

IN THE COURT OF APPEALS  
STATE OF GEORGIA

RAW PROPERTIES, INC.	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. A15A1747
	)	(RELATED CASE: A14A0175)
CLAUDIA G. LAWSON, TAX	)	
COMMISSIONER and EX-OFFICIO	)	
SHERIFF OF DEKALB COUNTY;	)	
and DEKALB COUNTY, GEORGIA,	)	
	)	
Appellees.	)	

**BRIEF OF APPELLANT**  
**RAW PROPERTIES, INC.**

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**BRIEF OF APPELLANT**

**PART ONE**

Comes now the Appellant in this appeal, **RAW PROPERTIES, INC.** (hereinafter referred to as "RPI"), and files this Brief to appeal that portion of the Order entered in the DeKalb County Superior Court on March 6, 2015 ("the March, 2015 Order"), holding that Appellee Claudia G. Lawson, in her capacity as Tax Commissioner and Ex-Officio Sheriff of DeKalb County, Georgia (hereinafter "the Tax Commissioner"), is entitled to the protection of sovereign immunity as a defense against RPI's claims for damages in the action below. (A15R-40). RPI

also re-asserts all of the Enumerations of Error it asserted in related Case No. A14A0175 (“the 2014 Appeal), as directed in the final paragraph of this Court’s Order in the 2014 Appeal, dated June 4, 2014. (A15R-5). RPI expressly incorporates herein all of the facts and arguments contained in its Appellant’s Brief and Reply Brief of Appellant in the 2014 Appeal, to support its arguments in both the 2014 Appeal and in this appeal.

This action arose after the Tax Commissioner wrongfully sold RPI’s real property for taxes, despite knowing she (or her staff) had filed false returns of process and failed to comply, in multiple instances, with Georgia’s statutory requirements governing the written tax sale notices taxing authorities must send to Georgia taxpayers prior to seizing and selling their property for taxes. RPI brought its action against the Tax Commissioner to recover the monetary damages RPI incurred to reclaim its property following the defective tax sale. For more than a century, this Court has repeatedly endorsed this precise form of recourse against county authorities who failed to comply with the statutory tax sale prerequisites.

In July, 2013, the trial court erred by holding that tax authorities in Georgia can willfully ignore the statutory requirements governing tax sale notices. RPI

appealed that decision to this Court in Case No. A14A0175 (“the 2014 Appeal”). After receiving briefs and hearing oral argument in the 2014 Appeal, this Court remanded the case back to the trial court to consider whether sovereign immunity protects tax authorities who fail to comply with the statutory tax sale requirements. Upon remand, the trial court entered an Order in March, 2015, erroneously holding that the Tax Commissioner is protected by sovereign immunity in this case. (A15R-40). The trial court erred by failing to recognize that O.C.G.A. §§ 48-5-137(c) and (d) and 15-13-2 constitute express waivers of sovereign immunity, which authorize RPI’s action against the Tax Commissioner for recovery of the monetary damages she wrongfully and knowingly caused RPI to suffer.

This case presents a potentially dangerous precedent. If the trial court’s decision is allowed to stand, then several statutes at issue are robbed of their plain meaning, and tax authorities in Georgia will have no obligation to follow any of the multiple statutory procedures that the Georgia legislature has enacted into law to govern the seizure and sale of a taxpayer’s property for taxes.

### **A. PRESERVATION OF ERRORS**

In both this appeal and the 2014 Appeal, RPI's enumerated errors were preserved through the pleadings, briefs and exhibits submitted to the trial court; through oral argument conducted in the trial court; and through Appellant's timely filing of Notices of Appeal. (A14R-1, A15R-1).

### **B. STATEMENT OF FACTS AND PROCEEDINGS BELOW**

RPI expressly incorporates by reference herein its statements of facts, its arguments and citations of authority contained in RPI's Appellant's Brief and Reply Brief in the 2014 Appeal. Citations to the record relating to the 2014 Appeal shall begin with "A14R." Citations to the record in the 2015 Appeal shall begin with "A15R." The underlying facts are recounted as follows:

#### **1. RPI and its Real Property.**

RAW Properties, Inc. ("RPI") is the Appellant herein and the Plaintiff below. RPI is a privately-owned Georgia corporation. Its sole shareholder and proprietor is Robert Wilson, Jr. (A14R-Vol. 3: p. 16, l.23 - p.17, l. 1). RPI's sole function is owning title to various real properties. (A14R-Vol. 3: p. 9, l.3; p. 17,

11. 21-25). RPI acquired title to the commercial property at issue in this action (“the Property”) in 2005. (A14R-17). The Property is located at 2500 Lantrac Ct., Decatur, DeKalb County, Georgia 30035. Id.

RPI’s office address in 2005 was **5350 Snapfinger Woods Dr., Decatur, GA 30035** (the “Decatur address”). (A14R-22). In 2008, RPI moved its office from Decatur to Sparta, Georgia, approximately 100 miles away. When RPI submitted its first 2008 property tax installment payment, it included a written notice instructing the Tax Commissioner’s office to change RPI’s address for tax notices to **407 Mill House Road, Sparta, GA 31087** (the “Sparta address”). (A14R-22). In 2008, 2009 and 2010, the Tax Commissioner correctly mailed RPI’s tax statements and tax bills relating to the Property to RPI’s address in Sparta. (A14R-24 - 28).

## **2. The Tax Commissioner Wrongly Sold RPI’s Property for Taxes.**

RPI did not timely pay its 2010 DeKalb County property tax bill on the Property. Less than six (6) months later, in May, 2011, the Tax Commissioner sold RPI’s Property for taxes, despite knowing she had failed to properly send RPI multiple statutorily-required written notices before the tax sale. (A14R-40). RPI

then had to reclaim its Property from the tax sale purchaser. RPI satisfied the taxes on the Property in full, but also had to incur other costs and expenses, including a **\$24,000.00** statutory redemption premium. (A14R-42).

There are four (4) different Georgia laws that required the Tax Commissioner to mail three (3) different **written** notices to RPI before the May, 2011 tax sale. The statutes requiring proper mailing of written notices to RPI were legal prerequisites that the Tax Commissioner had to satisfy before she could lawfully sell RPI's property for taxes. See §§ 48-3-3; 48-3-9(a); 9-13-13; 48-4-1 (summarized at A14R-322); see also Jones v. Flowers, 547 U.S. 220 (2006)(holding that compliance with statutory tax sale procedures is the **minimum** requirement placed on tax authorities).

A fifth statute, § 48-5-137(c), requires Georgia tax commissioners to perform tax sales in conformity with **all** of the Georgia laws that codify the procedure for conducting tax sales. Significantly, however, the Tax Commissioner admitted there is no physical or documentary evidence to show her office correctly sent **any** of the three (3) required written notices to RPI. (A14R-141, Response No. 11 to RPI's Requests for Admissions).

**a. First Required Written Notice: The Notice of Intent to Issue Fi.Fa.**

The first written notice the Tax Commissioner was required to send RPI was a Notice of Intent to Issue Fi.Fa. O.C.G.A. § 48-3-3 requires tax officials to mail the Notice of Intent to Issue Fi.Fa. to the property owner, in writing, when property taxes are not paid in full by the tax due date. The written notice must inform the taxpayer that property taxes remain outstanding and, if taxes are not paid within the next thirty (30) days, a tax Fi.Fa. will be issued by the Tax Commissioner and filed with the Superior Court Clerk. Id.

§ 48-3-3(e)(1) specifically mandates that the Tax Commissioner “shall” send the 30-day Notice of Intent to Issue Fi.Fa. to the property owner by mail, addressed to the property owner’s address of record as found in the County Tax Assessors' records. In this case, however, there is **no physical copy or any other physical evidence** showing that a Notice of Intent to Issue Fi.Fa. was ever correctly mailed to RPI’s Sparta address.

Having failed to send RPI the written Notice of Intent to Issue Fi.Fa., as required under § 48-3-3, the Tax Commissioner was not authorized to issue a Fi.Fa. against the Property. Yet, she did so anyway. See id. In the absence of a



*valid* Fi.Fa., the Tax Commissioner was not authorized to levy or sell RPI's Property.

**b. Second Required Written Notice: The Entry and Notice of Levy.**

The Tax Commissioner was also required by law to send RPI an "Entry and Notice of Levy." Specifically, O.C.G.A § 48-3-9(a) mandates that "it **shall** be the sheriff's **duty**, before proceeding to advertise the property for sale... to give 20 days' **written notice** of the levy to the record owner of the property."

A second statute, O.C.G.A § 9-13-13, similarly requires the Tax Commissioner to deliver a **written notice** of a levy to the property owner whenever, as in this case, the owner does not occupy the property. Therefore, the Tax Commissioner was required under *both* § 48-3-9 and § 9-13-13 to correctly send RPI the mandatory Notice of Levy.

§§ 9-13-13, 48-3-9 and 48-3-10 mandate that the Entry and Notice of Levy **must** be in writing; **must** be properly sent to the property owner's address of record; and **must** explicitly give specific information to the taxpayer, including the year for which taxes are delinquent; the principal amount of taxes due; the amount of costs due; and a description of the property to be sold.

§ 48-3-9(a) *further* mandates that the Tax Commissioner must prove she sent the Entry and Notice of Levy to the taxpayer's correct address of record. Specifically, the statute requires that the Tax Commissioner "**shall** keep a copy of the notice, on which he or she **shall enter the date** the notice was delivered, and **how, where, and to whom** the notice was delivered." Id. (Emph. added).

In this case, the Tax Commissioner **never** sent an Entry and Notice of Levy to RPI's correct address, as required under Georgia laws. Instead, the Tax Commissioner incorrectly mailed an Entry and Notice of Levy to RPI's long-unused Decatur address.<sup>1</sup> Her error was readily avoidable, as she had correctly mailed RPI's tax bills to its Sparta address over the three prior years.

Three weeks **before** the tax sale, the incorrectly-addressed envelope containing the statutorily-required Entry and Notice of Levy was returned to the Tax Commissioner's office, marked "**Return to Sender; Attempted - Not Known; Unable to Forward.**" (A14R-31; A14R-147, 148: Resp. 31, 32, 33 & 34 to RPI's Req. for Admissions). The Tax Commissioner never re-sent the required

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<sup>1</sup> The Entry and Notice of Love was mailed on or around March 17, 2011, via certified mail, item no. 7010 1060 0001 2380 7178. (A14R-30, 31).

written Entry and Notice of Levy to RPI's *correct* address in Sparta, as required by law.

**c. Third Required Written Notice: Final Notice of Tax Sale.**

As the last prerequisite, O.C.G.A. § 48-4-1 required the Tax Commissioner to mail a Final Notice of the tax sale, in writing, to RPI's "**last known address as listed in the records of the Tax Commissioner.**" The Notice was required to be **in writing** and mailed at least 10 days before the May, 2011 tax sale. Id. Here, however, the Tax Commissioner **failed** to send a Final Notice of Tax Sale to RPI's address of record in Sparta. Instead, the Tax Commissioner inexplicably mailed the Final Notice to RPI's long-abandoned Decatur address. (A14R-33, 35).

The mandatory Final Notice of Tax Sale was returned to the Tax Commissioner's office **more than a week before the tax sale**, stamped "**Addressee Unknown.**" (A14R-34; A14R-147, 148: Responses 31, 32, 33 and 34 to RPI's Requests for Admissions). The Tax Commissioner never re-sent the statutorily-required Final Notice of Tax Sale to RPI at its Sparta address.

Despite knowing she had failed to correctly send RPI any of the three written notices required by law, the Tax Commissioner sold RPI's Property at a

tax sale on May 3, 2011. An unrelated entity paid the Tax Commissioner \$130,000.00 for the Property at the tax sale. (A14R-40). RPI was forced to pay the purchaser \$156,000.00 to redeem the Property, which included the statutory redemption premium of **\$26,000.00**. (A14R-42).

### **3. The Action That Gives Rise to this Appeal.**

In November, 2011, RPI's counsel gave the Tax Commissioner proper Ante Litem Notice that RPI sought to recover the losses it suffered because of the defective May, 2011 tax sale. (A14R-44). RPI requested reimbursement of the \$26,000.00 redemption premium and other costs it incurred to reclaim its Property, following the defective tax sale. RPI's request for reimbursement was rebuffed.

RPI then filed its action against DeKalb County and the Tax Commissioner. (A14R-4). RPI asserted the following claims: Damages for Knowingly and Improperly Taking RPI's Property; Damages against the Tax Commissioner for Wrongful Performance of Duties as Ex-Officio-Sheriff; and Attorney's Fees and Expenses, pursuant to O.C.G.A. § 13-6-11. (A14R-12 - 14).

RPI sought partial summary judgment on the issue of the defendants' liability. (A14R-83). The defendants filed a Cross-Motion for Summary Judgment,

arguing there is no need for tax officials to perform tax sales in accordance with the unambiguous statutory tax sale procedures. (R-211). RPI then filed motions to strike portions of affidavits and documents the defendants filed to support their summary judgment motion. (A14R-274, 425).

In July, 2013, the trial court entered an Order (“the July, 2013 Order”) granting summary judgment in favor of the Tax Commissioner and DeKalb County. The trial court erred by finding as a matter of law that purported, disputed telephone calls, the contents of which are unknown, eliminate the need for taxing authorities to comply with Georgia’s multiple tax sale notice statutes - despite the fact RPI disputes both the occurrence and contents of the purported phone calls; and despite the Tax Commissioner’s failure to send RPI **any** of the statutorily-required information that must be furnished to taxpayers, **in writing**, before their property is seized and sold for taxes. (A14R-512).

RPI appealed the trial court’s grant of summary judgment in the 2014 Appeal. Weeks after briefing was completed, DeKalb County and the Tax Commissioner filed a Supplemental Brief asserting, for the very first time, the defense of sovereign immunity against RPI’s claims for damages. See A15R-4.

In January, 2014, this Court heard oral argument in the 2014 Appeal. In June, 2014, this Court entered an Order remanding the case to the trial court “for a hearing and ruling on whether sovereign immunity bars the instant claims against (Tax Commissioner) Lawson, the County, or both.” (A15R-5).

After reviewing briefs and conducting a hearing, the trial court entered its order on the sovereign immunity issue in favor of DeKalb County and the Tax Commissioner (but only in her official capacity). (A15R-40). RPI timely filed its Notice of Appeal on March 31, 2015 (A15R-1). Per the final paragraph in this Court’s June 4, 2014 Order, RPI now has “the opportunity to file an appeal from” the March, 2015 ruling on sovereign immunity and to once again raise “the issues presented in the (2014) appeal for this Court’s consideration.” (A15R-5).

## **PART TWO: ENUMERATION OF ERRORS**

RPI re-asserts against the Tax Commissioner its Enumerated Errors I - V, which RPI raised in the 2014 Appeal. Those enumerated errors are as follows:

- I. The trial court erred by deciding that county taxing authorities have no obligation to obey multiple statutes that require them to mail multiple written notices, containing specific detailed information, to a taxpayer’s

correct address as a condition precedent to selling a taxpayer's property for taxes.

- II. The trial court erred by holding that proffered "evidence" of purported telephonic notice of a tax sale is relevant.
- III. The trial court erred by holding that O.C.G.A. § 24-9-901(b)(6) applies to this case.
- IV. The trial court erred by granting summary judgment to the Tax Commissioner because there are material disputed facts in the record.
- V. The trial court erred by failing to hold that the Tax Commissioner should reimburse RPI for the charges it wrongly had to incur to regain its Property following the defective tax sale.

RPI now adds its Enumerated Error VI relating to the issue of sovereign immunity, which was decided erroneously in the trial court's March, 2015 Order:

- VI. The trial court erred by failing to hold that Georgia law authorizes RPI's action against the Tax Commissioner to recover the monetary damages RPI suffered after the Tax Commissioner wrongly sold RPI's Property for taxes.

**PART THREE**  
**A. STANDARD OF REVIEW**

This Court should review *de novo* the two (2) trial court orders RPI challenges: the July, 2013 Order, on the parties' cross-motions for summary judgment (A14R-512), and the March, 2015 Order, finding as a matter of law that the Tax Commissioner (in her official capacity) is protected by sovereign immunity against RPI's claims (A15R-40). Rubin v. Cello Corp., 235 Ga. App. 250 (1998). This Court should review the trial court's decision in the July, 2013 Order to admit irrelevant, inadmissible evidence as an abuse of discretion. Roberson v. Ocwen Fed. Bank FSB, 250 Ga. App. 350, 352 (2001).

**B. ARGUMENT AND CITATION OF AUTHORITY**

As to RPI's enumerated errors I - V, RPI reasserts and incorporates herein all of the contents of RPI's Brief of Appellant (filed in this Court on October 9, 2013) and its Reply Brief (filed on November 18, 2013) in Case No. A14A0175 ("the 2014 Appeal"), as well as the presentation made by RPI's counsel during the oral argument conducted in this Court on January 15, 2014.



RPI presents herein its Argument and Citation of Authority as to its enumerated error no. VI, as follows:

**VI. THE TRIAL COURT ERRED BY FAILING TO HOLD THAT GEORGIA LAW AUTHORIZES RPI’S ACTION AGAINST THE TAX COMMISSIONER FOR THE MONETARY DAMAGES RPI SUFFERED AFTER THE TAX COMMISSIONER WRONGLY SOLD RPI’S PROPERTY AT A FATALY-DEFECTIVE TAX SALE.**

**A. The Tax Commissioner Was Required to Follow the Law When She Sold RPI’s Property for Taxes.**

The Tax Commissioner acted as an Ex-Officio Sheriff when she levied and sold RPI’s Property at the May, 2011 tax sale. See O.C.G.A. § 48-5-137(a).

Unfortunately, the Tax Commissioner and her staff knowingly failed to comply with multiple statutes, which required them to send RPI multiple tax sale notices, in writing, to RPI’s **correct** address, containing specific and detailed information.

“Tax sales are creature of statute. When, how, and under what circumstances they are to be made, and their effect when made, are matters **depending upon the statute governing them.**” Forrester v. Lowe, 192 Ga. 469 (1941)(Emphasis added). “The burden is upon county tax authorities to prove they

have exercised their authority in the manner in which it has been imposed by a **valid law** of this State.” City of Ft. Valley v. Grills, 282 Ga. App. 397 (2006)(Emphasis added). See also Lines v. City of Bainbridge, 273 Ga. App. 420 (2005)(stating it was “undisputed that the Bainbridge tax sale was **void** due to the city's failure to give **proper notice** to lienholders.”)(Emphasis added).

These decisions are consistent with the U.S. Supreme Court’s decision in Jones v. Flowers, 547 U.S. 220, 234 (2006). In Jones, the Supreme Court held that ‘compliance plus’ is required; that is, tax authorities must initially comply with statutory requirements by correctly mailing **written** notices to the taxpayer’s last-known address. If, as in this case, properly-mailed notices are returned to authorities prior to the tax sale, then they have to make **additional** efforts to discern the taxpayer’s correct address and re-send the mandatory **written** notices to the taxpayer’s current **physical address, before** they can lawfully sell the taxpayer’s property for taxes. Id. The trial court’s decisions in this case contravene the decision in Jones v. Flowers and, therefore, they should be reversed.

**B. The State Has Expressly Waived Sovereign Immunity for Ex-Officio Sheriffs Who Violate the Statutes Governing Tax Sales.**

This Court should find that the Tax Commissioner is not entitled to the protection of sovereign immunity in this case. By enacting O.C.G.A. §§ 48-5-137(d) and 15-13-2, the state has expressly waived sovereign immunity for both Sheriffs and Tax Commissioners acting as Ex-Officio Sheriffs when they wrongly sell taxpayers' property for taxes. Therefore, the Tax Commissioner should be deemed liable, in her official capacity, for the damages RPI seeks in this action. Id.; §§ 48-5-137(c), (d) and 15-13-2.

Subsections (c) and (d) of § 48-5-137 expressly render Sheriffs responsible for their own acts, and the actions of their deputies, in conducting tax sales. See id. Specifically, § 48-5-137(c) requires that “(a)ll acts done and performed by tax collectors or tax commissioners by virtue of this Code section (concerning tax sales) **shall be done in conformity with the law in force governing the performance of the act done.**” The next subsection, § 48-5-137(d), expressly provides a penalty for Tax Commissioners who violate that mandate: Every “tax collector or tax commissioner **shall be responsible** for the acts of the deputy or deputies **in the same manner and to the same degree as sheriffs are liable** for the acts of their deputies.” (Emphasis added). There is no need for § 48-5-137(d)

to provide for the **liability** of Ex-Officio Sheriffs if, as the trial court found, they *cannot* be held liable when they fail to abide by the laws governing tax sale procedures, as § 48-5-137(c) requires. If this Court adopts the trial court's position, then it will render § 48-5-137(c) and (d) absolutely meaningless.

This Court should reverse the trial court's decision and find that the Legislature's enactment of § 48-5-137(d) constituted an express waiver of sovereign immunity for Tax Commissioners who fail to perform their duties as Ex-Officio Sheriffs in accord with the law, as expressly commanded by § 48-5-137(c). See id. Here, the Tax Commissioner failed to abide by **multiple** statutes prior to the tax sale at issue. She therefore violated § 48-5-137(c) and, as a result, is subject to liability, in her official capacity, under § 48-5-137(d). See id.

In addition to the provisions of § 48-5-137 (c) and (d), the Legislature enacted at least two (2) subsections under O.C.G.A. § 15-13-2 that expressly waive sovereign immunity for Tax Commissioners who fail to act properly as Ex-Officio Sheriffs. The first, § 15-13-2 (5), provides that "(a)ny sheriff **shall be liable to an action for damages** or an attachment for contempt of court, at the

option of the party, **whenever** it appears that the sheriff has injured the party **by making a false return.**” (Emphasis added).

§15-13-2 (1) similarly provides that “(a)ny sheriff **shall be liable to an action for damages... whenever** it appears that the sheriff has injured the party **by neglecting to make a proper return of any writ, execution,** or other process put into the hands of the sheriff.”

The terms chosen by the Legislature are significant. "The fundamental rules of statutory construction... require (courts) to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language merely superfluous.” Beneke v. Parker, 285 Ga. 733, 734 (2009). Black’s Law Dictionary has defined “whenever” as “(a)t whatever time; at what time soever. **In any or every instance in which.**” *Black’s Law Dictionary* 1596 (6th ed. 1990)(Emphasis added). Given this common sense definition of the purposely broad term “whenever,” which the Legislature used in **both** §§ 15-13-2(1) and (5), this Court should find that the trial court erred in refusing to apply those sections to the Tax Commissioner’s undeniably false and improper returns in this case. See id.

“Any writ (or) execution” plainly means *any* writ or execution. See § 15-13-2(1). Black’s Law Dictionary has defined a “false return” as a “return of a writ or process in which the officer charged with it **falsely reports that he served it, when he did not**, or makes some other **false or incorrect statement**, whereby injury results to a person interested.” *Black’s Law Dictionary* 619 (7th ed. 2000)(Emphasis added). See § 15-13-2(5). The evidence explained below amply proves that the Sheriff **made a false return** of her defective service of the Entry and Notice of Levy *and neglected to make proper returns of the writs and execution placed in her hands*, in violation of both § 15-13-2(1) and (5). Therefore, this Court should find that the Tax Commissioner’s sovereign immunity is expressly waived, rendering her liable to RPI’s claims for damages. See id.

**1. The Tax Commissioner made a False or Improper Return By Issuing and Recording a Tax Fi.Fa., Despite the Complete Lack of Evidence Showing She Ever Sent RPI the Statutorily-Required Notice of Intent to Issue Fi.Fa.**

O.C.G.A. § 48-3-3 requires tax officials to timely mail the first written tax sale notice, the Notice of Intent to Issue Fi.Fa, to the property owner if property

taxes are not paid in full. The requirements of § 48-3-3 are a mandatory prerequisite for the proper issuance of a tax fi.fa. § 48-3-3(e)(1) specifically mandates that the Tax Commissioner “**shall**” send the Notice of Intent to Issue Fi.Fa. to the property owner **in writing, by mail**, addressed to the property owner’s correct address of record.

In this case, however, there is **no physical copy, nor any other physical evidence** to show that the Sheriff ever mailed RPI a written Notice of Intent to Issue Fi.Fa. Consequently, the Sheriff’s unauthorized issuance and recording of a tax Fi.Fa. against RPI’s Property constituted a “false” or “improper” return of service, for which sovereign immunity has been expressly waived by an act of the General Assembly under O.C.G.A. § 15-13-2(1) and (5). See Barrett v. Marathon, 268 Ga. App. 196, 199 (2004). Accordingly, this Court should reverse the trial court’s erroneous conclusion in its March, 2015 Order, that the Tax Commissioner is protected by sovereign immunity in this action. (A15R-40). See City of Ft. Valley v. Grills, 282 Ga. App. 397 (2006); Bartow County v. Southern Development, III, L.P., 325 Ga. App. 879, 882 (2014)(holding that a plaintiff can establish a waiver of sovereign immunity by citing both the relevant statutes that

create a waiver and the relevant facts that warrant a waiver; unlike this case, however, the plaintiff in Bartow County made no effort to cite any facts or statutes constituting a waiver of sovereign immunity).

**2. The Tax Commissioner made a Blatantly False and Improper Return of her Defective Service of the Entry and Notice of Levy.**

The record plainly shows the Tax Commissioner **never** sent the second mandatory written notice, the Entry and Notice of Levy, to RPI's correct address in Sparta. She was required to mail this written notice to RPI under both O.C.G.A § 48-3-9(a) and § 9-13-13.

O.C.G.A § 48-3-9(a) unambiguously mandates that "it **shall** be the sheriff's **duty**, before proceeding to advertise the property for sale... to give 20 days' **written notice of the levy** to the record owner of the property." (Emphasis added). § 9-13-13 similarly required the Tax Commissioner to correctly mail RPI a written notice of levy, as RPI does not occupy the subject Property.

These statutes expressly require that the Entry and Notice of Levy **must** be in writing; **must** be properly sent to the property owner's correct **address of record**; and **must** explicitly give the taxpayer specific information **in writing**,



including the year for which taxes are owed; the principal amount of taxes due; the amount of costs that are due; and a proper description of the property to be sold.

§ 48-3-9(a) further mandates that the Tax Commissioner “**shall** keep a copy of the notice, on which he or she **shall** enter the date the notice was delivered, **and how, where, and to whom** the notice was delivered.” Id. (Emph. added). In Funderburke v. Kellet, 257 Ga. 822 (1988), the Court correctly held “(u)nder § 48-3-9(a), the record owner of property to be sold at a tax sale is **entitled to** (written) notice of the sale by either personal service or by registered or certified mail.”

Here, the Tax Commissioner incorrectly mailed an Entry and Notice of Levy to RPI’s long-abandoned Decatur address, instead of to RPI’s actual address of record in Sparta. Thus, the Tax Commissioner “neglect(ed) to make a proper return of (a) writ, execution, or other process put into (her) hands.” See § 15-13-2(1). The Legislature has expressly decided that the Tax Commissioner is liable “**whenever**” she fails to make an proper return of a writ or execution. See id., § 48-5-137(d). Accordingly, this Court should reverse the trial court’s March, 2015 Order and find that §§ 15-13-2 and 48-5-137 constitute an express waiver of the

Tax Commissioner's sovereign immunity in these circumstances, rendering her liable to RPI. See id; Barrett v. Marathon, 268 Ga. App. at 199.

Compounding her error, the Tax Commissioner made a **blatantly false return of service** regarding the statutorily-required notice. Specifically, the Tax Commissioner **wilfully misrepresented the address where the required Entry and Notice of Levy was sent**. She falsely reported on the Certified Mail Receipt, which she retained as proof of service upon RPI, that she mailed the mandatory Entry and Notice of Levy to RPI's address in **Sparta**. However, the returned envelope plainly shows that the Sheriff **actually** mailed the required notice to RPI's long-outdated **Decatur** address. Thus, the Tax Commissioner had to admit in this action that she falsely reported the address where she sent the Entry and Notice of Levy. (A14R-147, 148: Resp. No. 30 to Plaintiff's Requests for Admissions).

The Legislature has expressly determined that the Tax Commissioner "**shall be liable to an action for damages... whenever**" she makes a false return. § 15-13-2(5). Simply put, whenever means whenever. The trial court erred by ignoring

this simple but powerful word, which the Legislature purposefully chose. Therefore, this Court should find that the Tax Commissioner's sovereign immunity has been expressly waived due to her false return in this case, under § 15-13-2(5).

Even worse, she knew of her error. Three weeks **before** she wrongfully sold RPI's Property for taxes, the incorrectly-addressed envelope containing the statutorily-required Entry and Notice of Levy was returned to the Tax Commissioner's office, marked "**Return to Sender; Attempted - Not Known; Unable to Forward.**" In Hamilton v. Renewed Hope, Inc., 277 Ga. 465, 468 (2003), the Court stated that "when (redemption notices are) mailed to the [taxpayer] (but are) returned as undeliverable" then the party required to send the notice **must** "make reasonably diligent efforts... to ascertain the **address** of the delinquent taxpayer" and mail the written notices to the correct address. See also Jones v. Flowers, 547 U.S. 220, 234 (2006)(requiring statutory compliance as the bare minimum standard for delivering written tax sale notices required by law). The Tax Commissioner made no attempts, however, to rectify her false return of

service upon RPI by re-sending the statutorily-required written notice to RPI at its correct address of record.

When the Tax Commissioner knowingly made a false return of her defective service of a required written notice to RPI, she rendered the tax sale improper **and** waived her sovereign immunity protection, under the express language in O.C.G.A. §§ 15-13-2(1), 15-13-2(5) and 48-5-137(d). Therefore, this Court should reverse the trial court's decision and hold that the Tax Commissioner is not protected by sovereign immunity in this action.

**3. The Tax Commissioner Failed to Properly Serve the Required Written Final Notice of Tax Sale Upon RPI and was Thus Precluded From Making a Proper Return of the Execution Placed in Her Hands.**

Under § 48-4-1, the Tax Commissioner was required to mail the third mandatory written notice, the Final Notice of Tax Sale, to RPI's "**(l)ast known address**" as listed in the records of the Tax Commissioner" at least 10 days before she sold RPI's Property for taxes. The Tax Commissioner failed to comply with this requirement. Instead, she wrongly mailed the Final Notice of Tax Sale to RPI's long-unused address in Decatur. The postal service later returned the mis-

addressed Final Notice of Tax Sale to the Tax Commissioner's Office, stamped "**Addressee Unknown**," more than a week before the tax sale. Later, she admitted her failure to comply with § 48-4-1 in this case. (A14R-34; A14R-147, 148: Resp. 31, 32, 33 and 34 to RPI's Requests for Admissions).

Having failed to properly serve the statutorily-required, written Final Notice of Tax Sale, the Tax Commissioner undeniably "neglected to make a proper return of (the) writ, execution or other process put into" her hands. Therefore, under § 15-13-2(5), the Tax Commissioner's sovereign immunity has been expressly waived, rendering her liable on RPI's claims in this action. This Court should reverse the trial court's erroneous determination to the contrary. (A15R-41).

**C. Since at Least 1852, Georgia's Appellate Courts Have Repeatedly Recommended Exactly the Type of Suit RPI Brought Against the Tax Commissioner.**

The remedy RPI seeks in this case – recovering the monetary losses it suffered when the Tax Commissioner unlawfully sold RPI's Property for taxes -- is not a novel approach. In fact, the Georgia Appellate Courts have recommended this exact recourse in numerous cases, since at least 1852.

That year, the Georgia Supreme Court rendered its decision in Brooks v. Rooney, 11 Ga. 423, 424 (1852). The Brooks decision is still relevant in this case. In Brooks, the Court held it is “a sound doctrine” that neglect of the laws “which make it the duty of the Sheriff to advertise the sale of property in a particular way... may subject him to a suit for damages, at the instance of the party injured by the neglect,” in which the Sheriff “would be compelled to indemnify the owner of the land which might be irregularly sold.” Id. at 428. Thus, the Georgia Supreme Court recommended exactly the remedy RPI seeks in this action. See id.

In the 163 years since Brooks v. Rooney was decided, the Georgia Appellate Courts have repeatedly endorsed this same remedy, in cases that include Hendrick v. Davis, 27 Ga. 167 (1859); Solomon v. Peters, 37 Ga. 251 (1867); Jeffries v. Bartlett, 75 Ga. 230 (1885); Marshal v. Armour Fertilizer Works, 24 Ga. App. 402 (1919); and Hayden v. Liberty County, 183 Ga. 209, 211 (1936).

Significantly, the Georgia Appellate Courts **did not waver** from holding this form of recourse is proper, even after sovereign immunity was established in Georgia. Sovereign immunity became law by constitutional amendments in 1974 (as amended in 1983) and in 1991. A long list of post-1974 appellate decisions

uniformly advocate the exact relief RPI seeks in this case. See Sizemore v. Brown, 179 Ga. App. 594 (1986); G.E. Capital Mtg. Svc. v. Clack, 271 Ga. 82, 83 (1999); Harper v. Foxworthy, 254 Ga. App. 495, 498 (2002); Davis v. Harpagon, 281 Ga. 250, 252 (2006); and Saffo v. Foxworthy, 286 Ga. 284, 289 (2009).

The post-1974 decisions are highly instructive, as each appellate court in this state “appl(ies) the law **as it exists at the time of its judgment.**” Powell v. Dougherty Christian Acad., Inc., 215 Ga. App. 551, 552 (1994) (Emphasis added). Consistent with this long history of cited decisions, this Court should find that the facts of this case and the statutes enacted by the Legislature, including §§ 48-5-137(c) and (d), and 15-13-2(1) and (5), properly support RPI’s action against the Tax Commissioner. See id.

### **CONCLUSION**

This Court should find that the Tax Commissioner is not entitled to assert sovereign immunity as a defense to avoid liability for her wrongful actions, which damaged RPI. “Liable” means liable. “Whenever” means whenever. Therefore, this Court should find that the Tax Commissioner’s sovereign immunity is waived under the plain terms of O.C.G.A. §§ 48-5-137(c) and (d) and 15-13-2(1) and (5).

This 28<sup>th</sup> day of May, 2015.

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IN THE COURT OF APPEALS  
STATE OF GEORGIA

RAW PROPERTIES, INC.	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. A15A1747
	)	(RELATED CASE: A14A0175)
CLAUDIA G. LAWSON, TAX	)	
COMMISSIONER and EX-OFFICIO	)	
SHERIFF OF DEKALB COUNTY;	)	
and DEKALB COUNTY, GEORGIA,	)	
	)	
Appellees	)	

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a true and correct copy of the foregoing **BRIEF OF APPELLANT** this 28<sup>th</sup> day of May, 2015, upon all interested parties by depositing same in the U.S. Mail in a properly addressed envelope, with adequate postage affixed thereon to ensure delivery to their address of record, as follows:

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