR PRELIMINARY INJUNCTION. However, it must be noted that at the March 6th hearing Defendants reported in open court and on the record, that the previously ordered segregation of the Redemption Fund had been accomplished by opening a new and separate account with Regions Bank, under Account #92361463.

At the March 13th hearing, the Court was informed that, after the payment from the Redemption Fund of $4,249,004.42 [as ordered March 7, 2008, in the companion case *MNP Class Settlement, CV 07-900669-MGG*], the opening balance of the newly segregated Redemption Fund account was $37,360,329.56. The Court then proceeded to receive evidence and hear oral argument on the three Motions set out above and then made verbal findings and rulings on the record that to date have not yet been entered as a separate written orders. The following is set forth to clarify for the record in this matter those FINDINGS and RULINGS.

III. (A) MOTION FOR LIMITED STANDSTILL INJUNCTIVE RELIEF

Plaintiffs *Winston Class* presented evidence, including Defendants' January 29, 2008, Responses to Plaintiffs' Interrogatory 14, showing that Defendants have on several occasions paid excess funds contained in the Redemption Fund to investors outside of the normal property redemption process. The Court stated then, and again now, that such payments are troubling because they were paid to the investors, who still held the property purchased at the tax sale, instead of to the owner whose property was sold generating the excess funds. Furthermore, those payments were made from the excess funds claimed by the plaintiff class members while this matter was pending. Accordingly, the Court **REAFFIRMS ITS FINDING** that payments from the Redemption Fund made by the Defendants outside of the normal redemption process and prior to the resolution of this class action litigation was without adequate safeguards to protect the *Winston Class*, possibly resulting in unequal treatment among *Class* members, thereby causing harm to the *Class*.

The Court further **REAFFIRMS ITS FINDING** that the *Winston* Class' requested relief to prohibit payments from the Redemption Fund except in the normal redemption process prior to the resolution of this litigation is imminently convenient to the Defendants and causes them no harm, while the failure to grant this relief would be potentially perilous to the *Winston Class* by threatening their homes and/or the excess funds generated by the tax sale of their homes. Thus, failure to grant this relief would subject the *Winston Class* to irreparable injury and imminent harm and the Court therefore **FINDS** that granting the MOTION FOR LIMITED STANDSTILL RELIEF will serve the public interest and preserve the status quo pending resolution of this matter.

III. (B) MOTION TO SEGREGATE THE REDEMPTION FUND

As stated above, Defendants reported in open court that segregation of the Redemption Fund

had been accomplished by opening a new and separate account with Regions Bank, and that the opening balance of the newly segregated Redemption Fund account was in excess of $37,000,000.00. Defendants have since moved this Court to dissolve the TRO but Plaintiffs have presented compelling evidence which shows several instances of wide variation in Redemption Fund balances as reported by Defendants, including the interest earned thereon. This evidence included Defendants' own discovery responses with instances where, at a particular date, the balance reported for the Redemption Fund varied by millions of dollars when compared to other responses by the Defendants for the same date. The Plaintiffs argue that these inconsistencies in accounting put the class in jeopardy.

The Court **REAFFIRMS** Defendants' agreement stated in open court that Defendants will continue to segregate the Redemption Fund as previously ordered. However, the Court **DENIES** the additional relief requested by the *Winston Class'* Motion, i.e., "real-time on-line access" to view and monitor activity. The Court **FINDS** that some ongoing reporting of Redemption Fund balances at frequent intervals is in the interest of the *Winston Class* and hereby **REAFFIRMS** its verbal Order directing Defendants to provide such information. Accordingly, upon the condition of the continued segregation of the Redemption Fund and ongoing reporting of Fund balances to Plaintiffs, the remaining aspects of the TRO previously entered by this Court on February 29, 2008, are hereby **DISSOLVED**.

The Court expressly **FINDS** that, in open court on March 6 and March 13, 2008, Counsel for Defendant JEFFERSON COUNTY, ALABAMA declared and asserted that Defendant JEFFERSON COUNTY makes no claim to the Redemption Fund. Thus, this Court's March 7, 2008, Order declaring the *Winston Class* claimants the "owners" of the Redemption Fund under ALA. CODE §40-10-28 (1975) with Defendant JEFFERSON COUNTY TREASURER holding said Redemption Fund in "*constructive trust*" for the *Winston Class* is **EXPRESSLY REAFFIRMED**.

Upon the representation of counsel of record for Defendant Jefferson County, Alabama, that it makes no claim to the redemption funds or the interest thereon, and upon this Court's finding that those funds and the accumulated interest are the property of the plaintiff WINSTON CLASS members, the parties have **STIPULATED** that Jefferson County, Alabama, may be dismissed as a party without prejudice. The Court **APPROVES** that dismissal, and, **FINDING** that the dismissal of Jefferson County has no impact upon the disposition of the Redemption Fund under any final Orders in this case, by separate Order entered September 12, 2008, Jefferson County, Alabama was

dismissed as a party defendant from this class action. Of course, Jefferson County Treasurer and Jefferson County Tax Collector **REMAIN** Defendants in this case and will remain bound by any final Orders in this case respecting injunctive relief or otherwise, and Jefferson County, Alabama is not a necessary party to Jefferson County Treasurer and/or Jefferson County Tax Collector carrying out those orders.

III. (C) AN ACCOUNTING OF THE REDEMPTION FUND

Plaintiffs' February 15th MOTION TO SEGREGATE THE REDEMPTION FUND also urges the Court to order an accounting by Defendants of the initial deposit to the segregated Redemption Fund in order to determine the excess and earned interest attributable to each member of the *WINSTON CLASS*. The undersigned emphatically agrees and specifically **FINDS** that an accounting of the Redemption Fund is in order and must be conducted as promptly, and as thoroughly, as possible. However, the undersigned is of the opinion that any accounting performed and/or produced by the WINSTON CLASS and/or Defendants must be reviewed and analyzed on the Court's behalf, by an independent, professionally qualified third party.

Accordingly, the Court hereby expressly **REAFFIRMS** its verbal **APPOINTMENT**, made pursuant to ALA. R. Civ. Pro. 53, of Ralph Q. Summerford, CPA/ABV, CFE, CIRA (hereinafter ***"Summerford"***) as SPECIAL MASTER FOR VOLUMINOUS MATTERS (hereinafter, ***"Special Master"***) involving the Redemption Fund in the instant matter. The appointment of Summerford and the tasks incident thereto shall be **ADMINISTERED** as follows:

1. Summerford is President of Forensic/Strategic Solutions, PC (hereinafter ***"FSS"***), a Birmingham, Alabama based litigation support and expert accounting firm located at 2001 Park Place North, Suite 430, Birmingham, AL, 35203.

2. Summerford and/or employees of FSS are authorized to complete the following tasks necessary for resolution of the above referenced matter:

(a) Calculate interest and amounts due Winston Class members, i.e., calculate the interest earned for Winston Class members as defined in this Court's January 7, 2008, ORDER ON CLASS CERTIFICATION. Interest will be calculated from the date of the tax lien sale for each individual property parcel ID through the date of this Order. Interest rates will be determined by the average monthly interest rate earned as reported on the Jefferson County Trust Account Investment Ledger, maintained at the Jefferson County Treasurer's Office. These are the same rates used to calculate the monthly interest earned for the already settled MNP Class. Calculations will be performed in the same manner as the MNP Class. Defendant Tax Collector will supply FSS with the parcel ID's assigned to the Winston Class which have redeemed their tax liens during the interim period from January 16, 2008,

through calculation end date of this Order. The total of those calculated amounts shall then be compared and checked against the fund balance attributable to the WINSTON CLASS.

3. Summerford shall assume and understand the following:

(a) The Redemption Fund has been withdrawn from the greater Jefferson County Trust Account for the purpose of resolving the claims made by the WINSTON CLASS and the MNP Class;

(b) The companion *MNP Class Litigation* has been settled for the amount of $4,249,004.42. (See, ORDER AND FINAL JUDGMENT GRANTING APPROVAL OF SETTLEMENT, CV-07-900669-MGG, entered March 7, 2008);

(c) That part of the Redemption Fund made up of Excess Funds received on the sale conducted in May, 2008, is NOT TO BE CONSIDERED part of the WINSTON CLASS Common Fund as is defined further, below, in ¶ 5 H.

4. Summerford will review and analyze Defendants' current procedures for calculating and handling interest earned on tax lien sale overbid amounts. Summerford will recommend prescriptive measures to ensure interest earned on Jefferson County tax lien sale overbid amounts is credited against the interest owed by property owners upon redemption of their tax liens.

5. Summerford is authorized to employ members of his firm, FSS, to assist in the above referenced tasks and any additional tasks that Summerford deems necessary for resolution of this matter in accordance with this instant Order. Summerford is further authorized to record his and/or his firm's fees in this matter in accordance with the standard hourly rates charged by Summerford and FSS. Said fees shall be presented for approval and payment at the conclusion of Summerford's duties as Special Master.

IV. PENDING MOTIONS and MOTIONS FOR SUMMARY JUDGMENT

On May 8, 2008, the Court heard oral argument on the following pending motions;

- Plaintiffs' MOTION FOR SUMMARY JUDGMENT filed April 3, 2008, supported by Plaintiffs' Evidentiary Submission and Plaintiffs' Brief which includes a lengthy statement of Uncontested Facts [this Motion was originally set for hearing April 16, 2008, but reset due to the Court's schedule].

- Defendants MOTION TO DISMISS filed April 14, 2008, to which the Plaintiffs filed a Reply on May 6, 2008;

- Defendants' MOTION FOR SUMMARY JUDGMENT filed April 25, 2008, also supported by Defendants' Evidentiary Submission and Brief.

- Plaintiffs' MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT filed May 6, 2008, which includes Plaintiffs'Response to Defendants' Statement of Uncontested Facts and a Brief in opposition; and,

- Plaintiffs' MOTION TO STRIKE THE AFFIDAVIT OF JEFFERY SEWELL, also filed May 6th, attacking the affidavit submitted by Defendants in support of their MOTION FOR SUMMARY JUDGMENT.

The Court notes that Defendants did not formally file any "OPPOSITION" to Plaintiffs' MOTION FOR SUMMARY JUDGMENT; however, Defendants' MOTION FOR SUMMARY JUDGMENT is clearly a "Cross-Motion for Summary Judgment [hereinafter, all Motions for Summary Judgment are referred to simply as ***"MSJ"*** and/or ***"the MSJ's"***] and the Court treats Defendants' Cross-MSJ as "OPPOSITION" to Plaintiffs' MSJ as well as on its own merits. Having considered these MSJ's, all Evidentiary Submissions, all Briefs of parties, all oral argument received, and, proposed Orders submitted by Plaintiffs and Defendants, the Court **FINDS** that the material facts in this matter are not in dispute, and, as discussed below, Plaintiffs' MSJ is due to be **GRANTED**.

IV. (A) DEFENDANTS' MOTION TO DISMISS

Defendants MOTION TO DISMISS filed April 14, 2008, is due to be **DENIED** as the allegations therein do not merit dismissal of this action.

IV. (B) PLAINTIFFS' MOTION TO STRIKE AFFIDAVIT

Plaintiffs' MOTION TO STRIKE THE AFFIDAVIT OF JEFFERY SEWELL, filed May 6, 2008, is due to be **DENIED**, in part. The Court will give appropriate evidentiary weight, if any, to the affidavit of Jeffery Sewell submitted in support of Defendants' MSJ.

IV. (C) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants Motion for Summary Judgment is due to be **DENIED** for the reasons given below in regards to Plaintiffs' MSJ.

IV. (D) PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs urge this Court to find and declare ALA. CODE §40-10-28 (1975), ["*Alabama Excess Funds Statute*"], or its application by the Defendants, to be unconstitutional.[1] The Court finds it is unnecessary to decide the constitutionality of the statute itself.[2] However, having reviewed the established facts in this matter, the Court **FINDS** that the Defendants' practice of retaining excess funds resulting from ad valorem tax sales which are over and above the taxes, interest and costs due, to be an impermissible application of §40-10-28, as well as a violation of due process owed to the owners of the property which was sold and resulted in the excess.

Under the established facts, Jefferson County real property owners have historically been given no notice prior to these tax sales that excess funds may be accepted at the point of sale.[3] While two sections of the overall tax statutes scheme suggest that excess funds may have been contemplated in some sales, this is not adequate notice to the property owners whose land would be subject to the ad valorem tax sale. Moreover, those provisions found in §40-10-28 and §40-10-122 give the owner no notice whatsoever as to the actual amount of excess that may be allowed or involved at the tax sale. This is so because that excess is determined by a competitive, high bid system presently used by the County at the tax sale. As a result, an owner has his/hers/its property subjected to a sale for not only the taxes, interest and costs owed Jefferson County, but for an excess amount determined only at the actual sale. Under the Defendants' application of this process, those

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[1]The Alabama Attorney General was given notice of this action and entered no contest. Further, the Court is quite familiar with *WINSTON, et.al. vs. JEFFERSON COUNTY, et.al., CV 05-P-0497-S,* a case filed in U. S. District Court, N.D. Ala., between these very parties on the very issues raised in this instant action; the Attorney General waived participation in the federal litigation. Further, the undersigned takes particular notice of Judge Proctor's MEMORANDUM OPINION [Doc. 119] and ORDER [Doc. 120], each entered June 25, 2007, in *CV05-P-0497-S.*

[2]The Court finds that it is unnecessary to address the Plaintiffs' breach of contract claim respecting the settlement agreement entered in Federal Court. The Court does find however that as a result of the prior federal action, including Plaintiffs' efforts there and the signed agreement in that matter, that the Defendants changed some policies pursuant to the terms of the agreement and instituted certain new notice provisions even though the Defendants withdrew from the agreement and retained the excess funds.

[3]The Court notes that after a settlement was reached between these parties in *CV 05-P-0497-S* [Ftn. 1], subsequent tax sale notices to real property owners were modified in line with the settlement terms even though Defendants attempted to withdraw from the settlement [See, Judge Proctor's MEMORANDUM OPINION [Doc. 119, *CV 05-P-0497-S*, at p. 7 and Ftn. 3 therein]. Also, the Court finds that it is unnecessary to address the Plaintiffs' breach of contract claim respecting the settlement agreement entered in Federal Court. The Court does find however that as a result of the prior federal action, the Plaintiffs' efforts there and the signed agreement in that matter, that the Defendants changed some policies pursuant to the terms of the agreement and instituted certain new notice provisions even though the Defendants withdrew from the agreement and retained the excess funds, ex., for the tax sale held in May, 2007, notices differed from previous years by now stating that excesses may result..

excess funds immediately begin bearing interest at 12% encumbering the owner's right of redemption, and all without notice to the owner. Essentially, this results in an involuntary loan against the owner's property, but the owner is not given adequate notice of the process, much less any opportunity to be heard and contest the same. Moreover, the Jefferson County Tax Collector takes this excess resulting from the tax sale and places it in the County treasury, again giving the owner no notice of its existence, location or any mechanism for the owner to acquire the same. Finally, if the owner learns of the excess sale funds through other means, these Defendants take the position that the funds will not be paid to the owner short of the owner redeeming the property.[4]

ALA. CODE §40-10-28 (1975) reads in part:

> "The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury, and it may be paid therefrom to such owner, agent or representative in the same manner as to the excess arising from the sale of personal property sold for taxes is paid. If such excess . . . "

Therefore, regarding any excess resulting in these circumstances, the statute directs Defendants to pay these funds (1) to the owner or the owner's agent or the person representing such owner; or, (2) into the County treasury and possibly paid there from to such owner in the same manner as the excess arising from the sale of personal property sold for the taxes paid.[5] Each of these two statutory provisions anticipates that the money will ultimately be paid over to the owner or for the owner's benefit and implicitly acknowledges that the excess is the owner's property. When *excess* arises from the sale of *personal property* under Alabama statutes, it is paid immediately to the owner at the point of the sale if the owner is then present. Nevertheless, Defendants have interpreted §40-10-28 as giving them the authority to simply retain any excess in the Jefferson County treasury,

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[4] Evidence before the Court attests that this had been Defendants' policy for 10 - 12 years. Further, after his deposition in this matter, Defendant JEFFERSON COUNTY TAX COLLECTOR J. T. Smallwood instructed officials in his office to institute new procedures so that the taxpayer/owner can get these excesses. Defendants' MSJ argues nonetheless that this is not the proper "owner" of the excess funds. In their brief Defendants state: *"According to Defendants' application and interpretation of the statute,* ***it is the owner of the real estate property subsequent to the sale that is entitled to the Excess Funds, as opposed to the plaintiffs who were the owners of the property at some time prior to the sale."*** Defendants' MSJ Brief, p. 9 (emphasis added). The Court finds that this position is without support.

[5] The Alabama statute regarding sale of personal property for taxes, ALA. CODE §40-5-15 (1975) provides as follows, " . . . any balance remaining shall be paid to the owner of the property . . ."

thus withholding the owner's money, at interest, without notice to the owner of either this practice, the retention, or any method to acquire the same short of redemption.

In defense of this policy Defendants contend that "owner" of the excess funds should be interpreted as the purchaser at the tax sale and not the taxpayer whose property was sold. In fact, the record before the Court reveals that Defendants, during the pendency of this litigation and on at least six occasions, paid out excess funds collected at the tax sale back to the tax sale purchaser who paid them even though the tax sale purchaser had ejected the owner and obtained possession of the property. The Court **FINDS** that these payments were improperly made, disbursing money owed to *WINSTON CLASS* members whose properties were sold resulting in those excesses.

Accordingly, the Court **FINDS** that the facts set forth above at ¶*II. pp. 2-4* are undisputed, and accurately describes the manner and practices utilized by Defendants over the last several years to conduct real property ad valorem tax sales in Jefferson County, Alabama. The Court **FINDS** that the "owner" of the excess funds resulting from the tax sale is the owner of the property immediately before the tax sale. Further, the Court **FINDS** Defendants' interpretation of the *Alabama Excess Funds Statute,* as well as their policies and practices developed under their interpretation are contrary to the clear intent of the statute and tantamount to an illegal taking without due process, and this Court cannot allow this practice to continue. The Court therefore **DECLARES** that the Defendants' present and past practices regarding ad valorem tax sales are both a violation of the due process rights of the owner and contrary to the intent and proper application of the statute. Plaintiffs' MSJ is due to be, and is hereby, **GRANTED.**

V. ORDERS & JUDGMENT

Accordingly, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

1. Plaintiffs' MOTION FOR LIMITED STANDSTILL INJUNCTIVE RELIEF filed February 5, 2008, is **GRANTED** as set forth above at ¶ III. (A);

2. Plaintiffs' MOTION TO SEGREGATE THE REDEMPTION FUND filed February 15, 2008, is **GRANTED** as set forth above at ¶ III. (B);

3. Defendants' MOTION TO DISMISS filed April 14, 2008, is **DENIED**;

4. Defendants' MOTION FOR SUMMARY JUDGMENT filed April 25, 2008, is **DENIED**;

5. Plaintiffs' MOTION FOR SUMMARY JUDGMENT filed April 3, 2008, is **GRANTED** and JUDGMENT for Plaintiffs *WINSTON CLASS* is **ENTERED,** and the Court does further **ORDER** as follows:

A. ORDER TO REIMBURSE THE REDEMPTION FUND

The Court notes that on at least six occasions the Defendants paid out excess funds collected at the tax sales back to the purchasers who paid them at the sale even though the purchaser had ejected the owner and obtained possession of the property. Those six payments totaled $80,500.00 as shown by records of the Tax Collector. Those payments were made during the pendency of this litigation and improperly disbursed money owed to the Plaintiff WINSTON CLASS members whose properties were sold resulting in those excesses. Therefore, Defendants JEFFERSON COUNTY TAX COLLECTOR and JEFFERSON COUNTY TREASURER are **ORDERED** to reimburse the Redemption Fund $80,500.00 for these payments.

In addition to the funds paid out in the six instances referenced above (totaling $80,500.00), Defendants shall also **REIMBURSE** the Redemption Fund for all payments which the Defendants have made from the excess funds back to other purchasers who paid the excesses even though they, i.e., the purchaser, retained the property. These reimbursements shall include all such payments which the Defendants have made since disclosure of the aforementioned six instances and shall be **PAID** into the Redemption Fund within 30 days of this order. The balance of the Redemption Fund after the aforementioned reimbursements are made, including all accrued interest, shall hereinafter be referred to as ***"the Excess Fund".***

B. ORDER TO PAY OUT THE EXCESS FUND

Consistent with the procedures hereinafter set out, Defendants are **ORDERED** and **DIRECTED** to **PAY** from the Excess Fund **TO THE BENEFIT** of the WINSTON CLASS members who owned property sold which generated these excesses all excesses and any interest thereon presently held by the Defendants. The Court **FINDS** that these funds and interest earned thereon comprise a common fund created by the efforts of the WINSTON CLASS Plaintiffs and class counsel.

C. DETERMINATION OF THE BALANCE OF THE EXCESS FUND

As indicated above, the Court previously segregated the Redemption Fund to include

the Excess Funds and interest thereon which are attributable to the WINSTON CLASS members. Since that time of segregation, an additional tax sale occurred on May 20, 2008, which this Court has herein specifically **EXCEPTED** from the WINSTON CLASS. Nonetheless, the Court is informed that the Excess Funds received on that May, 2008, sale were also deposited in the segregated Redemption Fund and have thus borne interest as part of that fund since that date. The funds to be distributed to the WINSTON CLASS **EXCLUDE** the funds received on the May, 2008 sale. The accumulated funds for the WINSTON CLASS therefore should be defined as the balance of the Redemption Fund immediately prior to the sale of May 20, 2008, together with any accumulated interest thereon to the date of distribution and less any amounts for redeemed parcels up until August 28, 2008, the date of this Court's Order. The balance of the segregated Redemption Fund from bank statements provided by the Defendants of the account show the fund to stand at approximately thirty four million dollars [$34,000,000.00] before the May 20, 2008 sale. The Defendants are **DIRECTED** to provide to WINSTON CLASS counsel, within three (3) days of the date of this Order, the current balance of the segregated Redemption Fund.

The Defendants are further **DIRECTED** by the Court to provide a listing of the various amounts comprising the Redemption Fund balance for the WINSTON CLASS and to set out for each included parcel, the amount of Excess Funds, the name and address of the assessed owner, and the amount of interest accrued, less any charges claimed to be made against those balances. Within fourteen (14) days of the date of this Order, Defendants are **DIRECTED** to provide this breakdown of the Redemption Fund balance to WINSTON CLASS counsel and the Special Master, and shall include those funds which are required to be reimbursed by the Defendants pursuant to the Court's Order above in ¶ V.5.A. Within seven (7) days of the receipt of that breakdown, WINSTON CLASS counsel and the Special Master shall **FILE** any objections to these two reports received from Defendants, or, in the alternative, certify the balance to be correct for purposes of distribution to the class. The actual segregated Redemption Fund account shall **REMAIN** under the control of Defendant Jefferson County Treasurer subject to the distribution procedures hereinafter set out.

D. IDENTIFYING AND LOCATING WINSTON CLASS MEMBERS

Plaintiffs' WINSTON CLASS counsel, with Defendants' cooperation and assistance,

are **DIRECTED** to:

(1) Aggressively **IDENTIFY** and **LOCATE** the individual WINSTON CLASS members;

(2) **VERIFY** their ownership of the property sold for taxes immediately prior to the sale;

(3) **NOTIFY** them of their rights under this order;

(4) **ASSIST** their claims; and,

(5) **RESOLVE** disputes where multiple claimants appear.

E. CLAIMS NOTICE

From the information provided by the Defendants as to the assessed owners of the parcels sold, WINSTON CLASS counsel SHALL NOTIFY WINSTON CLASS members as soon as practicable after this Order that the class member is entitled to claim their share of The Funds in accordance with the claims process. Recognizing that the list of assessed owners used by the Tax Collector in these sales and for notice to the WINSTON CLASS can be in error as to true title ownership, the notice shall also specifically advise that the Court may require proof of ownership by way of deeds, decrees, estate administration, affidavits, etc., and, as necessary, the employment of a title company. WINSTON CLASS counsel is **DIRECTED** to assist as necessary on the legal issues arising in this determination.

Notice shall be **GIVEN** to the WINSTON CLASS informing the class that funds recovered in this suit from the Defendants as a result of the class member's property being sold for an excess over and above taxes, fees and costs owed are available for distribution.

The notice **SHALL INFORM** each WINSTON CLASS member of the following:

(1) their property was sold for taxes;

(2) that an excess over and above the taxes and costs owed was collected;

(3) that the Excess Funds were previously on deposit at interest in the County Treasury;

(4) that they are entitled to the Excess Funds and accumulated interest thereon less fees and expenses awarded by the Court; but,

(5) should they decide to later redeem the property they will be required to

pay the taxes, interest, costs and 12% statutory interest on those amounts plus the return of the excess received and 12% interest thereon.

(6) that obtaining and receiving the excess bid amount is not the equivalent of redeeming the property;

(7) that they must repay the excess amount plus interest, taxes and interest thereon in the event of future redemption; and,

(8) that they must execute a written acknowledgment of the foregoing before receiving any funds due them.

For WINSTON CLASS members whose property was sold in the last three years, the notice shall **ADVISE** that they have three years from the date on which their property was sold to redeem the property from the Jefferson County Tax Collector, and that in order to redeem, they will be required to pay to the Tax Collector the amount of taxes, costs and fees prescribed by Alabama law, plus the Excess Funds paid at the sale by the purchaser and distributed to the owner and 12% on those amounts as limited by Alabama law, and if they do not redeem from the County within three years from the date their property was sold, they risk losing their property or may be required to redeem the property from the purchaser at the tax sale. The notice shall include the address of the property, date of sale, name and address of the purchaser, the amount of the excess bid.

Nothing herein shall prohibit the tax collector and treasurer from processing and facilitating redemptions in the ordinary course of their operations.

F. CLAIMS PROCESS AND PROCEDURE FOR PAYOUT OF EXCESS FUNDS

Class Members or their agents may claim and receive their share of the Excess Funds remaining after the payment of fees and costs by supplying satisfactory proof that they are the owner of the parcel sold at the tax sale or that they are their duly qualified representative entitled to participate in The Fund. The Defendants and Class Counsel shall cooperate fully with each other with respect to identifying and locating Class Members and determining their qualification to participate in The Fund.

For owners of property sold at the 2008 tax sale, since that sale occurred after this matter was submitted for Summary Judgment and after notice to the class, those owners **SHALL NOT** be considered WINSTON CLASS members. To the extent that Excess Funds

from the 2008 have been deposited into The Fund, they shall be made available in the net amount of the excess bid to those owners under the same claim procedure as shall be used for future sales.

As to the WINSTON CLASS members, the amount due each class member shall be determined by first calculating the common fund balance of the Redemption Fund immediately before the May 20, 2008, tax sale, together with any accumulated interest thereon, to the date of distribution. The class member's share of the Excess Fund shall be determined by the amount of excess paid on their property together with their share of the accumulated interest less their pro-rata share of Court awarded fees and expenses.

Once the calculation for an individual WINSTON CLASS member's net distribution is made and the appropriate notice given, the distribution of the funds shall be accomplished by WINSTON CLASS counsel submitting vouchers to the Jefferson County Treasurer [and simultaneously filing herein a suitable NOTICE OF VOUCHERS SUBMITTED/CHECKS REQUESTED] requesting the issuance of a check to the designated WINSTON CLASS member. The amount of the check will be the sum of the Excess Fund and accumulated interest due on the class member's parcel, less the pro-rata share of attorneys' fees, costs and administrative excess. For the purposes of those distributions, any such distribution of the Excess Funds and accumulated interest following this Court's Order of August 28, 2008, shall be subject to the pro-rata payment of those fees, costs and expenses.

G. DISPUTED OWNERSHIP

In the event of disputes between two or more parties each claiming to be the owner of the property sold, in order to resolve such disputes WINSTON CLASS counsel is **AUTHORIZED** to do any or all of the following:

(1) request the issuance of joint checks to those claiming ownership;

(2) invite those WINSTON CLASS members to voluntary mediate their dispute with the JEFFERSON COUNTY CIRCUIT MEDIATOR;

(3) initiate global or separate interpleader cases.

H. PROCEDURE ON FUTURE SALES

The Court further **GRANTS** the WINSTON CLASS' request for injunctive relief and, regarding each and every future ad valorem tax sale conducted by Defendants after entry of this Order, the Court hereby **ENJOINS** these Defendants:

(1) from interpreting ALA. CODE §40-10-28 [1975] in a fashion contrary to these findings;

(2) from requiring property owners to redeem or indemnify these Defendants in order to receive the Excess Funds resulting from the sale of their properties, provided however, Defendants are **NOT RESTRAINED** from using reasonable methods to determine ownership and verify the identity of the property owner[s] at the time of the sale;

(3) from failing to provide to property owners whose land is subject to sale for delinquent ad valorem taxes written notice before the sale specifically apprising said owners:

(i) that any required sale of their property could produce Excess Funds over and above the taxes and costs owed;

(ii) that any Excess Funds paid at the sale will bear interest at 12% until the property is redeemed;

(iii) that the Excess Funds are available for distribution to the owner after the sale, but that the amount of the Excess Funds will continue to incur interest charges of 12% should the owner desire in the future to redeem the property.

(4) from failing to announce to the bidders present at any tax sale, specifically before any tax sale begins, that any Excess Funds will be paid out to the owners of the properties upon their request without redemption and will not be held in the Jefferson County Treasury unless unclaimed by the owner;

(5) where the sale of a parcel produces Excess Funds immediately received by Defendants, from failing to immediately pay to any owner or owner's agent present at the sale, upon request and without requiring redemption of the property;

(6) where the sale of a parcel produces Excess Funds immediately received by Defendants, from failing to notify any owner or owner's agent within 14 days after the sale:

(i) that the required sale of their property produced Excess Funds over and above the taxes and costs owed;

(ii) the amount of any such Excess Funds;

(iii) that the Excess Funds are available for distribution to the owner after the sale;

(iv) that the Excess Funds paid at the sale will continue to bear interest at 12% until the property is redeemed;

I. ATTORNEYS FEES AND OTHER MATTERS

For purposes of determining attorneys' fees, the Common Fund resulting from WINSTON CLASS counsel's efforts will be considered to be the balance of the Redemption Fund immediately before the May 20, 2008, sale together with any accumulated interest on that amount (hereinafter ***"the Common Fund"***). That balance shall be the basis and source for a common fund award of attorneys' fees, the payment of expenses, class representative awards and the fees and costs of the Special Master. Since the May, 2008, tax sale occurred after the Court heard the WINSTON CLASS' MOTION FOR SUMMARY JUDGMENT upon which this Order is based, any part of the segregated Redemption Fund resulting from the May, 2008, sale **SHALL NOT** be considered or affected by those fees. The fee award itself and representative awards and any other fees and costs shall be determined by separate order of this Court.

6. Defendants' MOTION TO ALTER, AMEND OR VACATE JUDGMENT filed September 8, 2008, is **GRANTED** in part, and, **DENIED** in part as discussed, above;

7. The Order of September 12, 2008, dismissing JEFFERSON COUNTY, ALABAMA as a Defendant is **RATIFIED** and **CONFIRMED**;

8. The Court **RESERVES** continuing jurisdiction over this action for the purpose of entering such further orders that are necessary regarding attorney fees, costs and expenses, as well as to carry out the terms of this Order and for the orderly distribution of excess funds and all other issues related to the administration of the *WINSTON CLASS* litigation and items set out in this Order.

DONE and **ORDERED** this, the 27^{th} day of October, 2008.

S/Michael G. Graffeo
MICHAEL G. GRAFFEO
Circuit Judge

Cc: All Counsel of Record

TAB 7

Cited
As of: Jul 22, 2013

First United Security Bank and Paty Holdings, LLC v. W. Hardy McCollum, Judge of Probate of Tuscaloosa County, et al.

2110828

COURT OF CIVIL APPEALS OF ALABAMA

2012 Ala. Civ. App. LEXIS 324

November 30, 2012, Released

NOTICE:

THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE ADVANCE SHEETS OF THE SOUTHERN REPORTER.

PRIOR HISTORY: [*1]

Appeal from Tuscaloosa Circuit Court. (CV-10-901031).

DISPOSITION: AFFIRMED.

CASE SUMMARY:

OVERVIEW: Plaintiff bank sued defendants, a probate judge, a tax collector, and the prior owner of property on which the bank foreclosed, after the property was sold at a tax sale, for excess funds from the tax sale. The appellate court held the bank was not entitled to the excess funds because, under *Ala. Code § 40-10-28, (1)* such funds were payable to the person against whom the taxes were assessed, or that person's representative, and (2) no clear statement of authority from such person, such as a power of attorney, showed the bank had a trustee or agency relationship with the person.

OUTCOME: The trial court's judgment was affirmed.

LexisNexis(R) Headnotes

Real Property Law > Nonmortgage Liens > Tax Liens

[HN1] When the legislature directs in *Ala. Code § 40-10-28* that the excess funds from a tax sale of real property shall be paid over to the owner or his or her agent, the term "owner" means the person against whom taxes on the property are assessed.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Nonmortgage Liens > Tax Liens

[HN2] When determining who is entitled to excess funds from a tax sale, under *Ala. Code § 40-10-28*, anything

less than a clear statement of authority such as a power of attorney from an owner entitled to the funds to a mortgagee is inadequate to establish an agency or trustee relationship for a county trying to determine who should receive the excess funds from the tax sale.

Real Property Law > Nonmortgage Liens > Tax Liens
[HN3] See *Ala. Code § 40-10-28*.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Nonmortgage Liens > Tax Liens
[HN4] When considering who may be considered the "owner" of real property sold at a tax sale, for purposes of determining who is entitled to the excess proceeds of such a sale, under *Ala. Code § 40-10-28*, the term "owner" refers to the person against whom taxes were assessed and not the mortgagee of the property.

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Nonmortgage Liens > Tax Liens
[HN5] The list of those who can redeem property sold for taxes in *Ala. Code § 40-10-120* is broader than the list of those entitled to claim excess proceeds from a tax sale under *Ala. Code § 40-10-28*. The more expansive language in *Ala. Code § 40-10-120* includes both "the owner" and "any mortgagee," but the narrower language in *Ala. Code § 40-10-28* includes only the owner, or his agent, or the person legally representing such owner. If the legislature separately named both owners and mortgagees in *Ala. Code § 40-10-120*, then it could not have intended for the term "owner" in *Ala. Code § 40-10-28* to include "mortgagee."

Real Property Law > Nonmortgage Liens > Tax Liens
[HN6] When determining who is entitled to the excess proceeds of a tax sale, under *Ala. Code § 40-10-28*, the more expansive language in *Ala. Code § 40-10-120*, concerning those who are entitled to redeem property sold for taxes, includes both "the owner" and "any purchaser," but the narrower language in *Ala. Code § 40-10-28* includes only the owner, or his or her agent, or the person legally representing such owner. If the legislature separately named both owners and purchasers in *Ala. Code § 40-10-120*, then it could not have intended for the term "owner" in *Ala. Code § 40-10-28* to include "purchaser."

Real Property Law > Nonmortgage Liens > Tax Liens
[HN7] Excess funds from a tax sale of real property are not payable to a person or entity who purchases the property subsequent to the tax sale but, instead, are payable only to the person in whose name the taxes are assessed at the time of the tax sale (or his or her agent or representative).

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview
Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests
Real Property Law > Nonmortgage Liens > Tax Liens
[HN8] The Alabama Supreme Court has stated that, if a mortgagee forecloses on property and purchases it at a foreclosure sale, it becomes the owner of the property and, thus, entitled to excess funds from a tax sale. However, that statement must be taken to mean that the foreclosure sale must have occurred before the tax sale. A mortgagee may also require a mortgagor to execute a power of attorney as part of an agreement not to foreclose, or, if the mortgagee learns after the fact that the property has been sold for taxes, it can require the owner to execute a power of attorney before it redeems the property. The mortgagee may then become entitled to the excess proceeds under *Ala. Code § 40-10-28* as the person "legally representing such owner." The Supreme Court did not intend that a subsequent foreclosure sale may alter the "owner" of property under *Ala. Code § 40-10-28*.

Governments > Courts > Judicial Precedents
Governments > State & Territorial Governments > Employees & Officials
[HN9] Unlike court opinions, written opinions of the Attorney General are not controlling. They are merely advisory and, under the statute, such opinions operate only to protect the officer to whom they are directed from liability because of any official act performed by such officer as directed or advised in such opinions. *Ala. Code § 36-15-19*.

COUNSEL: For Appellants: Burt W. Newsome, Newsome Law, LLC, Birmingham.

For Appellants: Burt W. Newsome, Newsome Law, LLC, Birmingham.

For Wayne Allen Russell, Jr., Appellee: Stan Brobston, Bessemer.

JUDGES: MOORE, Judge. Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

OPINION BY: MOORE

OPINION

MOORE, Judge.

First United Security Bank and Paty Holdings, LLC, appeal from a judgment of the Tuscaloosa Circuit Court ("the trial court") determining that Wayne Allen Russell, Jr., was entitled to the excess funds received by Tuscaloosa County from the sale of certain property owned by Russell ("the property") for unpaid taxes.

Procedural History

On December 30, 2010, First United Security Bank filed a verified complaint against W. Hardy McCollum, in his capacity as Tuscaloosa County Judge of Probate, and Peyton Cochrane, in his capacity as Tuscaloosa County Tax Collector, seeking, among other things, a judgment declaring that it was entitled to the excess funds Tuscaloosa County received at the sale of the property for unpaid taxes. The complaint was later amended to add Russell as a defendant and Paty Holdings, LLC, as a plaintiff.

The case was submitted to the trial court for a decision upon the parties' briefs and the following joint stipulation of facts:

> "1. ... First United Security Bank is a banking corporation doing business in Tuscaloosa [*2] County, Alabama.
>
> "2. ... Paty Holdings, LLC is a limited liability company formed in Tuscaloosa County, Alabama and is a wholly owned subsidiary of First United Security Bank.
>
> "3. The Defendants, W. Hardy McCollum in his capacity as Tuscaloosa County Judge of Probate and Peyton Cochrane in his capacity as Tuscaloosa County Tax Collector, are public officials of Tuscaloosa County, Alabama and are over the age of nineteen years. The Defendant Wayne Allen Russell, Jr. is an individual over the age of nineteen years and is a resident of Tuscaloosa County, Alabama.
>
> "4. On or about February 15, 2002, Wayne Allen Russell, Jr. ... executed a note and mortgage in favor of First United Security Bank .... Said mortgage was recorded in the Probate Records of Tuscaloosa County ....
>
> "5. On May 25, 2010, ... certain property subject to the bank's mortgage (Parcel #63-25-09-30-0-001-008.020 and Parcel #63-25-09-30-0-001-008.014) were sold at a tax sale due to unpaid 2009 property taxes.
>
> "6. ... Parcel #63-25-09-30-0-001-008.020 sold to a third party, Alabama Widespread Investments, LLC, for the amount of $26,000.00 which included an excess bid in the amount of $17,833.45.
>
> "7. ... Parcel #63-25-09-30-0-001-008.014 [*3] sold to a third party, Alabama Widespread Investments, LLC, for the amount of $16,000.00 which included an excess bid in the amount of $14,471.67.
>
> "8. ... First United Security Bank assigned its foreclosure bid rights to ... Paty Holdings, LLC. ... Paty Holdings, LLC was the highest bidder at [a] foreclosure sale [on July 8, 2010,] with a bid in the amount of $2,381,790.00 and recorded a foreclosure deed in the Office of Probate, Tuscaloosa County, Alabama in Deed Book 2010, Page 11231. The bid amount equaled the amount of [Russell's] indebtedness to the bank.
>
> "9. ... First United Security Bank obtained the amounts to redeem the property taxes on both parcels good

through December 30, 2010. The amount to redeem Parcel #63-25-09-30-0-001-008.020, inclusive of the 2010 property taxes due, is $27,820.50 with interest accruing at the rate of $260.00 per month, and the amount to redeem Parcel #63-25-09-30-0-001-008.014, inclusive of the 2010 property taxes due, is $17,120.50 with interest accruing at the rate of $160.00 per month. Both redemption amounts included the excess bids totaling $32,305.12.

"10. ... W. Hardy McCollum as Tuscaloosa County Judge of Probate and Peyton Cochrane as Tuscaloosa [*4] County Tax Collector informed [First United Security Bank and Paty Holdings, LLC,] that [they] must pay the excess bids in order to redeem the property taxes but that [they] would not be entitled to a refund of the excess bids. Instead, [McCollum and Cochrane] asserted that the excess bids to be paid by [First United Security Bank and Paty Holdings, LLC,] will be made payable to ... Russell. ...

"11. [First United Security Bank and Paty Holdings, LLC,] contend that the excess bids should be refunded to them. ... Russell ... conten[ds] that the excess bids should be refunded to him. ... W. Hardy McCollum and Peyton Cochrane in their official capacities contend that the excess bids should be refunded to ... Russell ... and also assert that Mr. Russell can quit claim his interest in the properties at any time to Tuscaloosa County and be refunded the excess bids. [First United Security Bank and Paty Holdings, LLC,] dispute[] that this procedure is in accordance with Alabama law."

The parties subsequently stipulated that Black River Holdings, LLC, "the current owner" of the property, had proposed to redeem the property and had assigned any rights it had to the excess funds to First United [*5] Security Bank. The parties also stipulated that the excess tax-sale proceeds were to be held pending the trial court's determination of the case.

On May 25, 2012, the trial court entered a judgment, stating:

"1. The primary issue in this case is ... between ... First United Security Bank and Paty Holdings, LLC, and ... Wayne Allen Russell, Jr. who qualifies as the 'owner' or the 'person legally representing such owner' under *Ala. Code [1975,] Section 40-10-28*. In *First Union National Bank of Florida v. Lee County Commission [, 75 So. 3d 105] (Ala. ... 2011)*, the Alabama Supreme Court addressed this very issue when it concluded 'that [HN1] when the Legislature directs in *Section 40-10-28* that the excess funds from a tax sale shall be paid over to the owner or his agent, the term 'owner' means 'the person against whom taxes on the property are assessed.' Under the Stipulated Facts of the parties, that person would be ... Wayne Allen Russell' Jr.

"2. [First United Security Bank and Paty Holdings, LLC,] argue that the result in this case should be different from that in First Union National Bank, because unlike the mortgagee in First Union National Bank, there had been a foreclosure by the mortgagee [*6] in this case. Thus, in this case [First United Security Bank and Paty Holdings, LLC,] contend that as the foreclosing mortgagee, ... First United Security Bank is the full owner of the subject property. This argument would be persuasive if the foreclosure had occurred prior to the tax sale, as it is clear from the opinion in First Union National Bank that the Supreme Court was referring to a foreclosure which occurred prior to the tax sale and not after the tax sale as occurred in this case.

"3. [First United Security Bank and Paty Holdings, LLC,] further argued that ... Russell's mortgage contract with ... First United Security Bank allows [it] to act as

his attorney in fact when performing duties [Russell] has failed to perform; therefore, [First United Security Bank] was acting as [Russell's] legal representative when paying his taxes and is consequently entitled to the excess under *Ala. Code [1975,] Section 40-10-28*. The Supreme Court addressed this argument in First Union National Bank when it agreed with the County Commission's argument in First Union National Bank that [HN2] anything less than a clear statement of authority such as a power of attorney from the owner to the mortgagee [*7] would be inadequate to establish an agency or trustee relationship for a County trying to determine who should receive the excess funds from a tax sale. In agreeing with this argument of the County Commission in First Union National Bank the Supreme Court stated the following:

> "'We agree with the Commission that, in the absence of a written instrument naming First Union as Summers's legal representative, the trial court correctly held that First Union cannot claim the excess funds on that basis.'

"Accordingly, the Court finds in favor of [McCollum, Cochrane, and Russell] and against [First United Security Bank and Paty Holdings, LLC]. It is therefore the Order of the Court that the relief requested by [First United Security Bank and Paty Holdings, LLC,] is hereby Denied. It is the further Order of the Court that ... Russell ... is entitled to the refund of the excess funds from the tax sale at issue in this case. Costs are taxed to [First United Security Bank and Paty Holdings, LLC]."

On May 30, 2012, First United Security Bank and Paty Holdings, LLC (hereinafter referred to collectively as "the bank"), filed their notice of appeal.

Discussion

On appeal, the bank argues that it is the "owner" [*8] of the property as contemplated by *§ 40-10-28, Ala. Code 1975*, and, thus, that it is entitled to the excess funds from the tax sale. *Section 40-10-28* provides:

> [HN3] "The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury, and it may be paid therefrom to such owner, agent or representative in the same manner as to the excess arising from the sale of personal property sold for taxes is paid. If such excess is not called for within three years after such sale by the person entitled to receive the same, upon the order of the county commission stating the case or cases in which such excess was paid, together with a description of the lands sold, ' when sold and the amount of such excess, the county treasurer shall place such excess of money to the credit of the general fund of the county and make a record on 'his books of the same, and such money shall thereafter be treated as part of the general fund of the county. At any time within 10 years after such excess has been passed [*9] to the credit of the general fund of the county, the county commission may on proof made by any person that he is the rightful owner of such excess of money order the payment thereof to such owner his heir or legal representative, but if not so ordered and paid within such time, the same shall become the property of the county."

In *First Union National Bank of Florida v. Lee County Commission, 75 So. 3d 105 (Ala. 2011)*, our supreme court considered whether a mortgagee of

property sold for taxes could be considered the "owner" under *§ 40-10-28*. Our supreme court determined that [HN4] the term "owner" referred to the person against whom taxes were assessed and not the mortgagee of the property. *75 So. 3d at 114*. In this case, the bank argues that it was no longer just the mortgagee but that, due to its purchase of the property at the foreclosure sale, it was the new owner of the property. The bank argues that inclusion in the statute of the language "person entitled to receive the [excess funds]" implies that the owner of the property may change between the time of the tax sale and the distribution of the excess funds. However, in First Union National Bank the supreme court reasoned:

> "*Section 40-10-120(a), Ala. Code 1975*, [*10] governs when land sold for unpaid taxes may be redeemed, and, more importantly, who may redeem it.
>
> > "'Real estate which hereafter may be sold for taxes and purchased by the state may be redeemed at any time before the title passes out of the state or, if purchased by any other purchaser, may be redeemed at any time within three years from the date of the sale by the owner, his or her heirs, or personal representatives, or by any mortgagee or purchaser of such lands, or any part thereof, or by any person having an interest therein, or in any part thereof, legal or equitable, in severalty or as tenant in common, including a judgment creditor or other creditor having a lien thereon, or on any part thereof. ...'"
>
> "(Emphasis added.) [HN5] The list of those who can redeem property sold for taxes in *§ 40-10-120* is broader than the list of those entitled to claim excess proceeds under *§ 40-10-28*[, Ala. Code 1975]. The more expansive language in *§ 40-10-120* includes both 'the owner' and 'any mortgagee,' but the narrower language in *§ 40-10-28* includes only 'the owner, or his agent, or ... the person legally representing such owner.' The Commission argues that if the legislature separately named both [*11] owners and mortgagees in *§ 40-10-120*, then it could not have intended for the term 'owner' in *§ 40-10-28* to include 'mortgagee.' We agree."

75 So. 3d at 112. Similarly, for purposes of the present case, we note that [HN6] "[t]he more expansive language in *§ 40-10-120* includes both ' the owner' and 'any [... purchaser], ' but the narrower language in *§ 40-10-28* includes only 'the owner, or his agent, or ... the person legally representing such owner.'" Id. (emphasis added). "[I]f the legislature separately named both owners and [purchasers] in *§ 40-10-120*, then it could not have intended for the term 'owner' in *§ 40-10-28* to include '[purchaser].'" Id. Thus, applying the reasoning espoused by our supreme court in *First Union National Bank*, we conclude that the [HN7] excess funds are not payable to a person or entity who purchases property subsequent to a tax sale but, instead, are payable only to the person in whose name the taxes are assessed at the time of the tax sale (or his agent or representative).

The bank also points out that [HN8] the supreme court stated in First Union National Bank that, if a mortgagee foreclosed on property and purchased it at a foreclosure sale, it would become the owner [*12] of the property and, thus, entitled to the excess funds. We note, however, that to be consistent with the above-quoted reasoning from First Union National Bank, that statement must be taken to mean that the foreclosure sale must have occurred before the tax sale. Furthermore, the supreme court stated in First Union National Bank:

> "A mortgagee could also require the mortgagor to execute a power of attorney as part of an agreement not to foreclose, or, if the mortgagee learns after the fact that property has been sold for taxes, it can require the owner to execute a power of attorney before it redeems the property. The mortgagee could then become entitled to the excess proceeds under *§ 40-10-28* as

> the person 'legally representing such owner.'"

75 So. 3d at 116. Based on that language, it is clear that the supreme court did not intend that a subsequent foreclosure sale could alter the "owner" of property under *§ 40-10-28*.[1]

> 1 In any event, that case did not involve a foreclosure situation; thus, any statement regarding the effect of a foreclosure sale was nonbinding dicta. See, e.g., *Ex parte Patton, 77 So. 3d 591, 596 (Ala. 2011)*.

The bank also cites certain attorney general opinions that [*13] support its position; however,

> [HN9] "[u]nlike court opinions,
>
> > "'written opinions of the Attorney General are not controlling. They are merely advisory and, under the statute, such opinions operate only to protect the officer to whom it is directed from liability because of any official act performed by such officer as directed or advised in such opinions. *[§ 36-15-19, Ala. Code 1975.]*'"

Alabama Dep't of Revenue v. National Peanut Festival Ass'n, 11 So. 3d 821, 833-34 (Ala. Civ. App. 2008) (quoting *Broadfoot v. State, 28 Ala. App. 260, 261, 182 So. 411, 412 (1938)*).

The bank further argues that it should be entitled to the excess funds because, it says, returning those funds to the person who owned the property at the time of the tax sale would result in a windfall to that person. It further argues that, if a mortgagee who had foreclosed on property were unable to afford to redeem that property without the excess funds, the mortgagee would be forced to forfeit its rights to the property. As noted above, however, our supreme court noted in First Union National Bank that there are several contractual means by which a mortgagee can protect itself in such situations, such as requiring the mortgagor [*14] to execute a power of attorney in the mortgagee's favor to collect the excess funds. *75 So. 3d at 116*.

Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

AFFIRMED.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur.

TAB 8

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2 of 2 DOCUMENTS

*** Current through the end of the 2014 Regular Session ***

TITLE 40 Revenue and Taxation
CHAPTER 10 Sale of Land
Article 1 General Provisions

Go to the Alabama Code Archive Directory

Code of Ala. § 40-10-28 (2014)

Second of 2 versions of this section

§ 40-10-28. Excess funds after sale. (Effective July 1, 2014)

(a) **(1)** The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, including costs and expenses subsequently accruing, shall be paid over to a person or entity who has redeemed the property as authorized in Section 40-10-120 or any other provisions of Alabama law authorizing redemption from a tax sale, provided proof that the person or entity requesting payment of the excess has properly redeemed the property is presented to the county commission within three years after the tax sale has occurred. The county commission may retain any interest earned on those funds. Until and unless the property is redeemed, the excess funds from the tax sale shall be held in a separate account in the county treasury during the three-year period. If at the end of the three-year period there has been no proper request for the excess funds, those funds and any interest earned on those funds shall be deposited to the credit of the general fund of the county and shall thereafter be treated as part of the general fund of the county.

(2) The Department of Revenue shall promulgate rules authorizing the county commission to issue a voucher in the amount of the excess bid to a person or entity which has paid all other costs of redemption as required in this subdivision. The person or entity redeeming property may present the voucher to the judge of probate in lieu of the amount equal to the excess bid to complete the redemption process. The rules promulgated by the department shall include forms to be utilized for issuing such vouchers.

(b) At any time more than three years but within 10 years after a tax sale, the excess funds arising from the sale shall be paid to either of the following:

(1) To any person or entity entitled to redeem under Section 40-10-83, or any other provisions of law authorizing redemption from the tax sale, upon proof of a circuit court order granting redemption to the person or entity.

(2) To the owner of the land at the time of the tax sale or a subsequent owner, upon proof provided to the tax collector or other official performing those duties that the land has been redeemed by negotiated agreement from the purchaser at the tax sale or the purchaser's successor in interest. Proof of negotiated redemption agreement shall include the following:

a. A copy of a properly recorded deed or conveyance to the redeeming party executed by the party from whom redemption was made.

b. If the redeeming party was not the owner of the land at the time of the tax sale, a copy of a properly recorded deed or conveyance from the owner at the time of the tax sale to the subsequent owner.

c. If the party from whom redemption was made is a successor in interest of the tax sale purchaser, a copy of a properly recorded deed or conveyance from the tax sale purchaser to the successor in interest.

(c) Upon receipt of proof of redemption as required in subsection (b), the county commission shall order the payment of the excess funds as provided therein and retain any interest earned on those funds. If proof of redemption is not received within 10 years after the tax sale, the excess funds and any interest earned on the funds shall become the property of the county.

HISTORY: Acts 2013, No. 13-370, §§ 1, 2, Aug. 1, 2013; Acts 2014, No. 14-442, § 1, July 1, 2014.

NOTES: Postponed action.

For the text of the section effective until July 1, 2014, see the first version.

2014 amendments.

The 2014 amendment, effective July 1, 2014, added the (a)(1) designation; in (a)(1), deleted "On and after August 1, 2013" at the beginning and "held on and after August 1, 2013" following "real estate," added the second sentence, and deleted the former last two sentences; redesignated former (b) as (a)(2); added (b) and (c); and made stylistic changes.

TAB 9

REL: 09/26/2014

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2014

1120302

Ex parte First United Security Bank and Paty Holdings, LLC

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: First United Security Bank and Paty Holdings, LLC

v.

W. Hardy McCollum, Judge of Probate of Tuscaloosa County, et al.)

(Tuscaloosa Circuit Court, CV-10-901031; Court of Civil Appeals, 2110828)

MURDOCK, Justice.

This Court granted certiorari review to clarify our decision in First Union National Bank of Florida v. Lee County Commission, 75 So. 3d 105 (Ala. 2011), and to further address who is the "owner" entitled to recover excess funds received from the tax sale of real estate. We reverse and remand.

I. Facts and Procedural History

First United Security Bank ("First United") and its wholly owned subsidiary, Paty Holdings, LLC (sometimes hereinafter referred to collectively as "the bank"), brought suit to recover excess funds received by Tuscaloosa County from the tax sale of real estate owned by Wayne Allen Russell, Jr., and on which First United had a mortgage. The bank foreclosed on its mortgage after the tax sale but before the demand for excess proceeds was made.

In their decision below, the Court of Civil Appeals stated the facts and the substance of the trial court's judgment as follows:

> "On December 30, 2010, First United Security Bank filed a verified complaint against W. Hardy McCollum, in his capacity as Tuscaloosa County Judge of Probate, and Peyton Cochrane, in his capacity as Tuscaloosa County Tax Collector, seeking, among other things, a judgment declaring that it was

entitled to the excess funds Tuscaloosa County received at the sale of the property for unpaid taxes. The complaint was later amended to add Russell as a defendant and Paty Holdings, LLC, as a plaintiff.

"The case was submitted to the trial court for a decision upon the parties' briefs and the following joint stipulation of facts:

> "'....
>
> "'4. On or about February 15, 2002, Wayne Allen Russell, Jr. ... executed a note and mortgage in favor of First United Security Bank .... Said mortgage was recorded in the Probate Records of Tuscaloosa County ....
>
> "'5. On May 25, 2010, ... certain [parcels of land] subject to the bank's mortgage ... were sold at a tax sale due to unpaid 2009 property taxes.
>
> "'6 & 7 [The two parcels at issue were sold for a combined amount of $42,000, of which $32,305.12 represents excess proceeds.]
>
> "'8. ... First United Security Bank assigned its foreclosure bid rights to ... Paty Holdings, LLC. ... Paty Holdings, LLC was the highest bidder at [a] foreclosure sale [on July 8, 2010,] with a bid in the amount of $2,381,790.00 and recorded a foreclosure deed .... The bid amount equaled the amount of [Russell's] indebtedness to the bank.
>
> "'....

> "'10. ... W. Hardy McCollum as Tuscaloosa County Judge of Probate and Peyton Cochrane as Tuscaloosa County Tax Collector informed [First United Security Bank and Paty Holdings, LLC,] that [they] must pay the excess bids in order to redeem the property taxes but that [they] would not be entitled to a refund of the excess bids. Instead, [McCollum and Cochrane] asserted that the excess bids to be paid by [First United Security Bank and Paty Holdings, LLC,] will be made payable to ... Russell. ...
>
> "'...'

"The parties subsequently stipulated that Black River Holdings, LLC, 'the current owner' of the property, had proposed to redeem the property and had assigned any rights it had to the excess funds to First United Security Bank. The parties also stipulated that the excess tax-sale proceeds were to be held pending the trial court's determination of the case.

"On May 25, 2012, the trial court entered a judgment, stating:

> "'1. The primary issue in this case is ... between ... First United Security Bank and Paty Holdings, LLC, and ... Wayne Allen Russell, Jr. who qualifies as the "owner" or the "person legally representing such owner" under Ala. Code [1975,] Section 40-10-28. In First Union National Bank of Florida v. Lee County Commission[, 75 So. 3d 105] (Ala. ... 2011), the Alabama Supreme Court addressed this very issue when it concluded "that when the Legislature directs in Section 40-10-28[, Ala. Code 1975,] that the excess funds from a tax sale shall be paid over to the owner

or his agent," the term "owner" means "the person against whom taxes on the property are assessed." Under the Stipulated Facts of the parties, that person would be ... Wayne Allen Russell, Jr.

"'2. [First United Security Bank and Paty Holdings, LLC,] argue that the result in this case should be different from that in First Union National Bank, because unlike the mortgagee in First Union National Bank, there had been a foreclosure by the mortgagee in this case. Thus, in this case [First United Security Bank and Paty Holdings, LLC,] contend that as the foreclosing mortgagee, ... First United Security Bank is the full owner of the subject property. This argument would be persuasive if the foreclosure had occurred prior to the tax sale, as it is clear from the opinion in First Union National Bank that the Supreme Court was referring to a foreclosure which occurred prior to the tax sale and not after the tax sale as occurred in this case.

"'....

"'Accordingly, the Court finds in favor of [McCollum, Cochrane, and Russell] and against [First United Security Bank and Paty Holdings, LLC]. It is therefore the order of the Court that the relief requested by [First United Security Bank and Paty Holdings, LLC,] is hereby denied. It is the further order of the Court that ... Russell ... is entitled to the refund of the excess funds from the tax sale at issue in this case. Costs are taxed to [First United Security Bank and Paty Holdings, LLC].'"

First United Sec. Bank v. McCollum, [Ms. 2110828, Nov. 30, 2012] ___ So. 3d ___, ___ (Ala. Civ. App. 2012) (emphasis added).

II. Standard of Review

> "Our standard of review is de novo: 'Because the issues presented by [this appeal] concern only questions of law involving statutory construction, the standard of review is de novo. See Taylor v. Cox, 710 So.2d 406 (Ala. 1998).' Whitehurst v. Baker, 959 So. 2d 69, 70 (Ala. 2006). ..."

Ex parte Birmingham Bd. of Educ., 45 So. 3d 764, 767 (Ala. 2009).

III. Analysis

The issue presented here is whether a purchaser at a foreclosure sale is an "owner" entitled under Ala. Code 1975, § 40-10-28, to receive the excess proceeds from a tax sale of the real property foreclosed upon.[1] Section 40-10-28, as it read at the time of the foreclosure and attempted redemption in this case, provided, in pertinent part:

> "The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury, and it may be

[1]Section 40-10-28 was amended while this case was pending. See note 2, infra.

> paid therefrom to such owner, agent or representative in the same manner as to the excess arising from the sale of personal property sold for taxes is paid. ..."

This provision does not define "owner" and does not, by its terms, impose any limitation on when the owner must have acquired its interest in the property in order to be eligible to receive the excess proceeds from a tax sale of the property.

In First Union National Bank of Florida v. Lee County Commission, 75 So. 3d 105 (Ala. 2011), this Court held that the term "owner" in § 40-10-28 meant "the person against whom taxes on the property were assessed," 75 So. 3d at 117, and that the term "owner" does not include a mortgagee who has not foreclosed on its mortgage. In reaching this conclusion, this Court noted (1) that the statute does not define the term "owner" and (2) that Ala. Code 1975, § 40-10-120(a), specifies a broader range of persons who are entitled to redeem the property from a tax sale. This Court then concluded that the different language in the two related statutes limits the breadth of the term "owner" in § 40-10-28 so as to exclude mere mortgagees.

This Court in First Union also rejected the argument that a mere mortgagee is an "owner" by virtue of the fact that Alabama is a "title" state in which the mortgagee holds legal title to property and the mortgagor holds only equitable title. This Court provided a thorough discussion of precedent, including Loventhal v. Home Insurance Co., 112 Ala. 108, 115, 20 So. 419, 420 (1896), in support of the proposition that "equitable title is more than an interest in property; it is ownership of the property." First Union, 75 So. 3d at 113.

Lastly, this Court in First Union rejected various policy and equitable arguments in favor of treating a mortgagee as an owner entitled to the excess proceeds, noting, among other things, that mortgagees have potential remedies regarding excess tax-sale proceeds. In this regard, we specifically made note of the mortgagee's ability to "foreclose upon the property, purchase it at the foreclosure sale, and thereby merge the equitable title with the legal title, thus becoming entitled to any excess funds." 75 So. 3d at 116 (emphasis added).

The bank argues that this case is distinguishable from First Union because First United foreclosed its mortgage before the demand for or the payment of the excess funds and thus became the "owner" by virtue of owning both legal and equitable title to the property. We agree.

The Court of Civil Appeals rejected the bank's argument, holding that First Union stands for the proposition that the excess funds "are payable only to the person in whose name the taxes are assessed at the time of the tax sale (or his agent or representative)." ___ So. 3d at ___ (emphasis added). In so doing, however, the Court of Civil Appeals erroneously added a temporal qualification to this Court's holding in First Union. This addition extends this Court's holding in First Union beyond its context and imposes a temporal element on ownership that is not found in the statute itself or in this Court's opinion in First Union. Nothing in First Union suggests that there is, or should be, a distinction between one who completes a foreclosure purchase (or other purchase for that matter) and becomes the "owner" of the property before a tax sale and one who completes a purchase after the

tax sale, but before the payout of any excess tax-sale proceeds.

The issue in First Union was not the timing of a sale or foreclosure, but whether a mere mortgagee -- with only a bare legal title to the property -- was an "owner" of the property. In First Union, the only claimants to the excess proceeds were a mortgagor/owner (who was also the owner listed on the assessment, and who apparently was still in possession of the property) and a mortgagee who had not foreclosed and who had only bare legal title.

The reference in First Union to "owner" as "the person against whom taxes on the property are assessed," 75 So. 3d at 114, was not intended to impose any temporal limitation on when a person must become an "owner" in order to be entitled to the excess proceeds. Nor was it intended to limit "owner" to the person or entity listed on the tax assessment, whether or not that person or entity is the actual owner at the time of the tax sale (and whether or not the owner was correctly listed on the assessment).

The Court of Civil Appeals' limitation of "owner" of the property to the person in whose name the taxes were assessed

at the time of the tax sale not only adds a temporal element not found in the statute, but also is contrary to (1) the ordinary meaning of the word "owner" (which does not ordinarily betoken a prior owner who does not retain any interest in the property at the time of the events at issue) and (2) the ordinary expectations of purchasers and sellers of real estate. Ordinarily, the conveyance of real property transfers not only the property itself but also all rights appertaining thereto, unless excepted. We see no reason not to include the right to receive the excess proceeds in the rights transferred. See W. Hereford and J. Haithcock, Money for Nothing: Who Is Entitled to the Excess Paid at a Tax Sale?, 73 Ala. Law. 424, 427 (2012) (seller of real estate ordinarily gives up all rights to the sold property, including the right to the excess proceeds); Ala. Op. Att'y Gen. 2011-087 (2011) (warranty deed normally conveys all rights in the property, including the right to excess proceeds); McGallagher v. Estate of DeGeer, 934 So. 2d 391, 40 (Ala. Civ. App. 2005) (right to rents and profits runs with the land).

Further, as noted above, the opinion in First Union specifically indicated that one of the possible remedies by

which a mortgagee could protect itself would be a foreclosure of the mortgage, thereby causing a merger of legal and equitable title in the foreclosure purchaser and a resulting entitlement to the excess proceeds. We see no reason to conclude that such a merger is any more complete when it occurs before a tax sale than when it occurs after it.

Finally, limitation of the term "owner" to the owner in whose name the taxes were assessed at the time of the tax sale often would lead to inequitable results. The "assessed owner" may not be the actual or equitable owner at the time of the tax sale, either because the property was sold between the October 1 assessment date and the date of the tax sale, or because the assessment was not changed after a sale to reflect the name of the new owner. In either of those instances, payment of the excess proceeds to the assessed owner would represent a windfall to the assessed owner and would unfairly penalize the purchaser/current/actual owner. The injustice is particularly acute if the current owner paid the excess proceeds in order to redeem the property, but the excess proceeds are then returned to the assessed owner, who did not

pay the taxes, did not contribute to the redemption amount, and no longer has any interest in the property.[2]

IV. Conclusion

Based on the foregoing, we conclude that the bank is entitled to the excess tax-sale proceeds. We reverse the judgment of the Court of Civil Appeals and remand the case for further proceedings consistent with this opinion.

---

[2]While this case was pending, the legislature amended § 40-10-28 to provide that the excess tax-sale proceeds shall be paid to "a person or entity who has redeemed the property." Act No. 2013-370, Ala. Acts 2013 (emphasis added). In addition to the argument made by the bank as to the meaning of § 40-10-28 as written at the time of the events at issue, the bank also argues that we should consider the amendment to § 40-10-28 to be retroactive and to apply to any property as to which the excess proceeds had not been paid out as of August 1, 2013, the effective date of that amendment. The defendants disagree, contending that the amendment was intended to apply only to tax sales made on or after that date and, furthermore, that any other interpretation would upset settled expectations and would be unconstitutional. Our judgment of reversal in favor of the bank in this particular case is not dependent on the bank's argument on this issue. Even if the bank were correct, in this case the entity actually attempting to redeem the property is also the "owner" of the property.

REVERSED AND REMANDED.

Stuart, Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Moore, C.J., concurs in the result.

Bryan, J., recuses himself.*

*Justice Bryan was a member of the Court of Civil Appeals when that court considered this case.

TAB 10

2003-220

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

BILL PRYOR
ATTORNEY GENERAL

August 19, 2003

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
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Honorable Marilyn E. Wood
Revenue Commissioner, Mobile County
P.O. Drawer 1169
Mobile, Alabama 36633-1169

Revenue Commissioners - Tax Sales – Redemption – Code Section 40-10-122

County revenue commissioners and other local tax collecting officials are under no obligation to inform a tax sale purchaser that the property is about to be redeemed.

The Revenue Commissioner's function in the redemption process can be completed after the requirements of section 40-10-122(a) of the Code of Alabama have been met.

Dear Commissioner Wood:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. What responsibility, if any, do I have to notify the tax sale purchaser when someone is about to redeem property on which the tax sale purchaser may have a claim under section 40-10-122(b) or (c) of the Code of Alabama?

2. Can I complete the redemption procedures in my office before the tax sale purchaser and the "proposed redemptioner" have settled on any amounts that are owed under section 40-10-122 of the Code of Alabama?

FACTS AND ANALYSIS

Section 40-10-122 of the Code of Alabama was substantially amended by the Legislature in Act 2002-426 and became effective on July 1, 2002. As you state in your request, provisions were added to the law to allow for a tax sale purchaser to be reimbursed for certain insurance and improvement costs from the proposed redemptioner. Except for the last sentence of subsection (a), all the new language is contained in subsections (b) through (e). For clarity, a complete recitation of the law is appropriate. Section 40-10-122 of the Code of Alabama states as follows:

> (a) In order to obtain the redemption of land from tax sales where the same has been sold to one other than the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest thereon at the rate of 12 percent per annum from date of sale, . . . together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records in the office of the tax collector, or other tax collecting official, with interest on said payment at 12 percent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if said taxes are due which may be ascertained by consulting the tax collector or other tax collecting official of the county, the probate judge shall also require the party desiring to redeem said land to pay the tax collector or other tax collecting official the taxes due on said lands which have not been paid by the purchaser before he or she is entitled to redeem the same. In all redemptions of land from tax sales, the party securing the redemption shall pay all

costs and fees as herein provided for due to officers and a fee of $.50 to the judge of probate for his or her services in the matter of redemption. This application and payment may be executed by an on-line transaction via the Internet or other on-line provision.

(b) With respect to property located within an urban renewal or urban redevelopment project area designated pursuant to Chapters 2 or 3 of Title 24, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on insurable structures with interest on said payments at 12 percent per annum.

(2) The value of all permanent improvements made on the property determined in accordance with this section with interest on said value at 12 percent per annum.

(c) With respect to property which contains a residential structure at the time of the sale regardless of its location, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on the residential structure with interest on the payments at 12 percent per annum.

(2) The value of all permanent improvements made on the property determined in accordance with this section with interest on said value at 12 percent per annum.

(d) As used herein, "permanent improvements" shall include, but not be limited to, all repairs,

improvements, and equipment attached to the property as fixtures. As used herein, "preservation improvements" shall mean improvements made to preserve the property by properly keeping it in repair for its proper and reasonable use, having due regard for the kind and character of the property at the time of sale. The proposed redemptioner shall make written demand upon the purchaser of a statement of the value of permanent or preservation improvements as applicable made on the property since the tax sale. In response to written demand made pursuant to this subsection, within 10 days from the receipt of such demand, the purchaser shall furnish the proposed redemptioner with the amount claimed as the value of such permanent or preservation improvements as applicable; and within 10 days after receipt of such response, the proposed redemptioner either shall accept the value so stated by the purchaser or, disagreeing therewith, shall appoint a referee to ascertain the value of such permanent or preservation improvements as applicable. The proposed redemptioner shall in writing (i) notify the purchaser of his or her disagreement as to the value; and (ii) inform the purchaser of the name of the referee appointed by him or her. Within 10 days after the receipt of such notice, the purchaser shall appoint a referee to ascertain the value of the permanent or preservation improvements as applicable and advise the proposed redemptioner of the name of the appointee. Within 10 days after the purchaser has appointed his or her referee, the two referees shall meet and confer upon the award to be made by them. If they cannot agree, the referees shall at once appoint an umpire, and the award by a majority of such body shall be made within 10 days after the appointment of the umpire and shall be final between the parties.

(e) If the proposed redemptioner fails or refuses to nominate a referee as provided in subsection (d), he or she must pay the value put upon the improvements by the purchaser. If the purchaser refuses or fails to appoint a referee, as

> provided in subsection (d), the purchaser shall forfeit his or her claim to compensation for such improvements. The failure of the referees or either of them to act or to appoint an umpire shall not operate to impair or forfeit the right of either the proposed redemptioner or the purchaser in the premises and in the event of failure without fault of the parties to affect an award, the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable and enforce the redemption accordingly.

ALA. CODE § 40-10-122 (Supp. 2002).

Your first question asks what responsibility the Revenue Commissioner has to notify the tax sale purchaser when someone is about to redeem property on which the tax sale purchaser may have a claim for payment under section 40-10-122(b) or (c) of the Code of Alabama. The wording of subsection (d) states that the "proposed redemptioner shall make written demand upon the purchaser of a statement of the value of all permanent or preservation improvements as applicable made on the property since the tax sale." *Id.* The Legislature placed no responsibility on your office to inform the purchaser that a redemption is about to take place. The responsibility rests solely with the proposed redemptioner.

Your second question asks whether your office can complete the redemption procedure before the tax sale purchaser and the proposed redemptioner have settled on any amounts that are owed under section 40-10-122 of the Code of Alabama. The statute expresses a legislative intent that the proposed redemptioner must pay only the amounts set forth in subsection (a) before the redemption process can be completed, as it relates to the functions of your office. Subsections (b) through (e) allow for the reimbursement of certain improvements and insurance premiums that are unrelated to the functions of the local property tax assessing and collection officials.

This Office issued an opinion to the Honorable Eugene H. Hawkins, Judge of Probate, Jefferson County, dated February 1, 1939, which relates to your present question. Judge Hawkins asked what, if anything, his office was required to do when a mortgagee is seeking to redeem property when it had received no written notice from the purchaser at the tax sale and the three-year redemption period had expired. The opinion stated, in pertinent part, as follows:

> It will be seen from the above that the Judge of Probate is not required to go beyond his own records. The fact that notice has been or has not been given will not appear on his records. Moreover, he is not required to examine mortgage records. In other words, after the three year period of redemption has expired, he must execute a tax deed under Sec. 241 of the Revenue Acts of 1935, in accordance with the provisions thereof. After this is done, he has no further duties on the premises. The remedy of a mortgage holder of record, who has received no notice from the purchaser at the tax sale or his assignee, is to institute proper court proceedings.

14 Op. Att'y Gen. 83, 84 (1939).

Your office will have nothing in its files or records to document what the tax sale purchaser has spent in improvements or insurance premiums. The reimbursement is a matter purely between the redemptioner and the tax sale purchaser that requires no input from your office.

Also, subsections (d) and (e) provide for precise steps for the proposed redemptioner and purchaser to follow to facilitate the reimbursement of the allowed improvements and insurance premiums. They include the appointment of referees and possibly an umpire should the parties not come to agreement on the reimbursement amounts. Ultimately, the parties can proceed to an appropriate court should the aforementioned process fail to produce a settlement. Input from your office is not required for any of these procedures.

CONCLUSION

The Revenue Commissioner has no responsibility to notify the tax sale purchaser when a proposed redemptioner is about to redeem property. That responsibility is placed on the proposed redemptioner. Your office can complete the redemption process after the requirements of section 40-10-122(a) of the Code of Alabama have been met. The reimbursement to the purchaser from the proposed redemptioner for allowable improvements and insurance premiums is a matter outside the purview of your office and is not required before your office can complete its role in the redemption process.

I hope this sufficiently answers your questions. If this Office can be of further assistance, please contact Keith Maddox, Legal Division, Revenue Department.

Sincerely,

BILL PRYOR
Attorney General
By:

CAROL JEAN SMITH
Chief, Opinions Division

BP/KM
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TAB 11

REL:09/27/2013

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

1120920

Ex parte Foundation Bank

PETITION FOR WRIT Of MANDAMUS

(In re: CMC Properties, LLC

v.

Emerald Falls, LLC, et al.)

(Autauga Circuit Court, CV-11-900023)

BOLIN, Justice.

Foundation Bank ("the Bank") petitions this Court for a writ of mandamus compelling Autauga County Circuit Judge Sibley Reynolds to vacate his order staying the Bank's

attempted redemption in the probate court of certain property pursuant to Ala. Code 1975, § 40-10-120 et seq. We grant the petition and issue the writ.

I. Facts and Procedural History

The property at issue consists of two parcels of contiguous property located in Autauga County, which includes equipment for outdoor entertainment opportunities for the community. The property is identified as Parcel I: 19-06-23-2-003-003.000 and Parcel II: 19-06-23-2-003-004.000 (hereinafter referred to collectively as "the property"). Emerald Falls, LLC, and its only member, Alice L. Smith (hereinafter referred to collectively as "Emerald Falls"), owned the property originally.

On May 18, 2010, Rob Riddle purchased the property at a tax sale as a result of Emerald Falls' failure to pay the ad valorem taxes on the property. Riddle allegedly purchased insurance on the property and made certain improvements to the property. On January 1, 2011, Riddle executed a document, assigning his interest in the property to CMC Properties, LLC ("CMC"); the assignment was not recorded until February 11, 2011.

On January 17, 2011, Riddle sent written notification to Working Capital No. 1, LLC ("Working Capital"), the mortgagee of the property, advising Working Capital that he had purchased the property belonging to Emerald Falls at the 2010 tax sale.

On January 19, 2011, Riddle filed in the circuit court a complaint against Emerald Falls pursuant to § 40-10-74, Ala. Code 1975,[1] alleging that Emerald Falls had abandoned the property and that Riddle was entitled to immediate possession of the property. Riddle also sought a judgment declaring his rights and/or interests in the property.

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[1]Section 40-10-74, Ala. Code 1975, states, in pertinent part:

> "Any purchaser of lands at a tax sale other than the state or anyone claiming under him shall be entitled to possession of said lands immediately upon receipt of certificate of sale from the tax collector; and, if possession is not surrendered within six months after demand therefor is made by said purchaser or his assignee, the said purchaser or his assignee may maintain an action in ejectment or a statutory real action in the nature of ejectment, or other proper remedy for the recovery of the possession of the lands purchased at such sales and shall be entitled to hold the possession thereof on recovery, subject, however, to all rights of redemption provided for in this title."

On May 27, 2011, the circuit court entered a consent order, in which Emerald Falls and Riddle acknowledged that Riddle had purchased the property subject to the redemption rights of Emerald Falls, that Riddle had made improvements to the property, and that Riddle was entitled to be reimbursed for those improvements. The consent order stated that should Emerald Falls attempt to redeem the property, the matter would be placed on the active trial docket by way of motion from either party to address the amount of taxes owed, reimbursement for improvements, and the accrual of statutory interest.

On January 30, 2013, Riddle sent written notification to the Bank, advising the Bank that he had purchased the property belonging to Emerald Falls at the 2010 tax sale. Riddle sent this notification to the Bank after discovering that Working Capital had assigned its mortgage on the property to the Bank as additional security for a line of credit held by the Bank. As previously noted, Riddle assigned his interest in the property to CMC on January 1, 2011; the assignment was

recorded on February 11, 2011. We hereinafter refer to Riddle and CMC collectively as CMC.[2]

On March 2, 2013, an attorney representing both the Bank and Working Capital (hereinafter referred to collectively as "the Bank") gave written notice to CMC of its intent to redeem the property. The attorney requested that CMC, pursuant to § 40-10-122, Ala. Code 1975, identify "any and all amounts that [CMC] claim are either 'permanent improvements or 'preservation improvements' as defined [§ 40-10-122(d)]." A dispute arose between CMC and the Bank regarding the amount of moneys CMC claimed it had expended on the property. The Bank and CMC thereafter appointed individual referees pursuant to § 40-10-122(d), which provides that if the proposed redemptioner does not agree with the value of the improvements stated by the purchaser, the proposed redemptioner "shall

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[2]After notifying the Bank that he had purchased the property, Riddle filed a second amended complaint to reflect that he had assigned his interest in the property to CMC. The complaint also added the Bank as a party, although no specific claims were asserted against the Bank. CMC, as assignee of the property, filed a third amended complaint stating claims against both the Bank and Working Capital alleging constructive trust, quantum meruit, and unjust enrichment; those claims were based on the improvements CMC had made to the subject property. We note that CMC also named other parties in its complaint; those parties, however, are not relevant to the Bank's mandamus petition.

appoint a referee to ascertain the value of such permanent or preservation improvements as applicable."

On March 31, 2013, the Bank notified the probate court in writing that it was electing to exercise its statutory right of redemption pursuant to § 40-10-120 et seq., Ala. Code 1975.[3]

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[3] "Under Alabama law, after a parcel of property has been sold because of its owner's failure to pay ad valorem taxes assessed against that property (see § 40-10-1 et seq., Ala. Code 1975), the owner has two methods of redeeming the property from that sale: 'statutory redemption' (also known as 'administrative redemption'), which requires the payment of specified sums of money to the probate judge of the county in which the parcel is located (see § 40-10-120 et seq., Ala. Code 1975), and 'judicial redemption' under §§ 40-10-82 and 40-10-83, Ala. Code 1975, which involves the filing of an original civil action against a tax-sale purchaser (or the filing of a counterclaim in an ejectment action brought by that purchaser) and the payment of specified sums into the court in which that action or counterclaim is pending."

First Props., L.L.C. v. Bennett, 959 So. 2d 653, 654 (Ala. Civ. App. 2006). See also Heard v. Gunn, 262 Ala. 283, 78 So. 2d 313 (Ala. 1955)(noting that § 40-10-122 requires the proposed redemptioner to observe the requirements of the statute within three years from the date of the sale; otherwise, the only right to redeem is by virtue of § 40-10-83, Ala. Code 1975); see also William R. Justice, Redemption of Real Property Following Tax Sales in Alabama, 11 Cumb. L. Rev. 331, 335 (1980-81)("The term 'judicial redemption' will be used to refer to an owner who redeems his land outside of

The Bank further requested that the probate court provide it with the amount of money to be deposited for the redemption pursuant to § 40-10-122(a), which, according to the probate court, was $32,249.96--representing the amount for which the property was sold, with interest.

On April 1, 2013, CMC moved the circuit court to enter a stay prohibiting the probate court from accepting any redemption moneys from the Bank pending a hearing in the circuit court regarding the redemption amount. In its motion to stay, CMC specifically stated that a resolution had not been reached between CMC and the Bank regarding the amount necessary to redeem the property and that the parties had appointed referees as required. CMC also stated in its motion that "it has come to the attention of [CMC] that [the Bank is] still in contact with [the probate court] in hopes to back door the redemption process and thus pay monies directly to the Probate Office so a Certificate of Redemption can be obtained ... for the property." On April 1, 2013, the circuit

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the statutory setup found in Alabama Code sections 40-10-120 to 40-10-143.").

court entered an order, which stated: "Redemption issue stayed, pending hearings as set."

On April 2, 2013, the Bank attempted to redeem the property by depositing with the probate court $32,249.96. The probate court entered an order, denying the Bank's attempted redemption. Specifically, the probate court stated that the Bank was authorized as the mortgagee of the property to redeem the property and "[b]ut for the order entered by [the circuit court], this court would have accepted the redemption amount being paid by [the Bank]...."

On April 9, 2013, the Bank filed this petition for a writ of mandamus, compelling the circuit court to vacate its April 1, 2013, order staying the "redemption issue" pending hearings in the circuit court. In its petition, the Bank argues that the circuit court lacked subject-matter jurisdiction to prohibit it from exercising its statutory right of redemption in the probate court pursuant to Ala. Code 1975, § 40-10-122. As an additional ground for the issuance of the writ, the Bank argues that a party desiring to redeem property is neither required to pay a tax-sale purchaser amounts owed under § 40-10-122(b) and/or (c), Ala. Code 1975,

prior to redeeming the property pursuant to subsection (a) of that Code section, nor is a proposed redemptioner required to resolve a dispute regarding any disputed amounts owed under § 40-10-122(b) and/or (c) prior to redeeming property pursuant to subsection (a).

II. Standard of Review

> "'The question of subject-matter jurisdiction is reviewable by a petition for a writ of mandamus.' Ex parte Liberty Nat'l Life Ins. Co., 888 So. 2d 478, 480 (Ala. 2003). However, '[f]or the writ of mandamus to issue "'[t]he right sought to be enforced by mandamus must be clear and certain with no reasonable basis for controversy about the right to relief.'"' Ex parte Vance, 900 So. 2d 394, 398-99 (Ala. 2004)."

Ex parte Tuscaloosa County Special Tax Bd., 963 So. 2d 610, 611-12 (Ala. 2007).

III. Ala. Code 1975, § 40-10-122 and § 40-10-127

Section 40-10-122, Ala. Code 1975, governs the manner of statutory redemption when land is sold at a tax sale to a party other than the State. At all times pertinent to this action § 40-10-122 provided:

> "(a) In order to obtain the redemption of land from tax sales where the same has been sold to one other than the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated the amount of money for which the lands were sold, with interest payable at the rate of 12 percent per annum from date

of sale, and, on the portion of any excess bid that is less than or equal to 15 percent of the market value as established by the county board of equalization, together with the amount of all taxes which have been paid by the purchaser, which fact shall be ascertained by consulting the records in the office of the tax collector, or other tax collecting official, with interest on said payment at 12 percent per annum. If any taxes on said land have been assessed to the purchaser and have not been paid, and if said taxes are due which may be ascertained by consulting the tax collector or other tax collecting official of the county, the probate judge shall also require the party desiring to redeem said land to pay the tax collector or other tax collecting official the taxes due on said lands which have not been paid by the purchaser before he or she is entitled to redeem the same. ...

"(b) With respect to property located within an urban renewal or urban redevelopment project area designated pursuant to Chapters 2 or 3 of Title 24, the proposed redemptioner must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

> "(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on insurable structures with interest on said payments at 12 percent per annum.
>
> "(2) The value of all permanent improvements made on the property determined in accordance with this section with interest on said value at 12 percent per annum.

"(c) With respect to property which contains a residential structure at the time of the sale regardless of its location, the proposed redemptioner

must pay to the purchaser or his or her transferee, in addition to any other requirements set forth in this section, the amounts set forth below:

> "(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on the residential structure with interest on the payments at 12 percent per annum.
>
> "(2) The value of all preservation improvements made on the property determined in accordance with this section with interest on the value at 12 percent per annum.

"(d) As used herein, 'permanent improvements' shall include, but not be limited to, all repairs, improvements, and equipment attached to the property as fixtures. As used herein, 'preservation improvements' shall mean improvements made to preserve the property by properly keeping it in repair for its proper and reasonable use, having due regard for the kind and character of the property at the time of sale. The proposed redemptioner shall make written demand upon the purchaser of a statement of the value of all permanent or preservation improvements as applicable made on the property since the tax sale. In response to written demand made pursuant to this subsection, within 10 days from the receipt of such demand, the purchaser shall furnish the proposed redemptioner with the amount claimed as the value of such permanent or preservation improvements as applicable; and within 10 days after receipt of such response, the proposed redemptioner either shall accept the value so stated by the purchaser or, disagreeing therewith, shall appoint a referee to ascertain the value of such permanent or preservation improvements as applicable. The proposed redemptioner shall in writing (i) notify the purchaser of his or her disagreement as to the value; and (ii) inform the purchaser of the name of the

> referee appointed by him or her. Within 10 days after the receipt of such notice, the purchaser shall appoint a referee to ascertain the value of the permanent or preservation improvements as applicable and advise the proposed redemptioner of the name of the appointee. Within 10 days after the purchaser has appointed his or her referee, the two referees shall meet and confer upon the award to be made by them. If they cannot agree, the referees shall at once appoint an umpire, and the award by a majority of such body shall be made within 10 days after the appointment of the umpire and shall be final between the parties.
>
> "(e) If the proposed redemptioner fails or refuses to nominate a referee as provided in subsection (d), he or she must pay the value put upon the improvements by the purchaser. If the purchaser refuses or fails to appoint a referee, as provided in subsection (d), the purchaser shall forfeit his or her claim to compensation for such improvements. The failure of the referees or either of them to act or to appoint an umpire shall not operate to impair or forfeit the right of either the proposed redemptioner or the purchaser in the premises and in the event of failure without fault of the parties to affect an award, the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable and enforce the redemption accordingly."

(Emphasis added.)

Section 40-10-127, Ala. Code 1975, governs the issuance of certificates of redemption and provides, in pertinent part:

> "Upon the payment of the amount required by law for the redemption of the lands sold for taxes by a person entitled to redeem, the judge of probate, or official who performs the same function, shall issue that person a certificate of redemption describing the lands, setting forth the facts of the sale

> substantially as contained in the certificate of purchase, the date of redemption, the amount paid, by whom the lands were redeemed, and make the proper entries in the book of sales in his or her office and immediately give notice of the redemption to the county treasurer or custodian of the county funds. The judge of probate, or official who performs the same functions, shall sign the certificate."

(Emphasis added.)

IV. Discussion

In Alabama, circuit courts have only a "general superintendence" over probate courts. Ala. Code 1975, § 12-11-30(4). See also Franks v. Norfolk Southern Ry., 679 So. 2d 214, 216 (Ala. 1996)("Encompassed in this superintendence is the power to review certain judgments and orders of the probate court, either through direct appeal or by petition for an extraordinary writ.").

The jurisdiction of probate courts in Alabama is set forth in § 12-13-1, Ala. Code 1975, which provides, in part:

> "(a) The probate court shall have original and general jurisdiction as to all matters mentioned in this section and shall have original and general jurisdiction as to all other matters which may be conferred upon them by statute, unless the statute so conferring jurisdiction expressly makes the jurisdiction special or limited."

See also Wallace v. State, 507 So. 2d 466, 468 (Ala. 1987) ("The jurisdiction of the probate court is limited to the matters submitted to it by statute.").

Based on the clear language of § 40-10-122, the probate court has, to the exclusion of all other courts, exclusive jurisdiction over the statutory redemption process. And, as discussed below, the process of redemption involves several requirements, if applicable, that must be met before a certificate of redemption is issued. In other words, contrary to the Bank's argument, the process of depositing with the probate court "the amount of money for which the lands were sold, with interest," pursuant to § 40-10-122(a), is only one affirmative requirement stated in the entirety of § 40-10-122.

Based on the unambiguous language of § 40-10-127, the probate court also has, to the exclusion of all other courts, the exclusive power to issue to the redemptioner a certificate once the redemption process is complete. Accordingly, the circuit court in this case did not have subject-matter jurisdiction to enter an order staying the Bank's statutory right of redemption in the probate court, and its order

purporting to do so is void.[4] "Any action taken by a trial court without subject-matter jurisdiction is void." Johnson v. Neal, 39 So. 3d 1040, 1045 (Ala. 2009).

As previously stated, the Bank argues as an additional ground for issuance of the writ that a party desiring to redeem property is neither required to pay to the tax-sale purchaser any amounts owed under § 40-10-122(b) and/or (c) prior to redeeming the property pursuant to subsection (a) of that Code section, nor is a proposed redemptioner required to resolve any dispute regarding amounts owed under § 40-10-122(b) and/or (c) prior to redeeming the property pursuant to subsection (a). We disagree. As the title implies, § 40-10-122 governs the "Manner of redemption when land [is] sold to [a] party other than [the] state." The statute is

[4]We note that CMC argues in its response brief that the circuit court's order "did not order the Probate Judge not to issue a redemption certificate to [the Bank], as [the Bank] has argued." The circuit court's order, staying the "redemption issue" pending hearings in the circuit court, is not a model of clarity. However, the probate court interpreted the order as precluding it from accepting from the Bank any redemption moneys. And, as previously noted, CMC indicated in its motion to stay that it was basing it motion on the Bank's attempt to redeem the property with the probate court. We, therefore, interpret the circuit court's order as staying the Bank's attempted redemption in probate court pending hearings in the circuit court.

unambiguous, and all the requirements set forth in each applicable subdivision must be satisfied before a certificate of redemption can be issued pursuant to § 40-10-127.

The first part of 40-10-122(a) provides that "[i]n order to obtain the redemption of land from tax sales ..., the party desiring to make such redemption shall deposit with the judge of probate ... the amount of money for which the lands were sold, with interest ...." (Emphasis added.) The second part of 40-10-122(a) provides that if there are any taxes due on the subject land, "the probate judge shall also require the party desiring to redeem the land to pay the tax collector ... the taxes due on the lands ... before he or she is entitled to redeem the same...." (Emphasis added.) Accordingly, a party desiring to redeem land must deposit with the probate court "the amount of money for which the property was sold, with interest...." And, if there are any taxes due, the party must also pay the tax collector "before he or she is entitled to redeem the same." (Emphasis added.)

In 2002, § 40-10-122 was amended to add subsections (b) through (e). Subsections (a) through (e) constitute the "statutory," as opposed to "judicial," redemption scheme (see

supra note 3) that must be followed in order for redemption to be completed.

> "Because the meaning of statutory language depends on context, a statute is to be read as a whole. King v. St. Vincent's Hospital, 502 U.S. 215, ----, 112 S.Ct. 570, 574, 116 L.Ed. 2d 578 (1991). Subsections of a statute are in pari materia and 'should be construed together to ascertain the meaning and intent of each.' McCausland v. Tide-Mayflower Moving & Storage, 499 So. 2d 1378, 1382 (Ala. 1986)."

Ex parte Jackson, 614 So. 2d 405, 406 (Ala. 1993).

Each subsection of § 40-10-122 following subsection (a) refers to the "proposed redemptioner." The proposed redemptioner under the statute refers to the same party in subsection (a), i.e., the party "desiring to make such redemption." Just like the requirement in § 40-10-122(a) by which the redemptioner must pay to a third party, i.e., the tax collector, any unpaid taxes before being entitled to redeem, subsections (b) and (c), if applicable, require the proposed redemptioner to pay the tax-sale purchaser the amounts expended for insurance premiums and improvements "in addition to any other requirements set forth in this section ...." (Emphasis added.) Thus, the proposed redemptioner, in an action for a statutory redemption before the probate court,

in addition to paying amounts required under subsection (a), must also pay any amounts owed under subsections (b) and (c) before a certificate of redemption is issued. Section 40-10-122(d) merely defines permanent improvements and preservation improvements and describes the process that the proposed redemptioner and the tax-sale purchaser should use to effect an award in the event of a dispute regarding the amounts claimed under subsections (b) and/or (c).

Section 40-10-122(e) provides, in pertinent part:

> "The failure of the referees or either of them to act or to appoint an umpire shall not operate to impair or forfeit the right of either the proposed redemptioner or the purchaser in the premises and in the event of failure without fault of the parties to affect an award, the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable and enforce the redemption accordingly."

(Emphasis added.) Again, § 40-10-122(e) refers to the "proposed redemptioner" and provides that "in the event of failure without fault of the parties to affect an award, the appropriate court shall proceed to ascertain the true value of such permanent or preservation improvements as applicable and enforce the redemption accordingly." (Emphasis added.) The word "appropriate court" merely refers to the probate court

"in the county in which the real property is located," as referenced in the first sentence of § 40-10-122(a). Accordingly, the probate court has the exclusive jurisdiction under the statute to enforce the statutory redemption by resolving any and all disputes regarding amounts owed under subsections (b) and (c) that cannot without any fault on the parties otherwise be resolved.

V. Conclusion

Because the probate court has exclusive jurisdiction over the entire statutory redemption process, we grant the petition for the writ of mandamus and direct the circuit court to vacate its April 1, 2013, order staying the Bank's attempted redemption in the probate court.

PETITION GRANTED; WRIT ISSUED.

Stuart, Parker, Murdock, Main, Wise, and Bryan, JJ., concur.

Shaw, J., concurs in part and concurs in the result.

Moore, C.J., dissents.

SHAW, Justice (concurring in part and concurring in the result).

I agree with the holding of the main opinion that Ala. Code 1975, § 40-10-122, in combination with Ala. Code 1975, § 12-13-1, grants the probate court the exclusive jurisdiction to issue a redemption certificate in cases of "statutory" or "administrative" redemption. Further, § 40-10-122 sets forth the procedure to determine the amount to be paid in a redemption case, and Foundation Bank has demonstrated a clear legal right to a writ a mandamus directing the circuit court to cease its attempts to make such a determination and to prevent the probate court from doing so.

The secondary issue presented in the petition--whether one must, before the redemption, pay amounts due under § 40-10-122(b)-(c) (or resolve any disputes as to such amounts)--is pretermitted by the decision regarding jurisdiction in the main opinion. Additionally, the circuit court made no decision on that issue that this Court must order set aside, and there is no indication that the probate court will not properly dispose of this issue. Thus, any discussion of that issue is, in my view, dicta.

TAB 12

REL: 09/12/2014

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2014

2130167

Wall to Wall Properties

v.

Cadence Bank, NA, and Tommy Ragland, Judge of the Madison Probate Court

Appeal from Madison Circuit Court (CV-12-901676)

MOORE, Judge.

Wall to Wall Properties ("Wall") appeals from a judgment of the Madison Circuit Court ("the circuit court") dismissing

its petition for a writ of mandamus directed to the Madison Probate Court ("the probate court"). We reverse.

Background

In a petition for a writ of mandamus filed in the circuit court, and in accompanying affidavits with supporting documentation attached, see Ala. Code 1975, § 6-6-640, Wall alleged that it had purchased a parcel of real property ("the property"), which included a residential structure, at a tax sale on May 3, 2012, for $814.07. Wall further asserted that it had purchased insurance to cover the property and that it had made permanent improvements to the property. According to Wall, Cadence Bank, N.A. ("Cadence"), subsequently foreclosed a mortgage on the property, deposited $867.07 with the probate court, and obtained a certificate of redemption from the probate court dated September 21, 2012. Wall averred that the probate court had acted without providing notice to Wall or conducting a hearing to verify that Wall had been reimbursed for the costs of insurance premiums it had paid and for the permanent improvements it had made to the property in accordance with § 40-10-122(c) through (e), Ala. Code 1975. Wall further asserted that, on October 22, 2012, it had

requested, in writing, that the probate court quash, vacate, or set aside the certificate of redemption and that the probate court had refused that request. Wall requested that the circuit court issue a writ of mandamus compelling the probate court to vacate the certificate of redemption.

Cadence and Judge Tommy Ragland, the judge of the probate court, filed multiple motions to dismiss the mandamus petition. In those motions, Cadence and Judge Ragland argued that the circuit court lacked subject-matter jurisdiction over the mandamus petition and that, even if the circuit court had jurisdiction, Wall had failed to timely file its petition in accordance with Rule 21, Ala. R. App. P. Cadence and Judge Ragland further argued that the certificate of redemption should not be set aside because a probate court has no authority or duty to collect premiums paid for insurance and costs expended for permanent improvements under § 40-10-122(c) through (e). Additionally, Cadence contended that the petition should be dismissed because Wall had not furnished sufficient evidence of the permanent improvements it had made to the property and the amounts it was owed for the insurance premiums it had paid and for the permanent improvements it had

made and that, after filing the petition for a writ of mandamus, Wall had forfeited its right to payment by failing to comply with § 40-10-122(d). Wall and Cadence filed competing "summary-judgment motions" addressing the above issues.

On September 5, 2013, the circuit court denied the "summary-judgment motions" and granted the motions to dismiss filed by Judge Ragland and Cadence without specifying the basis for its judgment. Wall filed a "motion to reconsider" on October 4, 2013, which was denied on October 8, 2013. Wall filed its notice of appeal to this court on November 15, 2013. This court transferred the appeal to the Alabama Supreme Court for lack of subject-matter jurisdiction; that court transferred the appeal back to this court, pursuant to Ala. Code 1975, § 12-2-7.

Standard of Review

> "A ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299."

Newman v. Savas, 878 So. 2d 1147, 1148-49 (Ala. 2003).

Discussion

Section 40-10-1, Ala. Code 1975, authorizes the probate court of each county to order the sale of lands in that county to recover unpaid tax assessments. Once land is sold at an authorized tax sale and the probate court confirms the sale, a certificate of purchase issues. §§ 40-10-13 and 40-10-19, Ala. Code 1975. The certificate of purchase does not vest in the purchaser title to the land but, rather, gives the purchaser a right to possession of the land, subject to the owner's statutory right to redemption. Smith v. Jackson, 277 Ala. 257, 169 So. 2d 21 (1964).

Within three years from the date of the tax sale, the owner may redeem land sold to a party other than the state by complying with the statutory-redemption scheme set out in § 40-10-122, Ala. Code 1975.[1] According to § 40-10-122(a), a party desiring to redeem property must deposit with the judge of probate the tax-sale price plus any taxes paid by the

[1]A party may also redeem the property through the "judicial-redemption" process outlined in §§ 40-10-82 and 40-10-83, Ala. Code 1975. First Props., L.L.C. v. Bennett, 959 So. 2d 653, 654 (Ala. Civ. App. 2006).

purchaser, with 12% interest.[2] Additionally, § 40-10-122(c) provides that if the land contained a residential structure at the time of the tax sale, the proposed redemptioner must pay to the purchaser

> "(1) All insurance premiums paid or owed by the purchaser for casualty loss coverage on the residential structure with interest on the payments at 12 percent per annum.
>
> "(2) The value of all preservation improvements made on the property determined in accordance with this section with interest on the value at 12 percent per annum."

"Upon the payment of the amount required by law for the redemption of the lands sold for taxes ... the judge of probate, or official who performs the same function, shall issue that person a certificate of redemption ...." § 40-10-127, Ala. Code 1975.

By the plain and unambiguous terms of § 40-10-127, a probate court cannot issue a certificate of redemption until the proposed redemptioner has paid all sums "required by law for the redemption of lands." Those sums include not only the amount to be deposited directly with the probate court to

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[2]If any taxes on the land have been assessed on the tax-sale purchaser, but not paid, the proposed redemptioner must also pay those taxes to the tax collector in order to redeem the property. § 40-10-122(a).

cover the tax-sale price, interest, and unpaid taxes under § 40-10-122(a), but also any insurance premiums and improvement costs owed under § 40-10-122(c). See Ex parte Foundation Bank, [Ms. 1120920, Sept. 27, 2013] ___ So. 3d ___, ___ (Ala. 2013) ("Thus, the proposed redemptioner, in an action for a statutory redemption before the probate court, in addition to paying amounts required under subsection (a) [of § 40-10-122, Ala. Code 1975,] must also pay any amounts owed under subsections (b) and (c) before a certificate of redemption is issued."). Thus, before issuing a certificate of redemption, a probate court must ascertain whether any payments are due to the tax-sale purchaser under § 40-10-122(c) and verify that the proposed redemptioner has made those payments.

In this case, Judge Ragland, as he explained in his motions to dismiss, believed that he did not have any jurisdiction or duty to enforce payment of the amounts due under § 41-10-122(c). Judge Ragland maintained that, once he had received the sums due under § 41-10-122(a), he had fulfilled his "collection" duties and could issue Cadence a certificate of redemption, leaving it to the parties to resolve between themselves any dispute as to amounts due under

§ 41-10-122(c).[4] However, Judge Ragland, and Cadence to the extent it joined Judge Ragland's argument, misconstrued the statutory-redemption scheme, which requires a probate court to ascertain whether all amounts due under the law have been made before issuing a certificate of redemption. Upon learning that Wall claimed a right to payment for improvements and insurance premiums, Judge Ragland should have vacated the certificate of redemption as requested and performed his statutory duty to assess Wall's claim for compensation and assure that Cadence paid any amounts for which it was duly obligated.

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[4]Section 40-10-122(d), Ala. Code 1975, "describes the process that the proposed redemptioner and the tax-sale purchaser should use to effect an award in the event of a dispute regarding the amounts claimed under [§ 41-10-122(c)]." Ex parte Foundation Bank, ___ So. 3d at ___. That process is largely extrajudicial in nature, requiring the parties to appoint referees and an umpire to ascertain the value of any permanent improvements, leaving it to the probate court to determine that value only in the rare instance when the referees and umpire do not perform their duties. However, nothing in § 41-10-122(d) empowers a referee or umpire to enforce an "award" for permanent improvements. The statutory scheme vests the probate court with the sole authority to assure payment is made for permanent improvements, even when the value of those improvements is established through the dispute procedures set out in § 41-10-122(d). No language contained in § 41-10-122(d) removes that authority or relieves the probate court of its duty to assure that all payments are made under § 41-10-122 before a certificate of redemption is issued.

A party aggrieved by the erroneous issuance of a certificate of redemption may petition a circuit court in the county in which the probate court lies for a writ of mandamus to compel the vacating of the certificate. Ordinarily, a circuit court may issue a writ of mandamus to a probate court only in cases in which it has appellate jurisdiction. See Ex parte Jim Walter Res., Inc., 91 So. 3d 50, 52 (Ala. 2012). Section 12-22-21, Ala. Code 1975, which defines the appellate jurisdiction of circuit courts over probate courts, does not include appeals concerning certificates of redemption. However, our supreme court recently recognized that a circuit court has jurisdiction to adjudicate petitions for a writ of mandamus involving the denial of a certificate of redemption. See Ross v. Rosen-Rager, 67 So. 3d 29, 38 (Ala. 2010) (citing Boyd v. Holt, 62 Ala. 296 (1878)) (refusal of the probate judge to issue a certificate of redemption for land sold for taxes was reviewable in the circuit court by a petition for a writ of mandamus). Furthermore, in Roach v. State, 148 Ala. 419, 39 So. 685 (1905), our supreme court accepted, without comment, an appeal from a circuit court's denial of a mandamus petition that was filed by a tax-sale purchaser. The tax-sale

purchaser had requested the circuit court to compel the probate court in that case to issue a deed to the purchaser where the probate court had issued a certificate of redemption to the owner after the expiration of the statutory period for redemption. See also Chattanooga Metal Co. v. Procter, 226 Ala. 492, 147 So. 666 (1933). If the circuit court had lacked jurisdiction in that case to adjudicate the mandamus petition, the supreme court would have dismissed the appeal as being from a void judgment. See, e.g., Ex parte Punturo, 928 So. 2d 1030 (Ala. 2002). Thus, the circuit court has subject-matter jurisdiction to adjudicate the petition for a writ of mandamus in this case.

A petition for a writ of mandamus filed in a circuit court under § 6-6-640, Ala. Code 1975, must be filed without unreasonable delay. See Evans v. Insurance Co. of N. America, 349 So. 2d 1099 (Ala. 1977). Any more specific deadline for filing a petition for a writ of mandamus found in Rule 21, Ala. R. App. P., applies only in the three designated appellate courts in this state and not in the circuit court. See Rule 1, Ala. R. App. P. In this case, Judge Ragland and Cadence argued only that Wall's petition for a writ of

mandamus should have been dismissed under Rule 21, Ala. R. App. P., because it was not filed within 42 days of the issuance of the certificate of redemption, the usual period for taking an appeal from a judgment of the probate court. See Rule 4(a)(1), Ala. R. App. P.[5] However, neither Judge Ragland nor Cadence moved the circuit court to dismiss the petition based on Wall's delay in filing its petition beyond a reasonable time or based on their having been prejudiced in some manner by that delay. Hence, the circuit court had no basis for dismissing the petition based on lack of timeliness.

Finally, the circuit court could not have dismissed the petition on the grounds asserted by Cadence that Wall had either failed to prove its right to compensation or had forfeited its right to compensation. The factual matters surrounding those grounds could not be decided in the circuit

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[5]In Ross v. Rosen-Rager, 67 So. 3d at 38, our supreme court held that a tax-sale purchaser cannot ignore a facially valid certificate of redemption, but must judicially challenge it. The court mentioned different ways to judicially challenge a probate-court action, but it did not specify the mode of review applicable to the issuance of a certificate of redemption. The supreme court did not, however, hold that a tax-sale purchaser has a right to appeal from the issuance of a certificate of redemption. We find no statutory authority allowing for an appeal from the issuance of a certificate of redemption.

court, which has no jurisdiction over the statutory-redemption process, but could be determined only by the probate court, which has exclusive jurisdiction over the process. See Ex parte Foundation Bank, supra. By his own admission, Judge Ragland did not consider, much less decide, Wall's claim, so any issues surrounding the validity of its claim remain extant. In fact, by granting the petition, the circuit court would merely be ordering Judge Ragland to vacate the certificate of redemption, enabling him to perform his statutory duty to ascertain whether, and how much, Cadence owes Wall.

Based on the foregoing, we reverse the judgment of the circuit court and remand this cause with instructions to the circuit court to vacate its judgment dismissing the petition for a writ of mandamus and to take such further actions on the petition as are consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.

TAB 13

REL: 11/06/2015

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2140683

Wall to Wall Properties, Inc.

v.

Cadence Bank, N.A.

Appeal from Madison Probate Court
(61511)

MOORE, Judge.

Wall to Wall Properties, Inc. ("Wall"), appeals from a judgment of the Madison Probate Court ("the probate court") determining that Cadence Bank, N.A. ("Cadence"), in order to complete the redemption of certain property that Wall had

purchased at a tax sale on May 3, 2012, for $814.07, did not have to reimburse Wall for the insurance premiums regarding the property Wall had paid or for the permanent improvements Wall had made to the property, which included a residential structure. We affirm the probate court's judgment.

Background and Procedural History

This is the second time this case has been before this court. See Wall to Wall Props. v. Cadence Bank, N.A., 163 So. 3d 384 (Ala. Civ. App. 2014) ("Wall").[1] In Wall, Wall argued that the probate court had issued a certificate of redemption to Cadence for the property and that the probate court had failed "to verify that Wall had been reimbursed for the costs of insurance premiums it had paid and for the permanent improvements it had made to the property in accordance with § 40-10-122(c) through (e), Ala. Code 1975." 163 So. 3d at 385-86. This court concluded that the probate court should "vacate[] the certificate of redemption ... and perform[] [its] statutory duty to assess Wall's claim for compensation

[1]In Wall, this court incorrectly referred to Wall as "Wall to Wall Properties."

and assure that Cadence paid any amounts for which it was duly obligated." 163 So. 3d at 388.

After our decision in Wall was issued, the probate court vacated the certificate of redemption and held a hearing to determine whether Wall "ha[d] been reimbursed for the costs of insurance premiums it ha[d] paid and for the permanent improvements it ha[d] made to the subject property in accordance with § 40-10-122(c) through (e), Ala. Code 1975." After that hearing, the probate court entered a judgment on January 22, 2015, determining that Wall had failed to prove that Cadence owed it for any permanent improvements Wall had made to the property or for insurance premiums it had paid. On February 11, 2015, the probate court entered an order reinstating the certificate of redemption. On February 23, 2015, Wall filed two separate postjudgment motions. Those motions were denied on April 13, 2015. Wall appealed to this court on May 2, 2015. This court transferred the appeal to the Alabama Supreme Court for lack of appellate jurisdiction; that court transferred the appeal back to this court, pursuant to Ala. Code 1975, § 12-2-7.

Discussion

Section 40-10-122(d), Ala. Code 1975, provides, in pertinent part:

> "The proposed redemptioner shall make written demand upon the purchaser of a statement of the value of all permanent or preservation improvements as applicable made on the property since the tax sale. In response to written demand made pursuant to this subsection, within 10 days from the receipt of such demand, the purchaser shall furnish the proposed redemptioner with the amount claimed as the value of such permanent or preservation improvements as applicable; and within 10 days after receipt of such response, the proposed redemptioner either shall accept the value so stated by the purchaser or, disagreeing therewith, shall appoint a referee to ascertain the value of such permanent or preservation improvements as applicable. The proposed redemptioner shall in writing (i) notify the purchaser of his or her disagreement as to the value; and (ii) inform the purchaser of the name of the referee appointed by him or her. Within 10 days after the receipt of such notice, the purchaser shall appoint a referee to ascertain the value of the permanent or preservation improvements as applicable and advise the proposed redemptioner of the name of the appointee. Within 10 days after the purchaser has appointed his or her referee, the two referees shall meet and confer upon the award to be made by them. If they cannot agree, the referees shall at once appoint an umpire, and the award by a majority of such body shall be made within 10 days after the appointment of the umpire and shall be final between the parties."

On appeal, Wall argues that, because, it says, Cadence failed to follow the procedure set forth in § 40-10-122(d),

Cadence waived the right to object to the amounts claimed by Wall for the permanent improvements and the insurance premiums. Specifically, Wall claims that Cadence failed to timely nominate a referee in accordance with the statute. Wall asserts that, because Cadence waived the right to object to the amounts claimed by Wall by failing to nominate a referee in a timely manner, the probate court should have entered a judgment for Wall for the amounts claimed by Wall.

The exhibits presented at the trial indicate that, on December 21, 2012, Cadence, the proposed redemptioner, demanded that Wall provide a statement of the value of all the permanent or preservation improvements it had made on and to the property since the tax sale. Cadence made that demand in the body of a motion to dismiss it filed with the Madison Circuit Court; that motion indicates that it was served on Wall through either the AlaFile system or the United States mail. The exhibits further indicate that Wall had communicated to Cadence that that demand was not in compliance with § 40-10-122(d), so Cadence served a second written demand on Wall on February 4, 2013. On February 13, 2013, Wall

mailed to Cadence a statement of the amounts for which it claimed reimbursement.

We conclude that Cadence's first demand was effective under § 40-10-122(d). Even if that demand was served on Wall through the AlaFile system instead of through United States mail, that transmission would constitute a written demand under § 40-10-122(d). See, e.g., Ex parte Alamo, 128 So. 3d 700 (Ala. 2013) (noting that an e-mail constitutes a written communication). Section 40-10-122(d) does not require that the demand be mailed or otherwise transmitted in any certain manner. Because Wall did not respond to Cadence's first demand within 10 days, Wall was the party that initially failed to comply with § 40-10-122(d).

In Ross v. Deutsche Bank National Trust Co., 56 So. 3d 679, 683 (Ala. Civ. App. 2010), this court stated: "[A]lthough § 40-10-122(d)[, Ala. Code 1975,] does not specifically provide that a failure to timely respond [to a request for improvement amounts] results in a forfeiture of the right to payment for improvements, the mandatory nature of the procedure set forth in that subsection implies the same." Because, in the present case, Wall failed to timely respond to

Cadence's first demand for a statement of the value of all the permanent or preservation improvements Wall was claiming it had made to the property, we conclude that Wall forfeited its right to payment for the improvements. Therefore, we affirm the probate court's judgment determining that Cadence owed no funds to Wall, albeit for a reason different than that stated by the probate court. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) ("[T]his Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court.").

Wall's second argument on appeal is that the probate court erred in concluding that it had not proved the value of the preservation improvements. Because we have determined that Wall waived its right to reimbursement for the preservation improvements it made to the property, we conclude that this argument is moot.

Finally, we note that, although Wall mentions reimbursement for insurance premiums in its brief to this court, Wall has failed to develop an argument regarding that

issue in compliance with Rule 28, Ala. R. App. P. Therefore, we conclude that Wall has waived that issue on appeal. See Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003) ("An argument not made on appeal is abandoned or waived.").

Conclusion

Based on the foregoing, we affirm the judgment of the probate court.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.

REL: 12/04/2015

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2140837

Wall to Wall Properties, Inc.

v.

Wells Fargo Bank, N.A.

Appeal from Madison Circuit Court
(CV-12-585)

MOORE, Judge.

Wall to Wall Properties, Inc. ("Wall"), appeals from a judgment entered by the Madison Circuit Court ("the circuit court") in favor of Wells Fargo Bank, N.A. ("Wells Fargo"). We affirm.

Procedural History

At some point, Wall purchased a parcel of real property ("the property") that was owned by Wells Fargo at a tax sale. On August 31, 2011, the Madison Probate Court ("the probate court") issued a certificate of redemption to Wells Fargo regarding the property. On August 6, 2012, Wall filed in the circuit court a petition requesting that the circuit court issue a writ of mandamus directing the probate court to set aside the certificate of redemption. Wall asserted that the probate court had failed to hold a hearing to verify that Wall had been reimbursed for the preservation improvements it had made to the property and for the costs of insurance premiums it had paid. Wall named Wells Fargo as a respondent to the action as well.

On November 5, 2012, Judge Tommy Ragland, the judge of the probate court, filed a motion to dismiss the petition, arguing that the probate court did not have jurisdiction to make a determination regarding whether Wall was entitled to reimbursement for the preservation improvements it had made to the property or for the insurance premiums it had paid. After a hearing, the circuit court entered an order on January 12,

2013, dismissing Judge Ragland as a respondent, stating: "[T]he costs of improvements are [not] costs that must be paid before a certificate of redemption may be issued by the Probate Judge."

Wells Fargo filed a motion to dismiss the petition for a writ of mandamus on April 19, 2013, which the circuit court initially denied. On August 14, 2013, Wells Fargo answered the petition and filed a counterclaim, alleging that Wall had continued leasing the property to tenants after the certificate of redemption had been issued, setting forth claims of ejectment and unjust enrichment, and requesting an accounting. On January 13, 2014, the circuit court entered an order that, among other things, granted Wells Fargo's motion to dismiss; the circuit court stated that it lacked subject-matter jurisdiction to consider Wall's mandamus petition and cited cases regarding the requirement of filing a timely petition. On March 14, 2014, Wells Fargo filed a motion for a summary judgment on its pending claims against Wall. On February 25, 2015, the trial court entered a summary judgment in favor of Wells Fargo, awarding Wells Fargo damages for

Wall's having continued to lease the property after the certificate of redemption was issued.

On March 4, 2015, Wall filed a postjudgment motion. On June 1, 2015, the circuit court entered an order denying Wall's postjudgment motion, noting that Wall's attorney had failed to attend the postjudgment hearing and that the attorney had failed to notify the court that he would not be attending the hearing until the scheduled time of the hearing. On July 10, 2015, Wall filed its notice of appeal to this court. This court transferred the appeal to the supreme court for lack of appellate jurisdiction; that court subsequently transferred the appeal back to this court, pursuant to Ala. Code 1975, § 12-2-7(6).

Discussion

In Wall to Wall Properties v. Cadence Bank, NA, 163 So. 3d 384 (Ala. Civ. App. 2014), this court held that, before a probate court issues a certificate of redemption on property that was sold at a tax sale, the probate court must first "ascertain whether all amounts due under [Ala. Code 1975, § 40-10-122(c),] have been made." 163 So. 3d at 388. If a probate court issues a certificate of redemption without

ascertaining whether the redeeming party has paid all lawful amounts due, a circuit court may, upon a timely filed petition, issue a writ of mandamus to the probate court directing it to vacate the certificate of redemption and to hold a hearing to fulfill its statutory duty. With regard to the timely filing of a mandamus petition under such circumstances, this court stated:

> "A petition for a writ of mandamus filed in a circuit court under § 6-6-640, Ala. Code 1975, must be filed without unreasonable delay. See Evans v. Insurance Co. of N. America, 349 So. 2d 1099 (Ala. 1977). Any more specific deadline for filing a petition for a writ of mandamus found in Rule 21, Ala. R. App. P., applies only in the three designated appellate courts in this state and not in the circuit court. See Rule 1, Ala. R. App. P. In this case, Judge Ragland and Cadence argued only that Wall's petition for a writ of mandamus should have been dismissed under Rule 21, Ala. R. App. P., because it was not filed within 42 days of the issuance of the certificate of redemption, the usual period for taking an appeal from a judgment of the probate court. See Rule 4(a)(1), Ala. R. App. P. However, neither Judge Ragland nor Cadence moved the circuit court to dismiss the petition based on Wall's delay in filing its petition beyond a reasonable time or based on their having been prejudiced in some manner by that delay. Hence, the circuit court had no basis for dismissing the petition based on lack of timeliness."

163 So. 3d at 388-89 (footnote omitted).

Wall notes that, in the present case, like in Wall, Wells Fargo relied upon Rule 21, Ala. R. App. P., in its motion to dismiss. However, in response to Wall's postjudgment motion, Wells Fargo also argued that the mandamus petition in the present case, which was filed almost one year after the certificate of redemption was issued, was due to be dismissed under the correct "unreasonable delay" standard set out in § 6-6-640, Ala. Code 1975. The circuit court considered that argument, to which Wall had had an adequate opportunity to respond, before denying Wall's postjudgment motion. Wall argues that it did not unreasonably delay the filing of its petition for a writ of mandamus because, it says, any delay in its filing was a result of Wells Fargo's failure to notify Wall that the certificate of redemption had been issued. Wall does not cite any law requiring a redeeming party to notify a tax-sale purchaser of the issuance of a certificate of redemption, see Rule 28, Ala. R. App. P.; furthermore, as Wells Fargo argues, by recording the certificate of redemption, as it did, Wells Fargo provided constructive notice of the certificate of redemption to Wall. See, e.g., Bynum v. Barker, 39 So. 3d 1013, 1017-18 (Ala. 2009). We

therefore affirm the judgment dismissing the petition for a writ of mandamus as having been untimely filed.

Wall also argues that, even if the circuit court correctly dismissed Wall's petition for a writ of mandamus, the circuit court erred in failing to offset the damages it awarded Wells Fargo by the amount of the alleged preservation improvements Wall had made to the property. Any claim Wall may have to an offset would be based on Ala. Code 1975, § 40-10-122(c)(2) (requiring redeeming party to pay the tax-sale purchaser "[t]he value of all preservation improvements" as part of certificate-of-redemption procedure). We have already concluded that Wall failed to timely file its petition for a writ of mandamus seeking to have the circuit court direct the probate court to vacate its certificate of redemption. Therefore, the certificate of redemption cannot be vacated or revoked. Because the certificate of redemption stands, Wall has no legal claim under § 40-10-122(c)(2) for the value of the preservation of improvements it made to the property. Wall cannot recover indirectly through an offset any moneys that it cannot directly recover because of the untimely filing of its petition for a writ of mandamus. Setoff is an

equitable defense. Head v. Southern Dev. Co., 614 So. 2d 1044, 1047 (Ala. 1993). "Equity will not lie when there is an adequate remedy at law." Union Planters Bank, N.A. v. People of State of New York, 988 So. 2d 1007, 1011 (Ala. 2008). In the present case, Wall had an adequate remedy at law, see § 40-10-122(c), that it failed to properly invoke.

Conclusion

Based on the foregoing, we affirm the judgment of the circuit court.

AFFIRMED.

Thompson, P.J., and Pittman, Thomas, and Donaldson, JJ., concur.