NO. 19-0011

SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

REDDENFOXX PROPERTIES, LLC,

Petitioner/Appellant,

V.

(Kanawha County Circuit Court
Case No. 18-C-AP-15)

TERRY MAZE and
WILLIAM MAZE,

Respondents/Appellees,

APPELLEES' BRIEF

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STATEMENT OF THE CASE:

A. Procedural history of case:

On July 20, 2017, appellant, Reddenfoxx Properties, LLC (and member, Eric Porterfield) purchased the tax lien on the appellees', William and Terry Maze's, home. [App. 174] The West Virginia Auditor's office sent notice of the fact to each of the Mazes by certified mail. [App. 135 & 138] Terry Maze signed for both certified mail items on August 2, 2017. [App. 163 - 164] She did not provide William Maze with the certified mail containing his copy of the notice or even tell him about it [App. 83-84]. On November 28, 2017, Russell Rollyson, Jr., Deputy Commissioner of Delinquent and Nonentered Lands of Kanawha County, West Virginia, executed a deed for the appellees' home to the appellant. On December 14, 2017, the appellant recorded the deed with the office of the Clerk of the Kanawha County Commission. [App. 121 - 163] The deed reflects that the appellant did not request the Auditor to send notice to the "Occupant" by first-class mail. [App. 162] The record is silent as to the delivery of the certified mailing to "Occupant" at the Macon Street address. [Appellant's brief, page 2]

On January 4, 2018, appellant (Reddenfoxx Properties, LLC by its "Property Manager," Danny Barie) filed a complaint of unlawful detainer in the Kanawha County Magistrate Court (Civil Action No. 18-M20C-00012) against Terry Maze, Willam Maze and John Doe, requesting "an order for them to immediately vacate the real estate located at 2925 Macon Street, South Charleston, WV." [App. 182] Terry Maze was served with summons at that address on January 10, 2018 (one each for herself and for her husband). She did not answer the complaint for herself or provide to her husband his copy or any information about the service of it. [App. 82 and 83] At a hearing on January 26, 2018, at

which the appellees did not appear, Hon. Kim Aaron, Kanawha County Magistrate, awarded immediate possession of the property to Reddenfoxx Properties and entered an "Order of Possession/Removal: Wrongful Occupation of Residential Rental Property." [App. 184-185] Upon being provided with notice from the Kanawha County Sheriff's office of the planned set-out of her belongings from the home, Ms. Maze retained counsel to file an appeal of those orders and thereby obtained an automatic stay of the enforcement action. Both appellees in turn filed an amended counterclaim seeking an order setting aside the deputy commissioner's deed. [App. 187] The matter was set to be tried by the court, Hon. Charles King, on June 25, 2018. Prior to trial, the circuit court granted the appellees' motion for leave to deposit with the court clerk certain funds (namely, the amount required pursuant to statute to be paid by the appellees to the appellant in the event they would be successful in having the deputy commissioner's deed set aside, or $5,097.88). [App. 207] The appellees deposited those funds with the clerk prior to trial. [App. 126]

The bench trial was held on June 25 and 26, 2018. At the conclusion of trial, the circuit court took the matter under advisement and directed the parties to present proposed findings of fact and conclusions of law. The appellees did so. The appellant did not, but, on July 25, 2018, the appellant filed a response to the appellees' earlier motion for summary judgment. [App. 230 and 218, respectively] On July 26, 2018, the appellees filed a reply memorandum addressing certain arguments raised in the appellant's summary judgment memorandum. On September 20, 2018, the circuit court entered the appellees' proposed order on the trial of June 25 and 26, 2018, granting judgment in favor of the appellees, namely, finding the sale should be set aside. This Order required the

appellees to also deposit an additional $5,000 with the clerk as a condition of reacquiring title, in order to compensate the appellant for money lost on the earlier, 2016 tax lien purchase [App. 119]. On October 10, 2018, the circuit court ordered the deputy commissioner's deed to be set aside and directed the clerk to pay the $10,097.88 held in trust to the appellant. [App. 129]

B. Statement of the facts of the case:

Appellee William Maze first learned of the question of the deputy commissioner's tax sale of his home on February 26, 2018 [App. 84]. Six months earlier, on August 2, 2017, (at a time when he had access to over $30,000 in his 401K account, namely, well more than was necessary to resolve his tax difficulties) Mr. Maze's wife received a July 31, 2017, notice of right to redeem from the W.Va. State Auditor's Deputy Commissioner of Forfeited and Delinquent Land for Kanawha County by certified mail at their home. [App. 85] William Maze was not provided with a copy of his right to redeem at the time it was sent to him and never saw it until he learned that he had been sued for eviction, and that his eviction had been ordered, all on February 26, 2018. [App. 85] He did not sign the certified mail receipt for either item delivered to his home on August 2, 2017. [App. 85] He was given no information by his wife about the matter at all until February 26, 2018, the day before his scheduled eviction. [App. 81]

William Maze explained in his court testimony that on August 2, 2017, the date that Terry Maze signed for the certified mail items containing the notices of right to redeem, he had been called into work (from sick leave). That is, he had to leave his wife at home alone, where he had been off from work assisting her as she was recuperating from hip replacement surgery performed several days earlier. [App. 86-87] Ms. Maze

was at the time observed by him to be both physically and mentally incapacitated. [App. 86]

William Maze testified that Ms. Maze had also been responsible for the same house being lost to foreclosure by the bank several years earlier as a result of her poorly handling the couple's finances and then concealing the delinquent status of the mortgage loan from him. [App. 88-89; 97] He was fortunately able to purchase the house back from the lender by accessing funds from his 401K to pay the debt off in full. [App. 98] Unfortunately for the Mazes, the house thereafter remained taxed in the name of the lender, and, through some anomaly, etc., he was never sent notice of his tax debt. [App. 89] In turn, the Mazes' taxes went unpaid; the property was offered for sale at the sheriff's sale; and, following the lack of a sale of the property there, the tax lien on it was sold to appellant at the Kanawha County Deputy Commissioner's sale on July 20, 2017.

The appellant opted to send notice of the right to redeem to the appellees by certified mail, but did not provide notice to them by regular mail, publication, posting at the door, or personal service. The property was not redeemed and, in turn, the appellant applied for a deed. After the deed to Reddenfoxx Properties, LLC, was recorded, the appellant filed suit to obtain possession of the property. Upon the appeal of an order of eviction, Judge Charles King set aside the deputy commissioner's deed, and this appeal followed.

SUMMARY OF ARGUMENT:

A. The circuit court correctly found that the appellant failed to provide sufficient notice of the right to redeem to the appellee, William Maze. William Maze did not receive actual notice of the right to redeem. The appellant failed to direct the deputy

commissioner to send first-class mail notice of right to redeem to "Occupant" at the property address. Therefore, Mr. Maze was denied due process in the sheriff sale of his property and he was entitled to a return of that title after his repayment to the appellant of its purchase price.

B. There was no error involved in the introduction of evidence of Ms. Maze's mental disability. The testimony was rationally based to the witness' perception. The admission of the evidence did not and could not constitute material error because the circuit court did not set the deed aside on the basis of mental disability as per count one of the amended complaint (pursuant to West Virginia Code, §11A-4-6), but instead set the deed aside pursuant to West Virginia Code, §11A-4-4 on the basis of the lack of notice to Mr. Maze.

C. There was no error in the circuit court's refusal to allow a witness to testify remotely. The circuit court explained that its normal practice is to always refuse to allow witnesses to testify remotely. The testimony of the requested witness would not have been relevant or material inasmuch as the proffered testimony related to contradicting Ms. Maze's testimony about her knowledge of the unpaid taxes, yet the circuit court's holding in the case rested on Mr. Maze's lack of knowledge of the tax payment status (and Ms. Maze's involvement in concealing that information from him). Therefore, the testimony which the appellant sought to have introduced could not have affected the outcome of the trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

The appellees assert that oral argument is not necessary per the *West Virginia Rules of Appellate Procedure*, Rule 18, because the facts and legal arguments are

adequately presented in the briefs and record on appeal. The appellees assert that Rule 20 is not applicable to the circumstances presented. However, the appellees assert that, if the Court finds oral argument is proper pursuant to Rule 19, they request the opportunity to participate.

ARGUMENT:

A. The Circuit Court Correctly Found There to be Insufficient Notice of Right to Redeem Provided to Appellee, William Maze:

West Virginia Code, §11A-3-55, provides the requirements for the service of the notice of the right to redeem due the appellees. The statute (*West Virginia Code*, §11A-3-55. Service of notice.) reads as follows:

> As soon as the deputy commissioner has prepared the notice provided for in section fifty-four of this article, he shall cause it to be served upon all persons named on the list generated by the purchaser pursuant to the provisions of section fifty-two of this article. Such notice shall be mailed and, if necessary, published at least thirty days prior to the first day a deed may be issued following the deputy commissioner's sale.
>
> The notice shall be served upon all such persons residing or found in the state in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested. The notice shall be served on or before the thirtieth day following the request for such notice.
>
> If any person entitled to notice is a nonresident of this state, whose address is known to the purchaser, he shall be served at such address by certified mail, return receipt requested.
>
> If the address of any person entitled to notice, whether a resident or nonresident of this state, is unknown to the purchaser and cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication as a Class III-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such real estate is located. If service by publication is necessary, publication shall be commenced when personal service is required as set forth above, and a copy of the notice shall at the same time be sent by certified mail, return receipt requested, to the last known address of the person to be served. The return of service of such notice, and the affidavit of publication, if any, shall be in the manner provided for process generally and shall be filed and preserved by the auditor in his office, together with any return receipts for notices sent by certified mail.

> *In addition to the other notice requirements set forth in this section, if the real property subject to the tax lien was classified as Class II property at the time of the assessment, at the same time the deputy commissioner issues the required notices by certified mail, the deputy commissioner shall forward a copy of the notice sent to the delinquent taxpayer by first class mail, addressed to "Occupant", to the physical mailing address for the subject property.* The physical mailing address for the subject property shall be supplied by the purchaser of the property, pursuant to the provisions of section fifty-two of this article. Where the mail is not deliverable to an address at the physical location of the subject property, the copy of the notice shall be sent to any other mailing address that exists to which the notice would be delivered to an occupant of the subject property. [Emphasis added.]

Clearly, at the time the certified mail is sent, it is necessary that first-class mail to "Occupant" must also be sent. There is no evidence that this requirement was met.

Eric Porterfield testified that the sending of certified mail was required because the real estate was Class II property [App. 43, line 21 - 22], but that publication was not required because the appellees lived in the property and had signed the certified mail receipts. His explanation of his decision-making was as follows:

> A. I was just saying we - - sometimes when you mark boxes, you have to go back if you made an error. And I just - - when they accepted the bill for that, I told them we did not indeed need publication on those particular property or properties at that time. If the properties had not met code, then we would have continued forward and done publication, which we have had to do at times, but in the case everything was taken in the preliminary measures when your client signed for the documents at their home. So publication was not needed. If publication had been needed, which it is not the preliminary process in which you do, whenever you go through notification you go through first class mail and you're required to have certified mail if it is a class 2 property. If it is class 3 and beyond, it can be handled a little bit differently, but in either case publication is not necessary if the people are notified with the previous measures taken. And there is an intermediate measure. In fact, Your Honor, that is before publication to take place, which would be personal process serving, which obviously in this case did not need to be done because the client signed for -- for the notification and they've not paid taxes since 2012.

[Testimony of Eric Porterfield, App. 30 -31] Mr. Porterfield did not expressly address his

failure to cause the Deputy Commissioner to send notice to the appellees by first-class mail.

The West Virginia Supreme Court of Appeals recently addressed the analogous case of the failure to send notice of the right to redeem to a delinquent taxpayer relating to a sheriff sale purchase. In *Archuleta v. US Liens, LLC*, No. 17- -528, 813 S.E.2d 761 (2018), the Court applied the service of notice section relating to the sheriff sale (§11A-3-22) in setting aside a tax deed for failure of the buyer to provide notice to the "Occupant" by first class mail. The section of the Code applicable to the case before the Court (involving a deputy commissioner's sale) is *West Virginia Code*, §11A-3-55. The final paragraph of §11A-3-55 is virtually identical to subsection (d) of §11A-3-22. Each of these sections provides the additional requirement of service of the notice of right to redeem by first-class mail directed to "Occupant" as a necessary component of due process. Therefore, the manner in which the Supreme Court ruled in *Archuleta v. US Liens, LLC*, as to the notice of right to redeem for a sheriff sale would certainly be expected to extend to the same type of notice of right to redeem required to be provided to the taxpayer with respect to a delinquent land commissioner sale, as in this case.

The record in this case demonstrates that William Maze did not actually receive his notice of right to redeem by certified mail. In addition, the record demonstrates, as discussed below, that the appellant opted against requesting the Auditor and/or Deputy Commissioner to send the notice of claim directed to "Occupant" by first-class mail. This failure, per *Archuleta v. US Liens, LLC,* is sufficient to result in the sale being set aside, as follows:

> In the instant proceeding, the record is clear in showing that the requirement under W. Va. Code § 11A-3-22(d), that redemption notice be

> mailed and addressed to the "Occupant," did not occur. The circuit court found that this noncompliance with the statute was harmless because the Petitioner would not have received the notice. However, the decisions of this Court have made clear that "the right of a landowner to have the statutory procedures complied with before he is deprived of his land is fundamental[.]" *Morgan*, 177 W. Va. at 106, 350 S.E.2d at 734. *See also* Syl. pt. 1, *Cook v. Duncan* , 171 W. Va. 747, 301 S.E.2d 837 (1983) ("Persons seeking to obtain complete title to property sold for taxes must comply literally with the statutory requirements."). To follow the logic of the circuit court would require rewriting the statute and omitting the "Occupant" notice requirement. This requirement is no less important than any of the other notice requirements set out under W. Va. Code § 11A-3-22. It is not the role of the courts to cherry pick which notice is important and which notice may be tossed to the curb. The role of courts is to apply the law fully, not to partially ignore it. It is for this reason that W. Va. Code § 11A-3-19(a)(5) clearly instructs courts that "*[i]f the purchaser fails to meet these requirements, he or she shall lose all the benefits of his or her purchase*." Nothing could be any clearer. The circuit court was simply wrong in discounting the omission of the "Occupant" notice requirement. *See Koontz v. Ball* , 96 W. Va. 117, 121-22, 122 S.E. 461, 463 (1924) ("Those statutes which require notice to the owner ... 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, and, unless their provisions are literally complied with, the sale will be void."). [Emphasis added.]

Archuleta, at page 767.

In this case, Reddenfoxx Properties, LLC, did request the deputy commissioner to send the notice by certified mail to the "Occupant" of the home at 2925 Macon Street, South Charleston [App. 161-162]. However, the *Code* and, by implication, the decision in *Archuleta v. US Liens, LLC,* require that the notice be sent to the occupant also by first-class mail. This implication is significant. The service on "Occupant" is mandatory. Yet, the record contains no information as to any delivery of the certified mailing to "Occupant," and the record demonstrates that the appellant affirmatively elected against directing the deputy commissioner to cause the delivery of the notice to "Occupant" by

first-class mail. Therefore, the statute, as to the notice to "Occupant," was not complied with in two respects.

Moreover, the overall circumstances demonstrate that the appellant did not otherwise exercise *reasonably diligent efforts* to provide notice of its intention to acquire title to the appellee, Mr. Maze. The testimony of Eric Porterfield before the circuit court demonstrated that it was never appellant's intention to generally exercise *reasonably diligent efforts* to give notice, but instead it was Mr. Porterfield's specific intention to do only those narrow acts which appeared to him might satisfy the State Auditor (or his designee, Deputy Commissioner of Forfeited and Delinquent Lands Russell Rollyson) that appellant was entitled to a deed. The appellant took the risk that those limited actions might not satisfy due process.

A delinquent taxpayer who has lost his or her real estate to a tax sale purchaser is entitled, pursuant to *West Virginia Code*, §11A-4-4, to bring suit to set aside the sale if the tax sale purchaser failed to exercise reasonably diligent efforts to provide notice to the taxpayer of the purchaser's intent to acquire the title to the property. *West Virginia Code*, §11A-4-4, reads as follows:

> §11A-4-4. Right to set aside deed when one entitled to notice not notified.
> (a) If any person entitled to be notified under the provisions of section twenty-two or fifty-five, article three of this chapter is not served with the notice as therein required, and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed. No deed shall be set aside under the provisions of this section until payment has been made or tendered to the purchaser, or his heirs or assigns, of the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum.

> (b) No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.
> (c) Upon a preliminary finding by the court that the deed will be set aside pursuant to this section, such amounts shall be paid within one month of the entry thereof. Upon the failure to pay the same within said period of time, the court shall upon the request of the purchaser, enter judgment dismissing the action with prejudice.

The question presented to the circuit court for its consideration was whether or not the appellant exercised reasonably diligent efforts to provide notice to Mr. Maze. The circuit court heard the evidence, particularly the testimony of Eric Porterfield, and determined that, based upon all the circumstances presented, the appellant had not.

Mr. Porterfield's testimony demonstrates that he took the opportunity he perceived to be presented by the fact that Ms. Maze had signed for William Maze's certified mail to take no further action with respect to attempting to provide *actual* notice to Mr. Maze, as follows:

> Q. That -- that after the certified mail receipts were returned with one -- only one person signing both certified mail receipts, for the other person it was as though that [other] person had never been given notice?
> A. That's -- here's the thing, they have been given notice. If you're over the age of 16 years old in the state of West Virginia and someone signs at your residence or where ever you're being served, it is viable notification. That is not my doing. That is -- that is the laws of the state. That property -- the only reason we know anything about the who's and how's who've signed it is because you are here. If -- if Joe Blow was living there as a rental and he signed notification of that and there was notification somewhere else and the person signed for it, it's viable notification. *In this case it is a class 2 property.* We didn't look for the -- for who the signatures were. We look to see if the notices were delivered, if they were signed for, if they were signed for, the state auditor is then who gives us the pass and the green light that we can apply for a deed. It doesn't have anything to do with Eric Porterfield or Reddenfoxx Property. That is the law. They determine whenever we can do that. I didn't determine any of that. Look for that. All we did was track our -- track all of our sales and see where they were at in the process. And then once we

were able to apply for a deed, we applied for a deed and followed the code and statutes of the State of West Virginia. [Emphasis added.]

[Testimony of Eric Porterfield. App. 43-44.]

In *Kelber v. WVT, LLC*, 213 F. Supp.3rd 789 (N.D.W.Va. 2016), the notices of right to redeem were sent to the owner of the property by certified mail and the items came back marked as: not known; not deliverable; unable to forward; and/or unclaimed. In the case before this Court, the items were not returned, but were signed for by a party other than William Maze. As it relates to Mr. Maze, the circumstances are analogous to the situation in which the item is returned without a signature, since he did not sign for the item.

The *Kelber* Court explained as follows:

> To be clear, actual notice is not required before the government may deprive a person of their property. See *Jones v. Flowers*, 547 U.S. 220, 226, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). Rather, the government must provide "notice reasonably calculated, *under all the circumstances* [Emphasis added.], to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. (quoting *Mullane v. Central Hanover Bank & Trust Co.* , 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). The Supreme Court of Appeals of West Virginia has further defined these requirements as follows:
>
> > There are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice.
>
> *Mason v. Smith*, 233 W.Va. 673, 760 S.E.2d 487, 488 (2014) (quoting Syl. pt. 1, *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d 122 (1988)).
>
> *The notifying party must utilize methods or means that anyone honestly seeking to actually effectuate the notice would reasonably employ.* [Emphasis added.] See *Jones*, 547 U.S. at 229, 126 S.Ct. 1708 (quoting *Mullane*, 339 U.S. at 315, 70 S.Ct. 652 ("[W]hen notice is a person's due ... [t]he means employed must be such as one desirous of

actually informing the absentee might reasonably adopt to accomplish it.")).

Kelber at page 794.

The circuit court in this matter had the opportunity to listen to Mr. Porterfield's answers in response to questioning as to whether he took any further action (after the certified mail came back showing that one party --Ms. Maze-- had signed for both items of certified mail) to attempt to place William Maze on notice of Mr. Porterfield's intent to obtain a tax deed for the property. Mr. Porterfield was adamant that he had no obligation to take any further action due to the fact that the certified mail had been signed for by someone and had not been returned. Under all the circumstances presented in this case, the circuit court did not agree and determined that additional action was required.

Mr. Maze submits that the question is not simply whether or not the certified mail was returned or accepted, but whether "under all the circumstances" (as per the analysis in *Kelber* and *Mullane*), the appellant should have actually examined the results of the attempt to serve by certified mail. The question is not just whether or not the item was *signed for* but the proper question is whether or not the certified mail attempt at notice to Mr. Maze was *successful*. In this case, clearly, the attempt at notice by certified mail to William Maze was not successful. Mr. Porterfield has testified that he did not care about who signed for the item, all he was interested in was whether or not the certified mail was accepted by *someone*. [App. 42]

The circuit court had ample evidence upon which to find that additional action was required under the circumstances presented. Mr. Porterfield's testimony demonstrates disconnection with what is required of a person charged with exercising reasonably diligent efforts to place the delinquent taxpayer on notice of his right to redeem. During

his cross-examination, Mr. Porterfield was provided with every opportunity by appellee's counsel to either affirm or deny that he believed that he had exercised reasonably diligent efforts to put Mr. Maze on notice, but Mr. Porterfield was instead evasive and argumentative, as follows:

> Q. Now -- now, when -- when you were starting off on this process, were you trying to make sure that William Maze got actual notice?
>
> A. My job in this case was to follow the state laws of West Virginia which was to notify all parties involved. That was my goal because that's the law. I want to do what the law states. *If the law told me to give him actual notice in person, I would do that.* The law has set a statute and code that we follow. That was our clear objective to be within the balance of the law in order to obtain a deed. [Emphasis added.]
>
> Q. I think you're an -- let me repeat that. Was it your intent -- let me just -- let me ask you a different question. It was your intent to meet the minimum standard that the State of West Virginia required of you?
>
> A. I don't know that there is a minimum standard or a maximum standard. I just know there is a standard and procedure to follow in order to obtain tax sale property and we follow what the law tells us. As a matter of fact Mr. Rollyson oftentimes discourages us to go on the properties until the deed is recorded because the property does not belong to us until the deed is recorded. So with those parameters put in place and potentially being a trespasser we have to follow the law. Whatever the law has said.
>
> MR. PORTERFIELD: It's not the minimum standard of the law. Your Honor, it's just the standard that I did not set, but we're in total compliance with.
>
> BY MR. KARR:
>
> Q. So it was your intent to send certified mail to attempt notice?
>
> A. It was not my -- it was not my intent. It is the reality that we did that.
>
> Q. Well, I -- you're -- let me ask you what was your intent with respect to giving notice to William Maze?
>
> A. My intent was to follow the laws of the State of West Virginia, to go through every type of notification that was needed, to give everybody *ample notification* or entities *ample notification* to redeem their property. These people did not redeem their property. [Emphasis added.]

[App. 36] Mr. Porterfield contumaciously refused, when repeatedly given the express opportunity, to say he that he had genuinely attempted to place Mr. Maze on actual notice

of the right to redeem.

Mr. Porterfield, instead of asserting that he had genuinely attempted to put Mr. Maze on notice, did make the conclusory assertion that he had followed the law to provide every entitled entity with "ample notification" of the right to redeem. The record, however, demonstrates something quite to the contrary. Namely, the record contains the relevant State Auditor's Office Notice to Redeem Form completed by Eric Porterfield on or about July 31, 2017. [App. 162] This document was introduced into the record as a part of the attachments to the deputy commissioner's deed to the Appellant, which was recorded in the Office of the Kanawha County Clerk in Deed Book 2988, at page 439 [Trial exhibit D, App. 131]. A review of the form in this case [App. 194] clearly shows that the appellant opted to provide notification to William Maze, Terry Maze and "Occupant," by "Certified Mail *Only*." [Emphasis added.]

On the Notice to Redeem form, the appellant designated to the Auditor the type and manner of service which the appellant requested the Auditor to use to place the delinquent taxpayers (appellees) on notice of the sale of the tax lien. The Notice to Redeem form provides the deputy commissioner sale purchaser with several options from which to select for the Auditor to employ to provide the notice to the delinquent taxpayer. *West Virginia Code*, §11A-3-22. The form allows the lien purchaser to select one or more of the following:

a. Certified mail only;
b. Certified & Regular Mail;
c. Publication;
d. Personal Service; and/or
e. Secretary of State.

A review of the form in this case [App. 194] clearly shows that the appellant opted to

provide notification to William Maze, Terry Maze and "Occupant" by "Certified Mail Only." This fact seems to be at a marked variance with the testimony of Mr. Porterfield that he had requested the Auditor "to go through every type of notification that was needed" [App. 36] to give everyone *ample opportunity* to redeem.

Moreover, the Notice to Redeem form in this case actually contains handwritten notations indicating that the appellant had made the affirmative decision not to attempt notification by publication (and/or by personal service). That is, the form contains an "X" on the box requesting "Publication" but also contains an asterisk, by which appellant explained as follows:

> *Reddenfox Properties has incorrectly marked publication box and doesn't want this published.
> Eric Porterfield 7/31/17

[App. 194] Therefore, notwithstanding the appellant's testimony that he had provided "ample notification," the appellant had clearly sought to provide only a minimal level of notification -- which was apparently his estimation of what would meet the threshhold for convincing the Auditor to provide him a deed -- while at the same time limiting the chances that the delinquent taxpayers would receive actual notice of the sale of the property and of their right to redeem.

In light of Mr. Porterfield's own testimony, the circuit court found and concluded (in paragraphs 35 to 37 of its Order) as follows:

> 35. The plaintiff failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the defendant, William Maze, in light of the existence of signatures on the return receipt cards for certified mail indicating that the two documents were signed by one individual.
> 36. Reasonably diligent efforts to provide notice to the Defendants would require the Plaintiff to investigate the circumstances of the signing of the certified mail, particularly in light of the Plaintiff's original election

to decline to publish the notice in a newspaper, to decline to affix the notice on the front door of the residence; and/or to decline to cause the notice to be personally served on each party.

37. Under all the circumstances presented, reasonably diligent efforts would have resulted in William Maze being placed upon actual notice of the delinquency, the sale and the request for a deed.

September 20, 2018, Order (App. 125]

B. The Testimony of William Maze Relating to Terry Maze's Mental Disability was not Improper and is not the Source of Error:

The issue of Terry Maze's mental disability existing at the time that she signed for the certified mail item is not material to the count of the amended complaint on which the circuit court granted William Maze's relief (count two). The amended complaint alleged in count one that Ms. Maze was a mentally incapacitated individual at the time she received the notice of right to redeem for her (and that for her husband) and therefore was entitled to redeem the property from the sale within one year of the removal of the disability as per *West Virginia Code*, §11A-4-6. The provisions of this *Code* section allow the delinquent taxpayer (one under a mental disability) to redeem that person's own particular interest by paying the taxes and several other charges, including interest to the purchaser on the purchase price at the statutory rate.

West Virginia Code, §11A-4-6, reads, in pertinent part, as follows:

§11A-4-6. Redemption by persons under disability from purchase by individual.

In addition to and notwithstanding any other provisions of this article, any infant or mentally incapacitated person whose real estate was, during such disability, conveyed by tax deed pursuant to this chapter to an individual purchaser, may redeem such real estate by paying to the purchaser, or his heirs or assigns, before the expiration of one year after removal of the disability, but in no event more than twenty years after the deed was obtained, the amount of the purchase money, together with the necessary charges incurred in obtaining the deed, and any taxes paid on the property since the sale, with interest on such items at the rate of twelve percent per annum from the date each was paid. [...]

However, the circuit court did not address in its final order the appellees' claim for relief under §11A-4-6, but instead resolved the matter pursuant *West Virginia Code*, 11A-4-4, on the basis of the proof of the lack of reasonably diligent efforts to provide actual notice of the right to redeem to William Maze. Therefore, the evidentiary error alleged by the appellant (the testimony about Ms. Maze's disability) is not even material to the circuit court's decision. Moreover, Mr. Maze's testimony about her mental incapacity in the days following her surgery is non-expert opinion rationally based upon his perception which is admissible pursuant to the West Virginia Rules of Evidence, Rule 701.

C. The Circuit Court's Refusal to Allow a Fact Witness to Testify Remotely Was Proper:

The Appellant claims that the circuit court erred by refusing appellant's request to allow a witness, Jay Folse, to testify remotely. Mr. Folse was explained to be a competitor of Mr. Porterfield in the business of tax sale purchases, who was reported to have had a conversation with Ms. Maze in the Spring of 2017 as he was surveying the Maze's property for his own possible purchase of it from the sheriff's or deputy commissioner's sale. [App. 69] Mr. Porterfield explained to the Court that the testimony would be: that Jay Folse attends delinquent tax property sales; that Mr. Porterfield and Mr. Folse had discussed the piece of property, because Mr. Folse had spoken with Ms. Maze who had told him that she had knowledge that her property had tax problems; and that Mr. Porterfield wanted to introduce that evidence to rebut the testimony of Ms. Maze that she did not remember receiving the notice of sale [App. 102 - 103].

That representation by Mr. Porterfield was:

> Because that property was occupied he did not purchase it, but did speak with Ms. Maze. And she clearly understood that her property was in tax

trouble.

[App. 103] Mr. Porterfield further explained:

> I -- I think that if Mr. Falls [Mr. Folse] can be reached by phone or can be spoken to. I think that it -- or testify on another day. I mean, we -- his testimony will rebutt exactly what Mr. Karr has said that -- is her mental capacity, you know, as traumatized as she's trying to make it out to be. Especially -- and the fact that she did know they were in tax trouble.

[App. 105] That is, the appellant maintains that he required the testimony of Jay Folse to prove that Ms. Maze did have knowledge that her house had tax problems and that her mental difficulties were not as serious as she had asserted in her trial testimony. [App. 105]

The appellant's argument in the appeal, however, seems not to recognize that the exact reason Ms. Maze concealed the fact of the tax sale from Mr. Maze (whether because she did not recall it or because she chose to ignore it or to conceal it) was not material or even relevant to the circuit court's decision. The mere fact that she did not report the information to Mr. Maze is what was material to the ultimate decision. The appellees' position on the relevance of the proposed testimony was explained to the circuit court as follows:

> [By Karr] I don't -- I would urge that that's not required [testimony from Jay Folse]. I don't think rebuttal [by Mr. Folse] would be pertinent because our theory of the case, as the evidence has been presented, is that in fact Ms. Maze actively concealed various things from my client. The other -- the rest of the testimony is --
> THE COURT: Your client is who?
> MR. KARR: My -- both -- they're both my clients. But the case is that Ms. Maze due to her mental incapacity, et cetera, these circumstances that she's got, has caused her to conceal from my -- Mr. Maze the existence of the deed of trust foreclosure and the existence of the sheriff -- or delinquent tax foreclosure, the deputy tax foreclosure. The issue of her, in fact, not remembering -- which there was already some other testimony on that -- her memory is poor. I don't see that it -- I don't see it really accomplishes much by bringing him in here and saying that she had the

conversation with him. [App. 104 - 105]

The point which was successfully made to the circuit court at the time is that it did not make any difference whether Ms. Maze originally concealed the sale of the property from Mr. Maze as a result of her failure to recall having signed for the certified mail or whether she concealed the information from her husband as a result of an intention to deceive him. Mr. Maze has made clear in his testimony that he was never provided any notice of it from her until February 26, 2018. However, the circuit court made it clear that the overriding consideration for the ruling denying the remote testimony was that the court did not routinely make a practice of approving any requests to allow witnesses to testify by phone. [App. 102; 103; 106]

It is clear that the circuit court committed no error on the point. The appellant asserts in his brief that the intent of the proffer of the witness was simply to attack the credibility of Ms. Maze, namely, to "refute testimony from appellee Terry Maze as to specific factual assertions she had made in her trial testimony the day before." [Appellants' brief page 7] The appellant's brief, however, fails to explain how such manner of impeachment would be either proper or effective. Certainly, it is not clear how the proffered witnesses' conversation with Ms. Maze on a date between the 2016 tax sale and the 2017 tax sale [App. 102] could be relevant to this proceeding.

CONCLUSION:

The appellees assert that there is no error in the Kanawha County Circuit Court's decision in this case. The action of the circuit court in setting aside the deed and directing the payment by appellees of accumulated taxes and interest to the appellant should be affirmed.

WHEREFORE, the respondents request that the petition for appeal be denied; that the judgment of the circuit be affirmed; and that this Court grant all other relief proper under the circumstances.

Respectfully submitted,

Appellees, Terry Maze and William Maze

By counsel:

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CERTIFICATE OF SERVICE:

The undersigned counsel has caused a copy of Appellees' Brief to be served upon counsel for the appellant at his address of record in this matter, namely, Derrick W. Leffler, Esq., P.O. Box 1250, Princeton, WV 24740, by U.S. Mail on June 3, 2019.

David R. Karr, Jr., #4547