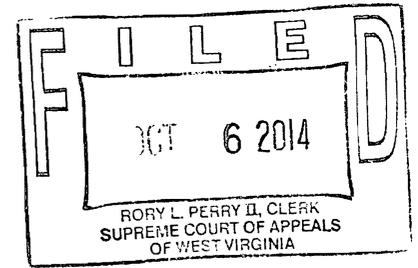


No. 14-0432



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 14-0432

**REBUILD AMERICA, INC., and REO AMERICA, INC.,**

*Petitioners,*

v.

**MARK E. DAVIS, and TAMMY L. DAVIS, Plaintiffs Below;  
MIKE RUTHERFORD, and VERA McCORMICK  
Clerk, Defendants Below; and  
HUNTINGTON NATIONAL BANK, N.A.,  
Intervenor Below,**

*Respondents.*

**REPLY BRIEF OF PETITIONERS  
REBUILD AMERICA, INC., and REO AMERICA, INC.**

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**1. Huntington's Response Does Not Rebut Petitioner's Argument, (Petitioner's Appeal Brief Section B), that Even if the Pre-Sale Notices Violated the Bankruptcy Stay, Under West Virginia Law The Failure of Pre-Sale Notices Is Not a Valid Basis To Set Aside the Tax Deed.**

This Court decided and laid to rest in *Rebuild America, Inc. v. Davis*, 726 S.E.2d 396, 229 W.Va. 86 (2012), that irregularities with the notices of a tax lien sale pursuant to W.Va. Code, 11A-3-2 (the "pre-sale notices", as this Court called them) are not a legal basis to set aside a tax deed. In that appeal, Huntington contended that the Sheriff violated West Virginia law that resulted in the failure to give the Davises the pre-sale notices. As this Court held, ". . . it is the post-sale notice to redeem that is the relevant inquiry in a lawsuit filed under W.Va. Code, 11A-4-4, and not one of the pre-sale notices". *Rebuild America, Inc. v. Davis*, 726 S.E.2d 396, 404, 229 W.Va. 86 (2012).

This appeal raises the very same issue as the last appeal in this case, and this appeal should be disposed of by applying the law established in *Rebuild America, Inc. v. Davis*, 726 S.E.2d 404, 229 W.Va. 86 (2012). In this appeal, the Circuit Court and Huntington Bank find fault with the very same pre-sale notices that this Court addressed in the first appeal. The difference is this: in the first appeal, the pre-sale notices failed and were not served because they violated West Virginia law; in this appeal, the pre-sale notices allegedly failed and were not served because they violated federal bankruptcy law. In either case, this Court's admonition is equally relevant and binding: ". . . it is the post-sale notice to redeem that is the relevant inquiry in a lawsuit filed under W.Va. Code, 11A-4-4, and not one of the pre-sale notices". *Rebuild America, Inc. v. Davis*, 726 S.E.2d 404, 229 W.Va. 86 (2012).

Huntington's brief does not attempt to distinguish this appeal from the last and explain why a different outcome is warranted in this appeal. Huntington's brief does not even address this Court's opinion and ruling in *Rebuild America, Inc. v. Davis*, 726 S.E.2d 404, 229 W.Va. 86 (2012). Huntington's arguments in this appeal and in the prior appeal are identical. In its brief filed in the prior appeal, in which Huntington contended that the Sheriff failed to give pre-sale notices as a result of the Sheriff's violation of W.Va. Code, 11A-3-2, Huntington asserted:

*. . . notice irregularities are jurisdictional and cannot be cured. Failure to give notice is not a "mere irregularity in the proceedings," but a total omission of a mandatory step" in the tax sale proceedings and a jurisdictional defect that cannot be cured.*

See, p. 18, Response of Huntington Bank, N.A., Appeal No. 11-0592, filed April 4, 2011. In its brief filed in this appeal, in which Huntington contends that the Sheriff failed to give pre-sale notices as a result of the Sheriff's violation of the bankruptcy code, Huntington asserted:

*. . . notice irregularities are jurisdictional and cannot be cured. Failure to give notice is not a "mere irregularity in the proceedings," but a total omission of a mandatory step" in the tax sale proceedings and is a jurisdictional defect that cannot be cured.*

See, p. 17, Response of Huntington Bank, N.A., Appeal No. 14-0432, filed September 15, 2014.

In both appeals, Huntington has contended that as a result of a violation of law (state law in the first appeal, bankruptcy law in the second), the Sheriff failed to properly and legally give the pre-sale notice. This Court ruled in the first appeal that irregularities in the pre-sale notice do not constitute a legal basis to set aside a tax deed. The same ruling applies to and disposes of this appeal. See, *Bascom Corporation v. Chase*

*Manhattan Bank*, 363 N.J.Super. 334, 342-, 832 A.2d 956 (2003) (finding the state court is free to make its own determination as to the effect of a void event in the tax sale proceeding, and upholding a tax deed even though a step in the tax foreclosure procedure was void as a result of a violation of the automatic stay).

**2. Huntington's Response Brief Does Not Rebut Petitioners' Argument (Petitioner's Appeal Brief Section A.3.) that a Creditor can Give Notice of a Creditor's Sale While the Automatic Stay Is In Place if the Creditor's Sale Procedure Was Initiated Prior to the Bankruptcy Filing and If the Sale Itself Occurs After the Automatic Stay Terminates.**

The only acts in violation of the bankruptcy code, according to the Circuit Court's order and Huntington's Response Brief, were the notices of the tax lien sale (the "pre-sale notices") given under W.Va. Code, 11A-3-2, which occurred after the bankruptcy case was filed but prior to the bankruptcy discharge. The Circuit Court did not find that the tax lien sale itself violated the automatic stay because the tax lien sale occurred on November 14, 2006, after the plaintiffs received their discharge from bankruptcy on October 17, 2006. Further, the Circuit Court's findings of fact demonstrate that the Sheriff's tax lien sale procedure was commenced with the May 2006 publication, prior to the Davises' bankruptcy filing in July 2006.

Petitioner's appeal brief cites many bankruptcy cases, at section 1. A., that held that if prior to a debtor's bankruptcy filing, a creditor has scheduled and published notices of a foreclosure, the creditor may take actions, including giving and publishing notice of the sale, after the bankruptcy case is filed, if the actions are necessary to preserve the proceeding. Courts find that the purpose of the automatic stay is to preserve the *status quo* between a debtor and creditor. To preserve the continuing validity of a foreclosure proceeding after a bankruptcy case is filed, a creditor may advertise and issue written notice of a sale.

Huntington does not dispute the sound legal basis espoused in these cases that it is permissible for a creditor to give notice of a sale while the automatic stay is in effect, if the creditor's sale was commenced prior to the bankruptcy filing. Nor does Huntington dispute that the Sheriff's tax lien sale procedure started prior to the Davises' bankruptcy filing. Instead, Huntington distinguishes these cases because they involved notices of continuance of foreclosure sales to a new date beyond the automatic stay period, not tax sales. Appellant's brief argued why the distinction is not meaningful.<sup>1</sup> Huntington's Response does not.

Importantly, Huntington cites no cases in which a tax sale was set aside simply because the notices of the sale occurred while the automatic stay was in effect. In the few cases that Huntington cites in which a tax lien sale was held to be void by bankruptcy law, the tax sale itself occurred while the automatic stay was in effect. *In re Formisano*, 148 B.R. 217 (Bankr. N.J. 1992) (tax sale occurred before debtor's discharge); *In re Isley*, 104 B.R. 673 (Bankr. N.J. 1989) (same); *In re Young*, 14 B.R. 809 (Bankr.N.D.Ill. 1981) (same). Accordingly, the cases relied upon by Huntington were not confronted with the issue presented in this case, in which only the notices and not the tax lien sale itself, occurred while the automatic stay was in effect.

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<sup>1</sup>To the extent the facts differ, the facts in the instant case more strongly warrant a finding that no violation of the automatic stay has occurred. First, this case involves the West Virginia tax lien sale procedure. The procedures to notify property owners of a delinquent account start in May and the publications and notices are all set by statute, and the process may only occur once per year. The West Virginia tax lien sale procedure encumbers a much longer period of time than a foreclosure sale, and if the process is terminated at any stage, then the matter can only be commenced again the following year. In foreclosures, creditors have more flexibility to begin the process anew, after the bankruptcy case is over. Second, in this case the sale only involved a tax lien. In foreclosures, the sale involves title to the real property. Accordingly, less harm is borne by the bankrupt property owner in this case than in a foreclosure case.

**3. Huntington's Response Brief Does Not Rebut Petitioners' Argument (Petitioner's Appeal Brief Section A.2.) that a Statutory Exception to the Automatic Stay Applies to Exempt the Sheriff's Tax Lien Sale from the Automatic Stay.**

A statutory exception to the automatic stay applies to this case. Section 362(b)(24) of the bankruptcy code, 11 U.S.C. §362(b)(24), exempts from the automatic stay "transfers" that are not avoidable by the bankruptcy trustee under Sections 544 and 549 of the bankruptcy code. Petitioner's Brief examined and analyzed several provisions of the bankruptcy code, including 11 U.S.C. § 101(54)(D) (for the definition of the term "transfer"); 11 U.S.C. § 541 (for the definition of property of the bankruptcy estate); 11 U.S.C. § 544 (for the trustee's avoidance powers); and 11 U.S.C. § 549 (for additional avoidance powers of the trustee). Also, Petitioner's Brief examined *W.Va. § 11A-3-5* for the determination that the Sheriff's sale of a tax lien qualifies as a "transfer" as defined in the bankruptcy code. Petitioner's brief examines these statutes carefully and quotes from them extensively.

Huntington's Response devotes exactly one paragraph to refute Petitioner's argument. See, *Huntington Response Brief*, unnumbered page between pages 16 and 17. Huntington refers generally to the cases that it cites previously in its Response brief, that enforcement of tax liens are subject to the automatic stay. This response is conclusory, and fails to engage in and refute Petitioner's argument. Moreover, the provision of the bankruptcy code that Petitioners rely upon, 11 U.S.C. Section 362(b)(24), became law in October, 2005<sup>2</sup>. All of the cases that Huntington refers to to refute application of 362(b)(24) predate the enactment of 362(b)(24). *In re Formisano*, 148 B.R. 217 (Bankr. N.J. 1992); *In re Isley*, 104 B.R. 673 (Bankr. N.J. 1989); *In re Young*, 14 B.R. 809 (Bankr.N.D.Ill. 1981).

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<sup>2</sup> This provision of the bankruptcy code was part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005 and applicable to cases filed on or after October 17, 2005.

**4. The Opinion of the Kanawha County Sheriff Deputy Regarding Application of Bankruptcy Law to the Facts of this Case is Inadmissible and Should Not Be Considered.**

For its “most compelling arguments” that bankruptcy law voids the Sheriff’s pre-sale notices and therefore the Sheriff’s sale itself should be void, Huntington relies on the opinions of Deputy Sheriff H. Allen Bleigh, as contained in Deputy Sheriff Bleigh’s affidavit and deposition testimony. *See, Huntington Response Brief, p. 9.* Huntington’s Brief proceeds to quote extensively Deputy Bleigh’s opinions and testimony at pages 9 through 11 regarding the effect of bankruptcy law on the Sheriff’s tax sale at issue. Huntington has relied on Deputy Bleigh’s opinions throughout this case, and Petitioner’s have objected to the Court’s consideration of Mr. Bleigh’s opinions because they are not admissible. *See, Appeal Record, 366-368.* The Circuit Court specifically arrived at her ruling on appeal without considering Deputy Bleigh’s opinions. *See, Appeal Record, 323, 324, 420.*

Petitioner filed a written motion for the Court to disregard Deputy Bleigh’s opinions, and that motion is not part of the record on appeal because the Circuit Court specifically made her rulings without relying upon or citing Deputy Bleigh’s opinions. However, given Huntington’s reliance upon the Deputy’s opinions on appeal, and to any extent this Court is asked to consider Deputy Bleigh’s opinions about the affect of bankruptcy law upon the tax sale procedure, Petitioner’s argue that the opinions should not be considered because they are legally pre-empted by federal bankruptcy law, and they are also not admissible evidence in this case.

First, any opinions or policies of Deputy Bleigh or the Kanawha County Sheriff are preempted by federal bankruptcy law to the extent they conflict with federal bankruptcy law. State tort claims alleging violation of the automatic stay provision are completely preempted by federal bankruptcy law. *Johnston v. Telecheck Servs. (In re Johnston)*, 362 B.R. 730, 736

(Bankr. N.D. W. Va. 2007) citing *Eastern Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 121 (2<sup>nd</sup> Cir. 2001). See *In re Hoffman*, 65 B.R. 985, 987 (D.R.I. 1986) (holding that state tax administrator's attempt to block Chapter 7 trustee's sale of debtor's liquor license until debtor has paid all delinquent taxes, as provided by state statute violates 11 USCS § 362 (a)(6), because Bankruptcy Code preempts state statutes).

In *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9<sup>th</sup> Cir. 1996) Ninth Circuit mandated that state tort claims alleging violations of the automatic stay provisions are preempted by federal bankruptcy law. According to the holding in *MSR*, this preemption arises because: (1) Congress placed bankruptcy jurisdiction exclusively in the district courts under 28 U.S.C. § 1334(a); (2) Congress created a lengthy, complex and detailed Bankruptcy Code to achieve uniformity; (3) the Constitution grants Congress exclusive power over the bankruptcy law, see U.S. Const. art. I, § 8, cl. 4; (4) the Bankruptcy Code establishes several remedies designed to preclude the misuse of the bankruptcy process; and (5) the mere threat of state tort actions could prevent individuals from exercising their rights in bankruptcy, thereby disrupting the bankruptcy process. *MSR*, 74 F.3d at 913-16; see also *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 123-27 (D. Md. 1995). The holding in *MSR* makes clear that courts should defer to federal bankruptcy law in order to promote Congress's intent in creating uniformity in the area of bankruptcy.

In addition, the Court should exclude Deputy Bleigh's testimony regarding whether the Plaintiffs' property should have been sold. Deputy Bleigh's testimony on this point is based upon his own interpretation of bankruptcy law. "[A]s a general rule, an expert witness may not testify as to questions of law such as the principles of law applicable to a case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of

conduct. It is the role of the trial judge to determine, interpret and apply the law applicable to a case.” Syl. Pt. 10, *France v. Southern Equipment Co.*, 689 S.E.2d 1 (W. Va. 2009). Rule 702 of the *West Virginia Rules of Evidence* only allows an expert to give an opinion that “will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” In West Virginia,

The trial judge is the “sole source of the law,” and witnesses should not be allowed to testify on the status of the law, just as counsel are forbidden to argue law to jurors. Hearing statements of “the law” from several sources would not be helpful to jurors.

...

[A]n expert’s testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of the testimony is to direct the jury’s understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.

...

Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the “expert” in the particular branch of the law knows more than the judge – surely an impermissible inference in our system of law.

Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702[.]

Franklin D. Cleckley, Handbook On Evidence For West Virginia Lawyers, 4th Ed., §7-4(B), pp. 7-78 – 7-79 (2010).

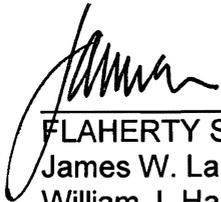
This Court should find that federal bankruptcy law preempts the unpublished local policies and procedures of the Kanawha County Sheriff’s Department. Further, Deputy Bleigh’s testimony and affidavit should be excluded and limited to the extent he provides an opinion regarding what the appropriate law is in this context and whether the same was violated.

**CONCLUSION**

WHEREFORE, for the reasons stated herein, Petitioner Rebuild America, Inc. and REO America, Inc., respectfully request that this Court reverse the Circuit Court's March 20, 2014 Order holding that the Tax Deed to Rebuild America, Inc. should be set aside.

**REBUILD AMERICA, INC. and  
REO AMERICA, INC.**

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0432

Rebuild America, Inc, and  
REO America, Inc.,  
Defendants Below,

*Petitioners,*

v

Appeal from a final order of the  
Circuit Court of Kanawha  
County  
(No. 08-C-1058)

Mark E. Davis, and Tammy L. Davis,  
Plaintiffs Below; Mike Rutherford,  
Vera McCormick, Clerk, Defendants Below;  
and Huntington National Bank, N.A.,  
Intervenor Below,

*Respondents.*

**CERTIFICATE OF SERVICE**

I, James W. Lane, Jr., do hereby certify that I served the foregoing **REPLY BRIEF OF PETITIONERS REBUILD AMERICA, INC. and REO AMERICA, INC.** upon Mark E. Davis and Tammy L. Davis, pro se, and counsel of record this 6th day of October, 2014, by depositing a true copy thereof in the United States mail, postage prepaid, as follows:

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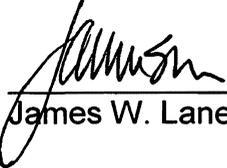
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