IN THE SUPREME COURT OF ARKANSAS

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

v. **Case No. CV-24-645**

BAS, LLC **APPELLEE**

AN APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
CIVIL DIVISION
28CV-22-388
HONORABLE RICHARD LUSBY
CIRCUIT JUDGE

APPELLANT'S REPLY BRIEF

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I. The circuit court failed to identify a disputed fact that would preclude a finding of sovereign immunity.

The circuit court did not list any disputed facts in its order denying summary judgment. (RP 1267-70). BAS, LLC ("BAS") has failed to name a single disputed fact in this case. *Appellee Br.* at 18-39. Yes, BAS has (repeatedly) agreed with the circuit court's *conclusion* that questions of fact remain (*Appellee's Br.* at 19, 26, 34, and 39), but that is no substitute for actually identifying them. That would be an impossible task because there are no disputed material facts to identify.

These are the material facts: (1) BAS purchased property in Paragould, AR on October 5, 2016; (2) The address listed on the property title was 3735 Winford Drive, Tarzana, California; (3) on July 1, 2020, the property was certified by the Greene County Clerk for non-payment of property taxes; (4) the Winford address was BAS' listed address when the Commissioner performed a Records and Lien Search Request; (5) a notice of delinquency and future tax sale was delivered via certified mail to the listed Winford Drive address on August 17, 2021; (6) the mail was not returned unclaimed, refused, or undelivered; and (7) BAS did not attempt to redeem the property prior to the August 2, 2022 tax sale.[1]

None of these facts are disputed by either party. The Commissioner is

[1] (1) *Appellee's Br.* at 8; (2) *Id*. at 8; (3) *Id*. at 9; (4) *Id*. at 9; (5) *Id*. at 9-10; (6) RP 1119; (7) *Appellee's Br.* at 12.

absolutely not arguing that "due process does not include a factual inquiry" (*Appellee's Br.* at 19) -- of course it does. There are simply no material facts left to resolve since both sides agree on them. The circuit court concluded that the remaining "question(s) of fact" are whether the notice was "reasonably calculated, under all the circumstances," to apprise BAS of its tax delinquency and the future tax sale. (RP 1268-69). The circuit court is referring to the *legal test* used in *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950), and *Jones v. Flowers*, 547 U.S. 220 (2006). These are questions of law.

For well over a century, the United States Supreme Court has recognized questions of law, questions of fact, and mixed questions of law and fact as three discrete categories. *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 238 (2020). On appellate review, the Arkansas Supreme Court must determine whether summary judgment was proper based on whether the evidence presented by the moving party left a material question of fact unanswered. *Scottsdale Ins. Co. v. Morrowland Valley Co., LLC*, 2012 Ark. 247, 8 (emphasis added). Undoubtedly, the questions identified by the circuit court in this case are purely legal. No facts are missing. The circuit court had all of the information available to decide both the issues of summary judgment and sovereign immunity.

BAS has adopted the circuit court's erroneous conclusion and is selectively critical of the Commissioner's argument that he satisfied due process when he

complied with Arkansas' notice statute; A.C.A. § 26-37-301. *See Appellee's Br.* at 19-22. The Commissioner concedes that compliance with a state's notice statute does not *always* equal compliance with due process guarantees. Indeed, Arkansas' notice statute was modified in 2007 to account for these very shortcomings. *See Appellant's Br.* at 17. The Commissioner still satisfied due process under the case law established in *Jones*, rendering BAS's argument inapposite.

Jones calls for reasonable additional steps to be taken when a notice letter is returned unclaimed after being sent via certified mail, i.e., when the sender is informed that his attempt at notice has failed. *Jones*, at 238-39. The facts in *Jones* originated from Arkansas where a former land commissioner followed the 1997 version of A.C.A. § 26-37-301, which still required notice to be delivered via certified mail to the recipient's last known address. *Id*. at 223. The US Supreme Court did not take issue with the method of delivery, rather, they were concerned with what should happen *after* a tax-sale notice has failed to reach the recipient and this is *made known* to the sender. *Id*. at 238-39. The holding was reiterated by this Court in *Rylwell, LLC v. Men Holdings 2, LLC*, 2014 Ark. 522, 8 ("The *Flowers* Court held due process requires additional reasonable steps to give notice when the State becomes aware that its prior attempt to give notice has failed.").

The notice letter in this case was delivered via certified mail to the address provided by BAS. (RP 973). The notice was not returned unclaimed. (RP 1119).

Thus, the Commissioner was never informed that his attempt at notice had failed. The Court need not even consider the additional step taken by the Commissioner of mailing further notice to the property's physical address. (RP 1209). The Commissioner's compliance with the latest notice statute is equal to achieving due process. The US Supreme Court has approved Arkansas' certified mail method as long as that mail is not later returned unclaimed, which would make the State explicitly aware that their effort failed. The Commissioner complied with the requirements of Arkansas' statute and was under no obligation to do anything further, per the *Jones* Court. Therefore, the circuit should be reversed.

The Commissioner afforded BAS due process, under all the circumstances, and did not act illegally and/or unconstitutionally. The Commissioner is entitled to summary judgment and sovereign immunity.

II. There are several facts listed in BAS's Statement of the Case that carry no relevance as a matter of law.

BAS included several statements of fact in its brief that were either not entertained by the circuit court or were simply irrelevant to this action. For example, BAS mentions that the Commissioner was unaware that the USPS modified its delivery protocols during the Covid-19 pandemic. *See Appellee's Br*. at 9-10. Neither these "protocol changes", nor the Commissioner's lack of knowledge surrounding them, changed the fact that notice was delivered to the address provided by BAS. (RP 756-59, 1119). The circuit court was concerned with whether the

"execution" of the statutory notice was sufficient to achieve due process. (RP 1269-70). This was answered by the *Jones* court in the affirmative. The Commissioner was under no duty to seek alternate delivery methods.

Similarly, BAS mentions that the Winford Drive address was "mistakenly recorded on title for the Property" (*Appellee's Br*. at 8), that "the Winford Drive address is a typical family residence and does not have a front desk, reception area, or mail room" (*Appellee's Br.* at 10), and that "BAS did not receive the August 2021 Notice" (*id.*). None of these facts have any bearing on this case whatsoever. It is no fault of the Commissioner that BAS did not update its address like it was supposed to. The commissioner did not have to confirm whether they were sending mail to a residential or commercial address. And "actual notice" is not required. *See Jones*, 547 U.S. 220, 226.

Finally, BAS notes that "the Commissioner did not check the Arkansas Secretary of State website to confirm BAS's address" (*Appellee's Br.* at 11), check for "any alternative addresses" (*id*.), "search the California Secretary of State website" (*id*.), and "took no reasonable steps to effect notice" after the June 2022 notice was returned undelivered. (*see id*.). The Commissioner was not required to do any of this. Under *Jones*, the Court lists a bevy of possible steps a commissioner could take "*upon return of [an] unclaimed notice letter.*" *See Jones*, at 234-36 (emphasis added). Here, the notice letter was delivered to the address on record. (RP

1119). It was not returned unclaimed. The *Jones* Court imposed no duty to do any of the things proposed by BAS under the circumstances of this case. This also applies to any additional steps BAS wants this Court to entertain after the June 2022 notice was returned unclaimed. The Commissioner had no duty to send the June 2022 notice to begin with because they had already complied with the law. Suggesting that the Commissioner had to take additional steps after sending this "bonus letter" is disingenuous and merely serves as a red herring to what *Jones* requires.

III. The General Assembly did not waive sovereign immunity in tax forfeiture cases.

BAS appears to argue that the General Assembly waived sovereign immunity for tax-forfeiture actions when they enacted Ark. Code Ann. § 26-37-204. BAS seemingly references language from subsections (a) and (c) in stating that the General Assembly "acknowledged that a tax forfeiture sale could be set aside by legal action." These subsections, however, merely go on to explain that if a sale is set aside, the purchaser shall be entitled to reimbursement and the record owner shall pay all back taxes, penalties, interest, and costs charged against the land. *See* A.C.A. § 26-37-204(a)-(c). This language does not amount to any kind of waiver of sovereign immunity, nor is there any authority to suggest that it does. BAS merely concludes its argument by stating that this "waiver" was a valid exercise of power by the General Assembly because it is "consistent with both the Arkansas and United States Constitutions." *Appellee's Br*. at 35.

BAS's argument is hard to follow and its conclusion is erroneous. The Arkansas Constitution is explicitly clear that the State of Arkansas shall never be made defendant in any of her courts. Art. 5, § 20. The three narrow exceptions identified by this Court (when the state is the moving party; when the legislature has created a specific waiver; or when the state agency is acting illegally) do not apply to this case. Therefore, the circuit court should be reversed, and this Court should find that the Commissioner is entitled to sovereign immunity.

IV. This is not an eminent domain action and tax forfeiture is legal.

BAS is attempting to confound this case as one of eminent domain, or a "taking" by the State. *See Appellee's Br*. at 37. BAS cites Article 2, Section 22 of the Arkansas Constitution, which states that "[t]he 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." This section of the Arkansas Constitution has nothing to do with this case.

Article 2, Section 22 establishes that the right of eminent domain cannot be exercised for the purpose of acquiring property for private use and the General Assembly cannot exercise the power of eminent domain nor delegate its exercise except for public uses. *Smith v. Arkansas Midstream Gas Services Corp.*, 2010 Ark. 256, 5. The instant case is not one of eminent domain. The Commissioner did not "take" BAS' property and repurpose it for public or private use. It was sold at auction

during a tax sale. (RP 1212). BAS received notice that taxes were due on its property as far back as March 2017, but failed to pay them for the four years prior to the property being certified as tax-delinquent. (RP 761-764). BAS forfeited its property to the state as a result. *See* Ark. Code Ann. 26-37-101(a)(1)(A).

The United States Supreme Court flatly rejects BAS's argument. "States have long imposed taxes on property. **Such taxes are not themselves a taking**, but are a mandated contribution from individuals for the support of government for which they receive compensation in the protection which government affords." *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 637-38 (2023) (internal citation omitted). "**In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed.**" *Id.* at 638, citing *Jones v. Flowers*, at 234 (emphasis added).

Given that tax forfeitures are not a "taking" for purposes of Arkansas' Article 2, BAS's reliance on *City of Monterey* is misleading. *See Appellee's Br.* at 38. In that case, the city of Monterey (California) rejected a series of proposals submitted by developers who wished to develop land on property they owned. Each time a proposal was rejected, more rigorous demands were imposed on the developers. 526 U.S. 687, 693. Eventually, the developers concluded that the city was unwilling to approve development under any circumstances and also unwilling to compensate them, which they classified as an unlawful "regulatory taking." *Id*. at 698.

Regulatory takings are generally grouped into two categories: (1) when the government either requires a property owner to suffer a permanent physical invasion (such as a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings) or (2) when the government's regulations deprive an owner of "all economically beneficial use of their property", also known as a "total regulatory taking." *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). BAS's classification of a tax forfeiture as a "taking" is simply incorrect.

BAS cries foul at losing its property rights due to its own failure to pay taxes, despite multiple years of opportunity and subsequent redemption periods – before *and* after the tax sale was completed. (RP 446, 792). However, the very remedy BAS seeks (setting aside the tax sale) would ironically disseize the current owners of the property, even though the new owners made a valid purchase at auction. (RP 1216). Parcel-Banyan's property rights are no less important than BAS's.[2]

V. CONCLUSION

BAS did not pay property taxes on land it acquired in Arkansas, as was required by law. BAS did not update its property's mailing address, as was required by law.

[2] Although it is not germane to the instant appeal, as it was not argued below, the Commissioner is skeptical of its status as a necessary party in this matter. Parcel-Banyan's action to confirm the tax sale and quiet title (*see* 28CV-22-380) preceded BAS's lawsuit against the Commissioner to set aside the sale. These actions were later consolidated, representing the case before us. The Commissioner essentially functions as an intermediary between these two parties' interest in the subject property as cross-claimants. *See e.g.,* A.C.A. § 26-37-204.

The Commissioner followed the law. The Commissioner sent multiple letters informing BAS that taxes were due. (RP 762-63). The Commissioner sent BAS a "tax sale" notice by certified mail to its address on file. (RP 973). The mail was delivered to the address on file and was not returned unclaimed. (RP 1119). The Commissioner followed every proper step for a tax sale, both statutorily and under case law precedent. BAS received due process from the Commissioner. There are no genuine questions of material fact remaining in this lawsuit, therefore, the circuit court should be reversed. This Court should find that the Commissioner is entitled to sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Julius J. Gerard, hereby certify that on February 26, 2025, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which will notify and provide copies of the foregoing to all counsel of record.

Julius J. Gerard

CERTIFICATE OF COMPLIANCE

This brief complies with Administrative Order No. 19's requirements concerning confidential information and with the word-count limitation found in Arkansas Supreme Court Rule 4-2(d). This brief contains 2,499 words, excluding the cover, table of contents, table of authorities, certificate of service, and certificate of compliance.

Julius J. Gerard