IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CASE NO.: 22-ICA-243

JAY FOLSE,

Petitioner Below/Petitioner,

v.

G. RUSSELL ROLLYSON, JR., and
JOHN MCCUSKEY, JR.,

Respondents Below/Respondents.

RESPONSE TO PETITIONER'S BRIEF

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II. NATURE OF THE CASE

A. Factual Background

On July 5, 2022, the Petitioner, Jay Folse, filed an unverified "Petition to Compel Issuance of a Tax Deed", pursuant to W.Va. Code §11A-3-60 to compel G. Russell Rollyson, Jr., the Deputy Commissioner of Non-Entered Lands, and the Honorable John B. McCuskey, in his official capacity as the West Virginia State Auditor and as Commissioner of Delinquent and Non-entered Lands, Ex-Officio, to compel the issuance of a certain tax deed. (APP 00002-00004).[1]

The sale at issue in the Petition was a tract sold at an annual auction held by the Deputy Commissioner of Non-Entered Lands.[2] (APP 00007-00040).

Pursuant to W.Va. Code §11A-3-60:

> If the deputy commissioner fails or refuses to prepare and serve the notice to redeem as required in sections fifty-four and fifty-five of this article, the person requesting the notice may, at any time within two weeks after discovery of such failure or refusal, but in no event later than sixty days following the date the person requested that notice be prepared and served, apply by petition to the circuit court of the county for an order compelling the deputy commissioner to prepare and serve the notice or appointing a commissioner to do so. If the person requesting the notice fails to make such application within the time allowed, he shall lose his right to the notice, but his rights against the deputy commissioner under the provisions of section sixty-seven of this article shall not be affected. Notice given pursuant to an order of the court or judge shall be valid for all purposes as if given within the time required by section fifty-five of this article.
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> If the deputy commissioner fails or refuses to prepare and execute the deed as required in the preceding section, the person requesting the deed may, at any time after such failure or refusal, but not more than six months after his right to the deed accrued, apply by petition to the circuit court of the county for an order compelling the deputy commissioner to prepare and execute the deed or appointing a commissioner to do so. If the person requesting the deed fails to

[1] Recognizing the Court's preference for reference to the Appendix Record to be formatted as "(AR xxxxx)," for the sake of consistency within this appeal, this Brief will follow the format established by the Petitioner in his preparation of the Appendix Record and the references in its Brief. Reference herein to "(APP 00001-00010)" and similar references throughout the Respondent's Brief shall refer to the page designations contained in the Appendix Record by the Petitioner.

[2] W.Va. Code §11A-3-45.

make such application within the time allowed, he shall lose his right to the deed, but his rights against deputy commissioner under the provisions of section sixty-seven of this article shall remain unaffected. Any deed executed pursuant to an order of the court shall have the same force and effect as if executed and delivered by the deputy commissioner within the time specified in the preceding section.

Ten days' written notice of every such application must be given to the deputy commissioner. If, upon the hearing of such application, the court is of the opinion that the applicant is not entitled to the notice or deed requested, the petition shall be dismissed at his costs; but, if the court is of the opinion that he is entitled to such notice or deed, then, upon his deposit with the clerk of the circuit court of a sum sufficient to cover the costs of preparing and serving the notice, unless such a deposit has already been made with the deputy commissioner, an order shall be made by the court directing the deputy commissioner to prepare and serve the notice or execute the deed, or appointing a commissioner for the purpose, as the court or judge shall determine. The order shall be filed with the clerk of the circuit court and entered in the civil order book. If it appears to the court that the failure or refusal of the deputy commissioner was without reasonable cause, judgment shall be given against him for the costs of the proceedings, otherwise the costs shall be paid by the applicant.

Any commissioner appointed under the provisions of this section shall be subject to the same liabilities as the deputy commissioner. For the preparation of the notice to redeem, he shall be entitled to the same fee as is provided for the deputy commissioner. For the preparation and execution of the deed, he shall also be entitled to a fee of $50 and recording expenses to be paid by the grantee upon delivery of the deed.

The Respondents argued to the Circuit Court that there is no evidence that the Auditor's Office refused to perform any statutory duty required by it.

There is one lien at issue in the "Petition to Compel Issuance of a Tax Deed." (APP 00002-00004). On October 29, 2021, the Petitioner purchased a tax lien identified as Certification Number 252922, described as LOT 37 Crawford ADD, CAMERON CORP district. (APP 00009). The sale was approved on November 1, 2021, by the Auditor of the State of West Virginia. (APP 00014). Thereafter, the Petitioner prepared a list of those to be served with notice of his/her right to redeem. (APP 00028). On April 6, 2022, Mr. Rollyson notified the Petitioner that notice was served in accordance with the West Virginia Code and that the property has not

been redeemed within the specified time. (APP 00021-22). An invoice was submitted to the Petitioner for the total deed fee less the deposit amount. (APP 00021-22).

Prior to the tax deed being executed and recorded, on May 17, 2022, Mr. Rollyson received a facsimile from the City of Cameron that Stanley Lahew, the property owner, signed a quit claim deed granting his ownership interest in the property to the City of Cameron. (APP 00025-27). On May 24, 2022, Mr. Rollyson sent the Petitioner a letter informing him that the purchase was being set aside due to the "Quitclaim Deed to the City of Cameron", and that the Sheriff of Marshall County has been directed to refund the $50.00 purchase price to the Petitioner. (APP 00023-24).

Thereafter, the Petitioner communicated to the City of Cameron and the Auditor's Office to dispute the acquisition of the property. (APP 00054). The attorney for the City of Cameron forwarded the agenda and minutes for the May 16, 2022, Cameron City Council meeting, and advised that the City of Cameron "strongly disagrees with your characterization of the facts, which seem to be based on nothing more than unsubstantiated speculation." (APP 00053). As the Circuit Court noted in its Order granting the Respondents' Motion to Dismiss, the real dispute regarding title to the property, if any, is between the Petitioner and the City of Cameron. (APP 00060). Notably, the Petitioner chose to file suit against the Respondents and not the City of Cameron.

The Circuit Court, based on a review of the "Petition to Compel Issuance of a Tax Deed", the Respondents' Motion to Dismiss, the Petitioner's Response to the Motion to Dismiss, the Respondents' Reply brief, and the factual record, found, pursuant to W.Va. Code §11A-3-60, that the Petitioner was not entitled to the requested deed. (APP 00055-61). There is no factual or legal basis to overturn that Order.

III. SUMMARY OF RESPONSE TO ASSIGNMENT OF ERROR

One assignment of error is identified in the Petitioner's Appeal Brief.

The Petitioner contends that the Circuit Court erred in "granting Respondents' Motion to Dismiss with prejudice." The Petitioner is wrong.

When the City of Cameron acquired the property on May 17, 2022, the City of Cameron's lesser right as the holder of the tax lien that attached due to the private owner's failure to pay taxes, was merged with its greater right as the owner of the property and, as such, the lien was extinguished.[3] The West Virginia Supreme Court of Appeals has long recognized and applied the doctrine of merger as a valid legal principle. The Petitioner has failed to cite any case in which a court has held that the merger doctrine applies when a state acquires property but does not apply when one of the state's subdivisions acquires property. Counties and cities are looked upon as part of the state rather than as inferior governmental bodies.

The Circuit Court's application of the law is correct. The Auditor's Office has not refused to perform any required statutory duty. When the State Auditor was notified, by the City of Cameron, that ownership of the property was deeded to the City, the tax sale was set aside and the Sheriff of Marshall County was directed to refund the $50.00 purchase money to the Petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents state that oral argument under W. Va. Rev. R.A.P. 18(a) is not necessary. The issues on appeal are adequately briefed and the case law related to the issues on appeal is well settled.

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[3] El Dorev Holdings, Inc. v. W.Va. Dept. of Admin., 760 S.E.2d 875 (W. Va. 2014).

V. ARGUMENT

A. Standard of Review.

This Court reviews an order granting a motion to dismiss under a *de novo* standard.[4]

B. The Circuit Court did not err in dismissing Petitioner's "Petition to Compel Issuance of Deeds".

The doctrine of merger has been recognized by the Supreme Court of Appeals and its application here is supported by both the factual circumstances and public policy.

Pursuant to the doctrine of merger, when the State purchases title to property on which it holds a lien, the State's lesser right as a lienholder merges in its greater right as landowner.[5]

The doctrine of merger, in the context of a purported sale of State property for taxes, is discussed at greater length in State v. Locke, a case that is cited and relied upon as supporting authority in the Armstrong decision.[6]

> 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. Another consideration, which should not be overlooked, is that if public property, that is to say, property owned by the state, is to be burdened with a tax lien, the public might lose it entirely through oversight or carelessness of its agents in failing to pay the taxes when due, and allowing the same to be sold and the title pass to third parties.
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> . . .
>
> [W]hen property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired that from the moment of its acquisition the power to enforce the lien is arrested or abated. The claim of the state for such taxes becomes merged in its ownership of the fee. To consider it further burdened with such lien, and to permit it to be subsequently sold for the payment thereof, results in the state selling its own property to pay itself. The claim of the state for unpaid taxes initiates the

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[4] Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995).
[5] Armstrong Products Corp. v. Martin, 119 W.Va. 50, 51-52, 192 S.E. 125, 127 (1937).
[6] State v. Locke, 219 P. 790 (N.M. 1923).

> proceedings which subsequently, by complying with the required procedure, ripens into ownership by the purchaser of the tax title. Such a claim for unpaid taxes is therefore indispensable to acquiring such a title. In this instance, there was no claim for any taxes after the state acquired the property, so that the defendant purchased without the existence of such a claim.[7]
>
> The property in question was freed and absolved from further liability for the taxes previously assessed against it, the moment it was acquired by the state. Prior to that time, the state merely held a lien against such property to secure the unpaid taxes so previously assessed, and this lien was merged into the ownership of the title in fee. That a lien, whether it be created by mortgage or otherwise, is merged into the title of the holder thereof the moment he acquires the fee to the property covered by such lien, is a proposition of law too well settled to merit the citation of authority.[8]

The Petitioner has failed to cite any case in which a court has held that the merger doctrine applies when a state acquires property but does not apply when one of the state's subdivisions acquires property. Counties and cities are looked upon as part of the state rather than as inferior governmental bodies.

Courts in other states adopting the rule that tax liens are extinguished apply it not only when property is acquired by the state, but also when it is acquired by political subdivisions of the state. The Supreme Court of California has held that a city's condemnation of land upon which the state held tax liens acted to merge the tax liens with the title to the property and extinguish them.[9] Similarly, the Texas courts have held that when property is acquired by a city or a county, all preexisting tax liens merge with the title.[10] The Washington Supreme Court has noted its acceptance of the rule that when property is acquired by the state, county or city existing tax liens are discharged or merged in the title acquired by the public body.[11] The Appellate Court of Illinois indicated that it was siding with the majority of jurisdictions holding

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[7] Locke, 219 P. at 792.
[8] Locke, 219 P. at 794.
[9] Smith v. City of Santa Monica, 162 Cal. 221, 121 P. 920 (1912).
[10] Childress County v. State, 127 Tex. 343, 92 S.W.2d 1011, 1016 (1936); City of Marlin v. State, 205 S.W.2d 809, 811-812 (Tex.App.1947).
[11] Halvorsen v. Pacific County, 22 Wash.2d 532, 156 P.2d 907, 908 (1945).

that "when a municipal corporation acquires property after a lien for unpaid taxes has accrued, the preexisting lien is extinguished and unenforceable, and any subsequent tax sale is rendered void."[12]

The West Virginia Supreme Court of Appeals in El Dorev Holdings, Inc. v. W.Va. Dept. of Admin. quoted State v. Locke (as cited above) where it held that when property is acquired by the State in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired that from the moment of its acquisition the power to enforce the lien is arrested or abated... the claim of the State for such taxes become merged in its ownership of the fee... to consider it further burdened with such lien, and to permit it to be subsequently sold for payment thereof, results in the State selling its own property to pay itself.[13]

The same public policy reasons articulated in Locke are equally valid when a political subdivision of the state acquires property. As noted in Locke, the tax exemption for property owned by the state, counties, and municipalities arises from public policy that repudiates as an act of futility the theory of the state taxing its own property in order to produce the funds with which to operate its own affairs. Obviously, in this context, counties and cities are looked upon as part of the state rather than as inferior governmental bodies, as they may be considered in other contexts.

The Petitioner attempts to distinguish El Dorev Holdings, Inc. and Armstrong, and in doing so simply fails to appreciate that the facts of those cases are irrelevant. When the City of Cameron acquired the title to the parcel of property, however that acquisition may occur is irrelevant. "It is a general principle of law that where a greater estate and a less coincide and

[12] In re County Collector, 79 Ill.App.3d 151, 34 Ill.Dec. 717, 718-719, 398 N.E.2d 392, 393-394 (1979).
[13] El Dorev Holdings, Inc. v. W.Va. Dept. of Admin., 760 S.E.2d 875 (W. Va. 2014).

meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase is said to be merged; that is, sunk or drowned, in the greater."[14]

The Petitioner's attorney's arguments that for "whatever reason(s), Respondents chose not to issue the tax deed to Petitioner for nearly two (2) months after the redemption deadline had passed" thereby constituting a "refusal to perform a statutorily required duty" are unsupported by the factual record and the Petitioner fails to include citations related to when these issues were presented to the Circuit Court.[15]

As it relates to the Petitioner's arguments related to W.Va. Code §11-3-9(a)(3), there is no direct evidence that was presented to the Circuit Court by the Petitioner that the State Auditor "determined that the property is exempt from taxation and is used for a public purpose." As noted by the Circuit Court, any dispute regarding the "use" of the property is between the Petitioner and the City of Cameron. (APP 00051). It is notable that the Petitioner chose not to sue the City of Cameron when raising these issues on appeal. One can only assume the Petitioner's receipt of the agenda and minutes from the May 16, 2022, Cameron City Council meeting led to that decision. (APP 00053).

W.Va. Code §11A-3-60 provides that if the court is of the opinion that the applicant is not entitled to such notice or deed, then the petition shall be dismissed. That is what happened related to the certificate at issue. W.Va. Code §11A-3-60 further provides that if the court is of the opinion that the applicant is entitled to such notice or deed, upon the applicant's deposit with the clerk of the circuit court of a sum sufficient to cover the costs of preparing and serving the notice, unless such a deposit has already been made with the deputy commissioner, an order shall be made by the court directing the deputy commissioner to prepare and serve the notice or

[14] Black's Law Dictionary 989 (6th ed. 1990).
[15] W. Va. Rev. R.A.P. 10(c)(7).

execute the deed, or appointing a commissioner for the purpose, as the court or judge shall determine. This is the only remedy set forth in the statute and had the Circuit Court determined that the applicant was entitled to the notice or to the deed, and the Circuit Court ordered the deputy commissioner to prepare and serve the notice or execute the deed, the act(s) would have been done. However, as shown above, the Circuit Court did not err in its findings.

The Petitioner then raises issues regarding damages and attorney's fees and costs.

As it relates to the Petitioner's claim for "damages" the only monetary remedy contemplated in an action filed pursuant to W.Va. Code §11A-3-60 is where it appears to the court that the failure or refusal of the deputy commissioner was without reasonable cause to issue a notice or deed, judgment shall be given against him for the costs of the proceedings. Otherwise, the costs shall be paid by the applicant.

The statute expressly provides the cause of action for an alleged failure to issue a notice or issue a deed. Nowhere in this expressly created statute does it authorize a tax lien purchaser to recover monetary damages from anyone. None of the case law cited by the Petitioner deals with a W.Va. Code §11A-3-60 application. All that is required under the statute is that the court decide whether the applicant is entitled to the notice or deed requested.

Because the Legislature defined the remedies available and remained silent regarding recovery of monetary damages, there can be little doubt that the Legislature did not intend to allow for monetary damages for violations of this statute. A statutory provision which is clear and unambiguous and plainly expresses the Legislative intent will not be interpreted by the courts but will be given full force and effect.[16] The statutes of this Article clearly provide that no cause of action against the State Auditor may be maintained for the purpose of claiming or recovering economic damages.

[16] See Syl. Pt. 2, State v. Epperly, 65 S.E.2d 488 (W.Va. 1951).

The Petitioner's argument that this Court should, if it rules in his favor that the matter should be remanded for further proceedings to allow him to proceed with claims against Respondents for damages is unwarranted. A motion to dismiss is not a pleading, and numerous affirmative defenses are available to the Respondents once a responsive pleading is filed, including, but not limited to, the Petitioner's failure to provide the required statutory pre-suit notice for many of his claims.

Again, the only monetary remedy contemplated in an action filed pursuant to W.Va. Code §11A-3-60 is where it appears to the court that the failure or refusal of the deputy commissioner was without reasonable cause to issue a notice or deed, judgment shall be given against him for the costs of the proceedings. Otherwise, the costs shall be paid by the applicant. The Circuit Court correctly found that the Petitioner was not entitled to the requested deed.

Attorney's fees are not "costs."[17] This lawsuit is not an original proceeding in mandamus. Rollyson v. Jordan shows that the Circuit Court is afforded considerable discretion in granting or denying costs to the applicant for relief.[18] Nowhere in that decision, which deals with language substantially similar to the language contained in W.Va. Code §11A-3-60 is an award of attorney's fees included in the term "costs." The Petitioner's arguments are without merit, and the statute is clear on this issue.

CONCLUSION

For the foregoing reasons, because the Petitioner has presented no admissible evidence sufficient to challenge the Circuit Court's rulings granting the Respondents' Motion to Dismiss, the Respondents, G. Russell Rollyson, Jr., the Deputy Commissioner of Non-Entered Lands, and the Honorable John B. McCuskey, in his official capacity as the West Virginia State Auditor,

[17] State ex rel. Citizens Nat'l Bank v. Graham, 68 W. Va. 1, 69 S.E. 301 (1910).
[18] Rollyson v. Jordan, 518 SE 2d 372 (W.Va. 1999).

respectfully ask that the Court affirm the entry of the Order granting the Respondent's Motion to Dismiss and allow the judgment in favor of the Respondents to stand.

Respectfully submitted this 29th day of March, 2023.

/s/ David P. Cook, Jr.
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CERTIFICATE OF SERVICE

I, David P. Cook, Jr., counsel for Respondents, G. Russell Rollyson, Jr., the Deputy Commissioner of Non-Entered Lands, and the Honorable John B. McCuskey, in his official capacity as the West Virginia State Auditor, do hereby certify that on March 29, 2023, I served a true and correct copy of the foregoing **RESPONSE TO PETITIONER'S BRIEF** upon all counsel/parties of record, via the Court's electronic filing system, and addressed as follows:

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