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IN THE
INDIANA SUPREME COURT

No. _____

Court of Appeals Cause No. 20A-TP-02347

WINDY CITY ACQUISITIONS, LLC,	)	Appeal from the Lake County Circuit Court
	)	
Appellant,	)	
	)	Trial Court Cause No. 45C01-1912-TP-02354
v.	)	
	)	The Honorable Lisa A. Berdine, Magistrate
ESTATE OF LELAND SIMMS, et al.,	)	
	)	
Appellee,	)	
	)	
BRENTWOOD EQUITABLE TRUST #1003-061387, and GREEN LEAF ENTERPRISES, LLC,	)	
	)	
Appellee.	)	

PETITION TO TRANSFER OF
APPELLEE BRENTWOOD EQUITABLE TRUST #1003-061387

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QUESTIONS PRESENTED ON TRANSFER

A. Is the Indiana Court of Appeals' finding that the tax deed petitioner substantially complied with Indiana Code § 6-1.1-25-4.5 and § 6-1.1-25-4.6 in conflict with decisions of the Supreme Court of the United States, the Supreme Court, and the Indiana Court of Appeals?

B. Is the Indiana Court of Appeals' finding that the tax deed petitioner substantially complied with Indiana Code § 6-1.1-25-4.5 and § 6-1.1-25-4.6 under these circumstances so limiting of due process that it is a significant departure from accepted law and practice?

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER[1]

This case arises out of the sale of property from a May 22, 2019, tax sale in Lake County, Indiana. The parcel in question consists of a ten-foot-wide strip of vacant land located adjacent to 2865 Dallas Street, Gary, Indiana, and was owned by Leland M. Simms ("Leland") who also owned the property at 2865 Dallas Street. (App. II:9) Leland was deceased at the time of the tax sale. His estate was probated in 2013, but the parcel was never transferred out of his name. (App II:12) His heirs included his brother Lloyd E. Simms ("Lloyd") who had an address of 3624 Burr Street, Gay, IN 46408. Lloyd testified at the hearing in the trial court. (App II:10)

The buyer at the May 22, 2019, tax sale was Alex Petrovski ("Petrovski") who, by and through attorney Kevin Marshall, issued the notice of tax sale pursuant to Indiana Code § 6-1.1-25-4.5 ("4.5 Notice"). The 4.5 Notice lists two addresses for Leland: one at 2685 Dallas Street and one at 3624 Burr Street. Certified mail was sent to Leland at 2865 Dallas Street, which was returned "Return to sender attempted not known unable to forward". Regular mail was also sent to Leland at 2865 Dallas Street. No certified mail receipts, regular mail, certified mail returns or returned mail exist or was provided for Leland at 3624 Burr Street. (App II:10-12) The 4.5 Notice was staked and posted on vacant property on August 13, 2019. (App II:13)

Petrovski subsequently assigned his Tax Sale Certificate to Windy City Acquisitions, LLC on December 11, 2019, who issued the Indiana Code § 6-1.1-25-4.6 notice of the petition for tax deed ("4.6 Notice"). This was sent, twice, by certified mail to interested parties including Leland at both 2865 Dallas Street and 3624 Burr Street. Lloyd received and signed for the second 4.6 Notice sent to 3624 Burr Street, while the notices to 2865 Dallas Street were returned. When the 4.6 Notice was received on January 18, 2020, the redemption period for the tax sale

[1] Pursuant to Ind. R. App. P. 57(G)(3), citations are to the Appendix of Appellant Windy City Acquisitions, LLC.

had already expired on September 19, 2019. (App II:14) The 4.6 Notice was staked and posted at the property on December 20, 2019. (App II:14)

Brentwood is the successor in interest to Leland via transfers from his heirs and objected to the issuance of the tax deed. The issues that were presented to and argued before the trial court included that Leland, although deceased was still entitled to notice at the 3624 Burr Street address (especially after the "Return to sender attempted not known unable to forward" certified mail at the 2865 Dallas address), that both the 4.5 Notice and the 4.6 Notice failed to substantially comply with the Indiana Code, that Petrovski failed to take reasonable additional steps after the 4.5 Notice was returned, and that the posting of the 4.5 and 4.6 Notices was insufficient as an additional step since it was not desirous of actually attempting to provide notice. Following a bench trial, the trial court issued Findings of Fact and Conclusions of Law, finding that neither the 4.5 Notice or the 4.6 Notice substantially complied with the Indiana Code. (App II:17-23)

Specifically, the trial court found that the due process requirements imposed by the Indiana Code, the Fourteenth Amendment to the U.S. Constitution and discussed in *Jones v. Flowers* [547 U.S. 220 (2006)] were not met in this case. Since the 4.5 Notice was not sent to the Burr Street address when the address was readily available and in fact already known by the petitioner, and the 4.5 Notice was posted on vacant land, Petrovski did not satisfy due process. (App II:21-22) The trial court also found that the posted 4.6 Notice was insufficient to satisfy due process since it was posted on vacant land. (App II:22)

The Court of Appeals wholly disagreed and found substantial compliance with both the 4.5 Notice and the 4.6 Notice. *Windy City*, slip op. ¶ 42.

II. ARGUMENT

A. The Court of Appeals' finding that the 4.5 Notice substantially complies with the Indiana Code conflicts with other decisions by the Supreme Court of the United States and the courts of this State.

Tax sales in Indiana are governed by statute. Whether notices issued pursuant to tax sales are sufficient is a question of law to be determined by a trier of fact. *Indiana Land Tr. Co. v. XL Inv. Properties, LLC*, 155 N.E.3d 1177, 1190 (Ind. 2020) (internal citation omitted). A petitioner for a tax deed must show that both the 4.5 Notice (notice of the right of redemption) and the 4.6 Notice (notice of the petition for tax deed) substantially complied with the statutory requirements for those notices. *Id*.

The Due Process Clause of the Fourteenth Amendment protects interested parties who may be faced with a tax sale. If a party has an interest in a parcel, he is "entitled to notice reasonably calculated to apprise him of a pending tax sale." *Mennonite Bd. of Missions*, 462 U.S. 791, 798 (1983). This Court has further noted that "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.' *XL Investment*, 155 N.E.3d at 1184 (quoting *Jones v. Flowers*, 547 U.S. 220).

The Court of Appeals ignored the due process rights of interested parties and abandoned the precedential decisions of the Supreme Court of the United States, the Supreme Court, and the Indiana Court of Appeals. Accordingly, this Court should accept transfer.

1. <u>The decision conflicts with the Supreme Court of the United States in *Jones v. Flowers*.</u>

The Court of Appeals discussed *Flowers* but failed to properly apply the framework of *Flowers* to the facts here. Though *Flowers* does not require "an open-ended search for a new address" following ineffective notice, knowledge of the ineffective notice triggers "an obligation

on the government's part to take additional steps to effect notice." *Flowers*, 547 U.S. at 230. The court in *Flowers* discussed that sending regular mail or posting a notice on the door to a property could be additional reasonable steps that would satisfy Constitutional due process but makes clear that the steps "available" depend on the circumstances of the case. *Flowers*, 547 U.S. at 234. When "relatively easy options" exist to provide notice, those additional steps should be taken. *Id*. at 236. In *Flowers*, following the failure to notify a party via certified mail, the State did not take any additional steps despite having "additional reasonable steps" available; as such, due process was not satisfied. *Id*. at 238.

In this case, Petrovski sent the 4.5 Notice to Leland at the Dallas Street address via certified mail and regular mail, and the certified mail was returned as "attempted not known unable to forward." *Windy City*, slip op. ¶ 29. Sending a single piece of regular mail concurrently with the certified mail is not contemplated by *Flowers* as a sufficient additional step on its own where other easy options were also available. The Court of Appeals' finding that the regular mail itself was a sufficient additional step is absurd where Petrovski (through Attorney Marshall) believed that the Burr Street address was associated with Leland, and he intended to send the 4.5 Notice to Leland at the Burr Street address. *Id*. at ¶ 30. Petrovski may not have been required to seek out the Burr Street address, but he had the address at the time that the 4.5 Notice was issued. *Id*. Sending such certified mail and/or regular mail to Burr Street – a relatively easy option given that Petrovski both had the address and intended to send notice to that address – was available to Petrovski, and Petrovski did not take any action.

In its Syllabus of the *Flowers* case, the United States Supreme Court describes that it held: "the government must consider unique information about an intended recipient regardless of the of whether the statutory scheme is reasonably calculated to provide notice in the ordinary case."

Flowers, syllabus, 547 U.S. 220. The Court of Appeals improperly applied *Flowers* when it excused Petrovski's failure to send the 4.5 Notice to the Burr Street address when that address was both available to him and he intended to send notice to that address.

2. The decision conflicts with the Supreme Court of the United States in *Mennonite Bd. of Missions v. Adams*.

Similarly, the Court of Appeals improperly applied the precedential decision of *Mennonite Bd. of Missions v. Adams*, which held that notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite Bd. of Missions v. Adams*, 462 U.S. at 795. The court in *Adams* wrote that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable." *Id*. at 800. In *Adams*, a mortgagee was entitled to notice and was only provided constructive notice by publication. The court held that additional notice was required where the address was readily ascertainable, as it was for the holder of the recorded mortgage in *Adams*. *Id*. at 798-799. Critically, the obligation to provide such notice is a constitutional prerequisite to the taking of an interest in property. *Id*.

Petrovski had more than a readily ascertainable address for Leland on Burr Street: he believed that notice was sent to that address and that notice was required to be sent to that address. The 4.5 Notice was not sent to Burr Street, and the 4.5 Notice sent to Dallas Street was returned "attempted not known unable to forward." *Windy City*, slip op. ¶ 29-30. The Court of Appeals ignores the plain language of *Adams* which implies the use of an additional address if the party providing the notice has that address.

The decision conflicts with at least two significant precedential decisions of the Supreme Court of the United States, and this Court should grant the Petition to Transfer.

3. The decision conflicts with prior decisions of the Supreme Court and the Indiana Court of Appeals.

The Court of Appeals' decision also conflicts with prior decisions of this Court. As recently as 2020 the Court affirmed that when a mailed notice is returned as undeliverable, additional reasonable steps must be taken before taking an owner's property "if it is practical to do so." *XL Investment*, 155 N.E.3d at 1190. In *XL Investment*, the initial certified mail letter came back undeliverable but regular mail was not returned. XL Investment then performed a skip-trace search, and the notice was published. *Id*. The Court found that notice was adequate under the circumstances and did not set aside the tax deed. Here, not only did Petrovski have another reasonable step available to him – sending the 4.5 Notice to the Burr Street address by certified or regular mail – he *intended* to take that step and failed. No notice was published, and the only other step taken was posting of the 4.5 Notice on vacant land. The Court of Appeals did not follow the Court's holding in *XL Investment* when it found the 4.5 Notice substantially complied with the Code.

The Court of Appeals did not properly apply the holding in *Sawmill*, which held that notice to interested parties of the right to redeem is "required as an element of due process." *Marion County Auditor v. Sawmill Creek, LLC*, 964 N.E.2d 213, 217 (Ind. 2012). The *Sawmill* court faced a similar question to that posed here: where a party giving notice is aware that a mailed notice was returned undeliverable, would posting that notice be a reasonable additional step? The court in *Sawmill* observed that, as here, "posting notice on bare, unimproved land was not practical." *Sawmill Creek*, 964 N.E.2d at 221. In *Sawmill*, the Auditor mailed various notices to property owners regarding tax sales. The Auditor received returned mail - an unclaimed notice letter - on a

property that it knew to be unimproved, bare land, "thus making posting a suspect form of notice." *Id*. The court found that posting notice on vacant land was impractical and was not a reasonable additional step. *Id*.

Here, the subject property was vacant land at the time that the 4.5 Notice was issued. This fact was unchallenged. This stands for the proposition that any notice posted on the property, whether the 4.5 Notice or any other notice, is suspect and does not meet the requirements of due process. The Court of Appeals went beyond the holding in *Sawmill* to discuss the size of the vacant land and how that impacts the absurdity of posting notice on vacant land. The attempt to distinguish this case from *Sawmill* must be addressed by this Court because vacant land is vacant land – and any notice posted on vacant land is deficient. Posting a notice on vacant land is not a reasonable additional step which must apply regardless of the type of vacant land. Should the Court of Appeals decision stand, a conflict will exist with *Sawmill* so the issue must be addressed by the Court and the Petition to Transfer must be granted.

The Court of Appeals' decision also conflicts with its decision in *McBain v. Hamilton County*. In *McBain*, a notice of tax sale was returned to the Auditor with an updated address. The Auditor then failed to send any notice to the updated address. The court found that the failure to send the notice to the updated address failed to meet the due process standard. *McBain v. Hamilton County*, 744 N.E.2d 984, 989 (2001). Like *McBain*, Petrovski knew of an additional address – the Burr Street address – and believed that he was required to send the 4.5 Notice to that address. Petrovski believed that he served the 4.5 Notice to Leland at the Burr Street address but was unable to provide any evidence whatsoever that certified or regular mail was sent. He found that address and believed it was associated with Leland. Petrovski knew of a proper additional step – sending the 4.5 Notice to another address – and completely failed to take that step.

The Court of Appeals failed to properly apply the precedential decisions of this Court and prior decisions in the Court of Appeals and the Petition to Transfer must be granted to remedy these conflicts.

B. The Court of Appeals has so significantly departed from accepted law and practice related to notice in tax sale proceedings [I.C. § 6-1.1-25-4.5 & § 6-1.1-25-4.6] as to warrant the exercise of Supreme Court jurisdiction.

The Court of Appeals unacceptably limits due process in an action that results in the loss of one's property rights. This is a significant departure from accepted law and practice in the field. The ultimate result of Indiana's tax sale process is the complete loss of one's rights in property – critically, unlike mortgage foreclosure, no equity whatsoever is retained by a property owner following a tax sale. Because of this, the United States Supreme Court has continually protected the rights of property owners through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Flowers*, 547 U.S. 220.

Our state courts – including this Court – have applied the reasoning and holding in *Flowers* to the Indiana Code over the years not to *limit* due process rights but to clarify the rights afforded by the Indiana Code and the Due Process Clause. Here, the Court of Appeals improperly limited the due process rights of delinquent taxpayers when it found that posting the notice on vacant land was a proper additional step under *Flowers* even though other additional steps – like the mailed notice to the Burr Street address – were available. Posting either the 4.5 Notice or the 4.6 Notice on vacant land is certainly not a means of notice that "one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Flowers*, 547 U.S. at 229. The Court of Appeals' holding in this respect is a significant departure from accepted law and practice especially because in *Sawmill* this Court held that posting notice on vacant land was not practical – someone

posting a notice on bare, vacant land does not intend to inform anyone of anything. *Sawmill*, 964 N.E.2d at 221

The Court of Appeals also failed to recognize the significance of Lloyd's acceptance of certified mail addressed to Leland at the Burr Street address [*Windy City*, slip op. ¶ 9] and instead focused on the fact that Lloyd testified that he "threw the mail [addressed to Leland] in the trash." *Windy City*, slip op. ¶ 4. The facts demonstrate that Lloyd *did* accept and receive mail for Leland at the Burr Street address and that, if the 4.5 Notice had been sent to that address as Petrovski thought it had been, the notice may have been received. In this the Court of Appeals has deviated from the commonly accepted practice of taking the reasonable additional step of sending notice to an alternate address when that address was already known to the party sending notice. *See, e.g.*, *Mennonite Bd. of Missions*, 462 U.S. 791; *Indiana Land Tr. Co. v. XL Inv. Properties, LLC*, 155 N.E.3d 1177.

This Court should grant the Petition to Transfer because the Court of Appeals' decision regarding the 4.5 and 4.6 Notice is such a significant departure from accepted law and practice in limiting the protections of the Due Process Clause of the Fourteenth Amendment.

III. CONCLUSION

For all the foregoing reasons, the Court of Appeals departed from established law and issued a decision that conflicts with decisions of the Supreme Court of the United States and the courts of this State. The Court of Appeals limited the due process protections of the Fourteenth Amendment, and this Court should grant transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that this Petition for Transfer contains no more than 4,200 words.

/s/ James W. Ensley
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of August, 2021, the foregoing document, pleading or paper, was electronically filed with the Court's e-file and serve system filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.

I further certify that on this 9th day of August, 2021, the foregoing document, pleading or paper, was served upon the following parties of record and registered users via E-service using the Indiana E-File System upon:

Green Leaf Enterprises, LLC
c/o Michael Kvachkoff

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