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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INCLUDES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents a sole critical issue that will need to be determined in hundreds of appeals involving tax foreclosure cases filed each year: (1) is a mortgage holder “a person entitled to redeem the land” pursuant to Ohio Revised Code 5721.25. This is the first time the Ohio Supreme Court has been requested to look at this issue of statutory construction and the Fifth District Court of Appeals is the first appellate court to construe whether a mortgage holder fits into the definition contained in that particular clause of Ohio Revised Code 5721.25.

In this case, the Fifth District Court of Appeals acknowledged that Ohio Revised Code 5721.25 does not specifically define the phrase “any person entitled to redeem the land.” Earlier in this case, the trial court found that the mortgage holder, appellee, Vanderbilt Mortgage and Finance Co. (hereinafter “Vanderbilt”) was a person entitled to redeem the land from a Coshocton County Tax Foreclosure Sale and the Fifth District Court of Appeals, in its March 29, 2013 decision, disagreed.

The Fifth District Court of Appeals decision hinged on “representations made to the trial court in oral argument” that the property owner did not choose to redeem the property and intended to allow the property to be sold at Tax Foreclosure Sale. But Vanderbilt argues that it has an independent right to redeem the property irrespective of the intentions of the property owner.

The decision of the Fifth District Court of Appeals threatens the integrity of millions of mortgage contracts throughout the state of Ohio, which contain clauses allowing the mortgage holder to pay property taxes owed by mortgagor/property owner. That standard mortgage clause is not intended for the benefit of the delinquent tax-payor/mortgagor, but rather to allow the mortgage holder to protect its collateral from being sold at a Tax Foreclosure Sale.

The implications of the decision of the Fifth District Court of Appeals affects nearly every Tax Foreclosure in which the property is encumbered by a mortgage. If mortgage holders are not provided with a means of protecting against the threat of the loss of their collateral, it will have a chilling effect on their willingness to make loans or force lenders to drastically change the terms of the loans they offer to hundreds of thousands of citizens in the state of Ohio. The public's interest in the ability to obtain financing is profoundly affected by a holding that a mortgage holder can't protect its collateral by redeeming it from a Tax Foreclosure sale.

STATEMENT OF THE CASE AND FACTS

On April 19, 2011, the Coshocton County Treasurer filed this foreclosure action for unpaid property taxes on a parcel of real estate. The property in question was owned by Troy and Brandi Wagner. Vanderbilt was served with the complaint because Vanderbilt held a mortgage on the real property and the mobile home located on the property. Default judgment was granted in favor of the Coshocton County Treasurer on July 15, 2011 after no responsive pleadings were filed by any of the defendants. However on August 25, 2011, the trial court allowed Vanderbilt to intervene and file an answer and cross-claim.

A sale of the property by the Coshocton County Sheriff was held on October 21, 2011. The property was purchased and designated to be owned by the Coshocton County Treasurer's husband. So, Janette Donaker, the Coshocton County Treasurer, in her official capacity, caused the property to be sold and it ended up being purchased and then transferred to none other than her own husband, Alan Donaker. Vanderbilt was successful in purchasing the mobile home at a separate sale that was held on the same date.

Jannette Donaker, the Coshocton County Treasurer, then prepared and submitted to the trial court an Entry for Confirmation of the Sale to her husband. On November 2, 2011 Vanderbilt filed a Motion to Stay the Confirmation of the Sheriff's Sale and a Notice of Redemption with the trial court. Vanderbilt also deposited \$6,000.00 with the Clerk of Courts of Coshocton County, Ohio to pay off the Coshocton County tax bill and satisfy the county's interest in the property. Surprisingly, Janette Donaker, the Coshocton County Treasurer, refused to accept the redemption funds, preferring to allow the sale to her husband to go forward despite the ability of Vanderbilt to satisfy the amount owed to Coshocton County.

Following oral arguments, the trial court accepted Vanderbilt's notice of redemption on December 5, 2011, and vacated the sheriff's sale. Appellant, the husband of Jannette Donaker, the Coshocton County Treasurer, filed this appeal and James Skelton, Special Prosecutor for the Treasurer of Coshocton County, Jannette Donaker, appeared before the Fifth District Court of Appeals at oral argument to argue on behalf of Jannette Donaker's husband.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Vanderbilt is entitled to redeem under Ohio Revised Code 5721.25

The controlling law concerning the redemption of delinquent land for which taxes, assessments, penalties, interest or charges have become delinquent is R.C. §5721.25. Under this statute, a property may be redeemed any time before the filing of an entry of confirmation of sale *by any person entitled to redeem* the land by tendering an amount sufficient to pay the taxes, assessments, penalties, interest and charges then due and unpaid, and the costs incurred in any proceeding ... (Emphasis added). Janette Donaker, Coshocton County Treasurer, and her husband argue that only the property owner is "a person entitled to redeem" and that Vanderbilt,

as a mortgagee, is prohibited from redeeming the land. Not only is that argument impracticable and nonsensical, it is also contrary to the law and common practices in the state of Ohio, and potentially detrimental to Janette Donaker's ability to efficiently receive payment of taxes from mortgagees when she is acting in her official capacity as Coshocton County Treasurer.

Ohio Revised Code. §5301.233 allows a mortgagee to advance sums to pay real estate taxes to protect its interests in the property. It is widely known that mortgagees often must pay real estate taxes to protect their mortgage interests in real estate. In 1885, the Ohio Supreme Court held that mortgagees have a right of redemption in property that is the subject of a foreclosure action. See *Hollinger v. Bates*, 34 Ohio St. 437 and *Pinney v. National Bank*, 71 Ohio St. 173 at 180 (1904).

Vanderbilt is the holder of a note and mortgage which attaches to the subject property. As a mortgagee, Vanderbilt has a vested interest in the property due to the mortgage deed. Under R.C. §5301.233, a mortgagee may secure unpaid balances of advances made, with respect to the mortgage premises, for the payment of taxes, assessments, insurance premiums or costs incurred for the protection of the mortgage premises, if such mortgage states that it shall secure the unpaid balances. Paragraph 24 of Vanderbilt's Mortgage includes a provision allowing Vanderbilt to advance sums necessary to pay real estate taxes and assessments which have attached to the subject property:

24. Certain Other Advances. In addition to any other sum secured hereby, this Security Instrument shall also secure the unpaid principal balance of, plus accrued interest on, any amount of money loaned, advanced, or paid by the Lender to or for the account and benefit of the Borrower, after this Security Instrument is delivered to and filed with the Recorder's Office, Tuscarawas County [sic], Ohio, for recording. *Lender may make such advances in order to pay any real estate taxes and assessments*, insurance premiums plus all other costs and expenses incurred in connection with the operation, protection or preservation of the Property, including to cure Borrower's defaults by making any such payments which Borrower should

have paid as provided in this Security Instrument, it being intended by this Section 24 to Acknowledge, affirm and comply with the provision of Section 5301.233 of the Revised Code of Ohio. (Emphasis added).

Vanderbilt was, therefore, properly exercising its rights pursuant to both the Mortgage and to R.C. §5301.233 by advancing funds due for unpaid taxes and assessments prior to confirmation of sale.

The Fifth District Court of Appeals cites to only one case in its decision, the case of *Wilke, Treasurer v. Secretary of Housing and Urban Development*, 1984 Ohio App. Lexis 11971, to demonstrate that a lien holder has no standing to redeem property sold at a tax foreclosure. 1984 Ohio App. Lexis 11971. But even the Fifth District Court of Appeals admits in its decision that the facts of the *Wilke* case are distinguishable to the facts in the within matter. In the *Wilke* case, a third party with no recognizable interest to the real estate paid the apparent property owner and received an assignment of its right to redeem and a quit claim deed putting said third party in title to the real estate. The *Wilke* appellate court relied on the principles set forth in *Wayne Savings & Loan Company v. Young* which held that the equity of redemption under a completely separate statute, R.C. §2329.33 is an inalienable personal privilege held only by the property owner. 49 Ohio App.2d 35 (9th Dist. 1976). In *Wayne*, a junior lien holder attempted to purchase the equity of redemption from the homeowner after a foreclosure sheriff's sale was held. The *Wayne* appellate court held that the equity of redemption in a mortgage foreclosure sale is a personal privilege held by the homeowner and cannot be transferred to third parties. *Id.* Both the *Wilke* and *Wayne* cases rely on fact patterns that are very different from the facts of the within matter. Here, Vanderbilt never attempted to take title to the property; it merely advanced the sums due for unpaid real estate taxes so that it could protect its mortgage interest in the subject property. In this instant case, Coshocton County gets paid its overdue tax bill if redemption is allowed, but

Janette Donaker, the Coshocton County Treasurer, will not accept the payment of taxes in this case from Vanderbilt because it would deprive her husband from being able to acquire the property.

The facts of *Toledo Trust Company v. Yakumithis Enterprises, Inc.*, 35 Ohio App.3d 31, are much more aligned with the facts of the within case. In *Toledo Trust*, the Sixth District Court of Appeals held that a third party may provide the funds to a property owner in order to redeem a property that is subject of a foreclosure sale so long as that third party did not receive title to the property in exchange for the funds. This third party was, therefore, not actually redeeming the property itself, but merely providing financing so that the owner may redeem. In the within case, Vanderbilt provided the funds necessary to redeem the property *on behalf of the property owner* pursuant to a contractual mortgage clause that allowed Vanderbilt to do so. There is no doubt that the owner of the property is a person entitled to redeem the land under R.C. §5721.25. Nor is there any doubt that pursuant to the terms of the Mortgage and under the authority provided by Ohio Revised Code 5301.233, Vanderbilt has the right to advance money for the payment of taxes owed by the owner of the property. If the Treasurer accepts the funds tendered by Vanderbilt, title to the property will go back to the status quo. This represents a proper redemption of the property by the property owner. The fact that Vanderbilt provided the funds on behalf of the property owner does not make the redemption void.

Further, if the Fifth District Court of Appeals is convinced that only a property owner can redeem under Ohio Revised Code 5721.25, then Vanderbilt should still be considered “a person entitled to redeem” because Ohio law has an unbroken 100 years of cases holding that mortgage holders like Vanderbilt are “property owners”. Between the mortgagor and mortgagee, legal title to the property passes to the mortgagee upon default on the mortgage loan. *Kerr, et al v.*

Lydecker (1884), 23 L.R.A. 842; *Levin v. Carney* (1954), 161 Ohio St. 513; *Hausman v City of Dayton* (1995), 73 Ohio St. 3d 671; *Wells Fargo v. Sessley* (2010), 188 Ohio App 3d. 213.

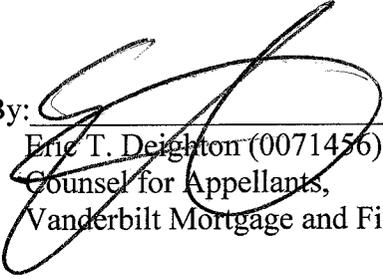
***Proposition of Law No. 2: As a matter of statutory construction
Ohio Revised Code 5721.25 can't be read narrowly to limit the right to
redeem property from a Tax Foreclosure Sale to only the property owner***

Ohio Revised Code 5721.25 provides that *any person entitled to redeem* may do so by tendering the amount due for unpaid taxes and assessments. The language of this statute is different than that of R.C. §2329.33, which is the statute governing redemption by judgment debtors. Under R.C. §2329.33, *only the debtor may redeem* the property prior to confirmation of sale. That the language limiting who may redeem property under R.C. §5721.25 is different than that under R.C. §2329.33 is of great significance to this case. The primary goal in statutory interpretation is to give effect to the intent of the legislature. *Christe v. GMS Mgt. Co., Inc.* (2000), 88 Ohio St.3d 376, 377, 726 N.E.2d 497, 499. In determining legislative intent, the court first looks to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381. In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441. If the meaning of the statute is unambiguous and definite, it must be applied as written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463, 465. It was the legislature's intent in drafting R.C. §5721.25 that redemption could be accomplished by a person other than the property owner, or else it would have put specific language limiting who could redeem the property. Thus, Vanderbilt has not only the power to redeem the land on behalf of the owner, but was a proper person to do so under R.C. §5721.25.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellee requests that this Court accept “jurisdiction” in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

By: 

Eric T. Deighton (0071456)
Counsel for Appellants,
Vanderbilt Mortgage and Finance Inc.

CERTIFICATE OF SERVICE

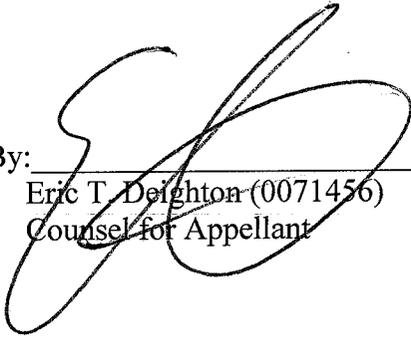
I certify that a copy of this Notice of Appeal was sent by ordinary
U.S. Mail to the below on May 3, 2013.

Shawn P. Lindsay
Connolly, Hillyer, Lindsay & Ong., Inc.
201 N. Main Street
PO Box 272
Uhrichsville, OH 44683
Attorney for Alan Donaker

James R. Skelton
309 Main Street
Coshocton, OH 43812
Attorney for Coshocton County Treasurer

Troy and Brandi Wagner
19601 Township Road 383
Walhounding, OH 43843

By: _____


Eric T. Deighton (0071456)
Counsel for Appellant

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE
FORECLOSURE OF LIENS FOR
DELINQUENT TAXES

: JUDGES:

Plaintiff-Appellee

:
: Hon. Patricia A. Delaney, P. J.
: Hon. John W. Wise, J.
: Hon. Julie A. Edwards, V.J.

-vs-

PARCELS OF LAND ENCUMBERED
WITH DELINQUENT TAX LIENS, ET
AL.

:
: Case No. 2012CA0001

Defendants-Appellants

:
: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County Court
of Common Pleas, Case No. 11 CI 0249

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

FILED
DATE: MAR 29 2012
FIFTH DISTRICT COURT OF APPEALS
STATE OF OHIO
COUNTY OF COSHOCTON, OHIO

APPEARANCES:

For Appellant Alan Donaker:

Shawn P. Lindsay
Connolly, Hillyer, Lindsay & Ong, Inc.
201 N. Main St., P.O. Box 272
Uhrichsville, OH 44683

For Appellee Vanderbilt Mortgage and
Finance Co.:
Eric T. Deighton
Carlisle, McNellie, Rini, Kramer & Ulrich
24755 Chagrin Blvd. Suite 200
Cleveland, OH 44112

For Treasurer of Coshocton County:
James R. Skelton, Special Prosecutor
309 Main Street
Coshocton, OH 43812

Troy and Brandi Wagner
19601 Township Road 383
Walhounding, OH 43843

Wise, J.

{¶1} Appellant Alan Donaker appeals a judgment of the Coshocton County Common Pleas Court vacating a Sheriff's sale. Appellee is Vanderbilt Mortgage and Finance, Inc.

STATEMENT OF FACTS AND CASE

{¶2} On April 19, 2011, the Coshocton County Treasurer filed the instant foreclosure action for unpaid property taxes on a parcel of real estate. The property in question was owned by Troy and Brandi Wagner. Appellee was served with the complaint because they held a mortgage on the real property and the mobile home located on the property. Default judgment was granted to the county on July 15, 2011. However, on August 25, 2011, the court allowed appellee to intervene and file an answer and a cross-claim seeking judgment against the Wagners in the amount of \$70,475.35.

{¶3} A sale of the property was conducted by the Coshocton County Sheriff on October 21, 2011. The highest bidder was James M. Matchett, who offered a bid of \$15,100.00. Matchett designated that the property be deeded to appellant. At a sale held later the same day, appellee successfully purchased the mobile home.

{¶4} The Coshocton County Treasurer submitted an entry for confirmation of the sale to the trial court. On November 2, 2011, appellee filed a motion to stay confirmation of the sale and a notice of redemption. Appellee deposited \$6,000.00 with the Clerk of Courts to pay off the county tax bill and satisfy the county's interest in the property.

{¶5} The trial court allowed appellant to intervene in the action on November 23, 2011. Following oral argument, the trial court accepted appellee's notice of redemption on December 5, 2011, and vacated the sheriff's sale. Appellant assigns a single error on appeal:

{¶6} "THE TRIAL COURT'S DECISION GRANTING THE NOTICE OF REDEMPTION FILED BY VANDERBILT MORTGAGE AND FINANCE, INC. WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRA TO EXISTING LAW."

{¶7} The sole issue before this Court is whether appellee had the right to redeem the property prior to the confirmation of the sheriff's sale pursuant to R.C. 5721.25, which provides in pertinent part:

{¶8} "After a foreclosure proceeding has been instituted under Chapter 323. or this chapter of the Revised Code with respect to delinquent land, but before the filing of an entry of confirmation of sale pursuant to the proceeding or before the expiration of the alternative redemption period as may apply under section 323.78 of the Revised Code, any person entitled to redeem the land may do so by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under Chapter 323. or this chapter of the Revised Code, and by demonstrating that the property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes."

{¶9} The statute does not define the phrase “any person entitled to redeem the land.” In the instant case, the trial court found that appellee was a person entitled to redeem the land. We disagree.

{¶10} In *Wilke v. Secretary of Housing and Urban Development*, 1st Dist. No. C-840077, 1984 WL 7141 (December 26, 1984), Gateway, a third party who was not the owner of the property in question, attempted to redeem the property following a sheriff's sale for delinquent taxes. The record was devoid of any indication of the nature or extent of Gateway's interest in the land. The court held that the clear meaning and intent of the second paragraph of R.C. 5721.25 is that only the former owner has the right of redemption, and this is a nontransferable personal privilege. *Id.* The court noted that any other conclusion would undermine the integrity of sheriff's sales for delinquent taxes. *Id.*

{¶11} In the instant case, appellee had a valid lien on the property, and unlike Gateway in the *Wilke* case, appellee was not a stranger to the title. However, we find that the intent of the statute is to provide the owner with an opportunity to redeem the property if they so desire. Appellee was notified of the sale of the land and in fact purchased the mobile home located on the property. Appellee had an opportunity to protect its interest in the land by bidding at the sale.

{¶12} Appellee argues that pursuant to the terms of the mortgage and R.C. 5301.233, they have the right to advance taxes to the property owner. However, that is not what appellee did in the instant case. Rather than advancing taxes on behalf of the property owners, appellee attempted to exercise the right to redeem the property for taxes owed by the property owner, not by appellee. Based on representations

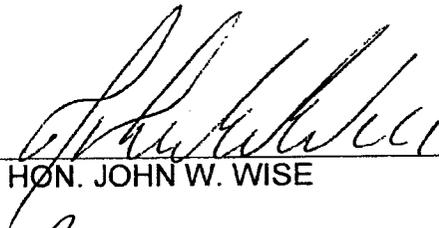
made to the trial court in oral argument, it appears that the property owner had no interest in redeeming the property and intended to allow the property to be sold at the sheriff's sale. To allow appellee to sit on their hands and fail to protect their interests at the sheriff's sale and then redeem the property for the lower amount of the unpaid property taxes, in the instant case \$825.84 on the land, undermines the integrity of sheriff's sales for tax delinquencies.

{¶13} The assignment of error is sustained. The judgment of the Coshocton County Common Pleas Court is reversed. This cause is remanded to that court with instructions to confirm the Sheriff's sale. Costs to appellee.

By: Wise, J.

Delaney, P.J. and

Edwards, V.J. concur.



HON. JOHN W. WISE



HON. PATRICIA A. DELANEY



HON. JULIE A. EDWARDS

rad/JWW

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE
FORECLOSURE OF LIENS FOR
DELINQUENT TAXES

Plaintiff - Appellee

-vs-

PARCELS OF LAND ENCUMBERED
WITH DELINQUENT TAX LIENS, ET
AL.

Defendants-Appellants

JUDGMENT ENTRY

Case No. 2012CA0001

For the reasons stated in our accompanying Opinion on file, the judgment of the Coshocton County Court of Common Pleas is reversed. This cause is remanded to that court with instructions to confirm the Sheriff's sale. Costs assessed to Appellant.

FILED
DATE: MAR 29 2013
FIFTH DISTRICT COURT OF APPEALS
STATE OF OHIO
COUNTY OF COSHOCTON, OHIO


HON. JOHN W. WISE


HON. PATRICIA A. DELANEY


HON. JULIE A. EDWARDS