
IN THE
Supreme Court of Virginia

RECORD NO. 210389

**KEN McKEITHEN, Successor Trustee of the
Craig E. Caldwell Trust U/A Dated December 28, 2006,**

Appellant,

v.

CITY OF RICHMOND,

Appellee.

REPLY BRIEF OF APPELLANT

**R. Kevin Kennedy (VSB No. 21117)
R. Kevin Kennedy, PLC
2006 Carrhill Road
Vienna, Virginia 22181
Telephone: (703) 279-8285
kkennedy@kennedytitle.com**

Counsel for Appellant

**Warner F. Young, III (VSB No. 24259)
Mahdavi, Bacon, Halfhill & Young, P.C.
11350 Random Hills Road, Suite 700
Fairfax, Virginia 22030
Telephone: (703) 352-1300
Facsimile: (703) 352-1301
wyoung@mbhylaw.com**

Counsel for Appellant

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| PROCEDURAL | 1 |
| APPELLANT’S REPLY TO APPELLEE’S ARGUMENTS AND AUTHORITIES..... | 1 |
| CONCLUSION..... | 5 |
| CERTIFICATE..... | 6 |

TABLE OF AUTHORITIES

Page(s)

CASES

Johnson v. City of Suffolk, 299 Va. 364, 851 S.E.2d 478 (2020)..... 4

Jones v. Hall, 177 Va. 658, 15 S.E. 2d 108 (1941).....3-4

STATUTES

Va. Code § 58.1-3967.....2

PROCEDURAL

1. Appellant (the “Caldwell Trust”) filed its Opening Brief of Appellant with this Court on February 16, 2023.

2. Appellee, the City of Richmond (the “City”), filed its Appellee’s Opening Brief with the Court on March 16, 2023. The City failed to file its brief within the time period required for the filing of appellees’ briefs under Rule 5:26(c)(2).

3. The Caldwell Trust is filing this Reply Brief of Appellant in response to the City’s brief if the Court waives the City’s failure to comply with Rule 5:26(c)(2) and admits the City’s brief to the record of this proceeding.

APPELLANT’S REPLY TO APPELLEE’S ARGUMENTS AND

AUTHORITIES

The City inexplicably states that the Caldwell Trust “neither claims, nor demonstrates, that it had a property interest in the property in dispute in this case: the \$14,000 paid into court for the superior lien.” Appellee’s Opening Brief, p. 5. To the contrary, the Caldwell Trust’s judgment lien is a property interest in the entire Net Tax Sale Proceeds of \$21,171.10:

1. The Caldwell Trust’s judgment lien is \$62,424.42 (plus 12% *per annum* interest from October 26, 2012 until paid) which far exceeds the

\$21,171.10 of total Net Tax Sale Proceeds held in the Trial Court’s registry. [JA 47, 76-80].

2. Paragraphs 6, 7 and 9 of section A of the Trial Court’s Written Statement of Facts in Lieu of Transcript confirm the validity and amount of the Caldwell Trust’s judgment lien. [JA 149-150].
3. Paragraph 8 of the Written Statement of Facts verified “...that the Caldwell Trust complied with all statutory procedures required of it pursuant to Virginia’s creditor’s rights laws and Va. Code §58.1-3967 to establish, protect, enforce and preserve its rights as the holder of an unsatisfied and valid lien “chargeable” against the Property and the proceeds of sale of the Property.” [JA 150].
4. As a pre-condition to distributing the \$7,171.10 out of the Trial Court’s registry to the Caldwell Trust, the City and the Trial Court had already established that the Caldwell Trust’s judgment lien is a property interest entitling it to Net Tax Sale Proceeds. [JA 86-88].
5. The Amended Order of Confirmation confirmed that the release of those funds was “... in partial satisfaction of the Defendant’s judgment debt to the Craig E. Caldwell Trust secured by its Lien of Record against the Property” [JA 87].
6. The unknown beneficiaries of the Deed of Trust did not file a claim to the

remaining \$14,000 within the two-year period [JA 143-144 and 150]. Its failure to do so immediately terminated any property interest it may have had in the Net Tax Sale Proceeds leaving the Caldwell Trust as the sole holder of a property interest in those proceeds.

The City cites the following two Virginia cases in its brief:

This Court stated in *Jones v. Hall*, 177 Va. 658, 15 S.E. 2d 108 (1941) that a judgment lien is “...a **right** given the judgment lien creditor to have his claim satisfied by the seizure of the land of his judgment debtor... a **right** to levy on any such lands for the purpose of satisfying the judgment.” (emphasis added). *Id.* at 664-665. *Jones* clarifies that, though the judgment lien attaches to the real estate, it does not confer on the judgment creditor the full bundle of “proprietary” real estate rights in the real estate. *Id.* at 664. A judgment lien vests the judgment creditor with the right to compel the sale of the real estate to liquidate the **equity** in the real estate to satisfy its debt. The equity, the Net Tax Sale Proceeds, is the protected property right that all judgment lien creditors are vested with. *Jones* involved a judgment lien creditor’s claim against a purchaser of timber sold by the owner of property subject to the creditor’s lien. The creditor argued that, because of his lien, the purchaser of the cut timber was personally liable to the creditor for the purchase price for the timber. This Court ruled that the judgment lien did not impose personal liability on a purchaser of removed timber to the creditor. The legal principles stated in *Jones*

are consistent with and confirm the Caldwell Trust's property interest in the equity, i.e., the Net Tax Sale Proceeds, of the real estate sold under the delinquent tax sale statute. Otherwise, the *Jones* ruling has no application to the Caldwell Trust's rights to the full Net Tax Sale Proceeds under the delinquent tax sale statute.

In *Johnson v. City of Suffolk*, 299 Va. 364, 851 S.E.2d 478 (2020) the lessee of state-owned oyster grounds filed an inverse condemnation claim against the City of Suffolk for polluting the oyster beds resulting in the lessee's inability to harvest uncontaminated oysters under the lease. The City cites *Johnson* for the principle that the "...threshold question in any takings case is whether the government action has affected a property interest...". *Id.* at 481. Since, the lease agreement governing the oyster grounds was "subject to the risk of the pollution of the water", this Court ruled that "[t]he limited rights the petitioners acquire when leasing state-owned bottomlands dooms their takings claim." *Id.* at 483-484. Inverse condemnation and regulatory takings cases, by their nature, require a careful determination of the precise property interests being affected by the government's actions, the basis and scope of the government's actions and whether those actions arise to the level of a prohibited taking of the property interest. The present proceeding is not complicated. Solely by operation of the escheat clause of the statute, the City directly pockets the Disputed Tax Sale Proceeds by superseding and eliminating the Caldwell Trust's existing perfected and protected property interest in those proceeds.

CONCLUSION

For the reasons stated in the Opening Brief of Appellant and herein, the Caldwell Trust seeks *de novo* review of the Trial Court’s Final Order and reversal of the Trial Court’s Final Order and the entry of Final Judgment awarding the entire Disputed Tax Sale Proceeds (plus interest) to be paid to the Caldwell Trust as just compensation under the United States and Virginia Takings Clauses.

Respectfully submitted,

**KEN McKEITHEN, SUBSTITUTE
TRUSTEE** of the Craig E. Caldwell Trust
U/A dated December 28, 2006
By Counsel

/s/ R. Kevin Kennedy
R. Kevin Kennedy, Esq., VSB # 21117
R. Kevin Kennedy, PLC
2006 Carrhill Road
Vienna, Virginia 22181
Telephone: (703) 279-8285
kkennedy@kennedytitle.com

Warner F. Young III, Esq., VSB # 24259
Mahdavi, Bacon Halfhill & Young, P.C.
11350 Random Hills Road, Suite 700
Fairfax, Virginia 22030
Telephone: (703) 352-1300
wyoung@mbhy.com

Counsel for Appellant