IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2721

L.T. CASE NO.: 1D01-3181

DELTA PROPERTY MANAGEMENT, INC.

Petitioner,

vs.

PROFILE INVESTMENTS, INC.

Respondent.
_____/

BRIEF ON THE MERITS OF PETITIONER

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I

THE CASE

This case involves a forfeiture of real property resulting from a tax sale in violation of the due process standard set forth in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).[1] Petitioner, DELTA PROPERTY MANAGEMENT, INC. ("DELTA"), appeals a final summary judgment quieting title to commercial property which it owned, then lost in a tax sale to respondent PROFILE INVESTMENTS, INC. ("PROFILE"), a business engaged in buying tax deeds. DELTA answered and counterclaimed contending essentially that the tax deed in favor of PROFILE was invalid because proper notice of the tax sale was not given as required by law to DELTA or to its mortgagee (AT&T Commercial Finance Corporation). (R1: 42-46) Cross motions for summary judgment were filed, and the trial court ruled in favor of PROFILE. (R1: 36-37, 110-126, 150-156)

The final judgment was affirmed by the First District in a two-to-one decision with Judge Ervin dissenting.[2] The essential basis for the majority decision below was its conclusion that the clerk of the court had no duty to ask the tax collector for updated "name and address" information prior to sending out a tax sale notice to the owner. According to the majority, it did not matter that an updated tax

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[1] In Mennonite, the United States Supreme Court held that when an owner is in danger of forfeiting property, "[n]otice by mail or other means as certain to ensure actual notice is the minimum constitutional precondition ... if [the owner's] name and address are *reasonably ascertainable*." Id. at 800 (emphasis added). Mennonite, in turn, formed the basis of Dawson v. Saada, 608 So. 2d 806 (Fla. 1992), in which this Court ruled that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending [and] ... does not relieve the state of its constitutional obligation to inform interested parties of the pendency of a tax sale." Id. at 810.

[2] A copy of the First District's opinion in this case is attached as an appendix to this brief and is designated as (A.).

assessment roll for the year 2000 containing DELTA's new address had become available during the five-month gap between the time the clerk first received DELTA's address from the tax collector in April of 2000 and the time the clerk actually sent out the notice of tax sale to DELTA in September of 2000. In a nine-page dissent, however, Judge Ervin vigorously disagreed with the majority and detailed the due process and statutory deficiencies in the majority's analysis. The dissent was subsequently adopted by the Fourth District in Baron v. Rhett, 847 So. 2d 1032 (Fla. 4th DCA 2003), which expressly certified conflict with the First District's decision.

The case is now before this Court on two jurisdictional grounds. First, there is an express and direct conflict with Baron. In each case the forfeiture occurred because the clerk of the circuit court failed to mail the notice of tax sale to the name and address of the property owner shown on the *latest* assessment roll as required by statute. In Baron the tax sale was invalidated, but in this case it was upheld. Second, this case impacts two classes of constitutional officers, namely clerks of the circuit court and tax collectors. See Art. VIII, § 1(d), Fla. Const.

II

THE FACTS

DELTA owns several pieces of commercial property in Duval County. The property in issue is worth in excess of $1 million, and it has been owned by DELTA since 1995. (R1:98) With the exception of one aberrant year (1997), DELTA paid each year's real estate taxes on the property -- including the taxes due in the *following* year (1998). (R1:99-101) In fact, the 1997 real property tax of $17,491.62 was not paid due simply to an undisputed oversight. It is that oversight which resulted in the issuance of the tax certificate purchased by PROFILE in

April of 1998. (R1: 18-20, 99)

The following chronology sets forth the circumstances leading up to DELTA's loss of its property through a tax sale to PROFILE:

- ***July 1, 1999:*** The *1999* tax assessment roll was certified containing DELTA's address in Jacksonville, Florida.
- ***December 1999***: DELTA provided the tax collector with written notice of its *new* address in Hallandale, Florida. (R1: 107-109)
- ***April 3, 2000***: PROFILE applied for a tax deed following expiration of the statutory two-year redemption period. (R1:25)
- ***May 30, 2000***: The tax collector provided the clerk with DELTA's *old* address as it had appeared on the 1999 assessment roll. (A. 2; R1: 24, 28)
- ***July 1, 2000:*** A *new* assessment roll was certified containing DELTA's updated address in Hallandale. (A. 4; R1: 146-47)
- ***September 4, 2000***: Relying solely on the May 30th statement from the tax collector, the clerk mailed the tax sale notice to DELTA at the outdated 1999 address

in Jacksonville. (A. 2; R1: 31, 34) The clerk sent a separate notice to the mortgagee, but put the wrong name on it. Both notices were eventually returned "undeliverable". (R1:34-35)

- ***September 27, 2000***: DELTA lost its property at a tax sale. (A. 2)

As the timeline illustrates,[3] the clerk prepared and mailed the notice of tax sale to DELTA, but it was not based upon the "*latest* assessment roll" because a new assessment roll had been certified in July of 2000. (A. 4; R1:146-47) The clerk unfortunately used the address for DELTA contained in the outdated 1999 assessment roll. Compounding the error, no notice whatsoever was sent to the mortgagee of record, AT&T

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[3] For the court's convenience and quick reference, the timeline can be summarized as follows:

DELTA **1999** PROFILE Tax Collector **2000** Clerk Mails DELTA
Buys **Tax** Applies for Sends Statement **Tax** Notice of Tax Loses Property
Property **Roll** Tax Deed to Clerk with **Roll** Sale to at Tax Sale
DELTA's DELTA's
1999 Address ***old address***
in Jacksonville *in Jacksonville*

|-----/ /-----|----------|----------|----------|----------|----------|---------|
1995 **7/1/1999** 4/23/2000 5/30/2000 **7/1/2000** 9/4/2000 9/27/2000

|<-----**Tax Roll shows Jacksonville address**---------- >|<--**Tax Roll shows Hallandale address**-->|

Commercial Finance Corporation.[4]

On appeal DELTA argued that the tax sale was void for failure to comply with § 197.502(4)(a), which explicitly requires a notice of tax sale to be mailed to the address of the property owner as it appears on the "latest assessment roll." (A. 3-4) Acknowledging that the 2000 tax roll reflecting DELTA's accurate address may well have been completed and "available to the clerk" when the notice was mailed, (A. 5) the majority nevertheless concluded that there was nothing improper about the clerk using DELTA's old address from an outdated tax assessment roll. (A. 5-6) It reasoned that the clerk "perform[s] a purely ministerial function when providing notice of an upcoming tax sale" and therefore "had no duty to look beyond the tax collector's statement" right or wrong. (A. 5-6) To hold otherwise, according to the majority, would improperly force the clerk to "diligently search the public records for proper addresses." (A. 6)

In his dissent, Judge Ervin focused on the vested property rights that were forfeited as a result of the tax sale and

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[4] The record shows that the notice to the mortgagee was incorrectly sent to "Commercial Finance Corporation." While this company name may appear similar to that of the mortgagee, the law provides that corporate names must be precise on documents which have legal consequences. See, e.g., Louis v. S. Broward Hosp. Dist., 353 So. 2d 562 (Fla. 4th DCA 1978).

determined that the majority opinion could not be reconciled with the applicable statutes, with Dawson, or with due process under Mennonite. In this regard, he observed:

> What the majority and the lower court apparently fail to understand, however, is that §§ 197.502(4)(a) and 197.522 (1)(a), when construed *in pari materia*, require the clerk to mail the notice to the record titleholder's address *as it appeared on the latest assessment roll, which in this case was required by law to have been completed as of July 1, 2000.* As stated, the notice was not mailed until September 4, 2000, more than two months thereafter. *It seems altogether clear to me that the clerk simply did not comply with his statutory duty.*
>
> If the applicable notice statutes can be interpreted, as the majority has done, as authorizing the clerk to send a notice to a titleholder at an incorrect address based on a tax roll that had been superseded by a later roll containing the correct address at the time of mailing, *such interpretation, in my judgment, would have serious constitutional implications.*

(A. 12-13; emphasis added) Judge Ervin concluded:

> [A] reasonable interpretation of [the statutory notice procedures] is that the clerk is simply directed to request the tax collector, once he is aware that the information contained in a statement may no longer be current *because it was based on a tax roll since superseded*, to supply him with a supplemental statement reflecting any updated materials.

(A. 15-16; emphasis added) In Baron, the Fourth District

adopted Judge Ervin’s reasoning, thereby creating conflict.

STANDARD OF REVIEW

This is an appeal from a final summary judgment. The issues are therefore reviewed *de novo.*

SUMMARY OF ARGUMENT

The clerk of the circuit court is a constitutional officer. As such, there is a constitutional duty to provide notice of a tax sale to the owner by means "*certain* to ensure actual notice ... [where the owner's] name and address are reasonably ascertainable." Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis added); see also Dawson v. Saada, 608 So. 2d 806 (Fla. 1992). Despite the mandate of the United States Supreme Court in Mennonite, the majority below surprisingly ignored due process altogether, failed to give meaning to the controlling statutes and upheld a tax sale resulting in DELTA forfeiting its property. In a sharp departure from Mennonite, the majority concluded that the circuit court clerk had no duty to obtain updated information *even though available*, reasoning that since the clerk's duty is "purely ministerial" the clerk is permitted to rely on the tax collector's statement *whether or not it is current*.

In his dissent, Judge Ervin correctly recognized due process as the central theme of the case, observing that where property rights are about to be forfeited through a tax sale the clerk as a constitutional officer has the *obligation* to use the latest

information available in preparing the notice thereof. In Baron v. Rhett, 847 So. 2d 1032 (Fla. 4th DCA 2003), the Fourth District saw the issue exactly as Judge Ervin did, thereby creating the conflict now before the Court. In Baron the Fourth District stated:

> We agree with Judge Ervin, adopt the reasoning of his dissent, and certify conflict with Delta Property Management v. Profile Investments, Inc., 830 So. 2d 867 (Fla. 1st DCA 2002). It is true that the statutes do not require the clerk to do anything more than rely upon the tax collector's statement in preparing the tax sale notices. However, there could come a point in time when the tax collector's statement no longer represents those who are entitled to notice.

Id. at 1035 (emphasis added). This is precisely the teaching of Mennonite. When the tax collector's statement no longer reflects the most current information as to those entitled to notice, the clerk has a constitutional duty to obtain an updated statement. In this case Mennonite was not followed; due process was denied; and the First District's decision must therefore be reversed.

ARGUMENT

CLERK'S NOTICE OF TAX SALE SENT TO TITLEHOLDER AT INCORRECT ADDRESS BASED ON OUTDATED AND SUPERSEDED TAX ROLL VIOLATED DUE PROCESS WHERE NEW TAX ROLL CONTAINED CORRECT ADDRESS AT TIME OF MAILING

I

STATUTORY PROVISIONS

Once the statutory machinery leading to a tax sale is set in motion under Florida Statutes § 197.432, the tax collector is required to prepare and deliver a statement (known as an "ownership and encumbrance report") to the clerk of the circuit court listing the parties to be notified of the impending tax sale pursuant to § 197.502(4).

[5] The statute provides in relevant part:

> (4) The tax collector shall deliver to the clerk of the circuit court a statement . . . stating that the following persons are to be notified prior to the sale of the property:
>
> (a) Any legal titleholder of record if the address of the owner appears on the record of conveyance of the lands to the owner. However, if the legal titleholder of record is the same as the person to whom the property was assessed on the tax roll for the year in which the property was last assessed, then *the notice may only be mailed to the address of the legal titleholder as it appears on the latest assessment roll.*

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[5] As DELTA explained in its jurisdictional brief, the positions of the clerk of the circuit court and the county tax collector are both expressly created by the Florida Constitution, see Art. VIII, § 1(d), Fla. Const., and this Court routinely resolves matters which affects the duties of such officers. See, e.g., Taylor v. Tampa Electric Co., 356 So. 2d 260 (Fla. 1978); Tyson v. Lanier, 156 So. 2d 833, 835 (Fla. 1963).

* * *

> (c) Any mortgagee of record if an address appears on the recorded mortgage.

(Emphasis added)[6] The clerk's duties are then enumerated in § 197.522, which specifies:

> (1)(a) The clerk of the circuit court *shall* notify by certified mail . . . the persons listed in the tax collector's statement pursuant to § 197.502(4) that an application for a tax deed has been made.

Florida Statutes § 197.522(1)(a)(emphasis added). The clerk's compliance with this provision is *mandatory* and non-delegable. Dawson v. Saada, 608 So. 2d 806 (Fla. 1992).[7]

The first statute requires the notice to be mailed *only* to the owner's address appearing on the *latest* tax roll. See Saggese v. Dep't of Revenue, 770 So. 2d 1244 (Fla. 4th DCA

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[6] Use of the term "only" to modify the directive "may" in § 197.502(4) indicates the mandatory nature of this requirement. See, e.g., Perry v. City of Fort Lauderdale, 352 So. 2d 1194 (Fla. 4th DCA 1977)(term "may" construed as "must" in connection with public official performance of duties)(quoting Seaboard Air Line Ry. Co. v. Wells, 100 Fla. 1027, 130 So. 587 (Fla. 1930)).

[7] Nearly every case cited by PROFILE in its jurisdictional brief to support upholding the tax sale predated this Court's seminal decision in Dawson. In fact, one of PROFILE's lead cases -- Mullin v. Polk County, 76 So. 2d 282 (Fla. 1954) -- even predated the current version of the statute. The statute at issue in Mullin had excused the clerk from even having to mail a notice of tax sale to the owner. Not only has that statutory provision been repealed, see Ch. 22079 § 17 at 883, Laws of Fla. (1943), but it runs directly contrary to this Court's directive in Dawson that the clerk's duty to provide notice is *mandatory.*

2000). The second requires the clerk to prepare and mail this notice. It therefore necessarily follows, *in pari materia,* that the clerk must ensure that the notice actually contains the address from the *latest* tax roll available -- not simply from the latest tax collector's statement.[8] The clerk is charged with knowledge of the latest tax roll which is updated every July pursuant to § 193.1142, so it is not reasonable for the clerk to rely on a statement from the tax collector that predates the latest roll. Since the 2000 tax assessment roll was indeed the "latest" roll, it was error to rely on the outdated 1999 information.[9] This problem arose because the tax collector's

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[8] Like all statutes on a single subject, the tax delinquency statutes must be construed *in pari materia*. Dawson, 608 So. 2d at 809.

[9] In dicta the First District observed that while the record contains a printout of the 2000 assessment roll containing DELTA's updated address, the record contains no evidence showing that the 2000 roll was timely certified by the statutory July 1st deadline. § 193.1142, Fla. Stat. As Judge Ervin explained in his dissent, however, the court must presume that the property appraiser fulfilled his duty in this regard on a timely basis. In Judge Ervin's words:

> [W]e are required to presume on the basis of this record that the property appraiser complied with the command of § 193.023(1) … It is a long established rule that elected and public officials are presumed to perform their duties in a lawful and proper manner. See County of Palm Beach v. State, 342 So. 2d 56, 58 n.1 (Fla. 1976); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977) .... [B]ecause [PROFILE] presented no proof that the property appraiser failed to comply with the statutory certification deadline, I am of the firm opinion that we must presume he carried out the duty imposed by law.

Delta, 830 So. 2d at 871 (Ervin, J., dissenting). Furthermore, once DELTA offered the July 2000 assessment roll in support of its motion for summary judgment, the burden shifted to PROFILE to offer counter-evidence on the timeliness issue

statement was prepared and forwarded to the clerk some five months ahead of time, and the assessment roll changed in the interim. In fact, the new 2000 assessment roll contained DELTA's correct address since DELTA had provided the tax collector with its change of address several months earlier. Judge Ervin recognized in his dissent that it would have been an easy matter for the clerk to have requested an updated statement from the tax collector, so that he could comply with the statutory mandate of using information from the "latest assessment roll." (A. 15-16) Unfortunately the clerk failed to do so, and the tax sale should therefore be declared void.

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if it intended to challenge the relevance of the tax roll, but it did not do so. See Landers v. Milton, 370 So. 2d 368 (Fla. 1979).

II

DUE PROCESS

This Court recognized in Dawson v. Saada, 608 So. 2d 806 (Fla. 1992), that the guiding principle of the statutory tax sale structure is due process. Dawson holds that the government's duty to mail proper notice to a property owner under § 197.522(1) is *mandatory*.

> A landowner whose property is to be sold for delinquent taxes undoubtedly has a vested ownership interest in the subject property and is therefore entitled to notice of a pending tax deed sale .... In any proceeding which is to be accorded finality, due process requires 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. ... Without the notice mandated by § 197.522 (1), the fundamental requirement of due process has not been satisfied and the tax deed or sale is not valid.

Id. at 808-09 (citations omitted; emphasis added). In so ruling, this Court rejected the argument that an owner's failure to pay taxes could "relieve the state of its constitutional obligation to inform interested parties of the pendency of a tax sale." Id. at 810 (quoting Mennonite). This Court based its ruling on the United States Supreme Court's decision in Mennonite, which made it clear that due process protections must be strictly adhered to when the consequence of not paying taxes is a property forfeiture.

A. Due Process under Mennonite

As Mennonite reflects, it was not a difficult case to decide. Sound due process principles from past decisions were simply applied to real property forfeitures. In the Court's own words, application of due process to a real property forfeiture is both "elementary" and "fundamental."

> In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, *under all circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Invoking this "elementary and fundamental requirement of due process," ibid, the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known.

Mennonite, 462 U.S. at 795 (emphasis added). Mennonite involved facts similar to this case. A purchaser of real property at a tax sale brought suit to quiet title. An Indiana statute required that notice be given to the owner by certified mail, but there was no provision for notice to the mortgagee by either certified mail or personal service. After the two year redemption period similar to the Florida provision, the plaintiff received the tax deed and sued to quiet title. The mortgagee claimed that it had not received constitutionally adequate notice, but the trial court rejected the argument. On appeal, that ruling was affirmed. The Supreme Court accepted the case for review and reversed the Indiana decision.

Determining that the case was controlled by Mullane, the Court held that a means certain to ensure actual notice is the *minimum* constitutional precondition in any proceeding adversely affecting real property. Id. at 798. While the case involved the interest of a mortgagee, the basis of the decision regarding notice and its relationship to due process is equally applicable to a property owner. Having found

that a mortgagee possesses a "substantial property interest that is significantly affected by a tax sale", the Court focused on the fact that the tax sale was in reality a potential forfeiture. Id. Next, the Court observed that notice by publication was not adequate since the very essence of published notice is "designed primarily to attract prospective purchasers to the tax sale" and "unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices." Id. at 799. Because Indiana law allowed for notice by publication, the Court astutely observed that published notice better served the interests of tax deed purchasers rather than those with existing interests in the property about to be forfeited.

Like the reasoning of this Court in Dawson, the Court in Mennonite rejected the argument that a property owner's failure to protect its interests relieves the government of its notice obligations. Thus, the Court refused to "shift" the burden where fundamental due process is at stake and determined that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." Mennonite, 462 U.S. at 799. Emphasizing the elevated level of responsibility which the government must satisfy in order to safeguard existing property ownership interests, the Court concluded:

> Notice 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, whether unlettered or well versed in commercial practice, *if its name and* address *are reasonably ascertainable*.[10] Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter was the information which the [County] was constitutionally obliged to give personally....

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[10] Recognizing the same principle in the context of probate proceedings, the Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), held that due process mandated *actual* notice not only to "*known*" creditors, but also to creditors who were "*reasonably ascertainable*" through "*reasonably diligent efforts*." Id. at 490-91.

Id. (footnote added; emphasis added).[11]

The majority's conclusion in this case that the clerk did not need to mail the notice of tax sale to DELTA's updated address on the assessment roll does not satisfy Mennonite. Applying the holding in Mennonite to this case makes it clear that the clerk had the burden to request the tax collector to provide updated information based upon the *latest* tax roll which was certified two months prior to the sale.[12] The Fourth District so found in its decision of Baron v. Rhett, 847 So. 2d 1032 (Fla. 4th DCA 2003), which struck down a tax sale under similar facts.

B. The Baron Decision

The Fourth District's decision in Baron presents a virtual template of this case with the sole distinction being that the notice of tax sale contained an outdated name rather than an outdated address.

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[11] The decision in Mennonite was six to three. Justice O'Connor's dissenting opinion (joined by Justices Powell and Rehnquist) makes the point that a "one size fits all" formula is too strict a test for procedural due process and that in certain instances constructive notice should be sufficient. Two points are worthy of note. First, in Dawson this Court appropriately followed the majority in Mennonite. And second, even if the "totality of the circumstances" test urged by Justice O'Connor were applicable, the key fact here is that the clerk had the needed information available through the most current tax roll.

[12] Other jurisdictions facing the same issue have recognized the constitutional importance of notice "reasonably calculated, under all the circumstances to apprise interested parties" of a tax deed sale. For example, in South Carolina, where the county failed to provide notice to the titleholder at his changed address, the court observed that, "[f]ailure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void." Tanner v. Florence County Treasurer, 521 S.E.2d 153, 159 (S.C. 1999). To the same effect is the District of Columbia's decision in Malone v. Robinson, 614 A.2d 33, 36 (D.C. 1992). In that case, the court recognized that where notice mailed to the titleholder was returned as unclaimed by the post office, due process considerations mandated by Mennonite require that some additional step must be taken to reach the property owner. Accord Bryant v. T.C.B. Enter., 395 So. 2d 823 (La. Ct. App. 1981) (tax collector required to make further efforts to locate address of property owner when notice is returned unclaimed); see also In re Tax Claim Bureau, 600 A.2d 650 (Pa. Commw. Ct. 1991) (holding that the tax collector failed to take reasonable steps to locate the property owner's address after the notice of tax sale was returned unclaimed).

In Baron a landowner failed to pay his 1998 property tax. Consequently, a tax certificate was issued. Following expiration of the statutory redemption period, the certificate holder applied for a tax deed. Pursuant to the application, the tax collector forwarded to the circuit court clerk a statement in April of 2001 containing the owner's name and address as listed on the most current tax assessment roll, which was for 2000. The clerk then waited approximately five months before noticing and setting the tax deed sale. Id. at 1035. During that five month period, a new assessment roll was certified for 2001 reflecting a new owner of the property. Id. Because the clerk relied on information from an outdated 2000 assessment roll, notice was never sent to the new owner, resulting in a forfeiture at a tax sale. Id.

Fortunately for the owner, the trial court saw the problem and set aside the tax sale for legally deficient notice. The Fourth District affirmed, concluding that § 197.522 cannot be interpreted to allow the clerk to rely on owner information which has become stale by operation of law. Id. at 1035-37. The court therefore concluded that when a new tax roll intervenes during the period between the tax collector's initial statement of ownership and the tax sale, the clerk must simply obtain an updated statement. Id. at 1036-37. At the very least, this would minimize the chances that a notice would be misdirected. Moreover, as the Fourth District explained, "[t]his requirement calls for no independent research and imposes minimal efforts on the clerk's part." Id.

Significantly, the court in Baron agreed with and quoted from Judge Ervin's dissent in this case. It zeroed in on Judge Ervin's observation that requiring the clerk to ask for updated information when a new intervening tax roll has been certified

would not unduly burden the clerk. Id. at 1035, 1037. The clerk by virtue of his position has reason to know that tax assessment rolls are revised annually on July 1st pursuant to statute, so this knowledge alone should alert the clerk to potential due process issues. See § 193.1142, Fla. Stat. Judge Ervin noted on this point:

> [A] reasonable interpretation of [the notice statutes] is that the clerk is simply directed to request the tax collector, once he is aware that the information contained in a statement may no longer be current because it was based on a tax roll since superceded, to supply him with a supplemental statement reflecting any updated material.

Baron, 847 So. 2d at 1035, *quoting*, Delta, 830 So. 2d at 873 (Ervin, J., dissenting). The court therefore concluded that while the statutes may only require reliance on the tax collector's statement, outdated statements do not necessarily represent those who are entitled to notice. Plain and simple, due process requires such statements to be updated.

The importance of due process cannot be overstated, yet the majority's opinion below never even mentions, much less discusses it. However, both the court in Baron and Judge Ervin in this case engaged in a full blown due process analysis, concluding that the constitutional officer charged with the responsibility of providing notice of a tax sale to a property owner cannot shirk his obligation by using stale information in

preparing the notice. Baron, 847 So. 2d at 1036-37; Delta, 830 So. 2d at 872-73 (Ervin, J., dissenting).

In fact, compliance with due process would require nothing more of the clerk than a simple telephone call or email to the tax collector to obtain the necessary updated information. Had the clerk taken this simple step in this case, there would have been immediate realization that DELTA's Jacksonville address was outdated. The majority suggests that this would be too much to ask of the "purely ministerial" clerk. Mennonite, however, dictates that a "modest administrative burden" on this constitutional officer is not too much to ask when a complete forfeiture of property rights is at stake. Mennonite, 462 U.S. at 799-800.

CONCLUSION

As Mennonite and Dawson teach, tax sale procedures are designed to protect the due process rights of a property owner. Unfortunately the First District did just the opposite in this case by protecting PROFILE's windfall at the expense of DELTA's due process rights. Although DELTA diligently provided written notice of its change of address to the tax collector, it nevertheless fell victim to the clerk's failure to use that information in preparing and mailing the notice of tax sale and

ultimately lost its property as a result.[13] With the First and Fourth Districts having reached contrary results as to the constitutionality of the clerk's conduct under such circumstances, the level of due process protection afforded a property owner now differs depending upon the geographic location of the property -- a result patently at odds with both Mennonite and Dawson. Accordingly, DELTA requests that the Court adopt Baron and Judge Ervin's dissent in this case as the controlling law of this state, set aside the tax sale and remand this case for entry of judgment in DELTA's favor.

[13] The record contains affidavits both from DELTA and the mortgagee attesting to the fact that had the notices been properly mailed -- based upon information readily accessible by the clerk -- and received by *either* party, steps would have been taken to protect the property and avoid the forfeiture. (R1: 99, 128)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31st day of July, 2003 to: Raye Curry, Esq., Holland & Knight, 50 North Laura Street, Jacksonville, FL 32202 and to William Graessle, Esq., 219 Newnan Street, 4th Floor, Jacksonville, FL 32202.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

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