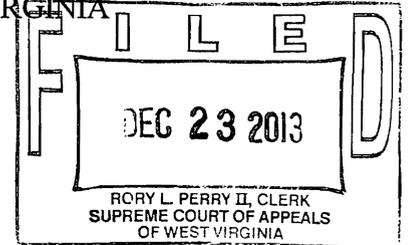


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0957



DON MASON AND  
BRENDA MASON,

PETITIONERS.

vs.

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

RESPONDENTS.

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*Response*

~~REPLY~~ BRIEF OF RESPONDENTS MARIA CATALANO,  
JEREMY D. CASTO AND JERAD D. CASTO

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Jerad D. Casto

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## **I. ASSIGNMENTS OF ERROR**

The Petitioners made the following Assignments of Error:

- A. THE CIRCUIT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS WHERE QUESTIONS OF MATERIAL FACT EXISTED AS TO THE RESPONDENTS KNOWLEDGE OF THE IMPENDING TAX SALE.
- B. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR THE RESPONDENTS WHERE THE MASON'S PROVED THAT THEY WERE BONA FIDE PURCHASERS OF THE SUBJECT REAL PROPERTY BY CLEAR, CONVINCING AND UNCHALLENGED EVIDENCE.

## **II. STATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

Kanawha County Civil Action Number 11-C-565 was commenced by Anna Maria Catalano and her two sons, Jeremy D. Casto and Jerad D. Casto (hereinafter the Catalanos or the Respondents), on April 7, 2011, by the filing of a Complaint seeking the setting aside of a November 15, 2008, tax sale of their real property by the Sheriff of Kanawha County, and allowing them to redeem the same. App. 1. This action was commenced within a period of three years from the date of the delivery of the tax deed as required by the provisions of West Virginia Code, §11A-4-4. App. 108, #5; 171, #10; 200, #10.

On December 27, 2011, the action was consolidated for discovery purposes with pending Kanawha County Civil Action Number 09-C-203 which involved many of the same parties and the same real property.

On February 3, 2012, the Respondents filed their Motion For Partial Summary Judgment seeking a setting aside of the tax deed and the subsequent conveyances of the Property. App. 45.

On April 5, 2012, the Petitioners filed their Response And Motion For Summary Judgment seeking a finding by the Circuit Court that they were *bona fide* purchasers of the property and that the Court could not disturb the deed they acquired. App. 126-36.

By Order entered on July 19, 2013, the Honorable Carrie Webster, Judge of the Circuit Court of Kanawha County, granted the Respondents' Motion For Partial Summary Judgment, directing that the tax deed and the subsequent conveyances of the property to an affiliate of the tax sale purchaser and to the Petitioners be set aside, and finding that the Petitioners were not bona fide Purchasers of the Property. App. 286-300.

## **2. STATEMENT OF THE RELEVANT FACTS**

By a Deed from Samuel Mark Campbell and Elizabeth Campbell, his wife, dated June 14, 2001, Anna Maria Catalano and her two sons, Jeremy D. Casto and Jerad D. Casto, acquired the property which was the subject of this litigation, located on the north side of Elk River, below Jarrett's Ford, in Elk tax district, Kanawha County, West Virginia (the "Property"). The Deed for the Property appears in the Kanawha County Clerk's Office in Deed Book 2528 at page 531. App. 1-2. The sale price for the Property was \$65,000, and it has a mailing address of 5024 Elk River Road South, Elkview. App. 216-19.

On November 14, 2006, the Sheriff of Kanawha County did sell the tax lien on the Property for the unpaid real estate taxes which were delinquent and unpaid for the year 2005. Sunrise Atlantic, LLC, a Florida limited liability company, ("Sunrise Atlantic") was the purchaser of the tax lien for the year 2005 in the names of the Catalanos for the sum of \$1,900. App. 10.

By tax deed dated April 9, 2008, and made of record on April 16, 2008, Vera J.

McCormick, the Clerk of Kanawha County Commission, conveyed the Property to Sunrise Atlantic. A copy of the tax deed appears in the Kanawha County Clerk's Office in Deed Book 2718 at page 897. App. 8-22.

By Quitclaim Deed dated May 16, 2008 and without payment of any consideration, Sunrise Atlantic did grant and convey the Property unto Harpagon MO, LLC, a Georgia limited liability company ("Harpagon"). A copy of the said Deed appears of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2729 at page 65. App. 23.

In consideration of a sale price of \$32,000, by Deed dated June 13, 2008, Harpagon did grant and convey the Property unto Don Mason by means of a Deed containing covenants of Special Warranty. A copy of the said Deed appears of record in the Office of the Clerk of the Kanawha County Commission in Deed Book 2724 at page 313. App. 24-25. At the time the Petitioner Mason acquired the Property, the deed from Sunrise to Harpagon was not recorded in the Kanawha County Clerk's Office. App. 23.

By a Deed dated April 10, 2006 and prior to the tax sale, the Catalanos had sold the Property to Raymond Richard Smith ("Smith") for the sum of \$68,000. However, the Deed was apparently lost and never recorded in the Office of the Clerk of the Kanawha County Commission. App. 212-16. Kanawha County Civil Action Number 09-C-203 was commenced by Mr. Smith for the purpose of recovering damages against the Catalanos as a result of their breach of the covenants of general warranty contained in his April 10, 2006 Deed, as well as damages against Robert Fletcher, the attorney whom he believed closed the transaction, as well as against The Poca Valley Bank where the transaction was closed, for failure to record the deed.

Attached to the tax deed was the "return receipt" for service of the notice of the right to

redeem the property from sale which was served upon The Poca Valley Bank, Inc. App. 13. Also attached to the tax deed were envelopes sent by the Kanawha County Clerk to the Catalanos containing their notices of the right to redeem the property from the tax sale which had been returned by the United States Postal Service. Twelve of the envelopes were marked by the Postal Service as being "Not Deliverable As Addressed," and three were marked as "Unclaimed." None were marked as "refused" by the addressee. Two of those are shown as being addressed to Jeremy Casto and Jerad Casto at 634 McNabb Drive, Elkview, West Virginia. The addressee, and the address of the third, is uncertain. All were postmarked January 28, 2008. No "return receipts" signed by any of the Catalanos or anyone on their behalf showing that they received the notice of the right to redeem the property from sale were attached to the tax deed recorded in the Kanawha County Clerk's Office. App. 14-21.

During January, 2008, when these notices appear to have been sent to the Catalanos at the 634 McNabb Drive, Elkview, address, neither Jerad Casto nor Jeremy Casto lived there. Jerad Casto was incarcerated at the Central Regional Jail in Flatwoods, Braxton County, from July, 2007, through March, 2008. App. 86-88. Jeremy Casto lived at 184 Hutchison Lake Drive, Ripley, West Virginia from 2007 until the present time. App. 82-85. Although Maria Catalano lived at the 634 McNabb Drive, Elkview, property during this time, she and each of her sons affirmed under oath that they never received any notice of the right to redeem the property from sale, consistent with the copies of the envelopes which were attached to the tax deed and which showed that none of the notices had been delivered. App. 89-92.

On April 7, 2011 and within the three year period from the date of the delivery of the tax deed as required by the provisions of West Virginia Code, §11A-4-4, Maria Catalano and her two

sons, Jeremy D. Casto and Jerad D. Casto, filed a Complaint in the Circuit Court of Kanawha County seeking the setting aside of the November 15, 2008 tax sale of their real property by the Sheriff of Kanawha County, and allowing them to redeem the same. App. 1; 108, #5; 171, #10; 200, #10.

Although all of the Catalanos lived within the State of West Virginia, they affirmed under oath they never received any of the certified or first-class mail notices sent by the Kanawha County Clerk, and discovery established that the tax sale purchasers never took steps to locate and serve any of the Catalanos with notices of their right to redeem the property from the tax sale when there were no return receipts evidencing service of the notices to redeem upon them. App. 170-71, ##7-8; 199, ##7-8.

Even though The Poca Valley Bank had received notice of the right to redeem the property from the sale for unpaid taxes, both of the Casto brothers, and their mother Anna Maria Catalano, as the owners of the property at the time the taxes went delinquent and in whose names the property was assessed upon the land books located in the Kanawha County Assessor's and Sheriff's Offices, affirmed in their affidavits that they were unaware that the tax sale had occurred, that any other party had been provided with a notice of the right to redeem the property from sale, and that if they had been provided notice, then they would have redeemed the property from sale. App. 203-11. In addition, they affirmed that, if allowed to redeem, they were prepared to comply with the redemption statute by paying the amounts due plus interest thereon.

*Id.*

After the Court granted summary judgment to the Catalanos, they complied with the statute in a timely manner by depositing with the Clerk of the Circuit Clerk in the manner

required by the Summary Judgment Order the amounts required to redeem. No party filed any exceptions to their calculations or objected to their tender of the redemption amounts. App. 301-07. As a result, the redemption of the Property was completed and title was restored to the Catalanos.

### **III. SUMMARY OF ARGUMENT**

The Catalanos, Respondents and former owners of the Property, filed this action within three years of the date of the delivery of the tax sale deed for their former residence property. In support of their Complaint to set aside the tax deed, they submitted affidavits which conclusively established what was already apparent from a review of the attachments to the tax deed itself: they were not provided with service of the statutorily-required notice of the right to redeem their property from the tax sale. Neither the Petitioners nor the tax sale purchasers provided any countervailing evidence which might have refuted those affidavits.

When the notices of the right to redeem the property from sale which had been sent to the Catalanos at various locations were returned as being undeliverable or unclaimed—and not as having been refused by them—the tax sale purchaser failed to take a single additional step to attempt to notify the Catalanos of their right to redeem. Although at the time of service of such notices the tax sale purchaser was unaware of the sale by the Catalanos to Mr. Smith, which was unrecorded, the tax sale purchaser and their grantees, including the Petitioners, have persisted in arguing that the Catalanos are not entitled to notice of the right to redeem the property from sale. Such a position is contrary to West Virginia law.

The Petitioners sought summary judgment on grounds that, if the Catalanos would otherwise be entitled to set aside the tax deed, the interest which the Petitioner Don Mason

acquired from the Respondent Harpagon could not be disturbed by the Circuit Court because Mason qualified as a *bona fide* purchaser of the Property.

Extensive materials, both evidentiary and legal in nature, were provided to the Circuit Court on this issue. The documentary evidence was overwhelming that the sale of the Property to the Petitioners was for insufficient consideration, and upon terms which removed them as being entitled to the protection of *bona fide* purchasers. App. 24-25; 212-19.

The Circuit Court carefully considered all of the factors and determined that the Catalanos were entitled to redeem the property from sale and set aside the tax deed, as well as the subsequent conveyances by the tax sale purchaser to an affiliate as well as the transfer to the Petitioners.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT**

This matter should be set for argument pursuant to Rule 20 of the Rules of Appellate Procedure because of the importance of the issues which are presented—issues of notice which are fundamental to the rights of property owners to protect them from being deprived of their interests without Due Process.

#### **V. ARGUMENT**

##### **1. STANDARD OF REVIEW**

“A circuit court’s entry of summary judgment is reviewed *de novo*.” *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), point 1, syllabus. “[Q]uestions of law and statutory interpretation are subject to *de novo* review.” *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995), point 1, syllabus.

## 2. ASSIGNMENTS OF ERROR

### A. SUMMARY JUDGMENT WAS APPROPRIATE WHEN RESPONDENTS RECEIVED NO NOTICE OF THE RIGHT TO REDEEM THE PROPERTY FROM THE TAX SALE, AND TAX SALE PURCHASER FAILED TO EXERCISE REASONABLY DILIGENT EFFORTS AT NOTICE.

West Virginia Code §11A-4-4(a) allows one who “is not served with notice [of the right to redeem] and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property” to institute a civil action set aside a tax deed. The Respondents Maria Catalano, and her sons Jeremy D. Casto and Jerad D. Casto, timely filed a Complaint in the Circuit Court of Kanawha County seeking the setting aside of a November 15, 2008, tax sale of their real property by the Sheriff of Kanawha County, and allowing them to redeem the same. App. 1; App. 108, #5; 171, #10; 200, #10.

Although the Petitioners have asserted that there are issues of fact surrounding the knowledge of the Respondents—in particular, of Maria Catalano—of the tax lien, they are addressing a different issue than that which entitles the Catalanos to have the tax sale set aside. The issue before both this Court and the Circuit Court is that of notice of the right to redeem the Property from sale, which is a separate and distinct notice required by West Virginia Code, §11A-3-22, and not the notices regarding tax payments, tax delinquencies, or sale of the tax lien.

While the Petitioners are particularly unkind to the Catalanos by labeling their affidavits as “shams” and “a farce” in an effort to have this Court believe there is conflicting evidence on the issue, the plain truth is that there are no issues of fact.

The Petitioners have asserted here, just as they asserted below, that the Respondents are unable to succeed in an action to set aside the tax deed because Mrs. Catalano admitted that she

was aware that the Property would be sold for real estate taxes if they remained unpaid. Mrs. Catalano conceded in deposition testimony that she had received notice from the Sheriff of Kanawha County and thus was aware if the real property taxes were not paid then the property would be sold for taxes (or more accurately, that the tax lien on the Property would be sold).

However, such notices were all **prior** to the tax sale. She did not receive any notice of the right to redeem the property from sale. App., 159-60, incorporating deposition transcript pages 58, at ll. 15-24, and 59, at ll. 1-24.

After being provided this evidence the Circuit Court properly applied the prior decisions of this Court in rejecting the Petitioners' assertion that no post-tax sale redemption could occur. As this Court expressed in *Rebuild America, Inc. v. Davis*, 229 W.Va. 86, 726 S.E.2d 396 (2012), actual notice of the tax sale itself does not deprive a party entitled to redeem the property from sale of both (1) their entitlement to notice of the right to redeem the property after the tax lien certificate has been sold, and (2) their right to redeem the property from the tax sale. *Id.*, 229 W.Va. at 94, 726 S.E.2d at 404 (“[I]t 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”).

The statutes and decisions of this Court are consistent in affirming that landowners and others who are obligated to pay the taxes are also entitled to redeem the property from sale, and thus are entitled to notice of their right to redeem as a matter of due process. “Pursuant to W.Va. Code, §11A-3-23(a), **the owner** of, or any other person who was entitled to pay the taxes on, any real estate for which a tax lien thereon was purchased” may redeem the property from sale. *Reynolds v. Hoke*, 226 W.Va. 497, 501, 702 S.E.2d 639, 643 (2010). (emphasis supplied).

The Court went on to make it clear that the tax sale purchaser “was required by W.Va. Code, §11A-4-4(b), to provide notice to parties **who were of record**” at the time of the providing of the required designation to the Clerk of those parties to whom the County Clerk would mail the notices of the right to redeem. *Id.*, n. 8 (emphasis supplied).

In the instant case, there is no doubt that the Catalanos were “the owner[s]” and “were of record” and therefore were entitled to pay the taxes on the subject Property. They were at all times entitled to receive notice of the right to redeem the property from the tax sale. Despite this, the tax sale purchaser failed to provide, and the Catalanos failed to receive, the required notices from the Kanawha County Clerk of their right to redeem.

The statutes of West Virginia require that, as a part of the efforts at post-tax sale redemption, the taxpayer must show that the tax sale purchaser “failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party.” W.Va. Code, §11A-4-4(b).

The uncontested affidavits of the Catalanos made it crystal clear that they had no notice of their right to redeem the Property from the tax sale, and that if such notice had been provided to them then they would have redeemed the Property before any tax deed was delivered. App. 82-92; 204, 207, 210. Even though the Petitioners would like to make the notice to The Poca Valley Bank an issue, it is not, as the Catalanos had no knowledge that the Bank had received notice of its right to redeem the property from sale.<sup>1</sup>

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<sup>1</sup>The notice of the right to redeem provided to The Poca Valley Bank did not result in the redemption of the Property from sale because the loan from The Poca Valley Bank which was secured by the Property had been paid-off and satisfied, and its Deed of Trust released in the Kanawha County Clerk’s Office.

The tax sale purchaser and Harpagon, its grantee, admitted that the Catalanos were entitled to notice of the right to redeem the property from sale. App. 164-65, #7; 193-94, #7. However, when the Petitioners and the tax sale purchasers were provided with an opportunity to demonstrate that notice of the right to redeem the property from sale was provided to the Catalanos, none of them provided even a scintilla of evidence or any affidavits to the trial court which would conflict with the Catalanos' affidavits. Moreover, the tax sale purchasers, who were responsible for serving such notices, conceded that **no evidence** existed that service of the notice of the right to redeem the Property from the tax sale was provided to the Catalanos. App. 170-71, ##7-8; 199, ##7-8.

Indeed, the tax sale purchasers and their grantee, the Petitioner Mason, asserted that the Catalanos were not entitled to such notices despite their being the sole owners of record, because of the sale of the Property to Mr. Smith. App. 103-04, ##8-11; 170-71, ##6-8; 199, ##6-8. Such a position is one which arose **after** the institution of litigation, however, and is a disingenuous one for them to take. Prior to the lawsuits which resulted in this appeal neither the tax sale purchaser, its grantee Harpagon, or the Petitioner, were aware of the sale of the Property.

The affidavits of the Catalanos also made clear that they were at all times residents of West Virginia. App. 86-88; 82-85; 89-92. Mrs. Catalano lived in Kanawha County, not far from the house which was the subject of the tax deed. One of her sons also had that mailing address, although he was incarcerated and thus was under a legal disability at the time the notice of the right to redeem were marked. However, no effort was made to serve either of them with a copy of the notice of the right to redeem the property from sale when the mailing of notice proved ineffective. The remaining son lived across the county line in Jackson County, but no effort at

in-hand service was attempted upon him either. Each were certainly susceptible to “in-hand” service of process as required by West Virginia Code, §11A-3-22.

West Virginia Code, §11A-3-22 clearly and unequivocally requires that “notice” of the right to redeem the property from sale “**shall be served upon all persons residing . . . in the state . . .** in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested.” W.Va. Code, §11A-3-22(b) (emphasis supplied). No personal service was attempted by the tax sale purchaser, thus they and the Petitioners must rely upon certified mail, with an executed return receipt in order to demonstrate that service upon the Catalanos was accomplished as required by the statute.

While the Petitioner asserts that there may be a presumption of delivery for properly addressed and stamped mail, and that the Catalanos are “hiding from accepting the certified mail addressed to them,” the attachments to the tax deed regarding the mail, and the Catalanos own affidavits overcome any presumption of delivery.

The certified mail which was generated by the Kanawha County Clerk to the addresses provided by the tax sale purchaser was not deliverable as addressed or was unclaimed, which undoubtedly should have made clear to the tax sale purchaser that its efforts at service were for naught, and that additional efforts at service were required. This Court has made it clear that mail which has not been either **accepted** or **refused**, but instead is returned by reason of it being undeliverable as in the instant appeal, is insufficient for any purpose. *Crowley v. Krylon Diversified Brands*, 216 W.Va. 408, 412, 607 S.E.2d 514, 518 (2004).

However, the tax sale purchaser made no additional efforts at service upon the Catalanos by any means when its efforts at mailing were ineffective, thus the Catalanos were

never properly served with the notice of the right to redeem as required by the statute. W.Va. Code, §11A-3-21.

“[W]here a particular method of serving process is prescribed by statute that method must be followed . . .” in order for a party’s efforts to have any legal vitality. In the absence of such compliance a party goes without any relief. *McClay v. Mid-Atlantic Country Magazine*, 190 W.Va. 42, 47-48, 435 S.E.2d 180 (1993).

This Court has consistently held that

**[T]he validity of a tax title depends upon strict compliance with the statute. Those statutes which require notice to the owner or other person in interest of the tax purchase and of the time of expiration of the period for redemption are strictly construed in favor of the owner, and against the purchaser. . . .**

*Koontz v. Ball*, 96 W.Va. 177 121-22, 122 S.E. 461, 463 (1924) (emphasis added). The burden is on the tax deed grantee to prove strict compliance with all of the statutory steps which are required, including proof that the notice of the right to redeem was properly served. *Rebuild America, Inc. v. Davis, supra*, 229 W.Va. at 94, 726 S.E.2d at 405 (collecting cases).

In the instant case, the Petitioners, the tax sale purchaser and its grantee preemptorily succeeded in obtaining a tax deed, but the tax deed was properly set aside when the Circuit Court learned that the tax sale purchaser had failed to comply with the statutory provisions for serving notice of the right to redeem upon the Catalanos, and had not undertaken any efforts at providing them with notice when the Clerk’s notices were returned as not received.

This Court has held that any deed delivered to a tax sale purchaser without proof of strict compliance with West Virginia Code, §11A-3-27 is voidable at the election of the party who was deprived of the required notice. *Rebuild America v. Davis, supra*, at 16.

“When a motion for summary judgment is mature for consideration and properly is

documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists.”

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

“[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and **must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.**” *Williams v. Precision Coil, Inc.*, 194 W.Va, 52, 60, 459 S.E.2d 329, 337 (1995) (citing *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214 (1986) (emphasis supplied)).

The Petitioners and the tax sale purchaser and their grantee failed to undertake such a presentation, and the Circuit Court simply applied the well-known summary judgment standard to the matters before it.

The Circuit Court properly found from the un rebutted and uncontradicted affidavits of the Catalanos, coupled with the exhibits to the tax deed itself, that the Catalanos, as the parties entitled to the required notices under the statutes and prior decisions of this Court, had not been served with the required notices of the right to redeem their property from sale as due process requires. App. 292, ¶27; 293, ¶¶ 30-31, 33

There was no showing by the tax sale purchaser of **any** efforts to provide notice to the Catalanos beyond those nascent and ineffective ones at the outset, and thus most certainly failed to exercise reasonably diligent efforts to provide the required notices to the Catalanos as required by W.Va. Code, §11A-4-4, and the Catalanos made such a showing by “clear and convincing evidence”. Therefore, the Circuit Court quite correctly determined that the Catalanos were entitled to have the tax deed and the subsequent transfers set aside. App. 297-98, ¶¶49, 54-55.

**B. THE CIRCUIT COURT PROPERLY FOUND FROM THE EVIDENCE THAT THE PETITIONERS DID NOT QUALIFY AS *BONA FIDE* PURCHASERS OF THE SUBJECT REAL PROPERTY**

The Petitioners do not qualify as *bona fide* purchasers under applicable West Virginia law. The Circuit Court correctly found that the deed which conveyed the title to the Property in the hands of the Petitioners was subject to being set aside as a result of the defects in the conducting of the tax sale. The Circuit Court rejected the contentions of the Petitioners that they were *bona fide* purchasers of the Property. App. 294-95, ¶¶ 36-43.

The principles which the Circuit Court applied were basic ones surrounding real property interests in this State. Any party acquiring an interest in real property is imputed with the knowledge of the statutes of West Virginia. Any party acquiring an interest in property which has been the subject of a tax sale is charged with constructive knowledge that a tax deed is or may become a nullity by virtue of the lack of notice to the tax payers who were entitled to service of the notice of the right to redeem. They must also know that such a party has a three year window from and after the date of the delivery of the tax deed within which to file a suit seeking to have the tax deed set aside.

Any title examination conducted by a competent title examiner would have readily disclosed numerous defects in the title beyond the failure to have the Notice To Redeem to be served upon either Anna Maria Catalano, Jeremy D. Casto, or Jerad D. Casto. Such an omission is a defect in the titles of all of Sunrise Atlantic, as the original purchaser, of Harpagon, the successor to Sunrise and the grantor of Petitioners, and is a defect in the title acquired by the Petitioners. Such defects constitute prior adverse claims of the Catalanos to the title to the

property acquired by Sunrise, Harpagon and the Petitioners, and remove the Petitioners from their asserted position as a *bona fide* purchasers as they are deemed to have constructive notice of all defects. *See, Simpson v. Edmiston*, 23 W.Va. 675, 680 (1884).

The law is strict in imputing knowledge to third parties as to matters which appear of record. “Generally whatever is sufficient on the face of the record of title to land to direct a purchaser’s attention to the prior rights and equities of third persons will put him upon an inquiry and will amount to notice to him. He is bound to take notice of everything disclosed by the record.” *Simmons v. Simmons*, 85 W.Va. 25, 100 S.E. 743 (1919), Point 4, Syllabus.

“[A] bona fide purchaser is charged with constructive notice of only those matters of record in the purchaser's chain of title referred to or about which the purchaser is placed on inquiry. . . . [One] must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information.” *Shaheen v. County of Mathews*, 265 Va. 462, 477-78, 579 S.E.2d 162, 171-72 (2003).

Moreover, an examination of the transfers which constitute the title history of the Petitioners’ Property also makes it clear that the Petitioners do not qualify as *bona fide* purchasers. Following the tax deed itself the next instrument is the deed from Sunrise Atlantic to Harpagon. This deed is just as telling in the indicia which cast doubt upon the *bona fides* of the Petitioners’ title. The deed from Sunrise to Harpagon is a quit-claim deed, conveying the interest in the property acquired by Sunrise Atlantic from the Kanawha County Clerk, and reciting that it is made without any warranty whatsoever. Significantly, the transfer is stated to be without consideration, App. 81, but there are other issues as well.

Among the issues which relegate the Petitioners to a position below that of *bona fide* purchasers are that the Deed from Sunrise Atlantic to Harpagon was not yet recorded at the time the Petitioners acquired the Property from Harpagon. The Deed was not recorded until September 15, 2008, over three months **after** the sale of the Property to the Petitioners. App. 79-80. As a result, Harpagon had no record title to convey to the Petitioners. Certainly had the Petitioners caused a title examination to be undertaken they would have discovered this defect in the record title at the time of their purchase. That they either failed to cause a title examination to be conducted, or failed to take notice of the defect in the record title, are sufficient to remove them from any protection which might be afforded to *bona fide* purchasers.

Furthermore, the purchase price paid by Petitioner when purchasing from Harpagon is also alone sufficient to eliminate the Petitioners from qualifying as *bona fide* purchasers, as well as to constitute an additional “suspicious circumstance” surrounding the sale *Id.* The consideration paid for the June 13, 2008, transaction from Harpagon to the Petitioners was \$32,000. App. 24-25. The consideration for the sale from the Catalanos to Richard Smith, dated April 6, 2006 was \$68,000. App. 212-15. When the Catalanos purchased the Property on June 14, 2001, the sale price was \$65,000. App. 216-19.

Thus the Petitioners paid to Harpagon a price for the Property which is **less than half** the price that the Catalanos paid for the Property exactly seven (7) years earlier, and is less than half the price that the Catalanos sold the same Property to Smith less than two years earlier.

Such a dramatic insufficiency in the consideration precludes any claim to protection afforded to a *bona fide* purchaser.

Another instance of “suspicious circumstances” which deprives the Petitioner of any

protection as a *bona fide* purchaser is that the Deed under which he asserts his title provides merely for a “special warranty” to accompany the interest conveyed. App. 24-25. Under West Virginia law, there is virtually no protection provided by this covenant, as it merely protects the purchaser from claims of the grantor and those claiming through him. It provides no other assurance of title (such as that of a general warranty) of the right to convey the property, quiet possession, freedom from encumbrances, or other assurances available to the purchaser under West Virginia law. For example, the Catalanos both obtained, and granted, covenants of general warranty in the Deeds whereby they acquired and sold the Property. App. 212-19; *contrast* W.Va. Code, §36-4-3 *with, e.g.*, W.Va. Code, §§36-4-2, 4, 5, 6, 8.

The fact that the series of conveyances, and especially that the deed to Petitioner evidences a reduction of the purchase price to less than half of the true market value of the property, has an extremely limited warranty, and that there are pre-existing title defects, constitute such “suspicious circumstances” which remove any doubt that the Petitioner certainly does not qualify as a *bona fide* purchaser.

Contrary to the contention of the Petitioners there is no “clear, convincing and unchallenged evidence” that they are *bona fide* purchasers of the Property. Indeed, as noted above, the Circuit Court was provided with abundant evidence which directly contradicted the Petitioners’ request in their Motion for Summary Judgment (App. 126-43) requesting that the Court find them to be *bona fide* purchasers, and legal authority which applied the governing law to the uncontroverted facts. The Petitioners did not file any Reply to that presentation and argument.

The Circuit Court entertained oral arguments on this issue after a full opportunity for

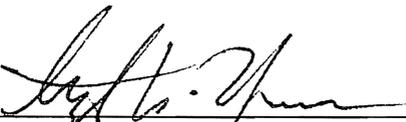
briefing and prior to the granting of summary judgment which included the Court's findings that the Petitioners were not entitled to be protected as *bona fide* purchasers of the Property. App. 229-30, 241-42, 262-66, 282-84. No one, including the Petitioners, contended that the Court needed to undertake any further fact finding on the issue, thus the issue was ripe for a ruling.

Summary Judgment was properly granted where there were no facts in dispute. Any doubt as to the inferences which might have resulted from the facts are to be resolved in favor of the Catalanos as the non-moving parties on that issue. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Where, as here, there are no genuine issues of fact to be tried and no inquiry of concerning the facts is necessary to clarify the application of the law, summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329 336 (1995).

## VI. CONCLUSION

For the foregoing reasons, Anna Maria Catalano and her two sons, Jeremy D. Casto and Jerad D. Casto, respectfully request that the Court affirm the decision of the Circuit Court of Kanawha County which restored to them title to the real property which was the subject matter of the litigation, and that the said Court be allowed to conclude the remaining issues pending before it.

ANNA MARIA CATALANO  
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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0957

DON MASON AND  
BRENDA MASON,

PETITIONERS.

vs.

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

RESPONDENTS.

**CERTIFICATE OF SERVICE**

I, Stephen L. Thompson, counsel for Maria Catalano, Jeremy D. Casto and Jeral D. Casto,  
do hereby certify that true and exact copies of the foregoing Reply Brief Of Respondents Maria  
Catalano, Jeremy D. Casto and Jerad D. Casto, were served upon

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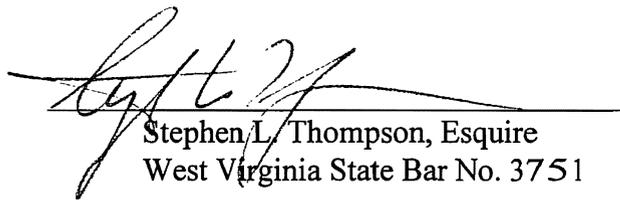
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in envelopes properly addressed, stamped and deposited in the regular course of the United States

Mail this 23<sup>rd</sup> day of December, 2013.



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