

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0957

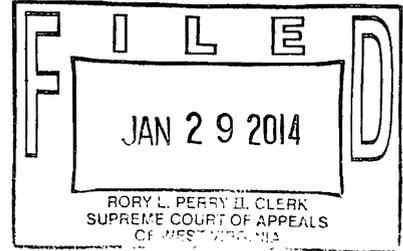
DON MASON AND
BRENDA MASON,

PETITIONERS,

vs.

RAYMOND RICHARD SMITH, MARIA CATALANO
JEREMY D. CASTO, JERAD D. CASTO,
ROBERT M. FLETCHER,
THE POCA VALLEY BANK, INC.,
SUNRISE ATLANTIC, LLC, AND
HARPAGON MO, LLC,

RESPONDENTS.



**REPLY BRIEF OF PETITIONERS,
DON MASON AND BRENDA MASON**

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I. ARGUMENT

Come now the Petitioners, by counsel, in reply to Respondents' responses and respectfully request that the Court reverse the ruling of the Circuit Court of Kanawha County and remand this case so that the Petitioners may proceed to trial on the merits.

Summary judgment for the Respondents was ordered in error. Competent evidence creating legitimate questions of material fact was presented to the trial court by the Petitioners but was ignored by the trial court or not regarded as true as the law requires the evidence be viewed for a non-moving party.

A. SUMMARY JUDGMENT WAS GRANTED IN ERROR WHERE QUESTIONS OF MATERIAL FACT EXISTED AS TO THE KNOWLEDGE OF THE RESPONDENTS WITH REGARD TO NOTICES OF REDEMPTION

The Respondents are incorrect in asserting that no question of fact exists as to the receipt of notice to redeem or actual knowledge that any other party had been provided with notice to redeem.

Poca Valley Bank undisputedly received notice of the right to redeem which was contained in the public record. As Respondents pointed out in their response brief. The law is strict in imputing knowledge to parties as to matter which appear of record. *Simmons v. Simmons*, 100 S.E. 743 (W. Va. 1919). This actual knowledge of the right to redeem raises a question of material fact on the ultimate issue of this case. The Respondents had actual knowledge of the notice to redeem and failed to timely act to redeem this property.

The admissions of the Respondents regarding notice of the delinquency and tax sale cannot be ignored as evidence tending to prove their knowledge of the circumstances surrounding the status of this property. It is questionable how Mr. Catalano received all tax bills and notices but not the notice to redeem.

The Petitioners have presented competent evidence to prove that Poca Valley Bank did know of the notice to redeem on September 29, 2008, and that the Catalanos were charged with actual knowledge of this notice being contained in the public record and as a result, a question of material fact remains which requires reversal of the Circuit Court's ruling and remand for trial on the merits. The Respondents failed to act when they had notice to do so.

B. SUMMARY JUDGMENT WAS GRANTED IN ERROR FOR THE RESPONDENTS WHERE QUESTIONS OF MATERIAL FACT EXISTED AS TO THE MASONS' STATUS AS BONA FIDE PURCHASERS

Now the Masons reply to Respondents' claims that they are not and can never be bona fide purchasers of the subject property. Questions of material fact remain with regard to the Mason's status as bona fide purchasers that the Circuit Court erred in not recognizing.

The Respondents claim that the Masons can never be bona fide purchasers because this property was once the subject of a tax lien sale. The Respondents rely heavily upon *Simpson v. Edmiston*, 23 W. Va. 675 (1884), to support the proposition that any party acquiring an interest in property which has been the subject of a tax sale cannot be a bona fide purchaser. The Respondents fail to acknowledge that our legislature has determined that property subject to a tax sale may reach the hands of a bona fide purchaser.

W. Va. Code § 11A-3-6(a), states:

The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, *until such real estate reaches the hands of a bona fide purchaser. (emphasis added)*

The legislature through this code section has abrogated the *Simpson* holding. This Court has recognized that a bona fide purchaser may come to possess property sold at a tax sale under

certain criteria. In *Subcarrier Communications Inc. v. Nield*, 624 S.E.2d 729, 737-738 (W.Va. 2005), a piece of property was obtained through a tax sale and a tax deed was recorded and then the property was subsequently sold to a corporation. The subsequent purchaser sought protection as a bona fide purchaser. This Court found that the subsequent purchaser of a tax sale deed was not a bona fide purchaser but only because one of the principals of the subsequent purchaser was a sheriff, prohibited from purchasing property in the first instance at a tax sale. In this case, the Masons were subsequent purchasers of the property after the tax sale, had no relationship with either Sunrise Atlantic, LLC or Harpagon MO, LLC and were not statutorily prohibited from purchasing the property. So the Respondents conclusory statement that the Masons can never be bona fide purchasers fails in light of the statutory and common law of West Virginia.

Next the respondents argue that the Masons cannot be bona fide purchasers because they received a special warranty deed. The law of this state has long been that one who obtains a special warranty deed can be a bona fide purchaser. The West Virginia Supreme Court in *Dunfee v. Childs*, 53 S.E. 209, 218-219 (W.Va. 1906), held that the holder of a special warranty deed may enjoy the protections of a bona fide purchaser.

The Respondents next argue that the purchase price somehow defeats the Masons' standing as a bona fide purchaser. Just because the price paid by the Masons was substantially less than that paid by the Catalanos, is no reason to say that there should be suspicion surrounding the transaction. The recent downturn in the economy and subsequent real estate market crash, of which the Justices of this Court are no doubt aware, are easy explanations for the price disparity. On its face, the respondents argument that because the Masons paid less for the property than the preceding owners is silly as a basis to say that they were not good faith purchasers. If the Court followed that logic no one would be a good faith purchaser if they paid less than the previous

owner. The Masons did pay \$32,000.00 for this property which is by no means a nominal sum. (A.R. p. 79). Respondents' argument that the price should have put the Masons on notice of suspicious circumstances surrounding the property, questions the subjective realization of the Masons. This is a classic question of material fact. See *Nutter v. Owen-Illinois*, 500 S.E.2d 398 (W. Va. 2001). The Circuit Court mistakenly allowed itself to make a factual determination on the truth of whether the purchase price defeated the Mason claim of bona fide purchaser protection and such a finding was error in the context of summary judgment.

“ ‘A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.’ Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992). Syl. pt. 2, *Painter*, 192 W.Va. 189, 451 S.E.2d 755. Moreover, [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. pt. 4, *Painter, id.* We are also cognizant that “[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. pt. 3, *Painter, id.*

Wolfe v. Alpizar, 219 W. Va. 525, 528, 637 S.E.2d 623, 626 (2006).

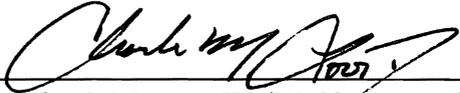
Questions of material fact remain as to the Masons' standing as bona fide purchasers and therefore the Circuit Court's grant of summary judgment was error and should be reversed with this case remanded for a trial on the merits.

CONCLUSION

For the foregoing reasons stated above, Petitioners respectfully request that the Court reverse the ruling of the Circuit Court of Kanawha County and remand this case so that the Petitioners may proceed to trial on the merits.

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CERTIFICATE OF SERVICE

I, Charles M. Love, IV, counsel for Petitioners, Don Mason and Brenda Mason, do hereby certify that true and exact copies of the foregoing "Reply Brief of Petitioners, Don Mason and Brenda Mason" were served upon:

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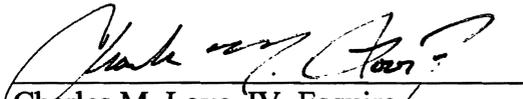
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