CV-24-645

IN THE SUPREME COURT OF ARKANSAS

TOMMY LAND,
Commissioner of State Lands **APPELLANT**

v.

BAS, LLC **APPELLEE**

ON APPEAL FROM THE
CIRCUIT COURT OF GREENE COUNTY, ARKANSAS
THE HONORABLE RICHARD LUSBY, CIRCUIT JUDGE
GREENE COUNTY CIRCUIT COURT CASE NO. 28CV-22-388

BRIEF OF APPELLEE BAS, LLC

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STATEMENT OF THE CASE AND FACTS

BAS, LLC ("BAS") is a California limited liability company with its principal place of business in Beverly Hills, Los Angels County, California. (RP 268). Gary Solnit and Jay Solnit own the company and are the sole members. (RP 875). Since its inception, BAS has operated from 9675 Bright Way, Suite 330, Beverly Hills, California 90210. (RP 881). BAS has never had any other address. (RP 881).

On October 5, 2016, BAS purchased property in Paragould, Greene County, Arkansas ("Property"). (RP 964). At the time BAS purchased the Property, Gary was renting a home at 3735 Winford Drive in Tarzana, California. (RP 887). The Winford Drive address was mistakenly recorded on title for the Property, rather than BAS's actual address at Brighton Way. (RP 889). Gary noticed this issue during the closing process and requested that the Brighton Way address be used instead. (RP 889). Gary also notified the title company of the error. (RP 889-90). By some oversight, the address on the Property title was not changed.

Gary moved out of the Winford Drive address in the middle of 2017 and no longer received any mail there. (RP 887). When Gary moved out of the Winford Drive address, he completed an address change form for himself. (RP 892). He did not complete an address change form for BAS because BAS had never operated from Winford Drive. (RP 892).

On July 1, 2020, the Property was certified by the Greene County Clerk for non-payment of real estate taxes. (RP 968-971). The Records and Lien Search Request the Commissioner performed showed that BAS was the record owner of the Property and erroneously stated that BAS's address was at the Winford Drive address. (RP 968-971). The Commissioner's search also showed that the Property's physical address was 1100 Country Club, Paragould, Arkansas 72450. (RP 968-971).

On August 17, 2021, the Commissioner sent a notice of delinquency and future tax sale to BAS at the Winford Drive address ("August 2021 Notice"). (RP 973). The Commissioner chose to send the August 2021 Notice by certified mail with return receipt requested. (RP 973). However, in 2021, the USPS modified the certified mail provisions to address COVID-19 social distancing requirements, and USPS delivery protocols changed such that recipient's actual signature was not required. (RP 1108). USPS workers were instructed to keep their distance from the recipient and leave the item in an appropriate location. (RP 1108). However, if these "social distancing recommendations are difficult to follow, alternative delivery methods can be explored." (RP 1108). There is no definition or explanation of what "alternative delivery methods" USPS workers might implement when they deem social distancing recommendations too difficult to follow. (RP 1108). Although the

Commissioner relied on USPS for mailings regarding forfeitures, the Commissioner testified that his office did not know that the USPS implemented a change in customer signature capture procedures for mail and did not know that its mailing to BAS was sent while the USPS COVID Response was in effect. (RP 1114-1117).

The August 2021 Notice was allegedly delivered to a front desk, reception area, or mail room at the Winford Drive address on August 24, 2021. (RP 1119). The Winford Drive address is a typical family residence and does not have a front desk, reception area, or mail room. (RP 1122). There is a manned guard house at the front of the community, but deliveries are not left at or handled at that guard house. (RP 922-923). Gary did not live at the Winford Drive address at the time the August 2021 Notice was purportedly delivered. (RP 1122). BAS did not receive the August 2021 Notice. (RP 1121).

The Commissioner did not receive a return receipt for the August 2021 Notice. (RP 1009-10). The Commissioner knew that it had requested a return receipt for the August 2021 Notice and that some error had prevented the completion of the certified mail process. (RP 1009-1011). The Commissioner did not conduct research to verify delivery even though USPS certified mail delivery processes had been loosened by the USPS COVID regulations. (RP 1012-1015).

For instance, the Commissioner did not make any effort to determine whether the Winford Drive address had a front desk, reception area, or mail room. (RP 1012-1015). The Commissioner did not check the California Secretary of State website to confirm BAS's address. (RP 1063-1066). The Commissioner did not check the Arkansas Secretary of State website to confirm BAS's address. (RP 1012-1015), (RP 1065-1066). The Commissioner did not check with the Greene County Collector's Office to see if it had sent BAS any notices or had any alternative addresses for BAS. (RP 1012-1015), (RP 1065-1066). Had the Commissioner merely searched the California Secretary of State website, it would have identified the Brighton Way address, which has been listed as BAS's mailing address since BAS's initial filing in May 2016. (RP 1025). Parcel-Banyan, the Property purchaser, was able to locate BAS using a simple internet search. (RP 1174-1178).

On June 27, 2022, the Commissioner sent by certified mail a notice of delinquency and future tax sale to the Property's physical address in Paragould, Arkansas ("June 2022 Notice"). (RP 1209). The June 2022 Notice was returned to sender undelivered as "ATTEMPTED—NOT KNOWN UNABLE TO FORWARD." (RP 1210). The Commissioner did not send a notice to the physical address in Paragould addressed to "occupant." (RP 1209). And, the mail was returned, confirming to the Commissioner that nobody received the June 2022

Notice. (RP 1210). It is undisputed that BAS did not receive the June 2022 Notice. (RP 1122). Yet, the Commissioner took no additional reasonable steps to effect notice of the impending tax sale after (1) being on notice that there had been an error with the August 2021 Notice and (2) receiving the June 2022 Notice showing that it had not been delivered. (RP 1012-1015), (RP 1065-1066).

Despite knowing of the errors in notifying BAS, the Commissioner proceeded with selling the Property on August 2, 2022. (RP 1212), (RP 1214). On August 22, 2022, the Commissioner executed a Limited Warranty Deed to Parcel Strategies, LLC Undivided 60% Interest and Banyan Capital Investments, LLC 40% Interest ("Parcel-Banyan"), reflecting that Parcel-Banyan had purchased the Property for $26,654.78 at auction ("Parcel-Banyan Deed No. 1"). (RP 1216).

In October 2022, BAS was served with Parcel-Banyan's quiet title action, which was BAS's first actual notice that its Property had been taken and sold by the Commissioner. (RP 958). Gary immediately arranged for taxes to be paid on the Property, depositing the total amount of taxes owed into the court's registry. (RP 958). On October 31, 2022, BAS timely filed its Complaint to Contest the Validity of a Tax Sale, and that action was then consolidated with Parcel-Banyan's action on February 17, 2023. (RP 16-26), (RP 44).

On August 30, 2023, BAS filed a motion for summary judgment. (RP 119-121). Parcel-Banyan filed a cross-motion for summary judgment. (RP 289). After a hearing on the matter, the circuit court entered an order on January 29, 2024, denying BAS's motion for summary judgment and granting in part, denying in part Parcel-Banyan's motion for summary judgment. (RP 413-420). Quoting precedent from the United States Supreme Court and the Arkansas Supreme Court, the circuit court determined that there were remaining issues of fact as to whether the Commissioner's steps were "reasonably calculated" to give notice "under all the circumstances" as required to effect due process. (RP 417-418) (quoting *Tsann Kuen Enterprises Co., v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003), *Jones v. Flowers,* 547 U.S. 220, 230 (2006), and other cases).

On March 6, 2024, BAS filed its First Amended Complaint, adding Section 1983 claims for violation of the Fifth and Fourteenth Amendment due process rights and a Fifth Amendment Takings Clause claim. (RP 424-434). In its First Amended Complaint, BAS sought just compensation for the taking of its Property in violation of due process. (RP 434).

On August 5, 2024, the Commissioner filed a motion for summary judgment. (RP 616-618). The Commissioner asserted the defense of sovereign immunity against BAS's takings claims, arguing that sovereign immunity barred BAS from

claiming monetary relief in the form of just compensation and barred BAS from seeking to set aside the tax sale because that would control the actions of the Commissioner. (RP 629).

The Commissioner acknowledged that the Arkansas Supreme Court recognizes exceptions to sovereign immunity, including unconstitutional conduct. (RP 629). However, the Commissioner argued that the claiming party has to "more than allege" the constitutional violation in compliance with the rules of fact pleading. (RP 629). The Commissioner stated: "It is not sufficient for BAS, LLCs [sic] to claim the exception; they must 'plead sufficient facts' to persuade the court that the government acted unlawfully *if those facts were true.*" (RP 629) (emphasis added). The Commissioner primarily argued that it was immune from a suit seeking monetary damages in any scenario. (RP 627-632).

BAS opposed the Commissioner's motion for summary judgment, arguing the State cannot be immune from claims of constitutional due process violations. (RP 834-842). BAS argued that it had stated a valid claim for violation of BAS's due process rights and a valid takings claim under both the United States and Arkansas Constitutions. (RP 842-860).

At the August 29, 2024, pre-trial conference, the parties argued sovereign immunity. (RT 1-118). The Commissioner focused its initial arguments on the

State's immunity from monetary damages. (RT 6-32). To streamline the process, BAS agreed to withdraw its claim for monetary damages and seek only injunctive relief. (RT 61-62).

The circuit court asked the Commissioner if BAS' withdrawal of its request for monetary damages mooted the Commissioner's sovereign immunity claim, given that the Commissioner admitted there is an exception to sovereign immunity when the case involves a claim of a constitutional violation when the plaintiff seeks injunctive relief. (RT 63). The Commissioner responded with a series of circuitous, conflicting, and confusing statements that simultaneously acknowledged the constitutional violation exception while maintaining that the Commissioner would not waive sovereignty. (RT 63-67). After repeated attempts to clarify the Commissioner's inapposite arguments, the circuit court concluded that "I can't help you" and took the issue of sovereign immunity under advisement. (RT 67). The Commissioner did not argue that the circuit court must make a decision on the merits of the constitutional violation allegations as part of its sovereign immunity analysis.

On September 4, 2024, the circuit court denied the Commissioner's motion for summary judgment. (RP 1263). On September 5, 2024, the Court entered a revised order denying the Commissioner's motion for summary judgment. (RP 1267). The circuit court ruled that:

> [T]here are issues of fact which must be resolved in order to determine whether notice provided by Land met due process requirements . . . . What is and is not "reasonably calculated" and the nature of "all the circumstances" and inferences which can be drawn therefore are matters to be determined by the trier of fact. Consequently, the Court cannot at this juncture hold as a matter of law that the exception does not apply and that Land is entitled to sovereign immunity.

(RP 1269). The circuit court further clarified that it was not ruling that the Ark. Code Ann. § 26-37-301 is unconstitutional. (RP 1269). "The statutory notice procedures are not unconstitutional. The question in this case is whether the execution of those procedures under all the circumstances was sufficient to meet constitutional due process requirements. The answer to that question turns upon the resolution of the issues of fact." (RP 1269-1270) (emphasis in original). The circuit court ultimately concluded that the Commissioner was not, as a matter of law, entitled to sovereign immunity because BAS had sufficiently pleaded a constitutional violation, the resolution of which turned on issues of fact. (RP 1270).

On September 5, 2024, the Commissioner filed its notice of interlocutory appeal on the issue of sovereign immunity under Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure. (RP 1271-1272). On appeal, the Commissioner maintains its prior arguments and adds the new, equally convoluted argument that the circuit court was required to decide the merits of the case as part of its sovereign immunity determination. *Appellant's Brief at 15-22.* The Commissioner's position contradicts

well established law, defies logic, and ignores the facts. The circuit court correctly ruled that, as a matter of law, the Commissioner was not entitled to sovereign immunity because BAS has pleaded a constitutional violation and there are questions of fact that must be resolved before determining if there was a constitutional violation. The Court should affirm the circuit court's denial of the Commissioner's motion for summary judgment and remand this case for trial.

STANDARD OF REVIEW

The circuit court denied the Commissioner's motion for summary judgment because BAS's "allegations of due process violations, if proven, bring this action for injunctive relief squarely within a recognized exception to sovereign immunity." (RP 1269). The circuit court determined that BAS's pleadings sufficiently stated a constitutional violation that, if borne out at trial, is not barred by sovereign immunity. The circuit court's decision is based its determination that there are genuine issues of material fact and, therefore, this Court reviews the circuit court's decision for an abuse of discretion. *Smith v. Daniel,* 2014 Ark. 519, 578, 452 S.W.3d 575; *see also Ark. Lottery Comm'n v. Alpha Mktg.,* 2013 Ark. 232, 428 S.W.3d 415.

ARGUMENT

There are several unassailable principles that the Commissioner cannot escape and that require this Court to affirm the circuit court's decision that sovereign immunity does not bar BAS's from seeking to set aside an unconstitutional tax forfeiture sale. First, sovereign immunity does not bar matters that raise factual allegations of unconstitutional State action. *Arkansas Dep't of Educ. v. Jackson*, 2023 Ark. 140, 7, 675 S.W.3d 416, 421. Likewise, a tax forfeiture sale of real property performed by the Commissioner that is done without complying with due process under the United States Constitution is unconstitutional State action. *See*

Jones v. Flowers, 547 U.S. 220 (2006). Here, BAS has alleged that the Commissioner sold BAS's property at a tax sale without providing BAS adequate notice and constitutional due process of law. And the circuit court ruled that there are questions of fact about whether the tax sale complied with constitutional due process. The Commissioner makes the novel argument that this Court should resolve questions of fact without a full record on interlocutory appeal under the guise of sovereign immunity to determine if BAS will ultimately prove that its constitutional due process rights were violated. The circuit court properly ruled that sovereign immunity does not bar claims for injunctive relief based on a constitutional violation and that there remain factual issues to determine at trial. The Court should affirm and remand.

I. The Circuit Court Correctly Ruled That There Are Material Issues Of Fact About Whether BAS Was Denied Constitutional Due Process

The Commissioner argues that sovereign immunity should be applied in this case because (1) the Commissioner complied with Arkansas's statutory procedures and (2) because due process does not include a factual inquiry. The Commissioner is wrong on both grounds. The United States Supreme Court and this Court have categorically held that following Arkansas's statutory notice scheme does not insulate the State from the requirements of the Due Process Clause. Likewise, both

the United States Supreme Court and this Court hold that due process is a fact intensive inquiry to be adjudicated on a case-by-case basis. This Court should affirm.

A. Compliance With Ark. Code Ann. § 26-37-301 Does Not Guarantee Due Process

The Commissioner first argues that the circuit court erred in concluding that there are questions of fact regarding constitutional due process because the circuit court ruled the Commissioner complied with its statutory notice obligations in Ark. Code Ann. § 26-37-301. The Commissioner finds these two rulings "incompatible because compliance with the statute *is* due process[.]" *Appellant's Brief at 14*. The United States Supreme Court disagrees with the Commissioner. *See Jones v. Flowers,* 547 U.S. 220 (2006) (holding that compliance with Arkansas's notice statute does not mean constitutional due process was met); *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). This Court holds the same as the United States Supreme Court: "Relying on our statutory notice scheme does not insulate the State from the requirements of the Due Process Clause." *Rylwell, LLC v. Men Holdings 2, LLC*, 2014 Ark. 522, 10, 452 S.W.3d 96, 102.

In *Jones,* the United States Supreme Court held that notice of an impending tax sale of the owner's house was inadequate when the certified letter mailed to the property owner at his record address was returned unclaimed. 547 U.S. at 225.

Because the State *knew* that something had "gone awry" with its chosen method of notice, the State was required to "take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones,* 547 U.S. at 225, 227. This was true even though the State had complied with the statutory scheme for notice. *Jones,* 547 U.S. at 225. The United States Supreme Court held that the State must "consider unique information about an intended recipient *regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." Jones,* 547 U.S. at 230 (emphasis added). If there is a "good reason to suspect" that the notice recipient is "no better off than if the notice had never been sent" additional action by the State is required to effectuate a forfeiture. *Jones,* 547 U.S. at 230.

The *Jones* decision was not a departure from due process precedent. In *Mullane,* the United States Supreme Court established that due process requires the Commissioner to take reasonable steps to effect notice that might be taken by "one desirous of actually informing the absentee[.]" 339 U.S. at 315. When notice is due, "process which is a mere gesture is not due process." 339 U.S. at 315. The focus of due process is on the ***knowledge*** and ***intent*** of the State entity—not statutory box checking. *See Mullane* 339 U.S. at 315; *Jones,* 547 U.S. at 225.

The Commissioner argues that checking the box of statutory compliance "*is"* due process, but the United States Supreme Court and this Court have definitively ruled that statutory compliance does not equal constitutional due process. The Commissioner may have complied with statutory notice requirements and still fallen short of constitutional due process. This Court should affirm the circuit court's denial of summary judgment and remand this case.

B. Whether The State Provided Constitutional Due Process Is A Mixed Question Of Fact And Law

The Commissioner argues that, after *Jones,* the Arkansas legislature revised Section 301 to add "additional reasonable steps" that must be taken if notice is returned unclaimed and that, following that legislative change, due process is a question of law centering on statutory compliance. *Appellant's Brief at 17-18.* The Commissioner misunderstands holding in *Jones* and vastly overstates the legal implications of a handful of differentiable notice cases. In *Jones,* the United States Supreme Court held that, regardless of any State statutory procedure, the "notice required will vary with circumstances and conditions." *Jones*, 547 U.S. at 227 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)).

Under *Jones*, each situation in which notice is due must be assessed based on the "unique information about an intended recipient *regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.*"

547 U.S. at 221 (emphasis added). This single sentence from *Jones* belies the Commissioner's argument that due process can be so articulately and effectively legislated that it guarantees due process in every circumstance. Constitutional due process depends on the developing facts of each individual case. *Jones,* 547 U.S. at 221. Due process is not a one-size-fits-all legal doctrine.

The Commissioner relies on (1) *Esterosto, LLC v. Kinsey,* (2) *Morris v. LandNpulaski, LLC,* (3) *Metro Empire Land Ass'n, LLC v. Arlands, LLC,* and (4) *Dickey v. Lillard* for the proposition that, following *Jones,* due process is a question of law in Arkansas. None of these cases make that holding or otherwise purport to overrule the United States Supreme Court's holdings *Jones* that due process is fact dependent and not constricted by statutory procedures.

In *Esterosto,* the undisputed facts showed that the Commissioner received a signed return receipt and there was not a second notice that was returned undelivered. 2010 Ark. App. 429, 3, 374 S.W. 3d 907, 909. In *Morris,* the facts showed the Commissioner sent a third notice that was not returned and that the property owner admitted that he received the Commissioner's notice. 2009 Ark. App. 356, 3-9, 309 S.W.3d 212, 215-218. In *Arlands, LLC,* the facts showed that the Commissioner received a signed return receipt after sending notice to the property owner and, therefore, was not on notice of an error in the delivery system.

2012 Ark. App. 350, 8, 415 S.W.3d 594, 598. And, in *Dickey,* the facts show that, after the initial notices were returned to the Commissioner as undeliverable, the Commissioner searched for additional addresses and sent additional notices by certified and regular mail. 2020 Ark. App. 447, 3, 607 S.W.3d 531, 533.

In each of these cases, the appellate court analyzed the specific *facts* as determined at the circuit court under the *Jones* ruling and concluded that, under those specific factual situations, constitutional due process was provided. Contrary to the Commissioner's contention, these cases do not establish a rule that due process is a purely legal question based on a determination of statutory compliance. Rather, they emphasize the necessity of assessing the specific facts of each scenario to determine if, under all the circumstances presented, the Commissioner has taken steps that are reasonably calculated to effectuate notice.

Indeed, the Arkansas Court of Appeals holds that summary judgment is improper when there is a "genuine issue of material fact as to whether the Commissioner's actions were consistent with federal constitutional standards." *See Jarsew, LLC v. Green Tree Servicing, LLC,* 2009 Ark. App. 324, 6, 308 S.W.3d 161, 164. In *Jarsew, LLC,* the property owner argued that, after notice of a tax sale was returned to the Commissioner, the Commissioner could have searched the Arkansas Secretary of State website to locate a better address. 2009 Ark. App. at 6, 308

S.W.3d at 164. The Arkansas Court of Appeals held that there were questions of fact regarding the reasonableness of the Commissioner's attempts at providing notice under constitutional requirements of due process and reversed a circuit court's grant of summary judgment and remanded the case for trial. *Jarsew, LLC*, 2009 Ark. App. 324, 308 S.W.3d 161; *Owen v. Quarles,* Case No. CA07-465, 2008 WL 2192807, at *2 (Ark. Ct. App., May 28, 2008) ("The notice issues raises a mixed question of fact and law under the Due Process Clauses of the State and federal Constitutions); *see also Erwin v. City of Santa Fe,* 115 N. M. 596, 599, 855 P.2d 1060, 1063 (1993) (denying the City of Santa Fe's interlocutory appeal of the lower court's denial of summary judgment because whether the notice provided violated due process is a factual issue).

In this case, the circuit court faithfully applied precedent from the United States Supreme Court and this Court, holding that constitutional due process requires that notice be "reasonably calculated, under all the circumstances to apprise BAS of its tax delinquency and the future tax sale." (RP 1269) (citing *Mullane v. Central Hanover Bank Trust Co.* 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006)). Review the factual developments in the record, the circuit court ruled: "What is and is not reasonably calculated and what are all the circumstances are matters to be determined by the finder of fact." (RP 418). The circuit court did not

abuse its discretion in ruling that there are questions of fact governing the provision of constitutional due process.

Whether the Commissioner complied with federal due process requirements is a highly factual analysis dependent upon the specific context and development of each case. The circuit court correctly ruled that there are factual questions remaining about whether the Commissioner complied with constitutional due process requirements. The Court should affirm the circuit court's denial of the Commissioner's motion for summary judgment and remand this case.

II. The Circuit Court Correctly Denied The Commissioner's Motion For Summary Judgment Because Factual Issues Remain Regarding Whether BAS Was Provided With Constitutional Due Process

The circuit court properly ruled that BAS is entitled to a trial to determine whether the Commissioner complied with constitutional due process when selling BAS's real property at a tax forfeiture sale. Sovereign immunity does not bar claims to set aside tax forfeiture sales based on a violation of due process. And, here, the circuit court properly ruled that BAS pleaded sufficient facts and provided sufficient proof that the tax forfeiture sale was unconstitutional. This Court should affirm.

A. Sovereign Immunity Does Not Bar Claims For Constitutional Violations That Seek To Set Aside Tax Forfeiture Sales

The Commissioner concedes that "[a]ctions that are illegal, unconstitutional, or *ultra vires* may be enjoined." *Appellant's Brief at 20*. A tax sale performed without providing the property owner constitutional due process is illegal, unconstitutional, and *ultra vires.* This Court has succinctly explained: "As the Supreme Court stated in *Flowers*, 'Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and an opportunity for hearing appropriate to the nature of the case.'" *Rylwell, LLC v. Men Holdings 2, LLC*, 2014 Ark. 522, 6, 452 S.W.3d 96, 100 (quoting *Jones v. Flowers,* 547 U.S. 220 and *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306).

Although the Commissioner filed a motion for summary judgment on the issue of sovereign immunity with supporting evidence, the Commissioner now argues for the first time on appeal and without citation to authority that this Court should review BAS's claim based on the failure to provide constitutional due process as a motion to dismiss and rule on the merits of the constitutional claim. *Appellant's Brief at 21* (citing *Williams v. McCoy*, 2018 Ark. 17, 535 S.W.3d 266). Here, though, the Circuit Court ruled on summary judgment that there are questions of fact regarding whether BAS was provided with constitutional notice. (RP 1270). And,

this Court has consistently held that on an interlocutory appeal from the denial of summary judgment on immunity, the Court does not go to the merits because it would require the Court to engage in a fact-based inquiry. *City of Farmington v. Smith*, 366 Ark. 473, 477, 237 S.W.3d 1, 4 (2006); *see also Arkansas Dept. of Finance and Administration v. 2600 Holdings, LLC,* 2022 Ark. 140, 6, 646 S.W.3d 99, 103 ("[I]n an interlocutory appeal from an order denying a motion to dismiss based on sovereign immunity, a decision on the merits . . . is outside [the Court's] jurisdiction."). Rather, on denial of summary judgment, the evidence is viewed in the light most favorable to the non-moving party resolving all doubts and inferences against the moving party. *Smith v. Daniel*, 2014 Ark. 519, at 10, 452 S.W.3d 575, 581.

Here, the circuit court properly ruled that there were questions of fact about whether the Commissioner had taken steps "reasonably calculated" under "all the circumstances" to give BAS notice of the impending tax sale as required by the United States and Arkansas Constitutions. The circuit court did not abuse its discretion and this Court should affirm.

B. BAS Pleaded A Violation Of Constitutional Due Process

In support of its demand for a merits determination via a sovereign immunity analysis, the Commissioner cites *Harmon v. Payne:* "[A] complaint alleging an

exception to sovereign immunity is not exempt from our fact pleading requirements. The complaint must plead sufficient facts establishing an unconstitutional or unlawful act that would avoid application of sovereign immunity." 2020 Ark. 17, 4, 592 S.W.3d 619. Based on this statement, the Commissioner leaps to the conclusion that:

> The courts do not wait to see if the plaintiff's facts have *actually* been proven by a trier of fact. Rather, they presuppose the facts *will be* proven . . . . Would the material facts, as alleged by the plaintiff, lead to a constitutional violation if proven at trial? If yes, sovereign immunity is denied. If not, then sovereign immunity is granted. The whole point of sovereign immunity is that it must be decided prior to trial for it to be effective.

Appellant's Brief at 21-22. Somehow, the Commissioner has misunderstood the "fact pleading" requirement to mean that a circuit court must make a merits decision regarding allegations of a constitutional violation based on the pleadings alone. *Harmon* does not go so far and merely notes that a plaintiff cannot overcome the defense of sovereign immunity with conclusory allegations that do not meet Arkansas' standard fact pleading requirements. *Harmon,* 2020 Ark. 17, 4, 592 S.W.3d 619. *Harmon* is inapposite.

Nonetheless, BAS's first amended complaint details at great length the Commissioner's processes, procedures, oversights, and premature termination of notice efforts that, viewed in the light most favorable to BAS, sufficiently shows a

due process violation. (RP. 424-434). The circuit court looked at the operative complaint and ruled that there are sufficient facts in the case to show a Constitutional violation. (RP 413-420), (RP 1267-1270). There is no legitimate claim that BAS has not met the pleading standard for asserting a violation of constitutional due process. The circuit court did not abuse its discretion and this Court should affirm.

i. There Are Sufficient Facts To Show A Constitutional Violation

The Commissioner claims that BAS' allegations, if presumed true, do not state a constitutional violation. The Commissioner's argument is a regurgitation of the misplaced claim that that statutory compliance is sufficient to satisfy due process. *Rylwell, LLC v. Men Holdings 2, LLC*, 2014 Ark. 522, 10, 452 S.W.3d 96, 102. ("Relying on our statutory notice scheme does not insulate the State from the requirements of the Due Process Clause."). The circuit court, however, correctly applied the constitutional due process standard and ruled that there are outstanding factual issues regarding whether the Commissioner had taken steps "reasonably calculated" under "all the circumstances" that must be resolved by a trial on the merits with a full and developed record. (RP 1269).

There is a factual dispute as to whether the Commissioner took steps reasonably calculated under all the circumstances to effectuate notice after learning the August 2021 Notice had "gone awry." *Jones,* 547 U.S. at 225, 227. BAS alleges

that the Commissioner did not avail itself of a number of reasonable steps that it was, under *Jones,* required to take after being made aware of an error in delivery. The Commissioner disagrees that additional steps were required under these particular factual circumstances. *Appellant's Brief at 23.* The disagreement is the definition of a factual dispute.

In an attempt to explain away the factual dispute, the Commissioner makes three arguments: (1) its methods complied with Section 301 and were reasonably calculated to reach the intended recipient, (2) there was an actual delivery of the August 2021 notice, and (3) the June 2022 Notice satisfied any requirement for additional reasonable steps.

First, the Commissioner (again) argues that it complied with Section 301, but Section 301 compliance is not at issue in the constitutional analysis. The Commissioner tries to circumvent the evidence that there was no signed return receipt by contending that this factual scenario is "easily contrastable" from the hypothetical put forward in *Jones,* where the Commissioner prepares a stack of letters to mail and then watches the postman drop the letters down a drain. *Appellant's Brief at 23.* In *Jones,* the United States Supreme Court explained that a person who watched his letters drop away would be on notice of an error and required to take additional steps to effect notice despite his or her original action

being reasonably calculated to reach the intended recipient as one of many examples. *Jones,* 547 U.S. at 229. However, the Commissioner does not explain how these two scenarios are contrastable when both involve later notice of an unexpected error in a process otherwise reasonably calculated to reach the intended recipient. *Appellant's Brief at 23.* Indeed, the ruling in *Jones* was broader, as detailed by the circuit court, in holding that the United States Supreme Court has "required the government to consider unique information about an intended recipient" and to consider the "practicalities and peculiarities of the case" because the "notice required will vary with circumstances and conditions." *Jones v. Flowers*, 547 U.S. 220.

Second, the Commissioner asks this Court to note that "the original return receipt (from the August 2021 Notice) was, in fact, signed and accepted by an unknown recipient" and "uploaded to a digital database." *Appellant's Brief at 24.* However, the alleged evidence referenced was excluded by the circuit court because it could not even be authenticated in the first place. (RT 83). Moreover, the Commissioner admits that the Commissioner's office had no knowledge of the alleged return receipt, if it could be authenticated, prior to the tax sale. *Appellant's Brief at 24*. Thus, the existence of a signed return receipt for the August 2021 Notice—presuming that such a thing does exist—is irrelevant because the

Commissioner was not relying on a signed return receipt when assessing whether it had satisfied due process.

Finally, the Commissioner argues that the June 2022 Notice was an additional reasonable step that satisfied due process. *Appellant's Brief at 25.* The June 2022 Notice was sent by certified mail to BAS, LLC at the Property address **and returned as undeliverable.** (RP 1209-10). However, the Commissioner argues that it was not required to do more than this because sending this second certified mail was found to satisfy due process by the Arkansas Court of Appeals in *Arlands. Appellant's Brief at 25.* The Commissioner's argument stands in direct contrast to the United States Supreme Court's holding that the Commissioner cannot rely on a known failed attempt at notice to satisfy due process. *Jones v. Flowers*, 547 U.S. 220. But more, the notice provided in *Arlands* followed the admonition of the United States Supreme Court because it was addressed to the residents of the subject property and was confirmed to have been received. *See Arlands, LLC* 2012 Ark. App. 350 at 3, 415 S.W.3d at 595 ("The other notice was mailed to the current residents of the subject property. This letter was received[.]"). Here, however, the notice was not addressed to the residents or occupants of the property and rather than being received, it was returned as undeliverable. (RP 1209-1210). The United States Supreme Court held that sending notice to the "occupant" of a property or sending

the notice by regular mail as opposed to certified mail were additional steps "reasonably calculated" to effect notice because the letter is more likely to be received by someone at the property. *Jones,* 547 U.S. at 234. But in this case, the Commissioner did not take those steps or any other action to effectuate notice after receiving the June 2022 Notice back as undeliverable.

Based on these three arguments, the Commissioner asks this Court to conclude that the circuit court should have found—as a matter of law—that the Commissioner took *every* reasonable step necessary to ensure that BAS received notice of the impending sale of its Property. *Appellant's Brief at 26*. But that is a merits inquiry outside of this Court's jurisdiction on a review of an interlocutory appeal and it prevents the circuit court from being able to make the decision in the first instance. *See 2600 Holdings, LLC,* 2022 Ark. at 6, 646 S.W.3d at 103. Moreover, the Commissioner does not address any of the other steps available to the Commissioner, such as a search of the California Secretary of State website or even the same simple Google search that led Parcel-Banyan to BAS's correct address when Parcel-Banyan wanted to serve its lawsuit. (RP 1174-78).

The circuit court correctly held that factual issues remain as to whether, under all the circumstances, there were reasonable steps the Commissioner could have taken to effectuate notice. Thus, the constitutional violation exception applies and

summary judgment is precluded. The Court should affirm the circuit court's denial of the Commissioner's motion for summary judgment and remand.

III. Sovereign Immunity Does Not Apply To Cases Seeking To Set Aside Tax Forfeitures Based On A Lack Of Due Process

There is no sovereign immunity for claims to set aside a tax forfeiture sale based on the failure to provide constitutional due process. The tax forfeiture statute provides the remedy and both the United States Constitution and Arkansas Constitution provide a self-executing remedy. The General Assembly specifically acknowledged that a tax forfeiture sale could be set aside by legal action. Ark. Code Ann. § 26-37-204. Although this Court holds that General Assembly does not have the power to waive sovereign immunity when the waiver directly contradicts the constitution, here Section 26-37-204 is consistent with both the Arkansas and United States Constitutions. *See Bd. of Trustees of Univ. of Arkansas v. Andrews*, 2018 Ark. 12, 11, 535 S.W.3d 616, 622 (holding that "the General Assembly does not have the power to override a constitutional provision . . . [t]o the extent[a statute] directly contradicts the constitution[.]").

Sovereign immunity is not a blank check for the State to disregard the constitutional rights of its citizens, and remedies for property taken by the State are self-executing and ingrained in the United States Constitution and the Arkansas Constitution. The United States Constitution and the rights it conveys on citizens of

the United States are higher than any other right or power given to any state, entity, or person. *See LegalZoom.com, Inc. v. McIllwain,* 2013 Ark. 370, 9, 429 S.W.3d 261, 266 ("The Supremacy Clause, found in Article 6 of the Constitution, provides that the Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land' and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.").

In this case, the federal constitutional right at issue is the fiercely protected right to hold and keep one's own private property. The Fourteenth Amendment dictates that "[no] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or *property*, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV (emphasis added). The Fifth Amendment also establishes that "[n]o person shall . . . be deprived of life, liberty, or *property*, without due process of law[.]" U.S. Const. Amend. V (emphasis added). The Commissioner cannot violate constitutional provisions that represent the *supreme law of the land* without fear that it can be brought into its own court or any court and held accountable for its actions.

The Arkansas Constitution puts the rights to private property before all other constitutional sanctions, even sovereign immunity: "The right of property is *before and higher* than *any* constitutional sanction; and private property *shall not be taken,* appropriated, or damaged for public use, without just compensation therefor." Ark Const. art. 2, § 22 (emphasis added). No person may be "disseized of his estate" or "deprived of his . . . property . . . except by the judgment of his peers, or the law of the land[.]" Ark. Const. art. 2, § 21.

While Arkansas law describes the right to hold property as the highest and most absolute of a citizen's constitutional rights, it uses limiting language about the state's right to tax. The Arkansas Constitution recognizes the state's inherent power to tax but specifies that power may only be delegated "*with the necessary restriction*, to the State's subordinate political and municipal corporations, to the extent of providing for their existence, maintenance and well being, *but no further*." Ark. Const. art. 2, § 23 (emphasis added). The state's power to tax ends abruptly at the line of a citizen's constitutional right to hold property and is subordinate to the same.

A tax forfeiture, which is a taking, is unique because both the Fifth Amendment to the United States Constitution and Article II of the Arkansas Constitution are self-executing in that they identify a harm that is done and an

automatic remedy to a person who suffers that harm. U.S. Const. Amend. V; Ark. Const. art. 2, § 22.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., explains how the United States Supreme Court views whether a harmed property owner can proceed against a State or municipal entity. 526 U.S. 687 (1999). The United States Supreme Court dismissively addressed the hypothetical suggestion that the city was immune from a property's owner claim of a regulatory taking, stating that, "[t]o the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error." *City of Monterey,* 526 U.S. at 688. It is well established that the State *takes* property when it forfeits property for unpaid taxes and auctions the property to another. *See Jones,* 547 U.S. at 224. The United State Supreme Court's statement acknowledges the self-executing nature of the Fifth Amendment—like Article 2 § 22 of the Arkansas Constitution—in that a property owner is entitled to a remedy for a taking. *See EEE Mins., LLC v. State of N. Dakota,* 81 F.4th 809, 815 (2023). Applying sovereign immunity to bar a party whose property has been taken by the State in violation of due process from seeking injunctive relief leads to absurd, improper, and unconstitutional results. *See City of Monterey,* 526 U.S. at 688.

The circuit court properly ruled that BAS's claim to set aside an unconstitutional tax forfeiture sale is not barred by sovereign immunity is correct. The circuit court's ruling that there are questions of fact to be resolved on the issue is proper and should be affirmed.

REQUEST FOR RELIEF

The circuit court correctly ruled that BAS's request to set aside the tax forfeiture sale was not barred by sovereign immunity and that there were fact issues for trial regarding whether the State provided BAS with constitutional due process. This Court should affirm the circuit court's denial of the Commissioner's motion for summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 2025, I electronically filed the foregoing with the Clerk of Court using the AOC eFlex electronic filing system, which shall send notification of such filing to all counsel of record.

I further certify that I have served a copy of the foregoing, *via* U.S. Mail, on the following:

Honorable Richard Lusby
Greene County Circuit Court
Second Judicial Circuit, Division 2
P.O. Box 1472
Jonesboro, Arkansas 72403

/s/ Joseph R. Falasco
Joseph R. Falasco

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19 AND WITH WORD-COUNT LIMITATIONS

Certification: I hereby certify that:

This brief complies with (1) Administrative Order No. 19's requirements concerning confidential information; (2) Administrative Order 21, Section 9, which states that briefs shall not contain hyperlinks to external papers or websites; and (3) the word-count limitations identified in Rule 4-2(d). Per Rule 4-2(d), there are 7,113 words in this Brief's Statement of the Case and Facts, Argument and Request for Relief.

Identification of paper documents not in PDF format:

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None.

/s/ Joseph R. Falasco
Joseph R. Falasco