IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35627

FOSTER FOUNDATION,

Petitioner,

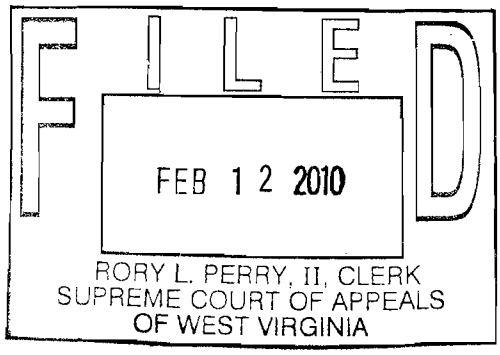
v.

GLEN B. GAINER III, in his capacity as West Virginia State Auditor,

and

THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA,

Respondents.



PETITION FOR WRIT OF CERTIORARI

AUDY M. PERRY, JR.
DANIEL J. KONRAD
CHARLES F. BELLOMY
HUDDLESTON BOLEN LLP
611 Third Avenue
Huntington, West Virginia 25701
304-529-6181
Counsel for Plaintiff/Petitioner

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES ii

APPENDIX OF EXHIBITS iii

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING 1

ASSIGNMENT OF ERROR 2

I. THE COURT OF CLAIMS ERRED IN HOLDING THAT THE STATE AUDITOR COULD COLLECT CERTIFICATE FEES IN THE ABSENCE OF A SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE TO ACCRUE A CERTIFICATE FEE.

STANDARD OF REVIEW 2

FACTS 2

MEMORANDUM OF LAW 6

A. IN THE ABSENCE OF THE SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE, THE STATE AUDITOR HAS NO LEGAL AUTHORITY TO CHARGE A CERTIFICATE FEE. 7

B. IN THE ABSENCE OF A SHERIFF'S TAX SALE, THE RESPONDENT SHOULD HAVE RETURNED THE PROPERTY TO THE CABELL COUNTY SHERIFF FOR A TAX SALE. 9

CONCLUSION 10

LIST OF PERSONS UPON WHOM THE RULE TO SHOW CAUSE IS TO BE SERVED 11

TABLE OF AUTHORITIES

CASES

Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996) 2

Maplewood Community, Inc. v. Craig, 607 S.E.2d 379 (W.Va., 2004) 4

State ex rel. Ayers v. Cline, 342 S.E.2d 89 (W.Va., 1985) 3

STATUTES

W.VA. CODE § 11A-3-7..... 9

W.VA. CODE § 11A-3-8 .....7, 8

W.VA. CODE § 11A-3-38 .....7, 8, 9

W.VA. CODE § 11A-3-39 .....7, 8

APPENDIX OF EXHIBITS

Exhibit A
Agreed Order Executed by Cabell County Assessor and the State Tax Commissioner..... 3

Exhibit B
Checks to Honorable Glen B. Gainer, State Auditor..... 5

Exhibit C
Certificates of Redemption of Lands..... 5

Exhibit D
Court of Claims Order Entered on August 14, 2009..... 6

Exhibit E
Petition for Rehearing Filed on September 11, 2009 6

Exhibit F
Order denying Motion for Rehearing Entered on October 15, 2009..... 6

No._____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FOSTER FOUNDATION,

Petitioner,

v.

GLEN B. GAINER III, in his capacity as
West Virginia State Auditor,

and

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.

FROM THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

The Foster Foundation brings this Petition for Writ of Certiorari from an Order of the Court of Claims of the State of West Virginia entered on October 15, 2009. The Court of Claims' Order denied the Petitioner Foster Foundation's claim seeking the return of $457,386.79 in "certificate" fees collected by the West Virginia State Auditor, in violation of the statutory provisions that authorize the assessment and collection of such fees.

KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING

The Court of Claims had before it a Petition filed on December 6, 2007 by Foster Foundation against Glen B. Gainer, III in his capacity as West Virginia State Auditor ("State Auditor"), asserting that the State Auditor had erroneously accrued interest and certificate fees on a contested tax assessment against the Foster Foundation. The Court of Claims ordered the parties to fully brief the issues and heard oral argument from both parties. On August 14, 2009,

the Court of Claims entered an Order denying the Foster Foundation's claims. The Foster Foundation filed a Motion for Rehearing on September 11, 2009, and the Court of Claims denied the Motion for Rehearing by Order entered on October 15, 2009. It is from the ruling of October 15, 2009, that the Foster Foundation petitions this Court for writ of certiorari.

The statutory scheme established by the West Virginia Legislature for certification of delinquent tax liens to the State Auditor requires that a Sheriff's tax sale occur before certificate fees can be assessed. The parties do not dispute the fact that a Sheriff's tax sale did not occur and was never attempted with respect to the tax assessments at issue. Nonetheless, the State Auditor collected $457,386.79 in "certificate" fees from the Foster Foundation that are unauthorized by statute or other law, and the Court of Claims erroneously refused to order a reimbursement of those fees to the Foster Foundation.

ASSIGNMENT OF ERROR

I. THE COURT OF CLAIMS ERRED IN HOLDING THAT THE STATE AUDITOR COULD COLLECT A CERTIFICATE FEE FROM THE RESPONDENT IN THE ABSENCE OF A SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE TO ACCRUE A CERTIFICATE FEE.

STANDARD OF REVIEW

This case presents questions of law and questions of law are reviewed *de novo*. Syl. Pt. 4, Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996).

FACTS

The action below arose from the Respondent State Auditor's intervention in a tax collection action by the Cabell County Sheriff, and the State Auditor's subsequent unjust and unsupported imposition of $457,386.79 in "certificate" fees upon the Foster Foundation. Foster Foundation is a 501(c)(3) nonprofit organization engaged in, among other things, the operation

of a continuous care retirement community for the aged and is not conducted for private profit. Since 1923, Foster Foundation has been granted and maintained tax-exempt status under the Internal Revenue Code.

In 1998, Ottie Adkins, Assessor of Cabell County, West Virginia, asserted that Foster Foundation no longer qualified for its exemption from ad valorem real property taxes. This decision negated an exemption that had been continuously in place for over 70 years. Pursuant to this Court's decision in State ex rel. Ayers v. Cline,[1] the Foster Foundation withheld payment of the contested tax pending the date of the Sheriff's tax sale, and followed the procedures for contesting the taxability of its property, which resulted in the filing of a Complaint against Assessor Ottie Adkins in the Circuit Court of Cabell County on or about March 26, 1998. In the Complaint, Foster Foundation asserted that Foster Foundation's homes for the elderly operated in West Virginia continued to be exempt from ad valorem taxation (hereinafter the "Taxation Matter"). In apparent recognition of the potential validity of Foster Foundation's claim, the Cabell County Assessor and the State Tax Commissioner entered into an Agreed Order that held any potential Sheriff's tax sale in complete abeyance until resolution of the Taxation Matter. See Agreed Order, attached as **Exhibit A**. Neither the Sheriff nor the State Tax Commissioner ever requested that the Agreed Order be set aside or appealed the entry of the Agreed Order. The Agreed Order remained the law of the case throughout the pendency of the Taxation Matter. After the Taxation Matter had been on the Cabell County Circuit Court's docket for over six years, the Circuit Court agreed with Foster Foundation and on September 23, 2004 ruled that the two homes for the aged owned and operated by Foster Foundation were exempt from ad valorem taxation.

[1] 342 S.E.2d 89 (W.Va., 1985).

The Circuit Court's 2004 ruling upholding Foster Foundation's exemption was appealed by the Cabell County Assessor to this Court. After remand, the Cabell County Circuit Court reversed itself and on December 7, 2005 ruled that Foster Foundation was subject to ad valorem taxation pursuant to this Court's then recent decision in Maplewood Community, Inc. v. Craig. 216 W. Va. 273, 607 S.E.2d 379 (2004).[2] Thereafter, Foster Foundation contacted the Cabell County Sheriff's office to inquire about payment of the then due and payable taxes. Foster Foundation was then informed that the Cabell County Sheriff's office did not have possession of the tax lien, could not accept payment and that the tax lien had been "certified" to the State Auditor as if a tax sale had occurred. The Foster Foundation was told that it should contact the Respondent State Auditor about payment. Foster Foundation was never provided a reason why the State Auditor was given responsibility for collecting the tax even though the property was never offered for sale at a Sheriff's tax sale. Foster Foundation contacted the State Auditor's office and was instructed to submit payment of the assessed taxes directly to that office, and was further advised that accrued interest of $1,794,148.03 and "certificate" fees of $457,386.79 were being assessed.

Thereafter, Foster Foundation inquired of the Respondent Auditor's office and the Cabell County Sheriff's office regarding the removal of the interest and certificate fees from the 1998 to 2005 tax bills that had been presented to it. The Respondent Auditor's office informed Foster Foundation that only payment in full, including all interest and certificate fees, would be accepted. According to Respondent Auditor's tax bill, Foster Foundation was incurring over $35,000 in fees and interest each month. If the fees had not been paid, Foster Foundation was faced with the prospect of a tax sale which would have resulted in hundreds of seniors being at

[2] On June 7, 2006, the West Virginia Supreme Court of Appeals declined to hear Claimant's appeal from the December 7, 2005 decision by Judge David M. Pancake.

risk of losing their homes. Thus, on May 25, 2006, Foster Foundation paid, under protest, $6,555,877.29 to the State Auditor's office to satisfy the ad valorem real property taxes, interest, publication fees and certificate fees for the parcels of real property owned by Foster Foundation in Cabell County. See Checks to Honorable Glen B. Gainer, State Auditor attached as **Exhibit B**. Of that amount, $457,386.79 represents charges for certificate fees wrongfully charged by the Respondent State Auditor.[3] See copies of the Certificates of Redemption of Lands, collectively attached as **Exhibit C**.

On September 11, 2006, Foster Foundation instituted a civil action in the Circuit Court of Cabell County seeking a refund of the $2,252,477.32 in interest, publication and certificate fees[4] it paid to the Respondent on or about May 25, 2006. On November 27, 2006, the Respondent filed a Motion to Dismiss asserting that the Complaint failed to state a cause of action upon which relief could be granted, and that the Respondent was immune from suit as a state agency. On January 2, 2007, Foster Foundation filed its Response to the Respondent's Motion to Dismiss, asserting that it was entitled to relief from the State Auditor and that the State Auditor could not seek the protection of immunity because he had improperly inserted himself into the disposition of the Foster Foundation's ad valorem taxes. By Order of Judge David M. Pancake of the Circuit Court of Cabell County, this matter was transferred to the Circuit Court of Kanawha County on April 17, 2007.[5]

On September 13, 2007, Judge Paul Zakaib, Jr., Circuit Court of Kanawha County, entered an Order granting the State Auditor's Motion to Dismiss, stating that the proper venue

---

[3] The State Auditor charged the Foster Foundation $457,386.79 in certificate fees that were not authorized by statute. This petition seeks reimbursement of the *ultra vires* certificate fees.

[4] That civil action sought $457,386.79 in certificate fees, $1,794,148.03 in interest, and $942.50 in publication fees. See Certificates of Redemption of Lands collectively attached as **Exhibit C**. Foster Foundation is not seeking to recover the aforementioned interest and publication fees in this petition.

[5] Judge Pancake ruled that the Circuit Court of Kanawha County was the proper venue for the Foster Foundation's action.

for Foster Foundation to recover funds paid to the State Auditor is the Court of Claims. Foster Foundation filed the underlying action in the Court of Claims on December 6, 2007 to recover the funds collected by the State Auditor as interest and certificate fees.

The Court of Claims considered briefs and heard oral argument from both parties regarding the interest and certificate fees collected by the State Auditor. On August 14, 2009, the Court of Claims entered an Order denying the Foster Foundation's claim. See Order attached as **Exhibit D**. The Foster Foundation filed a Petition for Rehearing on September 11, 2009, based on the Court of Claims' failure to address the absence of statutory or other legal authority for the State Auditor to impose a "certificate fee" in the absence of a Sheriff's tax sale that must occur prior to certification. See Petition for Rehearing attached as **Exhibit E**. The Court of Claims denied the Motion for Rehearing by Order entered on October 15, 2009. See Order attached as **Exhibit F**. It is from the ruling of October 15, 2009, that the Foster Foundation petitions for writ of certiorari.

MEMORANDUM OF LAW

The West Virginia legislature, pursuant to the authority granted to it by the West Virginia Constitution, has enacted a statutory method by which tax liens for delinquent ad valorem property taxes may be sold. This process is initiated by a Sheriff's tax sale. If a tax lien is offered but not sold at the Sheriff's sale, the tax lien may be "certified" to the State Auditor. That statutory structure only permits the State Auditor to receive tax liens and collect the "certificate" fees at issue after a Sheriff's tax sale of the tax lien is conducted without success. All parties readily admit that the tax liens in issue were never included in a Sheriff's tax sale. In the absence of the requisite Sheriff's tax sale, the State Auditor acted *ultra vires* in charging a certificate fee to the Foster Foundation.

A. IN THE ABSENCE OF THE SHERIFF'S TAX SALE THAT IS REQUIRED BY STATUTE, THE STATE AUDITOR HAS NO LEGAL AUTHORITY TO CHARGE A CERTIFICATE FEE.

The error in the State Auditor's collection of a certificate fee in this case is clear from an examination of the statutory progression that ultimately allows the collection of such fees. The statutes clearly reveal that, under the facts in this case, the State Auditor had no statutory or other legal authorization to administer Foster Foundation's tax lien or collect the $457,386.79 certificate fee from Foster Foundation.

West Virginia Code §11A-3-39(a) authorizes the State Auditor to collect a certificate fee after receiving "payment of the sum necessary to redeem" the delinquent property. Specifically, §11A-3-39(a) states:

> "Upon payment of the sum necessary to redeem, the auditor shall execute a certificate of redemption in triplicate, which certificate shall specify the real estate redeemed, or the interest therein, as the case may be, together with any changes in respect thereto which were made in the land book and in the record of delinquent lands, shall specify the year or years for which payment was made, and shall state that it is a receipt for the money paid and a release of the state's lien against the real estate redeemed. The original certificate shall be retained in the files in the auditor's office, one copy shall be delivered to the person redeeming and the second copy shall be mailed by the auditor to the clerk of the county commission of the county in which the real estate is situated, who, after making any necessary changes in his record of delinquent lands, shall note the fact of redemption on such record, and shall record the certificate in a separate volume provided for the purpose. <u>The fee for issuing the certificate of redemption shall be ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater</u>."

W.Va. Code §11A-3-39(a)(emphasis added). In this case, the State Auditor collected a certificate fee of $457,386.79, which is the basis for this petition.

Although §11A-3-39 authorizes the collection of a fee *following* redemption of a delinquent property, the method for redeeming property is not addressed by that section. Rather,

the process of redemption is set forth in the preceding Code provision, §11A-3-38, which states in relevant part:

> "(a) The owner of any real estate certified to the auditor pursuant to section eight of this article, or of any nonentered real estate subject to the authority of the auditor pursuant to section thirty-seven of this article, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time prior to the certification of such real estate to the deputy commissioner as provided in section forty-four of this article. Thereafter such real estate shall be subject to disposition pursuant to section forty-four of this article, and subsequent sections"

W.Va. Code §11A-3-38(a).

The plain language of §11A-3-38(a) [6] limits redemption to property that was "certified to the auditor pursuant to section eight of this article[.]" "Section eight of this article" refers to Code §11A-3-8, which states that:

> "**If no person present bids the amount of taxes, interest and charges due on any real estate offered for sale,** the sheriff shall certify the real estate to the auditor for disposition pursuant to section forty-four of this article, subject, however, to the right of redemption provided by section thirty-eight of this article. The auditor shall prescribe the form by which the sheriff certifies the property"

W.Va. Code §11A-3-8 (emphasis added).

The parties agree that the Cabell County Sheriff did not hold a tax sale of the tax liens on the Foster Foundation's property. Consequently, the property was not "certified to the auditor pursuant to section eight" because "section eight" (§11A-3-8) requires that an unsuccessful tax sale occur prior to certification. Since the property was not certified "pursuant to section eight," redemption was not permitted by §11A-3-38(a). Since redemption was not permitted by §11A-3-38(a), the State Auditor was not authorized to collect a certificate fee under §11A-3-39, which only arises following a valid redemption.

The West Virginia Legislature chose to limit redemption of delinquent property by the State Auditor to instances where property was "certified to the auditor pursuant to section eight of this article," and that clear, unambiguous language cannot be ignored. However, the Court of Claims did ignore that language in refusing to order the State Auditor to reimburse the $457,386.79 in certificate fees charged to Foster Foundation. The State Auditor is not statutorily authorized to redeem delinquent property and collect the associated certificate fee allowed by §11A-3-39(a) unless a Sheriff's tax sale occurs "pursuant to section eight of this article." *W.Va. Code §11A-3-38(a).* Since no Sheriff's tax sale was attempted in this case, the State Auditor has no legal authority for collecting a certificate fee of $457,386.79 from Foster Foundation.

B. IN THE ABSENCE OF A SHERIFF'S TAX SALE, THE STATE AUDITOR SHOULD HAVE RETURNED THE PROPERTY TO THE CABELL COUNTY SHERIFF FOR A TAX SALE.

The Court of Claims mistakenly reasoned that "if the [Auditor] redemption provision only applied to offers for sale of property, then suspended property owners would not be able to redeem their land." This is simply not the case. Any suspended property that has not gone through a Sheriff's tax sale but is thereafter transmitted to the Auditor should be *returned* by the State Auditor to the Sheriff of the respective county to be included in the next Sheriff's tax sale. *See W. Va. Code § 11A-3-7.* The property owner can then redeem the property from the Sheriff prior to the next sale. No certification fee is imposed upon a redemption from the Sheriff.

In this case, the State Auditor has been unjustly enriched by collecting $457,386.79 for an *ultra vires* redemption of property that has never been the subject of a Sheriff's tax sale, and for certificate fees that are unauthorized by statute. Due to the Respondent's failure to comply with the unambiguous statutory requirements for redemption from the State Auditor, the

---

[6] An exception exists under W.Va. Code § 11A-3-38(a) for "nonentered real estate," which is inapplicable to this case.

payment made by the Foster Foundation must be treated as a redemption from the Sheriff and thus no certificate fee can be imposed. Both law and equity require that the Respondent return those funds collected as certificate fees to Foster Foundation.

CONCLUSION

The statutory mechanism established by the West Virginia Legislature exists to protect the important due process rights at stake when the State acts to divest title to real property from its citizens. The statutory language at issue in this case clearly requires the occurrence of an unsuccessful Sheriff's tax sale before delinquent land can be certified to the State Auditor. In the absence of proper certification of the land, the State Auditor is not authorized to redeem the property or to collect the corresponding "certificate" fee. Therefore, the State Auditor should be ordered to return the $457,386.79 in certificate fees that it wrongfully collected from Foster Foundation, and to pay interest accrued on that amount during the time it was wrongfully withheld from Foster Foundation.

FOSTER FOUNDATION

BY: _____
Counsel

Audy M. Perry, Jr., Esquire (WVSB # 7216)
Daniel J. Konrad, Esquire (WVSB # 2088)
Charles F. Bellomy, Esquire (WVSB # 9117)
HUDDLESTON BOLEN LLP
611 Third Avenue
Huntington, WV 25701
(304) 529-6181

LIST OF PERSONS UPON WHOM THE RULE TO SHOW CAUSE IS TO BE SERVED

Pursuant to Rule 14(a) of the West Virginia Rules of Appellate Procedure, the Petitioner Foster Foundation designates the following as persons upon whom the rule to show cause is to be served:

Cheryl M. Hall, Clerk
West Virginia Court of Claims
1900 Kanawha Blvd., East
Room W-334
Charleston, WV 25305-0610
Phone: (304) 347-4850
Fax: (304) 347-4915

West Virginia State Auditor's Office
State Capitol Building 1, Room W-100
Charleston, WV 25305
Phone 304.558.2261
Fax 304.558.5200

Darrell McGraw, Attorney General
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305
Phone: (304) 558-2021
Fax: (304) 558-0140

Ronald R. Brown, Esquire
Assistant Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Fax: (304) 558-2525

Christie S. Utt, Esquire
Deputy Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305
FAX: (304) 558-0140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO._____

FOSTER FOUNDATION,

Petitioner,

v.

GLEN B. GAINER III, in his capacity as
West Virginia State Auditor,

and

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 12th day of February, 2010, a true copy of the foregoing ***"Petition for Writ of Certiorari"*** was served upon the following via hand delivery and by depositing the same, postage prepaid, in the United States Mail:

Cheryl M. Hall, Clerk
West Virginia Court of Claims
1900 Kanawha Blvd., East
Room W-334
Charleston, WV 25305-0610
Phone: (304) 347-4850
Fax: (304) 347-4915

West Virginia State Auditor's Office
State Capitol Building 1, Room W-100
Charleston, WV 25305
Phone 304.558.2261
Fax 304.558.5200

Darrell McGraw, Attorney General
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305
Phone: (304) 558-2021
Fax: (304) 558-0140

Ronald R. Brown, Esquire
Assistant Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, West Virginia 25305
Fax: (304) 558-2525

Christie S. Utt, Esquire
Deputy Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, West Virginia 25305
FAX: (304) 558-0140

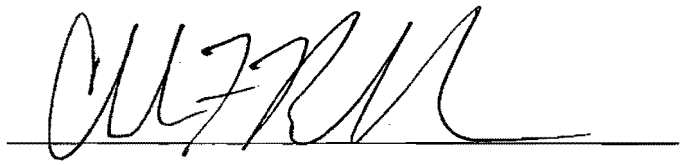


EXHIBIT A

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE