

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

**No. 13-0886**

**EB Dorev Holdings, Inc., Defendant Below,**

**Petitioner,**

**v.**

**Civil Action No: 04-C-3163  
Circuit Court of Kanawha County**

**West Virginia Department of Administration,  
Real Estate Division, Plaintiff Below,**

**Respondent.**

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**PETITION FOR APPEAL**

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Michael W. Carey WWSB No. 635  
David R. Pogue, WWSB No. 10806  
Carey, Scott, Douglas & Kessler, PLLC  
901 Chase Tower  
707 Virginia Street, East  
P.O. Box 913  
Charleston, West Virginia 25323  
(304) 345-1234

*Counsel for EB Dorev Holdings, Inc.*

## TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF AUTHORITIES .....	ii
ASSIGNMENTS OF ERROR .....	1
STATEMENT OF THE CASE .....	1
I.    Statement of the Facts .....	1
II.   Procedural History .....	2
SUMMARY OF ARGUMENT .....	4
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	5
ARGUMENT .....	5
I.    Standard of Review .....	5
II.   The Circuit Court Erred in Ruling That the Properties Were Rendered Exempt From 2009 Real Estate Taxes Upon the State's Purchase of the Properties in August And September Of 2008 .....	6
III.  The Circuit Court Erred in Concluding That the Property Tax Liens at Issue Were Extinguished Through the Doctrine of Merger .....	9
IV.  The Circuit Court Erred in Concluding That the Property Tax Liens at Issue Were Inchoate and Never Matured Into Liens Suitable For Sale .....	17
CONCLUSION .....	20

**TABLE OF AUTHORITIES**

**CASES**

**PAGES**

Armstrong Products Corp. v. Martin  
119 W.Va. 50, 192 S.E. 125 (1937) ..... 9, 10, 11

Cole v. State,  
73 W.Va. 410, 80 S.E. 487, 491 (1913) ..... 7, 18

Moore v. Johnson Serv. Co., Syl. Pt. 1,  
158 W.Va. 808, 219 S.E.2d 315, (1975) ..... 7, 18

State v. Locke,  
29 N.M. 148, 219 P. 790 (1923) ..... 10, 11, 12, 13, 14

State v. Salt Lake County,  
96 Utah 464, 85 P.2d 851 (1938) ..... 11, 12, 15

Williams v. Precision Coil, Inc.,  
194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995) ..... 5, 6

**STATUTES**

**PAGES**

W.Va. Code § 11-3-1 ..... 8

W.Va. Code § 11-3-1(a) ..... 9

W.Va. Code § 11-3-1(c) ..... 7, 13, 15, 18

W.Va. Code § 11-3-1(f) ..... 6, 7

W.Va. Code § 11-3-9(a)(2) ..... 6

W.Va. Code § 11-8-4 ..... 13

W.Va. Code § 11-8-5 ..... 13

W.Va. Code § 11-8-6 ..... 13

W.Va. Code § 11-8-6(a) ..... 13

W.Va. Code § 11-8-6(b) ..... 13

W.Va. Code § 11-8-6(c) ..... 13

W.Va. Code § 11-8-6(d) ..... 13  
W.Va. Code § 11A-1-2 ..... 8, 18  
W.Va. Code § 11A-2-2(a) ..... 13, 16  
W.Va. Code § 11A-2-10 ..... 9  
W.Va. Code § 11A-2-10a ..... 18, 19  
W.Va. Code § 11A-3-1 ..... 14  
W.Va. Code § 11A-3-2 ..... 19  
W.Va. Code § 11A-3-5 ..... 9, 10, 19  
W.Va. Code § 11A-3-7 ..... 19, 20  
W. Va. Constitution, Article X, § 1 ..... 15

## **ASSIGNMENTS OF ERROR**

1. The circuit court erred in ruling that real property which was owned by private entities on July 1, 2008 was rendered exempt from 2009 taxes upon the subsequent purchase of the property by the West Virginia Department of Administration, Real Estate Division in August and September of 2008
2. The circuit court erred in ruling that liens for year 2009 property taxes, which attached by statute to certain parcels of real property on July 1, 2008, were extinguished through the doctrine of merger upon the purchase of the property by the West Virginia Department of Administration, Real Estate Division in August and September of 2008.
3. The circuit court erred in ruling, in the alternative, that the tax liens described above were inchoate and never matured into liens suitable for sale.

## **STATEMENT OF THE CASE**

### **I. STATEMENT OF THE FACTS**

The essential facts in this case are not in dispute. On July 1, 2008, certain parcels of real estate located in Kanawha County, West Virginia (hereinafter "the Properties") were owned by CRW Real Estate, LLC, So Park, LLC, and Knollwood Investments, LLC (hereinafter collectively "the Tax Debtors"). App. at p. 5.<sup>1</sup> In August and September 2008, after the assessment date for the 2009 real estate taxes on the Properties, the Tax Debtors sold the Properties to the West Virginia Department of Administration, Real Estate Division (hereinafter "the State"). App. at p. 5. The 2009 real estate taxes on the Properties were not timely paid, and on November 16, 2010, the Kanawha County Sheriff sold the tax liens on the Properties to Petitioner EB Dorev Holdings, Inc. (hereinafter "EB Dorev"). App. at

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<sup>1</sup> References to the Joint Appendix will be made as "App. at p. \_\_\_\_."

p. 5.

After the sale, the Kanawha County Clerk sent the requisite written notice to all parties having an interest in the Properties, including to the Tax Debtors and the State, informing them that if the delinquent real estate taxes were not paid in full by April 1, 2012, then the Clerk would issue tax deeds to EB Dorev for the Properties. See App. at p. 5. No person or entity redeemed the Properties within the prescribed period. However, on March 30, 2012, the eve of the issuance of the tax deed, the State commenced the instant lawsuit in an effort to preclude the Clerk from issuing the tax deeds to EB Dorev.

## II. PROCEDURAL HISTORY

This is an appeal of an Order by the Circuit Court of Kanawha County, West Virginia granting summary judgment to the State. The State commenced the instant lawsuit by filing a "Complaint and Petition for Writ of Mandamus" seeking to prevent the issuance of tax deeds to EB Dorev. App. at pp. 3-9.<sup>2</sup> EB Dorev answered the State's Complaint, and asserted counterclaims and cross-claims seeking, *inter alia*, to compel the issuance of the tax deeds, to recover its attorney fees and costs incurred in defending the State's lawsuit and compelling the issuance of the deeds, and to recover its purchase money in the event that no deed is issued. App. at pp. 71-84.<sup>3</sup>

On or about November 16, 2012, the State moved for summary judgment arguing,

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<sup>2</sup> At the same time, the State also filed a "Petition for Temporary Restraining Order," which the circuit court granted via orders dated March 30, 2012 and April 24, 2012. App. at pp. 35-39, 48-56.

<sup>3</sup> Vera McCormick, in her capacity as the Clerk of the Kanawha County Commission, and Mike Rutherford, in his capacity as the Sheriff of Kanawha County, also filed an answer to the State's Complaint. App. at pp. 40-47.

*inter alia*, that (1) the Properties were rendered exempt from 2009 real estate taxes upon the State's purchase of the Properties in August and September of 2008, (2) the tax liens were extinguished through the doctrine of merger upon the State's purchase of the Property, and (3) the tax liens that attached prior to the State's purchase of the Property were inchoate and did not mature into saleable liens. App. at pp. 99-111. EB Dorev filed a cross-motion for summary judgment, arguing, *inter alia*, that the State's purchase of the Property did not affect the validity of the pre-existing tax liens. App. at pp. 127-153.<sup>4</sup>

On July 11, 2013, the circuit court entered an Order granting the State's motion for summary judgment. App. at pp. 234-247. In doing so, the circuit court voided the sale of the tax liens to EB Dorev and permanently enjoined the relevant Kanawha County authorities from attempting to transfer the Properties to EB Dorev by tax deed. App. at pp. 244-245.<sup>5</sup> As the basis for its rulings, the circuit court accepted the State's arguments that the Properties were rendered exempt from 2009 real estate taxes upon the State's purchase of the Properties, and that the tax liens were extinguished through the doctrine of merger or, alternatively, that the tax liens were inchoate and never matured into saleable liens. App. at pp. 244-245. On August 9, 2013, EB Dorev filed a timely Notice of Appeal. App. at pp. 248-274.

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<sup>4</sup> Defendants McCormick and Rutherford also filed a response to the State's motion for summary judgment, making similar arguments. App. at pp. 155-193.

<sup>5</sup> EB Dorev assumes that upon voiding the tax lien sale, the circuit court impliedly ordered the return of the purchase money that EB Dorev paid for the subject tax liens, but the circuit court's order makes no specific reference to the purchase money. It is axiomatic that if the sale of the liens is void, then EB Dorev is entitled to a refund of the money that it paid for the liens. Thus, in the event that this Court affirms the circuit court's order voiding the sale, EB Dorev respectfully requests that this Court clarify that the purchase money must be refunded to EB Dorev.

## SUMMARY OF ARGUMENT

The circuit court's determination that the State's purchase of the Properties operated to render the Properties exempt from 2009 real estate taxes directly violates the law and attempts to create new law. Under West Virginia law, real estate taxes are owed by the party who owns a parcel of property on the assessment date, and a lien for said real estate taxes attaches on the assessment date. In the instant case the Tax Debtors, who are private entities with no claim to immunity from taxation, owned the Properties on the assessment date for the 2009 real estate taxes. As such, the Tax Debtors are the owners of the Properties for the purposes of the 2009 taxes, and the State's purchase of the Properties after the assessment date could only affect the taxability of the Properties for subsequent years. When the 2009 taxes were not timely paid, West Virginia law authorized the Kanawha County Sheriff to sell the liens on the Properties to EB Dorev. The statutory scheme for the assessment and collection of taxes in West Virginia allows for the property to be first assessed, then for that assessment to be challenged, and finally to be billed and collected. The Legislators purposefully set an absolute date for assessment to avoid the exact arguments made here by the State, that some future sale somehow affects the past assessment. The Legislature could not have been more clear.

The circuit court's reliance on the doctrine of merger to avoid this result is misplaced. This Court has never adopted the doctrine of merger in the context of the factual scenario presented by the instant case, and the doctrine has not been universally adopted in this context by other states. In addition, the foreign authority that the circuit court discussed in support of its application of the doctrine of merger was grounded in

public policy considerations that do not apply in this case. Moreover, the application of the doctrine of merger to the facts presented here runs afoul of the West Virginia Constitution.

The circuit court's ruling, in the alternative, that the tax liens on the Properties were inchoate and never matured into saleable liens is also contrary to the law. Again, under West Virginia law, ownership of property for the purposes of taxation is determined on the assessment date, and a lien attaches on that date. The only thing that can prevent liens on property that was owned by a non-exempt private party on the assessment date from maturing is the payment of the assessed taxes. When the 2009 taxes for the Properties were not timely paid, the liens on the Properties for said taxes matured, and the Kanawha County Sheriff properly sold the liens to EB Dorev in accordance with the procedure set forth by the West Virginia Legislature.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner EB Dorev believes that oral argument is appropriate in this case, insofar as the parties have not waived oral argument, the appeal is not frivolous, the dispositive legal issues have not been authoritatively decided in this jurisdiction, and the decisional process will likely be aided by oral argument. EB Dorev further believes that the case should be set for a Rule 20 argument, rather than a Rule 19 argument, because the case involves issues of first impression and fundamental public importance.

### **ARGUMENT**

#### **I. STANDARD OF REVIEW**

The standard of review applicable to a circuit court's entry of summary judgment is de novo. Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* at 59, 459 S.E.2d at 336.

**II. THE CIRCUIT COURT ERRED IN RULING THAT THE PROPERTIES WERE RENDERED EXEMPT FROM 2009 REAL ESTATE TAXES UPON THE STATE'S PURCHASE OF THE PROPERTIES IN AUGUST AND SEPTEMBER OF 2008**

In its Order granting summary judgment to the State, the circuit court made the following determinations with respect to the 2009 real estate taxes on the Properties:

Although a tax lien for tax year 2009 attached by operation of law on July 1, 2008, the subsequent purchase of the property by [the State] in 2008 meant that [the State] owned the land prior to and throughout the calendar year, and tax year, 2009. As real property owned exclusively by the State is exempt from taxation, the property at issue was rendered exempt from 2009 taxes upon purchase by [the State] in 2008. Thus the Court finds that the Sheriff should have recognized that the July 1, 2008, tax liens were based upon an assessment that was no longer accurate as of the dates that the property at issue was purchased by the State.

App. at p. 244.

It is true that under West Virginia law, real property belonging exclusively to the State is exempt from taxation. See W. Va. Code § 11-3-9(a)(2). However, because the State did not own the Properties on the assessment date for the 2009 real property taxes (July 1, 2008), this exemption does not come into play for said taxes. West Virginia law recognizes an "assessment year" and a "tax year." See W.Va. Code § 11-3-1(f). The "assessment year" is the twelve-month period that begins on the "assessment date," which is July 1 of the year preceding the tax year. *Id.* The "tax year," on the other hand, is the

next calendar year that begins after the assessment date. *Id.* Thus, for the 2009 tax year, the assessment date is July 1, 2008.<sup>6</sup>

Importantly, West Virginia law provides that “[t]he taxes upon all property shall be paid by those who are the owners thereof *on the assessment date* whether it be assessed to them or others.” W. Va. Code § 11-3-1(c) (emphasis added); see also Syl. Pt. 1, Moore v. Johnson Serv. Co., 158 W. Va. 808, 219 S.E.2d 315 (1975) (“In the context of taxation of property . . . , ‘assessment date’ means a particular day upon which ownership and value are to be ascertained for the purposes of allocation of liability for, and future levy of, property taxes.”); Cole v. State, 73 W. Va. 410, 80 S.E. 487, 491 (1913) (“We think the policy of our law, evidenced by the statutes referred to, is to have a fixed and definite date by reference to which all property shall be assessed for taxation, and he is owner for the purpose of taxation who on that day, by himself or his tenant, has the freehold in possession.”).<sup>7</sup>

Thus, contrary to the circuit court’s ruling, ownership of the Properties for the purposes of the 2009 real estate taxes was determined *on the assessment date*, i.e. July 1, 2008. There is no ambiguity in the above-cited statutory framework about who owes the

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<sup>6</sup> Stated another way, the statutory tax system allows for the payment of taxes to occur after the assessment and any appeals of the assessment. Therefore, the tax year is essentially short hand for the “tax payment period;” it is not as it sounds the actual time period for which the taxes were assessed. The taxes are being assessed for the value of the property based on any information known on the July 1, 2008 assessment date. It is like paying a utility bill; first comes the usage for which there is a charge assessed and bill sent, then subsequently there is a payment period.

<sup>7</sup> In addition, W.Va Code § 11-3-8 provides that “[a]s to real property the person who by himself or his tenants has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation.”

taxes or when they are assessed. The Tax Debtors, who are private entities with no claim to immunity from taxation, owned the Properties on July 1, 2008. As such, it is the Tax Debtors (and not the State, which purchased the Properties several months after the assessment date) who were the owners of the Properties for the purposes of the 2009 real estate taxes, and who were and are responsible for paying the 2009 real estate taxes on the Properties. Pursuant to the property tax scheme established by the West Virginia Legislature, any change in ownership of real estate after the July 1, 2008 assessment date is simply irrelevant for the purposes of 2009 real estate taxes. Upon the State's purchase of the Properties in August and September of 2008, the Properties became exempt from the taxes assessed for future tax years (beginning with tax year 2010) for so long as the Properties belong exclusively to the State. However, by operation of W. Va. Code § 11-3-1 the State did not own the Properties for the purposes of the 2009 real estate taxes. Accordingly, the circuit court's ruling that "the property at issue was rendered exempt from 2009 taxes upon purchase by [the State] in 2008" is contrary to the law.

Furthermore, West Virginia law provides that "[t]here shall be a lien on all real property for the taxes assessed thereon, and for the interest and other charges upon such taxes, at the rate and for the period provided by law, *which lien shall attach on the first day of July, one thousand nine hundred sixty-one, and each July first thereafter for the taxes payable for the ensuing fiscal year.*" W. Va. Code § 11A-1-2 (emphasis added). In other words, the lien attaches on the assessment date, meaning that in this case, the liens for the 2009 taxes attached on July 1, 2008 when the Properties were still owned by the Tax

Debtors.<sup>8</sup> In addition, under West Virginia law, the Kanawha County Sheriff had the authority to sell these liens if the Properties were not redeemed within the prescribed time period. See W.Va. Code § 11A-2-10; W. Va. Code § 11A-3-5. Because (1) the Tax Debtors, as the owners of the Properties on the assessment date, are established by statute as the owners of the Properties for the purposes of the 2009 real estate taxes; (2) the lien for said taxes attached on the assessment date; and (3) the Sheriff was authorized by statute to sell the liens, the circuit court's ruling that "the Sheriff should have recognized that the July 1, 2008 tax liens were based upon an assessment that was no longer accurate as of the dates the property was purchased by the State" is contrary to the law.

**III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PROPERTY TAX LIENS AT ISSUE WERE EXTINGUISHED THROUGH THE DOCTRINE OF MERGER.**

The circuit court ruled that the statutory tax liens, which attached to the Properties by operation of law on July 1, 2008, were extinguished by the doctrine of merger upon the purchase of the Properties by the State. However, the doctrine of merger has never been applied by this Court in the context of the factual scenario presented in the instant case. While the circuit court cited Armstrong Products Corp. v. Martin, 119 W.Va. 50, 192 S.E. 125 (1937) in support of its ruling, the facts in Armstrong were much different than the facts in the instant case.

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<sup>8</sup> Chapter 11 of the West Virginia Code goes through the process of assessing real property for the purposes of taxation in great detail. At no point does Chapter 11 provide for review or consideration of changes to the ownership or value of the property (i.e. title, condition, enhancement, demolition, etc.) which occur after the assessment date. To the contrary, W.Va. Code § 11-3-1(a) specifically provides that property "shall be assessed annually as of July 1 at sixty percent of its true and actual value . . . ." (Emphasis added). Changes occurring after this date simply have no bearing on the assessment.

In Armstrong, the State purchased a tract of land at a sheriff's sale in 1931 and 1932 after the 1930 and 1931 taxes on the tract were not timely paid. 119 W.Va. at 50, 192 S.E. 126.<sup>9</sup> Thereafter, the manufacturing corporation that formerly owned the tract was adjudicated bankrupt, and the bankruptcy court ordered the tract to be sold again, with the liens to be transferred to the proceeds of the sale. Id. In 1935, in accordance with the bankruptcy court's order, the parcel was sold to a private party. Id. However, the Cabell County assessor thereafter refused to extend the 1937 taxes against the tract because it had never been redeemed from the sale to the State in 1931. Id., 192 S.E.2d at 127. The purchaser from the 1935 sale then sought a writ requiring the assessor to extend the taxes. Id.

This Court refused to issue the requested writ, reasoning that "when sale was attempted by the bankruptcy court, this land was not that of the bankrupt upon which the state had a mere lien, but was the land of the state." Id. The Court further explained that upon the State's purchase of the tract at the tax sale in 1931, "the state's lesser right as lienholder was merged in its greater right as landowner." Id. Thus, Armstrong merely stands for the proposition that, under the law then in effect in West Virginia, if the State purchased property at a sheriff's sale, the State's prior lien on the property is merged with its title as landowner. Because the instant case does not involve the purchase of property by the State at a sheriff's sale, this Court's ruling in Armstrong is inapposite.

The only other case cited by the circuit court in support of the doctrine of merger is State v. Locke, 29 N.M. 148, 219 P. 790 (1923). In Locke, as discussed in greater detail

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<sup>9</sup> This refers to an actual sale of *property*, as opposed to a sale of a tax lien under the current statutory framework, which was passed in 1994. See W.Va. Code § 11A-3-5.

*infra*, the Supreme Court of New Mexico held that when property is acquired by the state, the state's claim for any taxes previously assessed against that property becomes merged with the state's ownership of the fee interest in the property, and the power to enforce the tax liens on the property is arrested or abated. 29 N.M. 148, 219 P. at 792. Although this Court cited Locke in the Armstrong decision, it has never expressly adopted the doctrine of merger as articulated in Locke, nor applied it outside the limited context of Armstrong. Moreover, Locke has not been uniformly adopted by other states. See e.g. State v. Salt Lake County, 96 Utah 464, 85 P.2d 851 (1938).

In Salt Lake County, Lawrence L. Rindlisbach executed a warranty deed on December 16, 1936 conveying certain real property to the State of Utah. Id., 85 P.2d at 852. Thereafter, the property was sold to Salt Lake County in satisfaction of unpaid taxes for the years 1932 to 1936. Id. The State sued to quiet title, and the trial court ruled in favor of the State. Id. Citing a provision in the Utah constitution requiring "a uniform and equal rate of assessment and taxation on all tangible property in the State," the Supreme Court of Utah reversed the trial court's ruling. Id., 85 P.2d at 853-859. In the words of the Court,

[i]f the taxes for 1932 to 1936 inclusive were lawfully levied against this property as that of Rindlisbach, and we have so held, then by what process of reasoning can they be adjudged unlawful after and solely because the State obtained a deed for the property from Rindlisbach on December 16, 1936, in satisfaction of its mortgage? The State by that deed could acquire only such title as its grantor had at the time of the deed; that is, a title encumbered by taxes theretofore lawfully assessed and levied, and by prior tax sales, if any. If taxes lawfully levied upon the property prior to December 16, 1936, must be cancelled, or the property discharged of the tax lien, it is not because the taxes were unlawfully levied at the time, but because of a subsequent change of ownership whereby it becomes profitable to the State to have the taxes cancelled instead of paid. To escape payment the State

cannot loan its exemption status to its grantor, and have it reach back retroactively, for several years and ward off or cancel taxes already lawfully levied on his property. That would be abatement of taxes, not exemption from taxation. . . . The case here presented is that of an attempt to cancel or nullify the entire taxes for a number of years against the Rindlisbach property, and to destroy the lien thereof without any statute purporting to authorize the same, but in violation of the constitutional principle of equality of taxation, solely because the State has succeeded to the title to the property so encumbered.

Id., 85 P.2d at 854-855. Based on this reasoning, and after a thorough analysis of precedent from a myriad of jurisdictions, the Utah Supreme Court concluded that "the trial court erred in its conclusions of law and in its entry of judgment quieting the State's title against the tax liens upon the property in question for the years prior to its acquisition of title by deed from Rindlisbach on December 30, 1936." Id., 85 P.2d at 859.

Thus, as the Supreme Court of Utah's decision in Salt Lake County makes clear, the doctrine of merger as articulated in Locke is not a universally accepted maxim of black letter law. Furthermore, there are important reasons why the doctrine of merger, as set forth in Locke, should not be applied in the instant case.

First, the outcome in Locke was grounded in public policy considerations that do not apply in the instant case. In Locke, the State of New Mexico purchased a parcel of property from the Mills Ranch Resort Company in 1910, but thereafter the property was sold to Seon Locke for the nonpayment of the year 1909 taxes. 29 N.M. 148, 219 P. at 790-91. The Supreme Court of New Mexico ruled in favor of the state, holding as follows:

The exemption granted to the property of the United States is perhaps compulsory; that to the state, all counties, towns, cities and school districts *arises from public policy, which repudiates, as being utterly futile, the theory of the state taxing its own property in order to produce the funds with which to operate its own affairs.* To tax it would merely require and render it necessary to levy new taxes to meet the demand of those already laid; that

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the public would thus be taxing itself to produce the money with which to pay to itself the taxes previously assessed, thereby benefiting no one except the officers employed to collect and disburse such revenues, whose compensation would merely serve to increase the burden of this useless and idle ceremony. The object of taxing property is to produce the revenues with which to conduct the business of the state; it is entirely inconsistent with our theory of government for the *property of the state* to be taxed, or sold for taxes, in order to produce the money to be expended *by the state*. Such a procedure is but taking the money out of one pocket and putting it in the other.

Id., 219 P. at 792 (emphasis added). In other words, the ruling in Locke is based on the rationale that the *property of the state* should not be taxed, or sold for taxes, in order to produce money to be expended *by the state*.

The instant case does not involve taxing *property of the state* in order to produce money to be expended *by the state*. Rather, it involves taxing the property of the Tax Debtors in order to produce money to be expended primarily by Kanawha County, the Kanawha County Board of Education, and other local government entities.<sup>10</sup> As previously discussed, under West Virginia law, the 2009 property taxes are a personal obligation of the Tax Debtors who owned the Properties on the assessment date for said taxes. See W.Va. Code § 11-3-1(c); W. Va. Code § 11A-2-2(a). Furthermore, the overwhelming majority of property taxes in West Virginia go to taxing units other than the State, with the biggest share going to county boards of education. See W.Va. Code §§ 11-8-4 through 11-11-8-6(d). Indeed, the West Virginia Legislature enacted the statutory tax lien sale procedure “[i]n view of the paramount necessity of providing regular tax income for the state, county and municipal governments, *particularly for school purposes*; and in view of the further fact that delinquent land not only constitutes a public liability, but also

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<sup>10</sup> The State and the county are separate taxing units. See W.Va. Code § 11-8-4.

represents a failure on the part of delinquent private owners to bear a fair share of the costs of government . . . ." W.Va. Code § 11A-3-1 (emphasis added).

The application of Locke's doctrine of merger to the instant case flies in the face of this legislative pronouncement. Not only does it deprive the Kanawha County Board of Education of tax revenue, but it also makes it easier for delinquent private owners to avoid bearing their fair share of the costs of government. Moreover, rejecting Locke causes no undue hardship to the State. The State knows of the existence of tax liens when it buys property. If the State wants to avoid losing such property, all it has to do is make provision in the closing documents for the payment of the outstanding taxes from the proceeds of the sale. Indeed, it is usual and customary for lawyers closing transactions in which a property's tax status might be changing to collect for, withhold, or escrow amounts which may be required to pay the outstanding taxes for the calendar year following the closing. App. at pp.131-133.

However, the circuit court's adoption of the doctrine of merger from Locke completely obviates the State's incentive to take these measures, and instead allows the State to simply buy up property without giving a second thought to the collection of the tax revenue owing to county boards of education and other government bodies. Surely this is not what the West Virginia Legislature intended when it enacted W.Va. Code § 11A-3-1, *et seq.* This result is unfair to county boards of education that depend on property tax revenue to fund and operate schools, as well as municipalities and other taxing units that depend on property tax revenue to fund important institutions like police and fire departments. Again, it is relatively simple for the State to provide for the payment of

outstanding taxes by the seller in the closing documents when the State purchases property. County boards of education and other local bodies with no control over these transactions should not be deprived of their ability to collect the tax revenue that they need and was assessed to fund important programs simply because the State neglected or chose not to consider the effects of its actions on other units of government.<sup>11</sup>

Second, as in Salt Lake County, the application of the doctrine of merger contravenes our State's constitution. Like the Utah constitution, the West Virginia Constitution provides that "[s]ubject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." W. Va. Const. art. X, § 1 (emphasis added). While Article 10, §1 goes on to say that public property "may by law be exempted from taxation," the Legislature chose to provide that ownership for property tax purposes is determined on the assessment date. See W. Va. Code § 11-3-1(c). Article 10, §1 contains no exception that would permit taxes on two parcels of privately-owned real estate to be treated differently for a given tax year if one of the parcels is sold to the State after the assessment date and the other is not. Under West Virginia law, if both parcels were owned by private parties on the assessment date, then both parcels are deemed to be owned by private parties for the purposes of the ensuing

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<sup>11</sup>To illustrate the potential impact of the circuit court's ruling, if we assume that a property owner is ten years delinquent in his taxes and he sells his property to the State, the circuit court is saying that he does not owe these taxes at closing and neither does the State. Furthermore, the circuit court is saying that anyone who bought any of the delinquent liens should have known that several years into the future the property would be sold the State and be deemed retroactively exempt. This application of a retroactive exemption is absurd and has no support in the statutory framework, which at no point provides tax debtors or the State with retroactive rights.

year's taxes, and these parcels and property owners must be treated equally.

However, the doctrine of merger, as applied by the circuit court, defies this constitutional mandate by treating these two privately owned properties (and property owners) differently. The circuit court's ruling allows one property owner to effectively escape taxation by selling his interest to the State, while another property owner who keeps his property or sells it to a non-exempt entity still has to pay his taxes.<sup>12</sup> At the very least, under the circuit court's ruling, a property owner who sells his land to the State gets to do so free and clear of all tax liens regardless of whether he has paid his taxes, while a property owner who sells his land to a non-exempt entity does not. In other words, in the instant case, the circuit court's ruling has given the Tax Debtors and the Properties special treatment, and is unfair to everyone who actually paid their property taxes for tax year 2009.

Likewise, the circuit court's ruling gives the State an unfair advantage in purchasing property. While other buyers must make provisions for ensuring the payment of the outstanding taxes if they do not want to lose their newly acquired property, the circuit court's rulings allows the State to buy property without consideration of the payment of outstanding taxes. This makes it easier and cheaper for the State to buy up properties

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<sup>12</sup> While it is true that the Sheriff can still attempt to sue to collect the taxes under W.Va. Code § 11A-2-2(a), this is not nearly as effective a collection method as the tax lien sale procedure. For example, in the instant case, the Tax Debtors are limited liability companies. It is possible that these companies were formed for the sole purpose of holding the Properties, and that in the wake of the sale of Properties to the State and the distribution of the proceeds to the members, the companies no longer have sufficient assets to pay the taxes, penalties, and interest due.

than for private parties to do so,<sup>13</sup> and also makes it more difficult, if not impossible, for local government bodies to collect much needed tax revenue. While the Legislature has made property owned exclusively by the State exempt from taxation, there is no indication that the Legislature ever intended to confer upon the State the ability to purchase property free and clear of liens for taxes owed by the seller without making provision for the payment of said taxes. It would have been simple for the Legislature to explicitly provide that upon the date of sale to the State or other tax exempt entity, all assessed and unpaid taxes shall no longer be due or collectible and shall be abated. The fact that the Legislature has not so provided indicates that the Legislature did not intend such a result.

In short, West Virginia law allows for only two categories of properties when it comes to property tax assessment; properties are either taxable or they are exempt. If a property is not exempt on the assessment date for a given year's taxes, it cannot later become exempt from such taxes. Likewise, there is nothing in the statutory framework that allows for the abatement of taxes assessed against a person or entity that owned property on the assessment date. For all of the foregoing reasons, the circuit court erred in holding that the tax liens on the Properties were extinguished by the doctrine of merger upon the purchase of the Properties by the State.

**IV. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PROPERTY TAX LIENS AT ISSUE WERE INCHOATE AND NEVER MATURED INTO LIENS SUITABLE FOR SALE.**

The circuit court ruled that even though the liens for the 2009 real estate taxes

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<sup>13</sup> For example, if a property is listed for sale and the State and another buyer offer to purchase the property for the same price, hypothetically \$2,000,000, the State's offer would have the advantage that the seller would not owe the pending tax bill, roughly a \$40k advantage. Such an advantage is unconstitutional and was not intended by the Legislature.

attached to the Properties on July 1, 2008, the liens were inchoate because the value of the lien cannot be determined until later in the assessment year. In the words of the circuit court,

As of July 1, 2008, the liens might have matured into saleable tax liens that would be appropriate for sale, pursuant to the statutory procedure for the sale of tax liens, in 2010. However, upon the sale of the property at issue to the State, prior to tax year 2009, that possibility was eliminated and maturation of the tax liens was precluded.

App. at pp. 243.

The circuit court's ruling is contrary to the law. As previously discussed, the Legislature has decreed, and this Court has confirmed, that the owner of a parcel of property for tax purposes is the person or entity who owns the parcel of property *on the assessment date*. See W. Va. Code § 11-3-1(c); see also Syl. Pt. 1, Moore, 158 W. Va. 808, 219 S.E.2d 315; Cole, 73 W. Va. 410, 80 S.E. at 491. The Legislature made no mention of a change of ownership *after* the assessment date having any effect on the tax collection procedure. Likewise, the Legislature has plainly stated that a lien for the ensuing year's property taxes attaches *on the assessment date*. See W. Va. Code § 11A-1-2. The Legislature said nothing about this lien being "inchoate" and extinguishable by subsequent sale to a tax-exempt entity. Nowhere in the statutory framework is there mention of the need for the lien to "mature," nor for the price to be set in order for it to be in full effect.

Indeed, the only method that the Legislature has provided for extinguishing the liens is *the payment of the assessed taxes*. See W. Va. Code § 11A-2-10a ("On or after April first of each year the sheriff may prepare and publish a notice stating in effect that the taxes assessed for the previous year have become delinquent, and *unless paid by April*

thirtieth will be included for publication in the forthcoming delinquent lists...")(emphasis added); W.Va. Code § 11A-3-2 (providing for the publication of a list of delinquent lands, with notice that the tax liens on each listed property will be sold unless redeemed "by the payment to the undersigned sheriff (or collector) before sale, of the total amount of taxes, interest and charges due thereon up to the date of redemption.")(emphasis added); W.Va. Code § 11A-3-5 (providing that "[t]he tax lien on each *unredeemed* tract or lot . . . shall be sold by the sheriff...")(emphasis added). In other words, the variable that keeps the tax lien from maturing is the payment of the taxes, not the sale of the property to a tax exempt entity. If a private tax debtor, who owns property on the assessment date, pays its taxes within the legislatively-prescribed period for doing so, then the lien never matures. If the taxes remain unpaid, then the lien matures, and may be sold.

In the instant case, the Tax Debtors were the owners of the Properties on July 1, 2008 (the assessment date for the 2009 real estate taxes) when the lien attached, and are therefore the owners of the Properties for the purposes of the 2009 real estate taxes. When the Tax Debtors failed to pay the 2009 property taxes, the County proceeded against them in the manner provided by statute just as it would against any other private, non-immune tax debtor. The fact that the Properties were subsequently sold to the State is irrelevant. Neither the State nor the circuit court has cited anything in the statutory framework indicating that the procedure set forth therein became inoperative and unavailable when the Tax Debtors sold their property to the State after the liens had already attached.<sup>14</sup> As such, the tax liens in the instant case were no more inchoate and

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<sup>14</sup> As noted by the circuit court, the State argued below that by virtue of W.Va. Code § 11A-3-7, the statutory procedure followed by the County "was subject to reasonable discretion

unenforceable than they would be against the typical tax delinquent who does not sell its property to the State. Because the taxes remained unpaid, the liens matured and were properly sold to EB Dorev. Accordingly, the circuit court's ruling that the subject tax liens were "inchoate" and never matured into saleable liens is contrary to the law and must be reversed.

### CONCLUSION

As set forth above, the circuit court erred in granting summary judgment to the State. Accordingly, EB Dorev respectfully requests that this Court reverse the circuit court's order, uphold the validity of the tax lien sale to EB Dorev, compel the issuance of tax deeds to the Properties to EB Dorev, and remand the case to the circuit court for

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as the Sheriff was and is authorized to determine that a tax lien should not be sold for various good reasons." App. at p.239. Section 11A-3-7 provides, in relevant part, as follows:

Whenever it shall appear to the sheriff that any real estate included in the list has been previously conveyed by deed and no tax thereon is currently delinquent, or that the tax lien thereon has been sold previously and not redeemed, or that the tax lien thereon ought not to be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the county commission and to the auditor. If the commission finds that the tax lien on the real estate ought not to be sold, it shall so order; but if the commission finds that the tax lien on the real estate ought to be sold for the amount stated, or for a greater or less amount, it shall order the sheriff to include such real estate in his next September list, unless sooner redeemed.

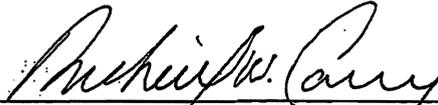
W. Va. Code § 11A-3-7. This section makes no mention of suspending the sale based on the sale of the property to a tax-exempt entity after the assessment date (when ownership of the property was determined for the purposes of the delinquent taxes). In addition, even if the State is correct that the Sheriff had the *discretion* to suspend the sale of the subject tax liens based on the State's purchase of the Property after the assessment date, the State has offered no authority in support of the proposition that the Sheriff was *required* to suspend the sale based on the State's purchases of the Property after the assessment date. In this case, it is significant that the Sheriff not only chose not to exercise his discretion to suspend the sale at the time, he stands by the decision and is in fact fighting the State's claim for a retroactive exemption.

consideration of EB Dorev's remaining counterclaims and cross-claims.

Respectfully Submitted,

EB DOREV HOLDINGS, INC.

By Counsel,



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Michael W. Carey, WWSB No. 635  
David R. Pogue, WWSB No. 10806  
Carey, Scott, Douglas & Kessler, PLLC  
901 Chase Tower  
707 Virginia Street, East  
P.O. Box 913  
Charleston, WV 25323  
(304) 345-1234  
[mwcarey@csdlawfirm.com](mailto:mwcarey@csdlawfirm.com)  
[drpogue@csdlawfirm.com](mailto:drpogue@csdlawfirm.com)

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

**No. 13-0886**

**EB Dorev Holdings, Inc., Defendant Below,**

**Petitioner,**

**v.**

**Civil Action No: 04-C-3163  
Circuit Court of Kanawha County**

**West Virginia Department of Administration,  
Real Estate Division, Plaintiff Below,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, Michael W. Carey, do hereby certify that on the 12<sup>th</sup> day of November, 2013, I have served the foregoing "**Opening Brief of Appellant**" and "**Joint Appendix**" upon the parties to this action, via United States Mail, postage pre-paid, addressed as follows:

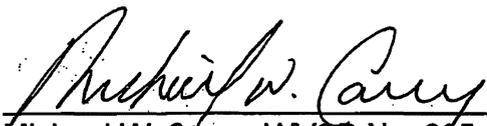
John L. MacCorkle, Esq.  
MacCorkle Lavender & Sweeney, PLLC  
300 Summers Street, Suite 800  
Charleston, WV 25301  
*Counsel for West Virginia Department  
of Administration, Real Estate Division*

Matthew J. Perry, Esq.  
Lamp, O'Dell, Bartram, Levy, Trautwein  
& Perry, PLLC  
P.O. Box 2488  
Huntington, WV 25725-2488  
*Counsel for Third-Party Defendant, CRW  
Real Estate, LLC*

Herschel H. Rose, III, Esq.  
Steven R. Broadwater, Esq.  
Rose Law Office  
P.O. Box 2502  
Charleston, WV 25335  
*Counsel for Vera McCormick in her  
capacity as Clerk of the County  
Commission of Kanawha County and  
Mike Rutherford in his capacity as Sheriff  
of Kanawha County*

Richard D. Owen, Esq.  
Goodwin & Goodwin, LLP  
P.O. Box 2107  
Charleston, WV 25328-2107  
*Counsel for Third-Party Defendants, So  
Park, LLC and Knollwood Investments,  
LLC*

Stephen C. Sluss, Esq.  
409 Virginia Street East  
Charleston, WV 25301  
*Counsel for Kanawha County Assessor's  
Office*

  
Michael W. Carey, WWSB No. 685