IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01219

ARCO OIL AND GAS COMPANY, ET AL. — APPELLANTS

V.

EOG RESOURCES, INC., ET AL. — APPELLEES

REPLY BRIEF OF APPELLANTS, WHELESS INVESTMENT COMPANY; J.T. TROTTER, TRUSTEE OF THE JOSEPH SYDNEY WHELESS, JR., 1974 TRUST; J.T. TROTTER, EXECUTOR OF THE ESTATE OF ADA NANCE WHELESS; PAIGE HOLLOWAY, SUCCESSOR TRUSTEE OF THE PAIGE HOLLOWAY TROTTER GST EXEMPTION TRUST; COMPASS BANK, TRUSTEE OF THE BARBARA TROTTER COLLINS GST EXEMPTION TRUST

ON APPEAL FROM THE CHANCERY COURT
OF COVINGTON COUNTY, MISSISSIPPI

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REPLY TO APPELLEES' BRIEFS

The Appellants are property owners whose property interests are protected by the Mississippi and U.S. Constitutions. Wheless 9-11.[1] The Appellees are purchasers at a tax sale, who are not protected as innocent purchasers but instead takes title subject to the infirmities of the tax deed. *Carmadelle v. Custin*, 208 So. 2d 51, 55 (Miss. 1968). Summary judgment in favor of the Appellees, the moving parties below, was improper because the Appellees failed to show there was no genuine issue of material fact regarding the infirmities of their tax title.

The Appellees failed to prove adequate notice to satisfy due process requirements of the Mississippi and U.S. Constitution. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). The lower court failed to make any finding of fact or conclusion of law that constitutional due process was given to the Appellants. The lower court's summary judgment ruling should be reversed because the record evidence at this stage of the case fails to show notice sufficient to satisfy constitutional requirements.

Appellees Fairchild-Windhan Exploration Company, Wiley Fairchild Family Trust, Barber Minerals, Inc., and William Wallace Allred ("Fairchild") and EOG Resources, Inc. ("EOG")[2] assert three main arguments in response to the constitutional deficiency of the tax sale.[3] First, both Fairchild and EOG assert we are seeking to have state statutes declared unconstitutional and are procedurally barred from doing so. Fairchild 14-19; EOG 25-26.

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[1] We refer in our citations to our previous brief as "Wheless," followed by the page number of the brief.
[2] We refer to the brief of Appellees Fairchild-Windhan Exploration Company, Wiley Fairchild Family Trust, Barber Minerals, Inc., and William Wallace Allred as "Fairchild" and the brief of appellee EOG Resources, Inc., as "EOG."
[3] We reply only to the arguments against the constitutional deficiencies of the tax sale. We adopt the rely brief of Appellants Belhaven Production, LLC and Little River Drilling, LLC on other issues not addressed.

Second, EOG asserts *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), should not be applied retroactively to a tax sale based on state doctrine. EOG 33-35. Third, both Fairchild and EOG contend reasonable notice was given. Both offer the holding in *Stern v. Parker*, 200 Miss. 27, 25 So. 2d 36 (1946), as somehow relieving the state of its constitutional duty to provide reasonably calculated notice because the mineral owners did not file for separate assessment of their minerals. All three arguments fail for reasons discussed below.

The constitutional due process issue was raised in the lower court and is properly before this Court now. The rules of federal constitutional law set out in *Mullane* and *Mennonite Board* apply to the litigants in this case because they applied to the litigants in those cases. Applying these constitutional rules to *de novo* review of the record evidence reveals reasonably calculated notice was not given, making any attempt of the state to take the mineral owners' property void.

1. Rule 24(d) and Appellate Rule 44 do not apply because appellants do not seek a declaration that any state statute is unconstitutional or invalid. The due process issue was presented to the lower court for subsequent appeal to this Court.

As explained in our initial brief, we do not contend that any former or current Mississippi statute is unconstitutional. Wheless 12-13. We have sought no declaratory judgment under Rule 57 to that effect. We have not questioned the legal validity of any statute. Nor have we sought to restrain or enjoin the enforcement or operation of any statute. Our contention is that, wholly apart from and independent of any statute, the county's failure to give fundamental, constitutionally-required due process to mineral owners before taking their property should void the county's tax sales and tax deeds. Therefore, contrary to Fairchild's and EOG's assertions, Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44 do not apply, and there is no obligation to give

notice to the Attorney General so that he may intervene to argue constitutionality of a state statute.

Fairchild's and EOG's mischaracterizations of our contention betray their misunderstanding of relevant federal precedent and in the process exposes the lower court's misunderstanding as well. Compliance with state statute is not the measure of whether constitutional due process has been afforded a property owner. *Mullane v. Central Hanover Bank & Trust Company* did not declare New York banking statutes unconstitutional as a perquisite to its holding that the Constitution mandates due process before property rights are taken. 339 U.S. 306. Likewise, *Jones v. Flowers*, 547 U.S. 220 (2006) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1981), held no state statute unconstitutional in their analysis of whether due process was afforded to property owners before taking their property. Although the Court in these cases looked first to state statute to see what notice may have been given, the mandate of actual notice under the circumstances rises from the United States Constitution, not from any declaration that state notice laws are constitutionally deficient. In fact, the Supreme Court refused "to prescribe the form of service that the [state] government should adopt or . . . attempt to redraft the State's notice statute." *Jones*, 547 U.S. at 238. The Court focuses on whether the notice given by the state under the circumstances in each case was reasonably calculated to provide actual notice to property owners prior to their property being taken.

Further, Fairchild's argument that we did not "properly" raise the issue of lack of sufficient due process notice falls flat. *See* Fairchild 16-19. First, Fairchild admits that Appellants "technically raised the constitutional issue in their pleadings" and "technically mentioned the constitutional issue in their letters to the chancellor and in a last-minute supplement to their response to the motion." *Id.* at 18-19. Second, Fairchild's argument that

these actions did not satisfy the "requirement of *Martin v. Lowery*" is wrong. Fairchild 19. *See Martin v. Lowery*, 912 So. 2d 461 (Miss. 2005). There, the chancellor *sua sponte*, not a party, raised the issue of a due process violation. 912 So. 2d at 464. Similarly, in *Smith v. Fluor Corporation*, 514 So. 2d 1227, 1232 (Miss. 1987), the constitutional issue was not raised at all before the lower court. Third, Fairchild's citation to *Banker's Life and Casualty v. Crenshaw*, 486 U.S. 71, 77 (1988), is not pertinent. There, appellant merely made the general argument that "the punitive damage award 'was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive find, and violates constitutional principles,'" without pointing to any specific constitutional provisions. Here, however, we made much more than a "vague appeal." *See Crenshaw*, 486 U.S. at 77. The June 16, 2008, letter specifically argues "the notice-by-publication of the tax sale in issue was constitutionally deficient and did not meet the requirements of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution for the reasons annunciated in *Mennonite Board of Missions v. Adams*." R. 1764-65. Unlike *Crenshaw*, there is "no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Crenshaw*, 486 U.S. at 77-78.

2. *Mullane* and *Mennonite Board of Missions* govern the constitutionally-required due process that the state must provide property owners for the 1942 tax sale.

The holdings of *Mullane* and *Mennonite Board of Mission* apply retroactively to the issue here of whether constitutionally sufficient notice was given to the mineral owners in 1942-1944. As the United States Supreme Court has explained, "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be

given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993)(emphasis added).

In *Mullane*, the Supreme Court applied retroactively to the parties before it the new rule that *in rem* and *in personam* distinctions did not control what notice was required and that constructive notice was insufficient to provide due process notice to parties who were known or reasonably knowable. 339 U.S. 306. In *Mennonite Board of Mission*, the Supreme Court applied retroactively to the parties before it the rule that *Mullane*'s requirement of reasonably calculated notice applied to tax sales and to all property owners affected by the tax sale. 462 U.S. 791.

In arguing this federal rule does not apply here, EOG cites *Bailey v. Federal Land Bank of New Orleans*, 206 Miss. 354, 40 So. 2d 173, 176 (1949), and state court opinions from other jurisdictions. EOG 33-35. *Bailey* overruled a prior case regarding compliance with state tax statutes. 40 So. 2d at 176. In overturning its previous rule, this Court retroactively imposed a new rule on the party before it, making him liable for taxes he had not paid in reliance on the old rule, although not imposing any penalty for non-payment. *Id.*

Although this Court may, as it did in *Bailey*, apply its own retroactivity doctrine to its interpretation of state law, this Court must apply the U.S. Supreme Court's retroactivity doctrine in interpreting the due process clause of the U.S. Constitution. *Harper*, 509 U.S. at 100 (reversing the Virginia Supreme Court for failure to apply retroactively a federal rule regarding due process). "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Id.* "Whatever freedom state courts may enjoy to limit the retroactive

operation of their own interpretations of state law cannot extend to their interpretations of federal law. *Id.* (internal citations omitted). Therefore, under federal doctrine, *Mullane* and *Mennonite Board* apply retroactively to the instant case.

Further, contrary to EOG's contention, the federal retroactivity doctrine does not carve out an exception for tax sales. The Supreme Court brooks no such exception.

> [W]e can scarcely permit the substantive law to shift and spring according to the particular equities of individual parties' claim of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Harper, 509 U.S. at 97. *See id.* at 94-99 (expressly overruling rule of *Chevron Oil v. Huson*, 404 U.S. 97 (1971) that allowed a court to consider the equities of retroactive application).

4. The lower court failed to make any finding of fact or law that due process notice satisfying *Mullane* and *Mennonite Board* was given. Summary judgment in favor of the moving parties, upholding the tax deed, was improper.

a. That the mineral owners did not separately assess their mineral interests for 1941 taxes does not relieve the county of its constitutional duty to give them reasonably calculated notice of the county's taking of their property.

The mineral owners did not separately assess their mineral interests for 1941 taxes. But the record does not support Fairchild's and EOG's unfair characterization of Wheless as "trying [on appeal] to have his cake and eat it too." Fairchild 21. The record shows that Wheless paid taxes on his mineral interests—and the county took his money—in 1942 and 1943 and that he applied for mineral documentary stamps in 1946. R. 914, 918, 1172-75. *See also* R. 1090 (Cohen's mineral stamp application).

More importantly, any responsibility imposed by Mississippi case law on mineral owners to have their minerals separately assessed does not relieve the county of its federal constitutional duty to provide notice sufficient under the circumstances. State case law cannot function as a

waiver of a property owner's constitutional rights to due process. "[A] waiver of constitutional rights is not effective unless the right is intentionally and knowingly relinquished." *Davis Oil v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989) (holding the mortgagee's "failure to request notice under Louisiana [statute] did not constitute a waiver of its due process rights").

Both Fairchild and EOG offer *Stern v. Parker*, 200 Miss. 27, 25 So. 2d 787 (1946), for the proposition that because the mineral owners here did not seek a separate assessment for 1941 taxes, the county is somehow relieved of its constitutional duty to provide notice to the mineral owners of the 1942 tax sale and of their right to redeem their property within the following two years. Fairchild 22-23; EOG 39-32. *Stern*, however, is not about constitutional due process and therefore does not control the issue. *Id.* *Stern* solely dealt with the operation of Mississippi statute. *Id.* at 789. There, the mineral owners argued their mineral interest could not be conveyed with a sale of the surface and that they should have been back-assessed for fifteen years worth of taxes on the separate mineral estate. *Id.* *Stern* held Mississippi statutes did not provide a procedure for back assessment. *Id.* at 791. Stern's holding that separately owned minerals may be transferred with the surface was not about the state's or the county's constitutional duty to provide notice of a tax sale as affected by the mineral owners' duty to assess separately.

"[T]he common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. [The U.S. Supreme Court has] previously stated the very opposite: An interested party's 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'" *Jones v. Flowers*, 547 U.S. 220, 232-33 (2006)(*citing Mennonite Board*, at 800). Therefore, the knowledge that minerals along

with the surface could be sold for taxes did not excuse the county of its constitutional obligation to provide sufficient notice.

b. **A *de novo* review of the record shows sufficient notice was not given to the mineral owners because their identities and interests were known to the county.**

i. Notice by publication of the sale was not sufficient under the circumstances to apprise the mineral owners that their property being taken.

The record does not reflect that the mineral owners would have received more than constructive notice of the 1942 tax sale had they separately assessed their minerals in 1941. Fairchild and EOG make much about the kind of notice the mineral owners *would* have received had they separately assessed their minerals. Fairchild 8, 24-25; *see* EOG 10. The record, however, contains no evidence of notice given in 1942. As acknowledged in our initial brief, while not in the record, constructive notice naming only the surface owners, not the mineral owners, was published in the newspaper. Wheless 15.

Constructive notice of the tax sale was insufficient as a matter of law because, like the mortgagee in *Mennonite Board*, the mineral owners' identities were known to the county through their publicly recorded mineral deeds and their addresses were reasonably ascertainable. 462 U.S. at 798. Wheless and Cohen were active in mineral play in the county at that time and held multiple interests in Covington County. *See e.g.*, R. 1172.

ii. Actual notice of the need to redeem was required because the mineral owners were known to the tax assessor.

Fairchild and EOG argue that the tax rolls indicate some type of notice was given to "owners" on January 15, 1944. Fairchild 24; EOG 10 (*citing* R. 665, 798). Presumably, this notice concerned the need to redeem the property before the state issued a tax deed to Windham.

This record does not indicate, however, the type of notification given.[4] More importantly, no where on these pages cited does it indicate the mineral owners were included in the "Owners notified." R. 665, 798. The only names listed are Graves, Nobles, and "Pope Co.," who is listed under the column for lienor.

Fairchild and EOG offer no explanation as to why Wheless and Cohen were not among the listed owners and cannot rely on their argument of lack of separate assessment. Both Fairchild and EOG's recitation of facts abruptly end in 1941 with the failure to assess and pay taxes on the minerals. Neither dispute, however, the record evidence that Wheless separately assessed and began paying taxes on his minerals 1942. Wheless 14-15; R. 1172-75.

Further, they offer no rationale as to why the county could not have given Wheless notice when he was paying taxes on this very property in 1942 and 1943. The county issued Wheless two separate, numbered tax receipts in 1942 for payment of taxes. R. 1772-75. *See* Miss. Code §§ 9909-11 (1942); Laws of 1932, Ch. 188, § 15 (governing issuance of tax receipts). If the tax assessor could issue Wheless a receipt on this very mineral interest, it is reasonable that he could have given Wheless actual notice of the need to redeem his minerals from the 1941 sale.[5]

Instead, the tax assessor allowed Wheless to pay *ad valorem* taxes on the minerals, and the county to receive revenue from Wheless, during the redemption period without notice of the 1942 tax sale. R. 1172-75. The fact Wheless applied for a mineral documentary stamps in 1946 demonstrates he had no knowledge about the 1944 tax deeds issued at the end of the redemption period. R. 914, 918; *see also* R. 1090 (Cohen's application).

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[4] Fairchild argues that notice was given to the owners by registered mail on "2-1-44." Fairchild 24 (*citing* R. 549). However, the notation on which Faichild relies is in the column about lienor notification. R. 549. The column with "owners notified" at the top lists a separate date, "1-15-44," and does not mention any method.

[5] The 1942-43 Land Assessment roll say the 1943 tax sale of Wheless' minerals to Windham was "erroneous," citing to the receipt of 1942 taxes. R. 1173-75, R.E. 5.

As this Court has acknowledged, while "[i]t is true that a taxpayer must be vigilant and make sure that his taxes are paid; nevertheless, he has the constitutional right to redeem his [property] when it has been sold for taxes and neither the state nor the tax gathering agents of the state can conceal a sale of land for taxes so as to deprive the owner of his right to redeem." *Carmadelle v. Custin*, 208 So. 2d 51, 55 (Miss. 1968)(invalidating tax deed based on owner's efforts to pay taxes during the redemption period).

CONCLUSION

Because the record shows the mineral owners were not afforded due process by notice reasonably calculated to actually inform them of the sale of their minerals, the tax deeds conveying their minerals are void. The lower court's summary judgment ruling validating the deeds should be reversed and judgment rendered for the Appellants.

Respectfully submitted,

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