

**IN THE COURT OF APPEALS OF GEORGIA**

CASE NO. A15A1747  
(RELATED CASE A14A0175)

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RAW Properties, Inc,

*Appellant,*

v.

Claudia G. Lawson and  
DeKalb County, Georgia,

*Appellees.*

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**BRIEF OF APPELLEES**

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## **PART I**

### **INTRODUCTION & BACKGROUND**

Appellees Claudia Lawson and DeKalb County file this Brief in response to Appellant Raw Properties, Inc.'s ("RPI") Brief appealing that portion of the DeKalb County Superior Court's March 6, 2015 Order (the "March 6 Order") holding that Appellees are immune from RPI's claims in this case. Appellees incorporate herein all the facts and arguments contained in their Amended Brief of Appellees in the related Case No. A14A0175 ("2014 Appeal").

RPI initiated this suit for damages for the alleged inadequate notice of the levy and tax sale of its property located at 2500 Lantrac Court in DeKalb County. In fact, the employees of the Tax Commissioner employed extensive efforts to notify RPI of the tax delinquency and pending sale, including:

- a notice of intent to issue Fi.Fa. pursuant to O.C.G.A. § 48-3-3(c) sent via regular mail;<sup>1</sup>

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<sup>1</sup> A14R. 356 (¶7) and 383 ("fifa intent entry")

- an entry of notice of levy pursuant to O.C.G.A. § 48-3-9(a) sent via regular and certified mail;<sup>2</sup>
- a final notice pursuant to O.C.G.A. § 48-4-1(a)(1) sent via regular and certified mail;<sup>3</sup>
- a March 21, 2011 voicemail message to RPI's CEO concerning delinquent taxes;<sup>4</sup>
- an April 14, 2014 phone call with RPI's CEO informing him of the pending tax sale;<sup>5</sup>
- an April 22, 2011 phone call with RPI's CEO again informing him of the delinquent taxes and pending tax sale;<sup>6</sup>
- an April 25, 2011 phone call with RPI's CEO again discussing the

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<sup>2</sup> A14R. 30 and 356 (¶¶7).

<sup>3</sup> A14R. 33 and 356 (¶¶7).

<sup>4</sup> A14R. 396-398 (¶¶¶ 5-10) and 408-409.

<sup>5</sup> A14R. 397 (¶¶¶7-10) and 408-409.

<sup>6</sup> *Id.*

delinquent taxes and potential repayment plan;<sup>7</sup>

- four notices posted in the Champion newspaper by employees of the Tax Commissioner in advance of the sale, on April 4, April 14, April 21 and April 28 of 2011;<sup>8</sup>
- a notice of the pending tax sale posted at the subject property on May 2, 2011, said notice affixed to the sign in front of the door.<sup>9</sup>

Though some of the notices above were admittedly sent to an outdated address, the trial court found that the undisputed evidence shows that RPI had actual notice of the unpaid taxes and potential levy and constructive notice of the tax sale. RPI's contention that notice was so inadequate that the DeKalb taxpayers should subsidize RPI's delinquent tax avoidance is specious at best and disingenuous at worst.

Regardless, the Georgia General Assembly has not authorized RPI to file suit against either DeKalb County or the Tax Commissioner concerning

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<sup>7</sup> *Id.*

<sup>8</sup> A14R. 397 (¶9) and 409.

<sup>9</sup> A14R. 398 (¶11) and 409.

allegedly deficient notice. Until the legislature expressly waives sovereign immunity, RPI's claims are barred. Accordingly, this Court should affirm the judgment of the trial court holding that Defendants are protected by sovereign immunity.

### **OBJECTIONS TO RPI'S STATEMENT OF FACTS**

Appellees object to RPI's statement of facts to the extent it: (a) suggests that Ms. Lawson had any personal knowledge of RPI's tax delinquency or involvement in the tax sale and attendant procedures; (b) fails to discuss the extensive efforts employed by the Tax Commissioner's employees to provide notice of the tax sale by mail, telephone, publication and posting; and (c) fails to discuss the admissions of RPI's CEO regarding notice.

## **PART II**

### **ARGUMENT AND CITATION OF AUTHORITY**

#### **I. STANDARD OF REVIEW**

This Court should apply a *de novo* standard of review to the trial court's March 6, 2015 Order. *Levine v. Suntrust Robinson Humphrey*, 321 Ga. App. 268, 269 (2013).

## **II. THE TRIAL COURT PROPERLY HELD THAT RPI'S CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY**

The Georgia Constitution provides that "sovereign immunity extends to the [S]tate and all of its departments and agencies," including counties and constitutional officers—such as the Tax Commissioner—sued in their official capacities. GA. CONST., Art. I, Sec. II, Par. IX (e); *Gilbert v. Richardson*, 264 Ga. 744, 747, 750 (1994) (“the 1991 amendment’s extension of sovereign immunity to the state and its department and agencies must also apply to counties”)(citations omitted).

Sovereign immunity can only be waived by a constitutional provision or an Act of the General Assembly that specifically provides for such waiver and the extent thereof. GA. CONST., Art. I, Sec. II, Par. IX (e); O.C.G.A. § 36-1-4 (“A county is not liable to suit for any cause of action unless made so by statute”). Georgia courts disfavor implied waivers of governmental immunity. *Currid v. DeKalb State Court Probation Dept.*, 285 Ga. 184, 186 (2009). Waivers of sovereign immunity are in derogation of the common law; such statutes are strictly construed against waiver. *Board of Com’rs of Putnam County v. Barefoot*, 313 Ga. App. 406, 409 (2011). "The party

seeking to benefit from the waiver of sovereign immunity bears the burden of proving such waiver." *Bd. of Regents of Univ. Sys. v. Doe*, 278 Ga. App. 878, 881 (2006).

RPI has failed its burden to show that the legislature clearly and expressly waived sovereign immunity for the County and the Tax Commissioner. Indeed, RPI's complex maze of inferences—citing and cross-referencing numerous statutes and subsections—is strong evidence in itself that the legislature did not expressly and clearly waive sovereign immunity here. Specifically, RPI alleges that the tax commissioner violated certain notice provisions found in O.C.G.A. § 48-3-3(e)(1)<sup>10</sup>, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1, and—by virtue of O.C.G.A. § 48-5-137(c), which allegedly creates a new and separate statutory duty enforceable through subsection (d)—the legislature intended to piggyback the sheriff's waiver of immunity in O.C.G.A. § 15-13-2 for making false "returns" to include a waiver of immunity for the County and the Tax Commissioner for inadequacy notice concerning tax sale and levy. While creative (and **bold!**),

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<sup>10</sup> Appellee assumes Appellant intended to cite O.C.G.A. § 48-3-3(c).

RPI's argument does not withstand scrutiny.

If the legislature wanted to waive sovereign immunity for the County and the Tax Commissioner concerning notice to delinquent taxpayers, the legislature would have done so. It has not. Accordingly, this Court should affirm the trial court's Order holding that RPI's claims are barred by sovereign immunity.

**a. O.C.G.A. § 48-3-1 et seq. Does Not Waive Sovereign Immunity for the County or the Tax Commissioner Acting as Ex Officio Sheriff**

RPI claims that the tax commissioner's staff violated the notice provisions of O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1 by allegedly sending tax sale notices to the wrong address. Even if the factual allegations are accepted as true, none of these code sections contain any language concerning county liability, sovereign immunity, or waiver. If the legislature intended to waive the county's and the tax commissioner's sovereign immunity for violating these notice provisions, it would have done so.

RPI can point to no case in which a Georgia court has found a waiver of sovereign immunity contained in O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), or O.C.G.A. § 48-4-1, and this Court should not be the first.



**b. O.C.G.A. § 48-5-137 Does Not Waive Sovereign Immunity for the County or the Tax Commissioner Acting as Ex Officio Sheriff**

O.C.G.A. § 48-5-137 governs tax commissioners in their role as ex officio sheriffs. Subsections (a) and (b) set forth the general powers of the tax commissioner in this role (e.g. “ex officio sheriff shall have full power to bring property to sale for the purpose of collecting taxes”). Contrary to Appellant’s argument, subsection (c) does not create any new or additional statutory duties for the tax commissioner, but simply directs the tax commissioner to rely on previously existing statutes concerning tax sale procedure.

RPI asserts that Subsection (d) waives sovereign immunity.

Subsection (d) states that:

“In carrying out this Code section, tax collectors or tax commissioners shall have the power and authority to appoint one or more deputies with all the powers of the tax collectors or tax commissioners while acting as ex officio sheriffs in the levy and collection of taxes... Each 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).

This language does not constitute an express or an implied waiver of sovereign immunity, and RPI can point to no case in which a Georgia court

has found a waiver of sovereign immunity contained therein. The legislature's use of the word "liable" in relation to the sheriff and "responsible" in relation to the tax commissioner strongly suggests that the legislature intended the words to have different meanings. If the legislature intended for tax commissioners to be liable for anything, the legislature would have used the word liable. If it was a scrivener's error, the legislature could have corrected it at least once in the nine times that O.C.G.A. § 48-5-137 has been since amended. Furthermore, under *Barefoot*, cite *supra*, the courts must construe statutes strictly to avoid a waiver of sovereign immunity and any ambiguity must be resolved against waiver. This case is not close, but even if it were, this Court should not extend a waiver of sovereign immunity without clear language evidencing the legislature's intent.

**c. O.C.G.A. § 15-13-2 Does Not Waive Sovereign Immunity for the County or the Tax Commissioner Acting as Ex Officio Sheriff**

O.C.G.A. § 15-13-2 provides that *sheriffs* may be liable for (1) making a false return, and (5) neglecting to make a proper return of any writ, execution, or other process put into the hands of the sheriff, among other things. Nowhere does this code section waive sovereign immunity for the

County or the Tax Commissioner. RPI can point to no Georgia case where even a *sheriff* was found liable under § 15-13-2 for allegedly providing defective notice in violation of O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1. Further, rules of statutory construction direct courts to prefer specific statutes over general statutes relating to the same subject matter. *Mental Health Institute v. Brady*, 263 Ga. 591 (1993); *see also* 82 C.J.S Statutes § 482. Here, O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1 relate specifically to the statutory duties that the tax commissioner allegedly violated. Thus, if the legislature intended to waive sovereign immunity for the County and Tax Commissioner for violations of those code provisions, it would have included a waiver of sovereign immunity in those code provisions, not in an unrelated statute providing for general liability for the *sheriff*.

Even if O.C.G.A. § 15-13-2 did include the County or the Tax Commissioner, the facts do not support even an initial finding that the County or Tax Commissioner violated § 15-13-2 for allegedly defective notice under O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1. “A substantial compliance with any statutory requirement, especially on

the part of public officers, shall be deemed and held sufficient.” O.C.G.A. § 1-3-1(c). As detailed above, employees of the tax commissioner employed extensive efforts to comply with the statute and to ensure that RPI was aware of the proceedings. The trial court properly found that the tax commissioner’s efforts constituted substantial compliance with the applicable notice statutes, and that RPI had actual knowledge of its delinquent tax status and constructive notice of the tax sale. Even if the legislature intended to waive sovereign immunity for inadequate notice under O.C.G.A. § 48-3-3, O.C.G.A. § 48-3-9(a), and O.C.G.A. § 48-4-1 through O.C.G.A. § 15-13-2, substantial compliance with each of the statutes would preclude a waiver of sovereign immunity even for the Sheriff let alone the County or the Tax Commissioner.

**d. In 2014, the Georgia Court of Appeals Held That the County is Protected by Sovereign Immunity Concerning Allegedly Defective Notice In Relation to a Tax Sale and Levy**

In *Bartow County v. Southern Development, III, L.P.*, 325 Ga. App. 879 (2014), the plaintiff filed suit against the county, claiming that the plaintiff never received notice of a pending tax sale and that the tax commissioner breached its statutory duty under O.C.G.A. § 48-4-5. *Id.* at

880. Even though O.C.G.A. § 48-4-5 includes a statutory notice requirement, as in our case, the court held that the county is immune from suit for alleged violations of a statutory duty. *Id.* at 882. As the court in that case declined to find a waiver of sovereign immunity in O.C.G.A. § 48-4-5, this Court should do the same here.

The cases RPI cites in support of its novel theory are distinguishable and inapplicable. *Barrett v. Marathon*, 268 Ga. App. 196 (2004), concerns a suit against a *sheriff* for failing to deliver excess funds from a tax sale. Not only does *Barrett* concern different entities from our case, but it also does not involve a challenge to allegedly defective notice. *Barrett* offers no support to RPI's claims. Similarly, *City of Ft. Valley v. Grills*, 282 Ga. App. 397 (2006), involves a challenge to a \$75 collection fee imposed by a city. *Grills* does not address the issue of sovereign immunity, it does not involve a county or county tax commissioner, nor does it involve allegedly defective notice or returns.<sup>11</sup> *Grills* stands solely for the proposition that a city official

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<sup>11</sup> It should be noted that RPI misquotes *City of Ft. Valley v. Grills* in its Brief of Appellants. RPI quotes the opinion as saying “[t]he burden is upon

must have express statutory authority to impose a collection fee and therefore offers no support for RPI's claims.

Finally, though RPI claims that Georgia's appellate courts have "recommended" suits like RPI's suit since 1852, in fact RPI can point to no case that has allowed a suit against a tax commissioner for allegedly defective notice, nor can it point to a single case establishing that the legislature intended to waive sovereign immunity for the county or the tax commissioner concerning allegedly defective notice in relation to a tax sale and levy. As the trial court correctly points out, sovereign immunity may

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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." (Appellant's Brief 16-17) (emphasis by Appellant). In fact, the opinion reads: "cities can levy no tax ... unless the power to do so be plainly and unmistakably granted by the State, and the burden is on every political subdivision of the State which demands taxes from the people to show authority to exercise it in the manner in which it has been imposed by a valid law of this State." *Grills* at 398-399.

only be waived by act of the legislature, not by inference from case law.

**CONCLUSION**

For the reasons explained above, the trial court properly concluded that sovereign immunity bars RPI's claims in this case.

Respectfully submitted this 16<sup>th</sup> day of June, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing BRIEF OF APPELLEE upon all parties to this matter via email and by depositing a true copy of the same in the U. S. Mail, proper postage prepaid, addressed to counsel of record as follows:

This 16th day of June, 2015.

*/s/ Bennett D. Bryan*

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