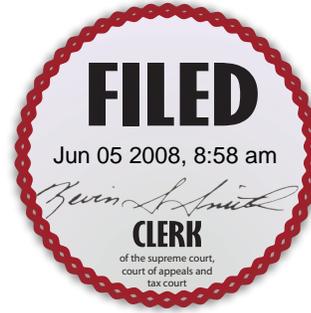


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUBLE J RANCH, LLC, )

Appellant-Petitioner, )

vs. )

MARK WILEY TRUST, )

Appellee-Respondent. )

No. 18A02-0712-CV-1024

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APPEAL FROM THE DELAWARE CIRCUIT COURT

The Honorable John M. Feick, Judge

Cause No. 18C04-0603-MI-20

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**June 5, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Double J Ranch, L.L.C. (“Double J”) appeals from the trial court’s order setting aside a 2004 tax sale and denying Double J’s verified petition for tax deed. Double J presents the following issues for our review:

1. Whether the trial court violated Indiana Code Section 6-1.1-24-11(b) when it permitted Mark Wiley Trust (“Wiley Trust”) to amend its objection to the issuance of a tax sale deed and to present evidence more than two years after the issuance of a certificate of sale on the subject property.
2. Whether the trial court erred when it set aside the tax sale and denied Double J’s petition for tax deed.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

Wiley Trust owned two parcels of real property in Delaware County, both of which were sold in a 2003 tax sale. Michiana Campgrounds, L.L.C. purchased one parcel at that tax sale for \$3200, of which \$2549.56 was the minimum bid and \$650.44 was tax sale surplus (“Michiana parcel”). Sansar Pabla purchased the second parcel for \$4400, of which \$1830.23 was the minimum bid and \$2569.77 was tax sale surplus (“Pabla parcel”). Due to a reassessment in 2002, the 2002 taxes that were due and payable in 2003 were not due until November 13, 2003. The 2003 tax sale was held in October 2003, so the taxes due in November 2003 were still due and owing at the time of sale. But the Delaware County Auditor’s Office (“the Auditor”) did not collect the taxes or apply the tax sale surplus to cover the taxes due in November 2003, so they went unpaid. As a result, the Michiana parcel was included in a 2004 tax sale.

At the 2004 tax sale, on October 12, 2004, Double J purchased the Michiana parcel for \$5348.70. And Double J obtained a tax sale certificate that same day. On October 13, 2005, Double J filed a verified petition for order directing the Auditor of Delaware County to issue a tax deed. On November 10, 2005, Wiley Trust filed an objection to issuance of tax sale deed, alleging in relevant part that “[t]here is evidence to rebut the presumption, provided in I.C. 6-1.1-24-11, of the regularity and validity of all proceedings related to the taxes or special assessments for which the real property was sold.” Appellant’s App. at 12. Also on that date, the trial judge recused himself from the case and gave counsel for both parties a list of three judges from which to choose. On March 16, 2006, the Honorable John M. Feick accepted jurisdiction of this matter as special judge.

After several delays, the trial court held a final hearing on October 16, 2007. Also on that date, Wiley Trust filed a motion for leave to file an amended objection to the issuance of tax sale deed and motion to set aside 2004 tax sale of subject parcel, which the trial court granted. Following the hearing, the trial court issued an order setting aside the 2004 tax sale of the Michiana parcel and denying Double J’s verified petition for tax deed. This appeal ensued.

## **DISCUSSION AND DECISION**

### **Issue One: Applicability of Statute**

Double J first contends that under Indiana Code Section 6-1.1-24-11(b), Wiley Trust was barred from amending its objection to the tax sale and from presenting

evidence to rebut the presumption that the tax sale was valid. Indiana Code Section 6-1.1-24-11 provides:

(a) A certificate of sale issued under section 9 of this chapter is presumptive evidence of:

- (1) the truth of the statements contained in the certificate;
- (2) the interest of the purchaser in the real property described in the certificate;
- (3) the regularity and validity of all proceedings related to the taxes or special assessments for which the real property was sold; and
- (4) the regularity and validity of all proceedings related to the sale of the real property.

(b) After two (2) years from the issuance of a certificate of sale, evidence may not be admitted in any court to rebut a presumption prescribed in subsection (a) of this section unless the certificate of sale was fraudulently procured. After four (4) years from the issuance of the certificate of sale, evidence may not under any circumstances be admitted in any court to rebut such a presumption.

(Emphasis added).

Double J first contends that “[b]y granting the Amended Motion [more than two years after the tax sale], the Trial Court impermissibly allowed [Wiley Trust] to raise a defense that was otherwise barred by a statute of limitations.” Brief of Appellant at 3. And Double J maintains that because the hearing was held more than two years after the tax sale, the statute of limitations likewise barred Wiley Trust from presenting evidence to rebut the presumption of validity. We cannot agree.

In St. Joseph County v. Wilmes, 428 N.E.2d 103 (Ind. Ct. App. 1981), St. Joseph County challenged the trial court’s application of Indiana Code Section 6-1.1-24-11 (“the statute”) in barring the County from presenting evidence to rebut the presumption

of the validity of a tax sale. In that case, the Wilmeses bought property at a tax sale, but the County subsequently determined that the property should not have been included in the tax sale and invalidated the purchase. When the trial court denied the Wilmeses' application for a deed to the property, they brought an action against the County, more than two years after the tax sale. The trial court found that "the provisions of [the statute] prohibited any evidence that would rebut the regularity and validity of the tax sale[,]" and the trial court granted summary judgment in favor of the Wilmeses. Id. at 104.

On appeal, we held in relevant part as follows:

If [Indiana Code Section] 6-1.1-24-11(b) is interpreted as a statute of limitations, it survives a constitutional challenge. The Legislature, based on considerations of public policy, may fix reasonable periods within which actions must be brought. On the other hand, if the statute is construed as establishing a conclusive presumption as to the contents of the certificate of sale, it constitutes an unconstitutional infringement upon the power of the judiciary to inquire into possible irregularities in the tax sale procedure.

A statute is clothed with the presumption of constitutionality and every doubt must be resolved in favor of a statute's validity. The statute must therefore be construed as a valid statute of limitations, which establishes time limits within which actions to challenge the contents of a certificate of sale must be brought. A statute which is constitutional may nevertheless be unconstitutionally applied.

The statute in the present case was unconstitutionally applied. Instead of forming a bar to an untimely action, the statute here was applied in a manner which created a conclusive presumption and stripped St. Joseph County et al. of their defense to the Wilmes' suit. St. Joseph County et al.'s evidence of irregularities in the tax sale cannot therefore be barred by the statute.

Id. at 105 (citations omitted).

Here, we likewise hold that the application of Indiana Code Section 6-1.1-24-11(b) would have been unconstitutional under the circumstances in this case. Wiley Trust timely filed its objection to the tax sale on November 10, 2005, and there is no evidence that Wiley Trust was at fault in delaying the hearing.<sup>1</sup> The trial court properly allowed Wiley Trust to amend its objection and to present evidence to rebut the presumption that the tax sale was valid. Double J's contentions on this issue must fail.<sup>2</sup>

### **Issue Two: Setting Aside Tax Sale**

Double J also contends that the trial court erred when it set aside the tax sale and denied Double J's petition for tax deed. In particular, Double J maintains that by statute, Wiley Trust first had to prove that it did not owe any delinquent personal property taxes in Delaware County in order to prevail on its claim that the County erred when it did not use the tax sale surplus to pay the delinquent property taxes. Double J asserts that because Wiley Trust did not present any such evidence, its objection to the tax sale must be denied. We cannot agree.

Indiana Code Section 6-1.1-24-7 provides in relevant part:

(a) When real property is sold under this chapter, the purchaser at the sale shall immediately pay the amount of the bid to the county treasurer. The county treasurer shall apply the payment in the following manner:

(1) first, to the taxes, special assessments, penalties, and costs described in section 5(e) of this chapter;

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<sup>1</sup> Double J states that one delay resulted from Wiley Trust's failure to strike from the panel of special judges. But that delay was only three months, and, according to the CCS, Double J did not timely file its notice of striking, either. Further, Double J suggests that Wiley Trust had a duty to "bring this matter to trial within the two year statute of limitations" and failed to do so. Brief of Appellant at 9. But Double J does not cite to any authority to support that contention, and we are not aware of any such duty under the circumstances of this case.

<sup>2</sup> While we need not address the issue, we disagree with Double J that Wiley Trust asserted a substantively "separate theory" in its amended objection.

- (2) second, to other delinquent property taxes in the manner provided in I.C. 6-1.1-23-5(b); and
- (3) third, to a separate 'tax sale surplus fund.'

And Indiana Code Section 6-1.1-23-5 provides:

(a) If the delinquent taxes, penalties, and collection expenses are not paid before the time set for the sale, the county treasurer shall sell sufficient personal property of the taxpayer to pay the delinquent taxes, penalties, and collection expenses. The county treasurer shall, at the time and place designated in the notice, sell the personal property at public auction to the highest bidder. The county treasurer shall keep a record of all sales in the form prescribed by the state board of accounts. The proceeds of the sale shall be paid into the county treasury and applied as follows:

- (1) first, to the collection expenses;
- (2) second, to the payment of the delinquent taxes and penalties;
- (3) third, to the payment of other tax delinquencies of the taxpayer in the order provided in subsection (b) of this section; and
- (4) fourth, any balance remaining shall be paid to the delinquent taxpayer.

(b) Any surplus funds to be applied to the other delinquent taxes of a taxpayer under subsection (a)(3) of this section or under I.C. 1971, 6-1.1-24-7(a)(2) shall be applied as follows:

- (1) first, to the payment of delinquent personal property taxes owed in the county by the taxpayer;
- (2) second, to the payment of delinquent real property taxes owed in the county by the taxpayer; and
- (3) third, to the payment of delinquent personal property taxes owed by the taxpayer and certified from another county.

Here, the undisputed evidence shows that the Delaware County Auditor's office did not use the surplus from the tax sales of the Wiley parcels to pay Wiley Trust's

delinquent real property taxes but placed the surplus into a tax surplus fund.<sup>3</sup> Indeed, an employee of the Delaware County Auditor's office, Norma Wheeldon, testified at the hearing that her office has "never" followed Indiana Code Section 6-1.1-24-7(a)(2) when dealing with surplus from a tax sale. Appellant's App. at 52; Transcript at 23. As the trial court correctly found, the Auditor's failure to follow the statute "is a basis to invalidate a tax deed under I.C. [§] 6-1.1-25-16(2)." Appellant's App. at 53.

Still, Double J contends that "[b]efore [Wiley Trust] can claim that the Auditor failed to apply surplus funds to the real property, they must prove as a precondition that no personal property taxes were owed." Brief of Appellant at 10. While it is true that Indiana Code Section 6-1.1-23-5 provides that the surplus from a tax sale "shall" first be applied to pay any "delinquent personal property taxes owed in the county by the taxpayer," here, Wheeldon testified that the Auditor's office did not follow the statute. Thus, whether Wiley Trust owed delinquent personal property taxes in Delaware County is irrelevant. The bottom line is that the Auditor's office placed the surplus from the tax sales into the tax sale surplus fund contrary to the Indiana Code. That noncompliance with the applicable statutes invalidates the tax sale. See MJ Acquisitions, Inc. v. Tec Investments, 863 N.E.2d 379, 382-83 (Ind. Ct. App. 2007) (holding tax sale process requires material compliance with each step of the governing statutes). The trial court did not err when it set aside the tax sale and denied Double J's petition for tax deed.

Affirmed.

DARDEN, J., and BROWN, J., concur.

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<sup>3</sup> Double J does not dispute that the tax surplus would have been sufficient to pay the delinquent taxes such that the Michiana parcel would not have been included in the 2004 tax sale. See Transcript at 23.