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

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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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Belhaven Productions, LLC, Appellant;

2. Little River Drilling, LLC, Appellant;

3. Roy Liddell, Counsel for Appellants Belhaven Productions, LLC, and Little River Drilling, LLC;

4. Fielding L. Cocke, Appellant;

5. Camille Cocke Patton, Appellant;

6. Tamara C. Jenkins, Appellant;

7. John Sanford McDavid, E. Stephen Williams, and Lindsay Green Watts, Counsel for Appellants Fielding L. Cocke, Camille Cocke Patton, and Tamara C. Jenkins;

8. Aarco Oil and Gas Co., Appellant;

9. Harrell Energy Corp, Appellant;

10. Glenn G. Mortimer, III, Appellant;

11. Anne Mortimer Ballantyne, Appellant;

12. Dorchester Royalty, Appellant;

13. Carey R. Varnado, Counsel for Aarco Oil and Gas Co., Harrell Energy Corp, Glenn G. Mortimer, III, Anne Mortimer Ballantyne, and Dorchester Royalty;

14. Wheless Investment Company, Appellant;

15. J. T. Trotter, Executor of the Estates of Joseph Sydney Wheless, Jr., and Executor of the Estate of Ada Nance Wheless, Appellant ;

17. Paige Holloway, Successor Trustee of the Paige Holloway Trutter GST Exemption Trust, Appellant;

18. Compass Bank, Trustee of the Barbara Trotter Collins GST Exemption Trust, Appellant;

19. Jefferson D. Stewart, Bernard Hess Both, IV, and Holmes S. Adams, Counsel for Appellants Wheless Investment Company, J. T. Trotter, Paige Holloway, and Compass Bank.

20. John M. Fairchild, Appellee;

21. Michael B. Moore, Appellee;

22. Lynn S. Jones, Appellee;

23. John M. Fairchild; Counsel for Appellees John M. Fairchild, Michael B. Moore, ant Lynn S. Jones;

24. William Wallace Allred, Appellee;

25. James L. Quinn, Counsel for Appellee William Wallace Allred;

26. Wiley Fairchild Family Trust, Appellee;

27. Fairchild-Windham Exploration Company, Appellee;

28. Lawrence Gary Gunn, Jr., Counsel for Appellees Wiley Fairchild Family Trust and Fairchild-Windham Exploration Company;

29. Barber Minerals, Inc., Appellee;

30. Watts Casper Ueltschey and Joseph Anthony Sherman Counsel for Appellee Barber Minerals, Inc.;

31. EOG Resources, Inc., Appellee;

32. Glenn Gates Taylor, C. Glen Bush, John Hart Geary, Jr., and Lindsey McGee Turk, Counsel for EOG Resources, Inc.

Dated: January 30, 2009.

Holmes S. Adams

Holmes S. Adams

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STATEMENT OF THE ISSUE

Whether this Court should reverse the chancery court's grant of summary judgment and render judgment in favor of Appellants/Mineral Owners when there is no record evidence supporting any findings of fact or conclusions of law that Covington County gave the Mineral Owners constitutionally adequate notice and the opportunity to be heard when the county assessed their property for taxes, sold their property for taxes, and deeded their property to the tax sale purchasers at the end of the redemption period.

To avoid duplication of arguments, the Appellants adopt by reference the issues and arguments presented in Sections 1, 2, 3, and 5 of the brief filed on January 23, 2009, by Appellants Belhaven Productions, LLC and Little River Drilling, LLC.

STATEMENT OF THE CASE

Statement of the Facts

This case is a dispute about the ownership of minerals in two tracts of land in Covington County, Mississippi. The dispute arises from tax sales of both tracts in 1942 by Covington County for delinquent 1941 taxes.

A. The record chain of title supports Appellants' interest in the two tracts.

On November 2, 1940, the State of Mississippi issued two forfeited tax land patents: (a) one to R. J. Graves covering Tract 1 (NW ¼ of SE ¼ of SE ¼ and SE ¼ of NE ¼ of Section 9, T 7 N, R 16 W and SW ¼ of NW ¼ of Section 10, T 7 N, R16 W, Covington County, Mississippi), recorded on November 4, 1940, at Book 75, Page 613, (R. 539, R.E. 3) and (b) another to John D. Nobles covering Tract 2 (SW ¼ of SE ¼ of Section 9, T 7 N, R 16 W, Covington County, Mississippi), recorded on November 4, 1940, at Book 75, Page 615. (R. 563; R.E. 6)

R. J. Graves immediately conveyed all his mineral interests in Tract 1. On October 30, 1940, a few days before the State's tax land patent, Graves conveyed by mineral deed to J. S. Wheless, Jr., an undivided one-half mineral interest in Tract 1. The mineral deed to Wheless was recorded in the Covington County land records on December 28, 1940, at Book 13, Page 78. (R. 540, R.E. 4) On November 2, 1940, Graves conveyed by mineral deed to Aaron Cohen the remaining undivided one-half mineral interest in Tract 1. The mineral deed to Cohen was recorded in the Covington County land records on November 11, 1940, at Book 12, Page 395. (R. 541, R.E. 5)

John D. Nobles also conveyed all his mineral interests in Tract 2. On October 29, 1940, Nobles conveyed to H. Guinn Lewis an undivided one-half mineral interest in Tract 2. The mineral deed to Lewis was recorded in the Covington County land records on December 28,

1940, at Book 13, Page 62. (R. 565, R.E. 7) On November 12, 1940, H. Quinn Lewis conveyed by mineral deed to J.S. Wheless, Jr., an undivided one-half mineral interest in Tract 2. This mineral deed to Wheless was recorded in the Covington County land records on December 28, 1940, at Book 13, Page 83. (R. 1515, R.E. 8) On October 29, 1940, Nobles conveyed by mineral deed the remaining undivided one-half interest in Tract 2 to Jim H. Pugh. This mineral deed to Pugh was recorded in the Covington County land records on December 19, 1940, at Book 13, Page 24. (R. 564, R.E. 9)

For convenience, we refer to Wheless, Cohen, and Pugh as the "Mineral Owners."

The successors of record to J.S. Wheless, Jr. in both Tracts 1 and 2 are Wheless Investment Company, Fielding L. Cocke, Camille Cocke Patton, Tamara C. Jenkins, Harrell Energy Corporation, Anne Mortimer Ballantyne, Dorchester Royalty Corporation, and Glenn C. Mortimer ("Wheless Successors"). (R. 1788, R.E. 2) The successor of record to Aaron Cohen in Tract 1 is Aarco Oil and Gas Company ("Aarco"). (R. 1788, R.E. 2) The successors of record to Jim H. Pugh in Tract 2 are Sugarberry Oil & Gas Corporation and Katy Pipeline and Production Corporation. (R. 1789, R.E. 2)

Wheless Successors and Aarco granted oil, gas, and mineral leases to Little River Drilling, LLC ("Little River"), which assigned partial interests in the leases to Belhaven Production, LLC ("Belhaven"). (R. 1789, R.E. 2)

B. The competing title chain for EOG, Wallace Allred, and Fairchild-Windham results from 1942 tax sales.

In 1940, real property taxes for the years 1940 and 1941 were assessed and equalized pursuant to existing statute. Tracts 1 and 2 were both assessed at "0" [zero] dollars. (R. 895, R.E. 10) At some undetermined time, presumably after the State issued its 1940 forfeited tax land patents, by entry at the back of 1940-41 Land Assessment Roll, Tracts 1 and 2 became subject to a supplemental assessment "for the tax year 1941-1942." (R. 896-898, R.E. 11)

Surface owner Graves was assessed $38.08 for Tract 1, and surface owner Nobles was assessed $9.52 for Tract 2. (R. 569) Even though the tax assessor had a statutory duty to separately assess severed mineral interests, the 1941-42 Land Roll contains no separate assessments for the minerals for Tract 1 or Tract 2. There is no evidence in the record that either the surface owners or the Mineral Owners were given notice of the supplemental assessment and an opportunity to heard regarding the supplemental assessment. Furthermore, there is no evidence in the record that the Board of Supervisors made an attempt to equalize the supplemental assessment or gave the surface or Mineral Owners any notice of their rights to have the assessment equalized.

No surface or Mineral Owners paid the 1941 taxes on Tracts 1 and 2 when due. The record contains no evidence that either the surface owners or the Mineral Owners were given notice that 1941 taxes were due on their property.

On April 6, 1942, the sheriff and tax collector sold Tracts 1 and 2 for delinquent 1941 taxes. Tract 1 was sold to Mrs. R.L. Windham. (R. 550-551) Tract 2 was sold to the Independent Trust Fund. (R. 573) EOG Resources, Inc., Fairchild-Windham, the Fairchild Trust, William Wallace Allred, and Barber Minerals, Inc. are successors in interest to Mrs. Windham and Independent Trust Fund ("Windham-ITF Successors"). (R. 1790-91, R.E. 2)

State statutes effective in 1942 required the county tax collector to advertise all lands to be sold for taxes in a "newspaper published in the county," and list the lands "in numerical order as they are contained in the assessment roll." Miss. Code of 1942, §9921, Miss. Code of 1930, § 3247. The then-effective statutes did not require the county to notify property owners by personal service, by mail, or any other means.

The record contains no evidence of notice by publication, personal service, mail, or any other means, to the Mineral Owners before the 1942 tax sales or at any time thereafter during the two-year redemption period. Although not a part of the record, publication of notice of the

pending tax sales was made in the Collins newspaper on March 13, 1942, briefly describing the land and giving the names of the surface owners, but not the names of the Mineral Owners.

Procedural History of the Case

In May, 2007, Belhaven and Little River ("plaintiffs") filed suit in the Chancery Court of Covington County to resolve the ownership dispute. During the pleading stage, the complaint was amended several times, additional interested parties were joined, counter-claims and cross-claims were filed, and counter- and cross-claims were amended. (R.E. 1) The Wheless Successors were initially joined as defendants, but their interests are aligned with plaintiffs. On April 17, 2008, defendants Fairchild-Windham Exploration Co. and the Wiley Fairchild Family Trust filed a motion for summary judgment. (R. 529) On April 24, 2008, defendant EOG Resources, Inc., filed its motion for summary judgment. (R. 632) The other Windham-ITF Successors joined in the motions, aligned with EOG and Fairchild-Windham. For convenience, we refer to all these parties as "movants" for summary judgment. Plaintiffs opposed the motions, filing affidavits and evidence from the public records in opposition. (R. 852-1580) Wheless Successors and Aarco joined in opposition. (R. 1589)

The movants contended there were no genuine disputes of material facts and that everything the Chancellor needed to rule was in the public records. (R. 529) They argued that the public records supported the validity of the assessment for taxes for tax year 1941 and the subsequent tax sales in 1942. They claimed ownership of the minerals on the grounds that, under then-applicable Mississippi precedent, the 1942 tax sales transferred both surface and mineral interests because the minerals were not separately assessed at the time of the 1942 sale. (R. 530-31)

Belhaven and Little River, Wheless Successors, and Aarco ("non-movants") opposed the motions for summary judgment, arguing that the public records or lack of such records raised

genuine issues of fact and law as to whether the assessment and tax sales complied with state statues and the Mississippi Constitution. (R. 852-67, 1598-1601)

On May 21, 2008, the chancery court held a hearing on the motions for summary judgment. (R. 1800) During this hearing, non-movants raised the issue that notice to the Mineral Owners was constitutionally deficient and violative of their due process rights. (R. 1840) Before ruling, the chancellor gave them an additional thirty days to develop evidence in opposition to summary judgment. (R. 1884) On June 12, 2008, non-movants wrote the court, arguing that before the 1942 tax sales could be held legally valid, the movants must show that the requirements of the federal Due Process Clause to the Mineral Owners had been satisfied, citing *Mennonite Board v. Adams*, 462 U.S. 791, 798 (1983). (R. 1764-65, R.E. 15)

The chancellor conducted a second hearing on June 26, 2008. (T. 85, R.E. 16) He said he was prepared to rule on the validity of the tax sales based on his belief that the county had complied with the then-applicable version of the Mississippi Code. (T. 92, 95; R.E. 16) The court's response to non-movants' concerns about violations of their constitutional due process rights was that everything was "done according to statute," without explaining whether or not the court was finding as undisputed fact and concluding as a matter of law that compliance with then-applicable state statutes also satisfied federal constitutional requirements. (T. 89, R.E. 16)

Before granting summary judgment, the chancellor directed another person present at the hearing to add a single hand-written sentence as an addendum to the proposed order already drafted by movants. (T. 99, R.E. 16; R. 1794 fn., R.E. 2) The court's order contains no other mention of the issue, much less any explanation by the chancellor of his reasoning and analysis of these constitutional issues.

On the same day of the second hearing, June 26, 2008, the chancellor entered his order granting summary judgment in favor of movants. The order holds the 1942 tax sales valid,

thereby conveying ownership of the minerals in the two tracts to the Windham-ITF Successors. (R. 1787-96, R.E. 2)

Plaintiffs, Wheless Successors, and Aarco timely filed their appeal. (R. 1888, 1902, 1915, 1932)

Standard of Review

This Court applies a *de novo* standard in reviewing a chancery court's grant of summary judgment. *Brown v. J.J. Ferguson Sand & Gravel Co.*, 858 So.2d 129, 130 (Miss. 2003) (*citing O'Neal Steel, Inc. v. Millette*, 797 So.2d 869, 872 (Miss. 2001). In conducting the *de novo* review, this Court looks at all the record evidence before it and views the evidence in the light most favorable to the party against whom the motion for summary judgment has been granted. *Id.*

SUMMARY OF THE ARGUMENT

Before Covington County may take the Mineral Owners' interests in real property, the Due Process Clause of the U. S. Constitution requires the county to give the Mineral Owners sufficient notice that their interests are being taken by the state and an opportunity to be heard before the taking occurs. *Mullane v. Hanover Central Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). The Mississippi Constitution affords the same rights to due process. Miss. Const. Art. 3, § 14. *See Secretary of State v. Wiesenberg*, 633 So.2d 983, 996 (Miss. 1994).

This constitutional requirement must be met even if the county has complied with all then-applicable state statutes governing assessment and tax sale.

In its summary judgment order, the chancery court failed to make any fact-finding that any notice was given, much less that the notice was constitutionally sufficient. Also, the chancery court did not make any conclusions of law that due process had been accorded the Mineral Owners whose interests were taken.

The record contains no evidence that the Mineral Owners were given constitutionally adequate notice of (1) the assessment of the property by the tax collector and any right of equalization; (2) the tax sales pending in 1942; or (3) notice of their opportunity to redeem the property following the tax sales. Therefore, the summary judgment order validating the tax sales should be reversed, and judgment should be rendered in favor of the Appellants.

THE ARGUMENT

I. Because the record evidence does not support any finding of constitutionally sufficient notice and because the chancery court did not make any such findings, the order granting summary judgment and validating the tax sales should be reversed.

A. Before taking the Minerals Owners' property, the county had a duty to provide them due process under the Fourteenth Amendment of the U.S. Constitution and Section 14 of Article 3 of the Mississippi Constitution.

The Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and Section 14 of Article 3 of the Mississippi Constitution prohibit a state or its political subdivisions like Covington County from depriving any person of life, liberty, or property without due process of law. U. S. Const., Amend. 14, Cl. 1; Miss. Constitution, Art. 3, § 14. *See Secretary of State v. Wiesenberg*, 633 So.2d 983, 996 (Miss.,1994) (same due process required by Federal Constitution required by Mississippi Constitution); *Mississippi Power Co. v. Goudy,* 459 So.2d 257, 275 (Miss.1984) (Due Process Clause of Section 14 of Mississippi Constitution and Fourteenth Amendment of U.S. Constitution are identical).

State law, not the Constitution, however, determines property interests. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Mississippi law recognizes ownership of mineral rights as a substantial property interest. *Stern v. Great S. Land Co.*, 148 Miss. 649, 114 So. 739, 740 (1927); *Fox v. Pearl River Lumber Co.*, 80 Miss. 1, 31 So. 583, 583-84 (1902). Therefore, the interests conveyed in 1940 to the Mineral Owners were property interests

deserving constitutional protection. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983).

Before the state may take away the Mineral Owners' property in 1942, Covington County must satisfy its constitutional duty to afford the Mineral Owners due process of law under the U.S. Constitution. *See Id.* (applying Due Process Clause whenever substantial property interest is significantly affected by a state's action).

1. An elementary and fundamental requirement of the Due Process Clause is notice reasonably calculated to apprise the owners of the pending action and afford them an opportunity to object.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)).

While reasonableness is a fact-dependent inquiry, the Supreme Court has given guidance for determining whether notice was reasonably calculated. *See Mullane*, 339 U.S. at 314-16. First, notice "which is mere gesture is not process." *Id.* at 315. Second, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* Third, constructive notice, e.g., publication, is not sufficient when the property owner is known or reasonably ascertainable. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Mullane*, 339 U.S. at 316-18.

In *Mullane v. Central Hanover Bank*, the Court specifically addressed notice by publication and why it is it far less sufficient than actual notice:

> It would be idle to pretend that publication alone, as prescribed [by statute], is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and, if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

339 U.S. at 315.

The Supreme Court "has adhered unwaveringly to the principle announced in *Mullane.*" *Mennonite Board*, 462 U.S. at 797 (*citing Greene v. Lindsey,* 456 U.S. 44 (1982) (notice posted on door inadequate to notify tenant of forcible entry and detainer actions); *Schroeder v. New York City*, 371 U.S. 208 (1962) (newspaper publication and posted notice inadequate to apprise property owners whose identity was reasonably ascertainable from recorded deed); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (published notice for condemnation proceedings inadequate to notify landowner who was known by city records)).

If reasonably calculated notice is not given, the taking is void from the beginning. *See Mennonite Board*, 462 U.S. 791; *Jones v. Flowers*, 547 U.S. 220 (2006) (interest holders successfully challenged tax deeds after redemption periods had run). Because selling a person's property for taxes is an "extraordinary power," the United States Supreme Court, in enforcing the Due Process Clause, requires a State to take affirmative steps to provide actual notice to the property owner. *See Jones v. Flowers*, 547 U.S. 220, 239 (2006). Therefore, for the 1942 tax sales to be valid, the county must have made reasonable efforts to notify the Mineral Owners.

Because the Due Process Clause of the Mississippi Constitution is *identical* to the Due Process Clause in the U.S. Constitution, failure to provide sufficient notice under the federal

constitution also equals failure under the Mississippi constitution. *See Miss. Power Co. v. Goudy*, 459 So.2d 257, 275 (Miss. 1984). Moreover, "the public policy of this state, as embodied in its constitution . . . favors and protects the owner of land from the loss by its sale for taxes," and, therefore, prohibits the taking of property without due process. *Carmadelle v. Custin*, 208 So.2d 51, 54-55 (Miss. 1968) (invalidating tax sale based on errors by tax authorities resulting in failure to provide due process).

2. The constitutional requirements applied to Covington County from 1940 through 1944.

Although not decided until 1950, the rule of law announced in *Mullane* applies retroactively to require constitutionally sufficient notice of the 1942 tax sales and notice of the opportunity to redeem the tax sales.

"Both the common law and [the Supreme Court's] decision have recognized a general rule of retrospective effect for the constitutional decision of [the Supreme] Court." *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 94 (1993) (*quoting Robinson v. Neill*, 409 U.S. 505, 507 (1973) (internal quotation omitted). A rule of federal law applied to the parties before the Court is the controlling interpretation of federal law, regardless of whether events predate or postdate the announcement of the rule. *Id.* at 97 (*following James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *superseded by statute on other grounds*). *See also Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1092-93 (Miss. 2000) (applying federal retroactivity doctrine announced in *Jim Beam*). Because the rule of law regarding due process arising from *Mullane* and *Mennonite Board* applied to the litigants in those cases, the constitutional rule applies to all litigants, regardless of when the cases were decided.

Therefore, whether notice given by Covington County in the period from 1940 through 1944 sufficiently satisfies the Due Process Clause is analyzed under the framework set forth by the U.S. Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) (specifically applying *Mullane* analysis to property owners in tax sales).

3. The constitutional requirement of due process notice is independent and in addition to Mississippi's statutory requirements.

In granting summary judgment, the chancery court solely relied on its conclusion that the county complied with then-governing Mississippi statutes. Statutory compliance in itself does not relieve Covington County of its constitutional duty. "All statutes must be measured against the due process requirements of the Constitution." *Kron v. Van Cleave*, 339 So.2d 559, 562 (Miss. 1976). Because statutes in effect did not require the county to give reasonably calculated notice to the Mineral Owners before taking their property through the tax sales, the county cannot rely on statutory compliance as proof of constitutionally sufficient notice.

Appellants, however, are not contending that the version of the Mississippi Code in effect in 1942 was unconstitutional. Rather, the statutory duties required were not sufficient to fulfill the constitutional due process duties, which are separate and independent of state statutes.

The United States Supreme Court has often affirmed this separate and overarching constitutional duty, overturning takings by states even though the states complied fully with their own statutes. *See Jones v. Flowers*, 547 U.S. 220 (2006), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), *Schroeder v. City of New York*, 371 U.S. 208 (1956), *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, while notice by newspaper publication to known beneficiaries of a common trust complied with New York statute, the Supreme Court held this notice did not satisfy the Due Process Clause. 339 U.S. 306. Similarly, in *Mennonite Board*, while Indiana statute did not require actual notice to the mortgagee of property being sold in a tax sale, the Constitution did. 462 U.S. 791. The Supreme Court held the mortgagee held a substantial property interest affected by the sale. 462 U.S. at 798. It was this property interest, not merely

state statute, that entitled the mortgagee to reasonably calculated notice under the Due Process Clause. *Id.*

In this case, the Mineral Owners' right to due process arises from their substantial property right, not from Mississippi statute. The ownership of the minerals triggered the county's constitutional duty to notify the Mineral Owners (1) that the tracts were being assessed for taxes; (2) their minerals were being sold for unpaid taxes; and (3) that the tracts, though sold, could be redeemed. The absence of a statutory requirement at the time did not relieve Covington County of this duty. The chancery court failed to recognize that, even if Covington County had done everything Mississippi's statutes required in 1941 to 1944, the county still did not fulfill its constitutional duty.

B. The movants did not meet their burden of demonstrating that Covington County had provided constitutionally adequate notice to the Mineral Owners.

Instead of relying solely on statutory compliance, the constitutional issues required independent analysis and findings of fact and conclusions of law. Absent such analysis, summary judgment should not have been granted to the movants.

1. The chancery court did not conduct the proper due process analysis in accordance with the U.S. Supreme Court's decisions in *Mullane* and *Mennonite Board of Missions*.

The chancery court order did not make the necessary fact findings or conduct the requisite legal analysis as to whether reasonably calculated notice was given to the Mineral Owners. The chancery court erred as a matter of law when it did not analyze whether sufficient notice was given under *Mullane* and *Mennonite Board* framework. *See Mennonite Board*, 462 U.S. 791, 798 (1983) (applying *Mullane* analysis to issue of due process notice in tax sale). Instead, the court's hand-written addendum merely stated *Mennonite Board* did not change the chancery court's opinion of the validity of the sale. (R. 1794 fn., R.E. 2)

The chancery court should have independently analyzed whether the record supported a finding of reasonably calculated notice before validating the tax sales on summary judgment. As evident from the June 26, 2008 summary judgment hearing, the court did not grapple with the constitutional issues raised by the Wheless Successors. (T. 89-99, R.E. 16) The Chancellor's continual reply that the county had complied with the statutes missed the mark of the concern raised about notice being constitutionally insufficient. (T. 89, 92, 95, and 99, R.E. 16) Because the chancery court did not first determine that Covington County fulfilled its duty to provide reasonably calculated notice under *Mennonite Board*, the chancery court erred in granting summary judgment.

2. The movants failed to meet their burden on summary judgment because the record contains no evidence that any notice was given regarding the 1942 tax sales.

On motion for summary judgment, the movants have the burden to show as a matter of law that the county gave constitutionally sufficient notice. Miss. Rule of Civ. P. 56(c). Here, the record contains no evidence that the county made any attempt to notify the Mineral Owners of the additional assessment in 1941, the impending tax sales in 1942, or the transfer of their property at the end of the redemption period in 1944.

In fact, what the record shows is the Mineral Owners never received actual notice of the county's taking of their minerals. Wheless' mineral rights were separately assessed for 1942 and 1943. (R. 1172, R.E. 12) The record indicates that in 1942 Wheless paid taxes on his minerals for the 1942 tax year.[1] (R. 1173-75, R.E. 12) In 1946, when state statutes were amended to allow for ad valorem exemption for minerals, Wheless promptly applied for the exemption by purchasing mineral documentary stamps that were affixed to his mineral deed. (R. 914, 918;

[1] 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)

R.E. 13) Cohen similarly paid separate mineral taxes for 1942 through 1948 and obtained an exemption of his minerals in 1949. (R. 1090, R.E. 14)

II. The county did not give constitutionally sufficient notice to the Mineral Owners, and, therefore, the 1942 tax sales are void.

The record evidence supports a legal and factual conclusion contrary to the chancery court's order. The tax sales are void for failure to provide constitutionally sufficient notice.

A. The trial record contains no evidence that any notice was given before the tax sales or close of the redemption period.

There is no evidence in the record that the county made any attempt to notify the Mineral Owners at any time from the unknown point when the tracts were assessed to Graves and Nobles for 1941 and 1942 ad valorem taxes to the time period of the sale in April, 1942 to the end of the redemption period in 1944. *See* § I(B)(2), *supra*. What is reasonable notice depends on the circumstances, but no circumstances allow for the county to do nothing at all. *See Jones v. Flowers*, 547 U.S. 220, 239 (2006) (requiring state to attempt to notify before exercising extraordinary power of tax sale); *Mullane*, 339 U.S. 306, 313 (1950) (requiring notice to precede taking). According to the record, the county did nothing to notify the Mineral Owners of the county's intent or efforts to sell the mineral rights with the surface. Therefore, the 1942 tax sales are void for failure to provide due process.

B. Constructive notice was not reasonably calculated to apprise the Mineral Owners that their property was being taken and, therefore, was constitutionally insufficient.

As we said in the statement of facts, while not part of the trial record, notice by publication of the pending tax sales was given to the surface owners in 1942. This notice, however, does not satisfy the county's duty to provide reasonably calculated notice to the Mineral Owners.

First, as a matter of law, constructive notice is insufficient because the Mineral Owners were known to the county, *Mennonite Board*, 462 U.S. at 798. Their interests and identities were recorded in the public records of Covington County in November, 1940. (R. 540, R.E. 4; R. 541, R.E. 5; R 564, R.E. 9; R. 1515; R.E. 8)

In *Mennonite Board*, that the mortgagee had a publicly recorded interest made the mortgagee reasonably ascertainable. 462 U.S. at 798-99. Although the recorded mortgage only contained the mortgagee's name, the Supreme Court "assume[d] that the mortgagee's address could have been ascertained by reasonably diligent efforts." *Id.* at 798 fn.4. In this case, the recorded 1940 mineral deeds identified the Mineral Owners. (R. 540, R.E. 4; R. 541, R.E. 5; R 564, R.E. 9; R. 1515; R.E. 8) These instruments were recently executed and recorded.[2] The Mineral Owners' addresses could have been ascertained by reasonably diligent efforts. Wheless and Cohen were active in mineral play in the county at that time and held multiple interests in Covington County. (R. 1172, R.E. 12) In particular, Wheless's mineral interests in both Tracts 1 and 2 were separately assessed in 1942 and 1943. (R. 1172; R.E. 12)

Mississippi statute requires a two-year redemption period before land sold for taxes is actually transferred, so the county did not take Wheless' minerals until it issued the deeds to Windham in 1944 and Independent Trust Fund in 1945. During the redemption period, the county separately assessed Wheless for the minerals. (R. 1172-75; R.E. 12) Apparently, the county was able to notify Wheless because the record shows he paid the 1942 taxes for both Tracts 1 and 2. (R. 1173-75, R.E. 5)

Therefore, it is reasonable for the county to notify Wheless about the initial assessment, the1942 tax sales, and the need to redeem his property by 1944. There is no evidence that the county did so. Because it failed to give Wheless notice reasonably calculated to apprise him of

[2] The mineral deeds were recorded by chancery clerk Ledrew Windham, husband of Mrs. R.L. Windham. (R. 540, 541, 564, 565, 1515; R.E. 3)

the assessment, tax sale, and subsequent transfer of his minerals at the end of the redemption period, the county's actions are constitutionally void. Because the Mineral Owners were reasonably ascertainable, constructive notice by publication only to the surface owners fails as a matter of law. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Mullane*, 339 U.S. at 316-17.

Second, constructive notice is insufficient because "[t]he means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. In fact, no record evidence demonstrates the county made any effort to notify the Mineral Owners of the assessment, tax sales, or transfer by deeds.

The county never notified the Mineral Owners of the additional assessment. This failure is important because of the requirement that the minerals be separately assessed, which the county did not do for Tracts 1 and 2. Miss. Code of 1942, § 9770; Miss. Code of 1930, § 3146 (1932). Without notice, the Mineral Owners were not apprised of their property being taxed under the names of the surface owners.

Further, the county never notified the Mineral Owners of its intent to sell their interests along with the surface in the 1942 tax sales. Even the constructive notice by publication only listed the names of the surface owners, not the Mineral Owners whose interests were also being sold. *See Mullane*, 339 U.S. at 315 ("chance of actual notice is further reduced when [the notice] does not even name those whose attention it is supposed to attract"). It was unreasonable for the county not to include the names of all the recorded owners.

Finally, even when Wheless began paying taxes on the same tracts before the redemption period ended, the county never gave Wheless notice of his need to redeem his minerals.

Under these circumstances, notice by publication to the surface owners was "mere gesture," which "is not process." *Mullane*, 339 U.S. at 315.

CONCLUSION

This Court should reverse the chancery court's order granting summary judgment in favor of the movants and render judgment in favor of the Appellants.

In the alternative, this Court should reverse the chancery court's order granting summary judgment in favor of the movants and remand the issue to the chancery court for findings of fact and conclusions of law consistent with the constitutional requirements of due process.

This 30th day of January, 2009

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

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