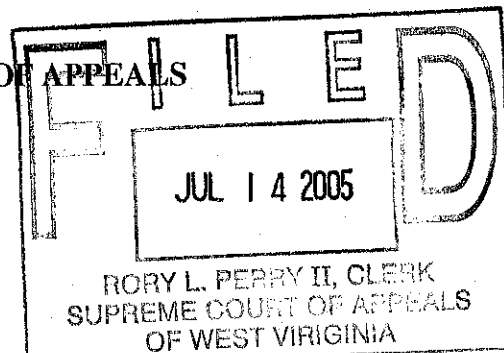


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



SUBCARRIER COMMUNICATIONS, INC.,
a New Jersey Corporation,

Plaintiff/Appellee,

v.

Case No. 32752
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 02-C-146

Ronald E. Nield, John B. Lusk,
Patrick Lee Nield, and LN&N Investments, LLC,
a West Virginia limited liability company,

Defendants and Third-party Plaintiffs/Appellants,

v.

Neil A. Reed and
The County Commission of Preston County,
a West Virginia statutory corporation,

Third-party Defendants.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

I. RULING FROM WHICH APPEAL IS TAKEN.....1

II. STATEMENT OF THE CASE2

III. RELEVANT PROCEDURAL HISTORY5

IV. STANDARD OF REVIEW6

V. STATEMENT OF FACTS7

VI. POINTS AND LEGAL AUTHORITIES.....8

VII. ASSIGNMENTS OF ERROR.....10

VIII. DISCUSSION OF LAW10

THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SUBCARRIER BECAUSE SUBCARRIER WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, INASMUCH AS APPELLANTS FULLY AND FAITHFULLY COMPLIED WITH W. VA. CODE §11A-3-19, WHICH GOVERNS WHAT A PURCHASER MUST DO BEFORE HE OR SHE MAY SECURE A DEED AND §11A-3-22, WHICH GOVERNS NOTICE REQUIREMENTS FOR SERVICE OF NOTICE AND INASMUCH AS SUBCARRIER FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANTS FAILED TO EXERCISE REASONABLY DILIGENT EFFORTS TO PROVIDE NOTICE TO SUBCARRIER OF THEIR INTENT TO ACQUIRE A TAX DEED TO THE PROPERTY.....10

IX. PRAYER FOR RELIEF23

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SUBCARRIER COMMUNICATIONS, INC.,
a New Jersey Corporation,

Plaintiff/Appellee,

v.

Case No. 32752
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 02-C-46

Ronald E. Nield, John B. Lusk,
Patrick Lee Nield, and LN&N Investments, LLC,
a West Virginia limited liability company,

Defendants and Third-party Plaintiffs/Appellants,

v.

Neil A. Reed and
The County Commission of Preston County,
a West Virginia statutory corporation,

Third-party Defendants.

APPELLANTS' BRIEF

I. RULING FROM WHICH APPEAL IS TAKEN

This appeal is taken from the Circuit Court of Preston County's Order Granting Plaintiff's Motion for Summary Judgment, dated October 25, 2004 (the "Order"), which set aside as void the tax deed at issue in the instant matter.¹

¹ This appeal does not encompass the Circuit Court of Preston County's Order Granting Motion for Summary Judgment of Third Party Defendant Neil A. Reed, dated October 25, 2004, which dismissed Neil A. Reed, with prejudice, from the instant action or the Circuit Court of Preston County's Order Granting the County Commission of Preston County's Motion for Summary Judgment dated October 25, 2005, which dismissed the County Commission of Preston County, with prejudice, from the instant action.

II. STATEMENT OF THE CASE

This appeal involves an interpretation of W. Va. Code § 11A-3-22, which governs the notice requirements to be given to a former landowner pursuant to a tax sale of the landowner's property.

Patrick E. Nield, John B. Lusk, and Ronald E. Nield, individuals, were the original defendants herein (the "Individual Appellants"). On November 15, 1999, appellants Patrick E. Nield and Ronald E. Nield attended a tax sale at the Preston County Courthouse where tax liens of delinquent landowners were being auctioned. See Defendants' and Third Party Plaintiff's Pretrial Memorandum, at *1. At that sale, Patrick Nield successfully bid on and paid the 1998 and 1999 delinquent taxes plus excess for property known as "923 Briery Mountain" (hereinafter, the "Property"). See id. Thereafter, pursuant to an oral agreement, Patrick Nield assigned his rights to Patrick Nield, John Lusk and Ronald Nield. See id. Patrick Nield, John Lusk and Ronald Nield thereafter retained the services of attorney Mr. Neil Reed to ensure that the statutory requirements needed to obtain a tax deed were fulfilled and to prepare the list of interested parties. See id.

By deed dated July 5, 2001, the Individual Appellants conveyed the Property to LN&N Investments, LLC ("LN&N"), a West Virginia limited liability company formed and operated by the Individual Appellants. Plaintiff and Appellee herein amended its original complaint on or about January 30, 2003 to add LN&N as a Defendant in the underlying civil action. See Plaintiff's Motion to Amend Complaint at *2, ¶3. LN&N and the Individual Appellants constitute the Appellants in this Petition for Appeal and shall hereinafter be referred to collectively as "Appellants."

Mr. Neil Reed completed a search of the Preston County Courthouse record room in an attempt to satisfy the requirements of Chapter 11A of the W. Va. Code and to prepare a list of interested persons to be notified of the right to redeem the Property. See Defendants' and Third Party Plaintiff's Pretrial Memorandum, at *2. An application for a tax deed, along with a list of interested persons, was prepared and signed by Mr. Reed and forwarded to Patrick Nield for his initials. See id.

Patrick Nield stated during his deposition that when he received the application for tax deed and list of interested parties from Mr. Reed, he became aware that the address listed for Subcarrier on the list of interested persons was the same address listed on the tax tickets mailed to Subcarrier by the Sheriff. See id. Thereafter, Patrick Nield called the West Virginia Secretary of State to inquire of any other addresses for Subcarrier, and was told that no other addresses were available for Subcarrier. See id.

Following the conversation with the Secretary of State, Patrick Nield called Mr. Reed to inform him of his conversation with the Secretary of State and to ask him whether further action was necessary, whereupon, Mr. Reed advised Patrick Nield that he would "take care of things from there." See id.

Thereafter, Mr. Reed took the application and list of interested persons as completed, prepared and signed by him and properly filed the same with the Clerk of the County Commission of Preston County (the "Clerk"), who sent notices by certified mail to all persons identified on the list as prepared by Mr. Reed. See Defendants' and Third Party Plaintiff's Pretrial Memorandum, at *2.

The statutorily required notice was sent to Subcarrier at its last known address and the notice of the delinquent tax was published on more than five (5) separate occasions. See Reed Deposition, 85:5-21. On each occasion where notice of delinquency or notice of right to redeem was published, the legal advertisement ran for three (3) consecutive weeks in the county paper. See id.

When the Property was not redeemed, the Clerk issued a proper tax deed to Appellants Ronald Nield, Patrick Nield and John Lusk in April of 2001, as evidenced in Preston County Courthouse, Deed Book 624, Page 193. See id.

In July of 2002, Subcarrier, after Appellants informed Appellee that property taxes on the Property had not been paid in West Virginia since June 1998, initiated the instant action to set aside the tax deed issued to the Individual Appellants in April of 2001. See id. at *3.

In the Amended Complaint, Subcarrier alleged that they contacted the Preston County Sheriff, by letter dated June 17, 1998, with an updated address along with a check for the 1997 taxes. See id. at *3. Subcarrier also alleged that it sent a previous unsigned letter on November 25, 1997, when it moved its principal office from the 101 Eisenhower Parkway, Roseland, New Jersey (the "Roseland Address") to 139 White Oak Lane, Old Bridge, New Jersey, ("the Old Bridge Address"). See id. at *3.

During his deposition, Mr. Paleski, President of Subcarrier, stated that a telephone conversation took place in July of 1998 between himself and an employee of the Sheriff's tax office wherein allegedly, the county employee told Mr. Paleski that the address change was or would be "taken care of." See id. at *3.

The record does not reflect any other action taken by Appellee to pay the subject taxes or to update its address until after delivery of the tax deed in April of 2001.

III. RELEVANT PROCEDURAL HISTORY

On or about July 29, 2002, Subcarrier Communications, Inc, Plaintiff below and Appellee herein ("Appellee") filed its complaint with the Circuit Court of Preston County, seeking, among other things, to set aside, pursuant to West Virginia Code §§11A-4-3 and 11A-4-4, the tax deed dated April 12, 2001, by Nancy Reckart, Clerk of the County Commission of Preston County to the Individual Appellants conveying the Property to the Individual Appellants. See Complaint at *6, Count I.

Appellants filed an answer and counterclaim to the complaint on September 3, 2002. See Order Granting Plaintiff's Motion for Summary Judgment at *7, ¶26. On or about February 7, 2003, Appellee filed its Amended Complaint, seeking to add Appellant LN&N Investments, LLC, a West Virginia limited liability company formed and owned by the Individual Appellants, ("LN&N"), as a defendant in the underlying action and party in interest in the litigation because the Individual Appellants conveyed the Property to LN&N by deed dated July 5, 2001. See id. On March 3, 2003, Appellants filed an answer to the amended complaint and filed a counterclaim seeking recovery of damages equal to the amount of income Appellee received pursuant to contracts between Appellee and third parties for the use of the tower installed on the Property. See id.

The Court previously denied Subcarrier's Motion for Summary Judgment heard on July 7, 2003 because discovery had not yet been concluded. See id., at *10, ¶7. However, Subcarrier filed Plaintiff's Renewed Motion for Summary Judgment on or about July 26, 2004. On October 25,

2004, the Circuit Court of Preston County issued its Order Granting Plaintiff's Motion for Summary Judgment, (the "Order"), herein being appealed.

IV. STANDARD OF REVIEW

In Stewart v. George, 607 S.E.2d 394, 2004 W. Va. LEXIS 157, at *7 (November 15, 2004), the West Virginia Supreme Court of Appeals recently reiterated its standard of review for appeals of summary judgment granted by a circuit court, stating that:

The standard of review for summary judgment granted by the lower court has been established as follows in syllabus point one of Mountain Lodge Association v. Crum & Forster Indemnity Co., 210 W. Va. 536, 558 S.E.2d 336 (2001): 'A circuit court's entry of summary judgment is reviewed de novo.' Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). In syllabus point three of Aetna Casualty & Surety Co. v. Federal Insurance Company of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963), this Court explained: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Further, in syllabus point two of Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995), this Court stated: "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." As required of the lower court, this Court must also "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." Painter, 192 W. Va. at 192, 451 S.E.2d at 758.

Stewart, 607 S.E.2d 394, 2004 W. Va. LEXIS 157, at *7.

In this appeal, Appellants seek a reversal of the Order because Subcarrier failed to prove the Appellants did not exercise due diligence in locating Subcarrier's address and because the Circuit Court failed to draw any permissible inference from the underlying facts in the light most

favorable to Appellants. Therefore, this Court should reverse and vacate the Circuit Court's Order Granting Plaintiff's Motion for Summary Judgment.

V. STATEMENT OF FACTS²

1. Subcarrier failed to pay West Virginia tax on the Property for four years (1998, 1999, 2000, and 2001) although it knew property in West Virginia was subject to real property taxes.
2. Patrick Nield and his father, Ronald Nield attended the tax sale in Preston County on November 15, 1999, where Patrick Nield purchased the tax lien on the Property as the taxes were delinquent.
3. Patrick Nield hired attorney Neil Reed to complete the statutory requirements necessary for receipt of a tax deed and to prepare the list of interested persons entitled to notice of the right to redeem the Property.
4. Patrick Nield assigned his rights in said tax lien to Ronald Nield, John Lusk and Patrick Nield on April 27, 2001.
5. Attorney Neil Reed completed a thorough search of the public records as were reasonably ascertainable from the Preston County Courthouse records in order to complete the list of interested persons.

² These facts were obtained from the Stipulated Facts filed pursuant to Defendants' and Third Party Plaintiffs' Pretrial Memorandum filed with the Circuit Court of Preston County on or about August 4, 2004.

6. The only address reasonably ascertainable in the public records of the Preston County Courthouse for Subcarrier was the same address listed on the tax tickets sent by the Sheriff and the same address was used to prepare the list of interested persons submitted by Mr. Reed to the Clerk of the County Commission.

7. Patrick Nield contacted the West Virginia Secretary of State's office to determine if another address was available for Subcarrier.

8. Subcarrier failed to register with the West Virginia Secretary of State's office until July of 2002, even though it had been transacting business in West Virginia since 1996.

9. Prior to May of 2001, Subcarrier paid no personal property taxes to the Preston County Assessor on the tower located on the Property, nor did it pay personal property tax on other property located on the site.

10. The Property is located off of Route 7, and the only road by which to access the Property is blocked by a locked gate.

11. During the years 1999, 2000 and 2001, Subcarrier had no sign indicating the name, address or phone number posted on the gate to the Property.

VI. POINTS AND LEGAL AUTHORITIES

Cases

<u>Aetna Casualty & Surety Co. v. Federal Insurance Company of New York,</u> 148 W. Va. 160, 133 S.E.2d 770 (1963).....	6
<u>Citizens National Bank of St. Albans v. Dunnaway,</u> 184 W. Va. 453, 458, 400 S.E.2d 888, 893 (1990).....	22

<u>Cook v. Duncan,</u> 171 W. Va. 747, 301 S.E.2d 93 (1983).....	16
<u>Hock v. City of Morgantown,</u> 162 W. Va. 853, 253 S.E.2d 386 (1979).....	22
<u>Lilly v. Duke,</u> 180 W. Va. 228, 376 S.E.2d 122 (1988).....	16, 21-22
<u>Mennonite Board of Missions v. Adams,</u> 462 U.S. 791 (1983).....	22
<u>Mingo County Revelopment Authority v. Green,</u> 207 W. Va. 486, 534 S.E.2d 40 (2000).....	23
<u>Mountain Lodge Association v. Crum & Forster Indemnity Co.,</u> 210 W. Va. 536, 558 S.E.2d 336 (2001).....	6
<u>Painter v. Peavy,</u> 192 W. Va. 189, 451 S.E.2d 755 (1994).....	6
<u>Plemons v. Gale,</u> 298 F.Supp. 2d 380 (S.D. W. Va 2004).....	16, 18
<u>Plemons v. Gale,</u> 2005 U.S. App. LEXIS 1734 (4th Cir. February 3, 2005)	16, 18, 19
<u>Stewart v. George,</u> 2004 W. Va. LEXIS 157, 607 S.E.2d 394 (November 15, 2004).....	6
<u>Williams v. Precision Coil, Inc.,</u> 194 W. Va. 52, 459 S.E.2d 329 (1995).....	6
West Virginia Code §11A-2-1	11
West Virginia Code §11A-2-10a	11
West Virginia Code §11A-2-11	11
West Virginia Code §11A-2-13	11
West Virginia Code §11A-3-1	23
West Virginia Code §11A-3-2	11
West Virginia Code §11A-3-8	20

West Virginia Code §11A-3-13	12
West Virginia Code §11A-3-19	12, 13, 14, 22
West Virginia Code §11A-3-21	15
West Virginia Code §11A-3-22	11, 15
West Virginia Code §11A-3-30	20
West Virginia Code §11A-3-62	20
West Virginia Code §11A-4-4	16
West Virginia Code §31D-15-1501	18
West Virginia Code §31D-15-1503	18
West Virginia Code §55-2-1	20

VII. ASSIGNMENTS OF ERROR

WHETHER THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SUBCARRIER.

VIII. DISCUSSION OF LAW

THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF SUBCARRIER BECAUSE SUBCARRIER WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, INASMUCH AS APPELLANTS FULLY AND FAITHFULLY COMPLIED WITH W. VA. CODE §11A-3-19, WHICH GOVERNS WHAT A PURCHASER MUST DO BEFORE HE OR SHE MAY SECURE A DEED AND §11A-3-22, WHICH GOVERNS NOTICE REQUIREMENTS FOR SERVICE OF NOTICE AND INASMUCH AS SUBCARRIER FAILED TO DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANTS FAILED TO EXERCISE REASONABLY DILIGENT EFFORTS TO PROVIDE NOTICE TO SUBCARRIER OF THEIR INTENT TO ACQUIRE A TAX DEED TO THE PROPERTY.

The sole issue in this case is whether the Circuit Court erred in granting summary judgment in favor of Subcarrier because Appellants failed to make a reasonable inquiry that could and would have revealed the correct mailing address for the notice requirements set forth in W. Va. Code §11A-3-22.

That Subcarrier failed to pay the assessed property taxes on the Property from 1998 until May of 2001, inclusive, is not in dispute. See Defendants' Response to Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment dated July 7, 2003, at *1, ¶3. ("Defendant's Response").

The subject property taxes were debts owing by Appellee for which Appellee was personally liable. See W. Va. Code §11A-2-2. Once property taxes become delinquent, the sheriff of the county in which the property is situate has a duty to enforce payment of such delinquent taxes. See W. Va. Code § 11A-2-1. In the case at hand, the Sheriff of Preston County (the "Sheriff") prepared and published a notice, pursuant to W. Va. Code §11A-2-10a, stating that the taxes assessed for the previous year were delinquent. See Defendant's Response, at *2, ¶10.

Pursuant to W. Va. Code §11A-2-11, the Sheriff prepared a list of all property, including the Property, for which property taxes were delinquent. See Defendant's Response at *2, ¶11. Then, the Sheriff published and posted the delinquent tax list pursuant to W. Va. Code §11A-2-13. See id. At least thirty (30) days prior to the date of the auction of the Property, the Sheriff again published the delinquent list in a paper of general circulation in the county in which the property is situate pursuant to W. Va. Code §11A-3-2. See Defendant's Response at *2, ¶13.

Only after the Sheriff complied with the proper statutory requirements did the Sheriff sell the tax lien on the Property on November 15, 1999. See Exhibit 3 to Deposition of Neil A. Reed Esquire dated March 4, 2003 ("Reed Deposition"); Deposition of Patrick Nield, 23:23-24, 24:1-3 ("Nield Deposition"). After sale of the tax lien on the Property, the Sheriff again published, pursuant to W. Va. Code §11A-3-13, a notice of Subcarrier's right to redeem the Property. See Defendant's Response at *2-3, ¶16. At the sale of the tax lien on Property, Mr. Patrick Nield paid the delinquent taxes and received a certificate of sale from the Sheriff. See Exhibit 3 to Reed Deposition.

West Virginia Code §11A-3-19 sets for the statutory requirements for what a purchaser must do before he or she may secure a deed. Specifically, that statutory section provides that the purchaser shall:

- (1) Prepare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in sections twenty-one and twenty-two [§§ 11A-3-21 and 11A-3-22] of this article;
- (2) provide the clerk with a list of any additional expenses incurred after the first day of January of the year following the sheriff's sale for the preparation of the list of those to be served with notice to redeem including proof of the additional expenses in the form of receipts or other evidence of reasonable legal expenses incurred for the services of any attorney who has performed an examination of the title to the real estate and rendered a written opinion and certification thereon;
- (3) deposit, or offer to deposit, with the clerk a sum sufficient to cover the costs of preparing and serving the notice; and
- (4) present the purchaser's certificate of sale, or order of the county commission where the certificate has been lost or wrongfully withheld from the owner, to the clerk of the county commission. For failure to meet these requirements, the purchaser shall lose all the benefits of his or her purchase. Id.

After purchasing the Property, Patrick Nield went to the record room of Preston County in order to obtain a more detailed description of the Property. See Nield Deposition, at 35:24, 36:1-3, 21-24, 37:1-3, 18-24, 38:1-4). While there, Patrick Nield obtained a copy of the deed

whereby the Property was conveyed to Subcarrier and learned that a microwave tower was located on the Property. See id.

Additionally, Mr. Patrick Nield then retained Neil Reed, an experienced, licensed and practicing real estate attorney in Preston County, West Virginia, in order to seek legal advice, do a title search, find interested parties for the statutorily required list, and to generally ensure that Patrick Nield complied with the relevant statutes so that he could obtain legal title to the Property if Subcarrier did not exercise its statutory right of redemption. See Nield Deposition, 44:13-21; Reed Deposition, 85:5-21.

Further, Patrick Nield phoned the West Virginia Secretary of State's office to inquire about Subcarrier's business and to obtain a proper address in order to contact Subcarrier, whereupon, the Secretary of State informed Mr. Nield that Subcarrier's records had elapsed and that the last address for Subcarrier in the Secretary of State's office was the Roseland Address. See Nield Deposition, 57:6-22, 60:12-19.

In order to faithfully comply with the terms of W. Va. Code §11A-3-19, attorney Neil Reed first went to the Preston County record room and examined the particular land book for the Property for each of 2000, 1999, and 1998. See Reed Deposition, at 29:1-7. He then went to the Sheriff's office to determine if the taxes were paid for the years in question and compare the address of the present owner to the tax ticket and against the computer in the record room. See Reed Deposition, 29:8-14. After making such a comparison, attorney Neil Reed noted that the current address for Subcarrier was the Roseland Address. See Reed Deposition, 29:15-18.

Mr. Reed then went back to the Preston County record room to look for a deed under Subcarrier. See Reed Deposition, 29:19-20. Mr. Reed performed a title search on the Property dating back to 1962, and found that Subcarrier had acquired the Property in 1996 from Skyline Communications, that Skyline Communications ("Skyline") had acquired the Property from Specialty Antenna Site Resources in 1992 and that Specialty Antenna Site Resources had acquired the Property from Western Union Corporation. See Reed Deposition, 34-37.

In performing his title examination, Mr. Reed also searched for deeds of trust, judgments, tax liens and any and all other liens that may have been recorded against the Property, and found a deed of trust, naming Patrick D. Deem and Evans L. King as trustees, that Skyline placed on the Property which was not released when the Property was transferred to Subcarrier. See Reed Deposition, 34-38.

In addition to Patrick D. Deem and Evans L. King, Mr. Reed found other persons named in the deed of trust who were included in the list of interested persons given to the Clerk to be served with notice, to-wit: Michael Mannix, Michael R. Budager, and Jonathan W. Old, II. See Reed Deposition, 35:6-24, 36:1-14.

All names found by Mr. Reed during his reasonable and diligent search of the public records for interested parties were on the list that was prepared and given to the Clerk pursuant to and in compliance with W. Va. Code §11A-3-19(a). See Exhibit 3 to Reed Deposition.

The statutorily required notice was sent to Subcarrier at its last known address and the notice of the delinquent tax was published on more than five (5) separate occasions. See Reed Deposition, 85:5-21. On each occasion where notice of delinquency or notice of right to redeem

was published, the legal advertisement ran for three (3) consecutive weeks in the county paper. See id. Importantly, trustees Patrick D. Deem and Evans L. King each received certified notice of Subcarrier's right to redeem. See Exhibit 3 to Reed Deposition.

W. Va. Code §11A-3-21 sets forth the form of the statutory notice of right to redeem that the clerk of the county commission is to prepare and send to all statutorily interested persons. See W. Va. Code §11A-3-21. W. Va. Code §11A-3-22 sets forth the requirements for service of notice. Specifically, that section states that:

As soon as the clerk has prepared the notice provided for in section twenty-one [§ 11A-3-21] of this article, he shall cause it to be served upon all persons named on the list generated by the purchaser pursuant to the provisions of section nineteen [§ 11A-3-19] of this article.

The notice shall be served upon all such persons residing or found in the state in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested.

The notice shall be served on or before the thirtieth day following the request for such notice.

If any person entitled to notice is a nonresident of this state, whose address is known to the purchaser, he shall be served at such address by certified mail, return receipt requested. If the address of any person entitled to notice, whether a resident or nonresident of this state, is unknown to the purchaser and cannot be discovered by due diligence on the part of the purchaser, the notice shall be served by publication as a Class III-0 legal advertisement in compliance with the provisions of article three [§§ 59-3-1 et seq.], chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such real estate is located. If service by publication is necessary, publication shall be commenced when personal service is required as set forth above, and a copy of the notice shall at the same time be sent by certified mail, return receipt requested, to the last known address of the person to be served. The return of service of such notice and the affidavit of publication, if any, shall be in the manner provided for process generally and shall be filed and

preserved by the clerk in his office, together with any return receipts for notices sent by certified mail. Id.

The Circuit Court found that Subcarrier was entitled to exercise its statutory right to redeem the Property pursuant to W. Va. Code §11A-4-4 because Appellants failed to exercise “reasonably diligent efforts” to provide notice to Subcarrier of its intent to acquire a tax deed. See Order, at *8, ¶3.

In reaching its decision set forth in the Order, dated October 25, 2004, the Circuit relied on three cases: Plemons v. Gale, 298 F.Supp. 2d 380 (S.D. W. Va. 2004), *vacated and remanded by* Plemons v. Gale, 2005 U.S. App. LEXIS 1734 (4th Cir. February 3, 2005); Lilly v. Duke, 180 W. Va. 228, 376 S.E.2d 122 (1988); and Cook v. Duncan, 171 W. Va. 747, 301 S.E.2d 93 (1983).

Cook involved an action by previous non-resident landowners to set aside a deed for land purchased at a tax sale. See Cook v. Duncan, 171 W. Va. 747, 748, 301 S.E.2d 837, 838 (1983). At issue in Cook was whether the clerk of the county commission failed to provide the requisite newspaper publication once a week for three consecutive weeks in a newspaper in the county where the property was located. See id. Because the county clerk failed to make a threshold determination of the previous landowner’s residency, the Court found that the clerk of the county commission failed to commence publication of the notice to redeem within the statutory period and thus failed to exercise due diligence. See id. at 842, 753. Importantly, the Cook Court defined “due diligence” as “the exercise of a reasonable effort to locate a person’s residence so that notice of the right to redeem may be provided.” Id. at 841, 751.

Lilly, however, can be readily distinguished from the case at hand. In Lilly, the proper address for the former landowners appeared as a handwritten notation in the margin of the relevant deed of trust. Lilly v. Duke, 180 W. Va. 228, 231, 376 S.E.2d 125 (1988). Further, the deed of trust specifically named two residents of Kanawha County as trustees and indicated that note payments were to be remitted to the Bank of Sissonville, which was the collection agent for the landowners. See id. at 126, 232. Thus, unlike the case at hand, the landowner in Lilly could have been “reasonably identified from public records.” Id. at 125, 231.

Unlike Lilly, the trustees in the instant matter, Patrick D. Deem and Evans L. King, residents of West Virginia, each received certified notice of Subcarrier’s right to redeem and took no action. See Exhibit 3 to Reed Deposition.

Perhaps the most compelling distinction between Lilly and the case at hand involves the nature of the former landowners. In Lilly, the former landowners were residents of the State of West Virginia. In the case at hand, however, Subcarrier is a foreign corporation that has availed itself of the benefits and protections of the State of West Virginia by purchasing land and conducting business in West Virginia. With those benefits and protections come rights and responsibilities, which Subcarrier chose to ignore. The record below reveals that Subcarrier knew that it had a duty to pay property tax on real estate owned in West Virginia because it paid such taxes for the 1997 year. See Exhibit 7 to Plaintiff’s Motion for Summary Judgment. Although Subcarrier will argue that it attempted to notify the Preston County Clerk of its change in address, common sense dictates that Subcarrier should have known that such change was not properly effected, given that it did not receive a tax ticket for 1998.

Further, despite the fact that Subcarrier generated income from the Property and from operation of the tower on the Property since 1996, Subcarrier failed to obtain a certificate of authority from the West Virginia Secretary of State to transact business in West Virginia until 2002, long after the tax deed had been properly delivered. See id.

W. Va. Code §31D-15-1501, et. seq. mandates that a foreign corporation must obtain a certificate of authority from the West Virginia Secretary of State before transacting business in this State. Any foreign corporation deemed to be transacting business in West Virginia is required to obtain a certificate of authority from the West Virginia Secretary of State. See W. Va. Code §31D-15-1501. Foreign corporations that transact business in West Virginia without the requisite authority are subject to certain penalties and may not even maintain a proceeding in any circuit court of this State until such certificate is obtained. See W. Va. Code §31D-15-1503.

Because Subcarrier failed to do even the statutory minimum required to operate in this State, it cannot show that Appellants failed to exercise due diligence in giving notice because “[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care.” Mennonite Board of Missions v. Adams, 462 U.S. 791, 809 (1983).

The case upon which the Circuit Court principally relies is Plemons v. Gale, 298 F.Supp. 2d 380 (S.D. W. Va. 2004), which was vacated and remanded by the Fourth Circuit Court of Appeals on February 3, 2005 subsequent to the entry of the Order, dated October 25, 2004. See Plemons v. Gale, 2005 U.S. App. LEXIS 1734 (4th Cir. February 3, 2005).

Plemons involves an action by a property owner to set aside a deed to her property purchased at a tax lien sale. Plemons v. Gale, 298 F.Supp. 2d 380 (S.D. W. Va. 2004). The District Court found that when notice sent by certified mail was returned unclaimed, the reasonable diligence standard required the party charged with giving notice to undertake further inquiry reasonably calculated to ascertain the intended recipient's correct mailing address. See id.

The Fourth Circuit, however, disagreed, finding the District Court's recommendation for further inquiry excessive and remanding the case for determination as to whether the purchaser checked the county's public records. See Plemons v. Gale, 2005 U.S. App. LEXIS 1734 (4th Cir. February 3, 2005).

Specifically, as a part of the "reasonable diligence" standard, the District Court in Plemons suggested that the subsequent purchaser could have checked the public records, consulting the local telephone directory, asking the current tenants of the property in question, or making inquiries of the mortgagee bank. See id. at *20.

The Fourth Circuit reasoned that checking the local telephone directory would have been an exercise in futility, given that the previous landowner was not reachable at the then current telephone number listed. See id. The Court further held that contacting the then tenants at the property would have been an unreasonable burden to impose upon the subsequent purchaser. See id. at 21. Finally, the Court held that reasonable efforts did not require the subsequent purchaser to contact the mortgagee bank. See id.

As to what reasonable diligence does require, the Fourth Circuit stated that "[a]ccordingly, reasonable diligence required Advantage to search all publicly available county

records once the prompt return of the mailings made clear that its initial examination of the title to the Echo Road property had not netted Plemons' correct address." Id. at *23 (emphasis added). The Court vacated and remanded the case, however, to determine what efforts, if any, the subsequent purchaser made to search public documents, or whether the landowner's proper address would have been easily ascertainable from such a search. See Plemons v. Gale, 2005 U.S. App. LEXIS 1734, at *23.

In the case at hand, it is undisputed that Appellants checked the county records as required by Plemons. In addition, Appellants even checked the records maintained at the West Virginia Secretary of State's office in order to obtain an address for Appellee, for which Appellee failed to register until July of 2002. The Circuit Court had absolutely no statutory authority to impose upon Appellants a requirement to call the New Jersey Secretary of State's Office to locate a current address and by doing so, has essentially ignored the statutory requirements in West Virginia with which foreign corporations must comply in order to do business in this State. See Order at *10, ¶9.

Further, Appellants were under no statutory duty to call one of the trustees named in the notice of right to redeem, given that such trustees had received proper notice of Subcarrier's redemption right through certified mail. See id. Moreover, Appellants were under no duty to physically visit the property and indeed, to do so prior to obtaining the tax deed would have constituted a trespass under West Virginia law, as Appellant did not have proper title to the Property prior to acquiring the tax deed and had no authority to traverse over the Property to read the posted signs. See id. at 11, ¶10; See Generally W. Va. Code §§ 11-3-8, 11-3-30, 11-3-62, 55-2-1.

Finally, there is absolutely no legal requirement that Appellants perform an internet search for Subcarrier's address or for that matter, that they even own a computer. See id. at 11, ¶11.

The mere suggestion that an internet search is required opens the door to a plethora of due process concerns, namely, whether an individual purchasing a tax deed is required to have a computer, have access to a computer, or be knowledgeable in the operation of a computer or proficient at internet searches and whether the information obtained from such a search is reliable or even admissible in court. Thus, the above requirements imposed upon Appellants by the Circuit Court are excessive, unsupported by the governing statute and unreasonable.

Moreover, the Circuit Court improperly imposed an even higher standard of diligence upon Petitioner Patrick Nield because he was the Sheriff of Mineral County at the time that the Property was purchased. See Order, at *11, ¶12. Neither the governing statutes nor any jurisprudence in construction thereof support such a conclusion.

Unlike in Plemons, here it is undisputed that attorney Neil Reed checked the public records for a proper address and that Patrick Nield phoned the West Virginia Secretary of State to confirm the address for Subcarrier. Although the Appellee will assert that the Appellants made no effort, let alone a reasonable effort, to obtain a current address for Appellee, the record is replete with evidence of the efforts that Appellants made, including engaging an attorney to complete a lien search and title search of the Property, who performed a thorough and complete search of the relevant county records and contacting the West Virginia Secretary of State.

The efforts made by Patrick Nield and his attorney far exceed the requirements for due diligence and satisfy the requirements of W. Va. Code §§11A-3-19, 11A-3-22. Further, the

Clerk properly attempted to notify Subcarrier of its right to redeem pursuant to W. Va. Code §§11A-3-21. Quoting the United States Supreme Court, the Lilly court noted that “[w]e do not suggest that a governmental body is required to take extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.” Lilly v. Duke, 180 W. Va. 228, 231, 376 S.E.2d 125 (1988), n.7, quoting Mennonite Board of Missions v. Adams, 462 U.S. 791, 798, n.4. (1983). See also Citizens National Bank of St. Albans v. Dunnaway, 184 W. Va. 453, 458, 400 S.E.2d 888, 893 (1990) (“We hold that the lack of personal notice to the Bank was caused by an improperly indexed deed that could not be located by reasonably diligent efforts, and therefore, no due process violation exists to vitiate the sale.”).

The Legislature has established a system to provide for the steps that a purchaser must take in order to secure a tax deed. See W. Va. Code 11A-3-19(a). This system provides that a prospective purchaser must perform a search of the public records, which was done in this case. Deviation from that system depletes the public confidence in land ownership, imposes unnecessary and constitutionally impermissible restrictions upon prospective land purchasers and erodes an already thin tax base in this State. As this Court recently recognized,

confidence in one's title to land is of paramount importance. As we have remarked previously, "certainty above all else is the preeminent compelling public policy to be served." Hock v. City of Morgantown, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979). We are also mindful that the government must make a timely collection of property taxes in order to function properly. As pointed out by the Legislature:

In view of the paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes; and in view of the further fact that delinquent land not only constitutes a public liability, but also represents a failure on

the part of delinquent private owners to bear a fair share of the costs of government, . . .

Mingo County Redevelopment Authority v. Green, 207 W. Va. 486, 534 S.E.2d 40

(2000) (citing W. Va. Code 11A-3-1).


In short, Subcarrier received all the due process that it is due, and the Circuit Court erred as a matter of law by granting it summary judgment because it failed to show by clear and convincing evidence that Appellants failed to exercise reasonably diligent efforts to provide notice of their intention to acquire title to the Property. Accordingly, Subcarrier was not entitled to judgment as a matter of law.

IX. PRAYER FOR RELIEF

WHEREFORE, based upon the evidence in the record and the authorities cited herein, Appellants respectfully submit that the Circuit Court of Preston County's Order Granting Plaintiff's Motion for Summary Judgment is in error, and as such, that Order should be reversed and vacated.

Ronald E. Nield, John B. Lusk, Patrick Lee
Nield, and LN&N Investments, LLC,
a West Virginia limited liability company,
Appellants

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SUBCARRIER COMMUNICATIONS, INC.,
a New Jersey Corporation

Plaintiff/Appellee,

v.

Case No. 32752
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 02-C-46

Ronald E. Nield, John B. Lusk,
Patrick Lee Nield, and LN&N Investments, LLC,
a West Virginia limited liability company,

Defendants and Third-party Plaintiffs/Appellant,

v.

Neil A. Reed and
The County Commission of Preston County,
a West Virginia statutory corporation,

Third-party Defendants

CERTIFICATE OF SERVICE

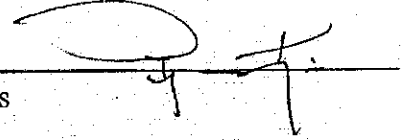
I, Robert S. Kiss, Esquire, do hereby certify that on July 14, 2005, a true and exact copy of the foregoing Appellant's Brief has been served, by United States Postal Service, postage prepaid and properly addressed upon the following:

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A handwritten signature in black ink, appearing to read 'R. S. Kiss', is written over a horizontal line. The signature is stylized and cursive.