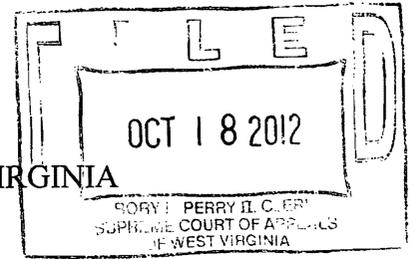


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0638



LEE TRACE LLC,

Petitioner,

v.

GEARL RAYNES, AS ASSESSOR
FOR BERKELEY COUNTY, WEST
VIRGINIA,

BERKELEY COUNTY COUNCIL SITTING AS
BOARD OF REVIEW AND EQUALIZATION,

and

BERKELEY COUNTY COUNCIL,

Respondents.

Appeal from a final order
Of the Circuit Court of
Berkeley County (11-AA-2)

Reply Brief

Counsel for Petitioner Lee Trace LLC
Thomas Moore Lawson, Esquire
West Virginia Bar No. 6468
Lawson and Silek, P.L.C.
P.O. Box 2740
Winchester, VA 22604
Phone: (540) 665-0050
Fax: (540) 722-4051
tlawson@lspc.com

TABLE OF CONTENTS

Table of Authorities.....iii

Assignments of Error.....1

Statement Regarding Oral Argument and Decision.....1

Argument.....2

 I. Standard of Review and Evidence.....2

 II. The 2010 Notice Was Inadequate.....2

 A. The 2010 Notice Does Not Comply With the Requirements of West
 Virginia Code §11-3-2a.....3

 B. The 2010 Notice Does Not Comply With the Requirements of Due
 Process.....3

 C. There is No Support in the Record for the Proposition that
 Respondent Assessor Did Not Know the Filing Deadline
 When the 2010 Notice Was Sent.....6

Conclusion.....7

TABLE OF AUTHORITIES

Cases

<u>Anderson v. Lockett</u> , 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944).....	3
<u>Baker v. Gaskins</u> , 128 W.Va. 427, 36 S.E.2d 893 (1946).....	4
<u>Berne Corp. v. Government of the Virgin Islands</u> , 570 F.3d 130 (3rd Cir. 2009).....	4-5
<u>Bob Holding Corp. v. Normal Corp.</u> , 223 Md. 263, 164 A.2d 457 (1960).....	5
<u>Brooks v. Secretary, Department of Health and Human Services</u> , 1997 WL 790728 (N.D.Ill. 1997).....	5
<u>Commercial Banking & Trust Co., v. Doddridge County Bank</u> , 119 W.Va. 449, 194 S.E. 619 (1937).....	3
<u>Dimenski v. I.N.S.</u> , 275 F.3d 574 (7th Cir. 2001).....	4
<u>Hagar v. Reclamation Dist. No. 108</u> , 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884).....	6
<u>Mizell v. Rutledge</u> , 174 W.Va. 639, 328 S.E.2d 514 (1985).....	3, 5
<u>Ottenheimer Publishers, Inc. v. Employment Security Administration</u> , 275 Md. 514, 340 A.2d 701 (1975).....	5
<u>Schulte v. Transportation Unlimited, Inc.</u> , 354 N.W.2d 830 (Minn. 1984).....	5
<u>State v. McCoy</u> , 107 W.Va. 163 (1972).....	3
<u>Stevens v. Astrue</u> , 2010 WL 148363 (D. Kans. 2010).....	5-6
<u>United States v. Yazell</u> , 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 893 (1966).....	3-4

Statutes

West Virginia Code §11-3-2a	2, 3, 6
West Virginia Code §11-3-24.....	1

ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN DENYING THE PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT
2. THE CIRCUIT COURT ERRED IN FINDING PETITIONER WAIVED ITS RIGHT TO CHALLENGE THE 2010 TAX ASSESSMENT PURSUANT TO WEST VIRGINIA CODE §11-3-24
3. THE CIRCUIT COURT ERRED IN FINDING THAT THE NOTICE SENT BY THE ASSESSOR WITH RESPECT TO THE 2010 TAX ASSESSMENT WAS ADEQUATE AND WAS IN CONFORMANCE WITH STATE LAW
4. THE CIRCUIT COURT ERRED IN DENYING THE PETITION FOR APPEAL AS TO THE 2010 TAX ASSESSMENT BECAUSE THE NOTICE PROVIDED WITH RESPECT TO THAT ASSESSMENT FAILED TO COMPLY WITH DUE PROCESS

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As discussed in the Petitioner's Brief, this case presents issues of first impression in West Virginia and involves constitutional principles. Thus, Petitioner Lee Trace LLC ("Petitioner") has respectfully requested oral argument and decision under Rule 20. Neither the response brief filed by Respondent Berkeley County Council and Respondent Berkeley County Council sitting as Board of Review and Equalization (collectively "Respondent Council") nor the response brief filed by Respondent Gearl Raynes, as Assessor for Berkeley County, West Virginia ("Respondent Assessor") (collectively with Respondent Council "Respondents") address these issues but simply state that Respondents waive oral argument. Petitioner reasserts its contention that because of the importance of the issues raised by this appeal, oral argument be allowed.

ARGUMENT

I. STANDARD OF REVIEW AND EVIDENCE

The parties agree that this Court reviews challenges to a circuit court's findings of fact under a "clearly erroneous" standard, but conclusions of law are reviewed *de novo*. As the issues presented in this appeal are issues of law, the appropriate standard of review is *de novo*. Respondent Assessor and Respondent Council's reference to presumptions of validity on valuations fixed by an assessor are irrelevant, as the Circuit Court never reached issues of valuation, instead finding based on purely legal grounds that Petitioner had waived its right to challenge such assessment.

II. THE 2010 NOTICE WAS INADEQUATE

As set forth in the Petitioner's Brief, the notice given by Respondent Assessor regarding the 2010 assessment ("2010 Notice") of Petitioner's property violated both the provisions of West Virginia Code §11-3-2a and the principles of due process. In its Response Brief, Respondent Council never addressed the arguments raised by Petitioner that the 2010 Notice violated the principles of due process. It argued only that:

1. The 2010 Notice complied with the requirements of West Virginia Code §11-3-2a, and the statute should be construed in favor of government;
2. All persons are presumed to know the law; and
3. It is not always possible for Respondent Assessor to know the deadlines for filing at the time the notices are sent out.

Respondent Assessor makes the same arguments as Respondent Council but adds citations to numerous cases in support of the proposition that "all persons are presumed to know the law."

A. The 2010 Notice Does Not Comply With the Requirements of West Virginia Code §11-3-2a.

West Virginia Code §11-3-2a requires that notice be sent advising “the person assessed ... of his or her right to appear and seek an adjustment in the assessment.” The 2010 Notice only stated “if you believe an adjustment in the assessed value is necessary, you should contact the County Commission sitting as a Board of Review and Equalization.” Contrary to the claims of the Circuit Court and the Respondents, the 2010 Notice does not “convey the exact wording required by statute.” Respondent Council’s Response Brief, p. 9.

B. The 2010 Notice Does Not Comply With the Requirements of Due Process.

Even assuming, *arguendo*, that the 2010 Notice did technically comply with West Virginia Code §11-3-2a (which it did not), such notice must also comply with the constitutional requirements of due process. Among other things, due process requires a government to properly advise persons of their appeal rights. Mizell v. Rutledge, 174 W.Va. 639, 641, 328 S.E.2d 514, 516 (1985). To argue, as the Respondents have, that all persons are presumed to know the law does not address the specific requirements of due process. The single case relied on by the Circuit Court, State v. McCoy, 107 W.Va. 163, 172 (1972), and the cases cited by Respondent Assessor, have nothing whatsoever to do with the issue of what is required by due process with respect to notices of appeal rights. McCoy, the sole case relied on by the Circuit Court, held that a person carrying alcoholic beverages is presumed to know that alcoholic beverages are intoxicating. *Id.* As such, McCoy provides no precedential support for the Circuit Court’s decision in this case. The cases cited by Respondent Assessor include issues of banking law (Commercial Banking & Trust Co., v. Doddridge County Bank, 119 W.Va. 449, 194 S.E. 619, 623-625 (1937)), procedures for disposition of property (Anderson v. Lockett, 321 U.S. 233, 243, 64 S.Ct. 599, 605, 88 L.Ed. 692 (1944)), Texas law regarding coverture (United States

v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966)), and immigration law (Dimenski v. I.N.S., 275 F.3d 574 (7th Cir. 2001)). None of these cases have any relevance to issues in this matter and specifically, the due process requirement of notice of specific filing deadlines in *ad valorem* tax cases. Respondent Assessor also cited Baker v. Gaskins, 128 W. Va. 427, 433-34, 36 S.E.2d 893, 896 (1946), for the proposition that “litigants were by law charged with knowledge of the dates of the holding of term of court and all subsequent terms of court.” Respondent Assessor’s Response Brief, p. 14. However, Baker did not involve lack of knowledge of dates but rather involved a defendant whose counsel was absent for military service for a year and a half. Id. The court, after three notices to the defendant, set a date for trial at which time the defendant did not appear. Id. The trial court entered judgment for plaintiff but then vacated it upon motion of the defendant. Id. The appeals court reversed the trial court, finding the defendant had actual notice of the trial and also had ample opportunity to find replacement counsel but did not do so. Id. This case clearly is not relevant to the instant case.

Respondent Assessor then perfunctorily dismisses the many cases directly on point cited by Petitioner by stating “these cases are easily distinguished” but then makes no effort whatsoever to distinguish any of them. Respondent Assessor states only that these cases involved specific statutes with specific notice requirements, and they are therefore inapplicable. That is not correct. Petitioner cites, at pages 8-11 of its Brief, numerous cases involving, as here, notice requirements in *ad valorem* property tax situations as well as other government administrative proceedings. Many of these cases were decided not based on the specific statutory requirements but rather on the requirements of constitutional due process, which clearly apply to a notice with respect to *ad valorem* taxes. See, e.g. Berne Corp. v. Government of the

Virgin Islands, 570 F.3d 130 (3rd Cir. 2009). For example, in Mizell the appellants contended that they were denied their statutory and constitutional rights of notice and due process when notices of disqualification for unemployment benefits failed to inform them of the finality of an administrator's decision. After holding that principles of due process require administrative agencies to observe the basic rules of fairness, this Court, citing a Maryland case, Ottenheimer Publishers, Inc. v. Employment Security Administration, 275 Md. 514, 340 A.2d 701 (1975), agreed with appellants, stating:

Even if there were no specific statutory requirement of notice, this principle would seem to require that adequate notice and opportunity to be heard be afforded in a case such as this.

Mizell, *supra*, emphasis added.

In Ottenheimer, the court stated:

When there is a statutory requirement of notice, the notice must contain such information and be presented in such a manner so as to 'enable a person of ordinary perception to understand the nature and purpose of the notice.'

Ottenheimer, *supra* at 519-520, quoting Bob Holding Corp. v. Normal Corp., 223 Md. 263, 268, 164 A.2d 457, 461 (1960). A notice is constitutionally defective if it does not meaningfully inform persons so that they can protect their interests. "Whether the notice enables a person to make an 'informed choice' is critical in analyzing its adequacy under the due process clause." Schulte v. Transportation Unlimited, Inc., 354 N.W.2d 830 (Minn. 1984), cited by this Court in Mizell, *supra* at 643. See also Brooks v. Secretary, Department of Health and Human Services, 1997 WL 790728 (N.D.Ill. 1997) (Plaintiff has Fifth Amendment claim for violation of due process when there is a causal connection between misleading language in a notice and plaintiff's subsequent failure to seek judicial review). In Stevens v. Astrue, 2010 WL 148363 (D. Kans. 2010) a notice similar to the one sent in the instant case was found constitutionally

wanting when it simply informed plaintiff that if she had any questions she could contact the phone number provided and/or write or visit the office at the address provided¹. A.R. 450. Thus, even if the notice in the instant case met the minimal requirements of the statute, it did not meet the requirements of due process, as a person of ordinary perception would not have known that it triggered very short deadlines for taking action.

Both Respondents rely on Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 710, 4 S.Ct. 663, 668, 28 L.Ed. 569 (1884) for the proposition that the law in prescribing the time when complaints in *ad valorem* cases will be heard gives all the notice required. Respondent Council's Response Brief, p. 11; Respondent Assessor's Response Brief, pp. 14-15. Clearly the law regarding due process has evolved since 1884, as shown by subsequent cases cited above which have spelled out the requirements of due process with respect to notice in *ad valorem* and other government administrative matters.

C. There is No Support in the Record For the Proposition that Respondent Assessor Did Not Know the Filing Deadline When the 2010 Notice Was Sent.

Respondents (and also the Circuit Court) claimed that their failure to follow the requirements of West Virginia Code §11-3-2a and the due process requirements were justified because the deadline for the filing of an assessment appeal to the Board "would change from year to year and may not be known in January." The Circuit Court, however, pointed to no evidence that the deadline for 2010 was not known at the time the 2010 Notice was sent, nor is there any evidence in the record that such date was not known. That the date may not be known every year (assuming *arguendo* that is true) is of no relevance to this case. Respondent Assessor could easily have informed Petitioner that such a deadline existed and would be no earlier than a certain date. More importantly, Respondents fail to address the undisputed fact that the notice

¹ The plaintiff did not prevail in this case because the court found no causal connection between the deficient notice and the plaintiff's failure to appeal.

now provided by the Assessor addresses this very issue and states that the landowner must take action within five (5) days of receipt of the notice. A.R. 5.

CONCLUSION

The Circuit Court's Order denying the Petition for Appeal in so far as it challenges the 2010 tax assessment should be reversed, and Petitioner's 2010 assessment should be reduced to its 2009 tax assessment (\$677,050.00), or, alternatively, this matter should be remanded for further proceedings.

Respectfully submitted,
LEE TRACE LLC
By Counsel



Thomas Moore Lawson, Esquire
West Virginia Bar No. 6468
Lawson and Silek, P.L.C.
P.O. Box 2740
Winchester, VA 22604
Phone: (540) 665-0050
Fax: (540) 722-4051

Counsel for Lee Trace LLC

CERTIFICATE OF SERVICE

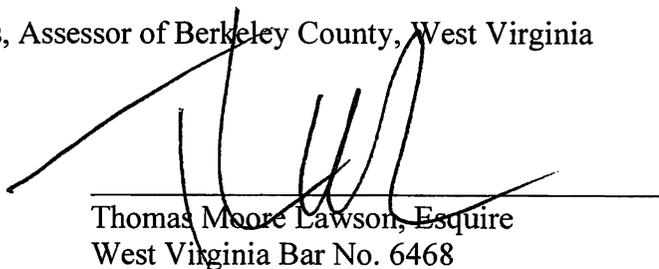
I hereby certify that on this 17th day of October, 2012, true and accurate copies of the foregoing Reply Brief were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

Norwood Bentley, Legal Director
Berkeley County Council
400 West Stephen Street, Suite 201
Martinsburg, WV 25401

Counsel for Respondents Berkeley County Council and Berkeley County Council as Board of Review and Equalization

Michael D. Thompson, Esquire
Thompson & Pardo, PLLC
119 East Liberty Street
Charles Town, WV 25414

Council for Respondent Gearl Raynes, Assessor of Berkeley County, West Virginia



Thomas Moore Lawson, Esquire
West Virginia Bar No. 6468

Counsel for Petitioner Lee Trace LLC