

IN THE SUPREME COURT OF IOWA

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GARY KLUENDER, JR.,  
Plaintiff-Appellant,

Supreme Court No. 21-1437

v.

PLUM GROVE INVESTMENTS, INC.,  
Defendant-Appellee.

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Appeal from final Order Regarding Motions for Summary Judgment entered on September 30, 2021, in Case No. EQCV031630 in the Iowa District Court for Floyd County by the honorable Judge Rustin Davenport.

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**APPELLEE'S FINAL BRIEF**

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I**

PROPERTY RIGHTS ARE CONSTITUTIONALLY  
PROTECTED UNDER IOWA LAW.

Appellant’s Brief sets forth four separate statements (under the headings I, II, III and IV) that the Appellant represents to be separate issues presented for review. Issue I is represented by the Appellant to be the

statement: “Property Rights are Constitutionally Protected under Iowa Law.” There has never been an issue in this case on the question of whether property rights are constitutionally protected under Iowa law. The Appellee certainly concurs with the Appellant that this proposition has been conclusively established by the Iowa Constitution and appellate caselaw. Accordingly, the Appellee objects to the Appellant’s characterization of this proposition as an issue presented for review in this case.

## **II**

IOWA’S STATUTORY SCHEME PROVIDES AN ADEQUATE PROCEDURAL DUE PROCESS FRAMEWORK AND IS FACIALLY CONSTITUTIONAL.

## **III**

IOWA’S TAX SALE PROCEDURES PROVIDE FOR ADEQUATE NOTICE IN COMPLIANCE WITH SUBSTANTIVE DUE PROCESS.

## **IV**

IOWA CODE § 447.9 TAX SALE PROCEDURES PROVIDE FOR ADEQUATE NOTICE IN COMPLIANCE WITH DUE PROCESS RIGHTS PROTECTED UNDER IOWA’S CONSTITUTION.

Appellant’s Brief sets forth four separate statements (under the headings II, III and IV) that the Appellant represents to be separate issues presented for review. In reality, the Appellant has raised only one legal issue for appellate review.

Each of the argument sections under issue headings II, III and IV of Appellant's Brief are set forth under the sub-heading "Scope of Review," in which the Appellant makes the same argument that the notice procedures mandated by Iowa Code chapter 447 are unconstitutional on their face in violation of the due process due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution and Iowa Constitution Art. 1, § 9.

Because all of the Appellant's arguments under the issues categorized in Appellant's Brief under the separate issue headings II, III and IV, concern the same limited argument that the notice procedures mandated by chapter 447 are unconstitutional on their face, the Appellee in Appellee's Brief has grouped all three issue headings together in its argument section and has addressed its argument to the single legal issue raised and re-raised by issue headings II, III and IV in Appellant's Brief.

**Authorities:**

*City of Waterloo v. Bainbridge*, 749 N.W.2d 245 (Iowa 2008)

*Dusenbery v. U.S.*, 534 U.S. 161 (2002)

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*U.S. v. Egenberger*, 424 F.3d 803 (8<sup>th</sup> Cir. 2005)

*War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714 (Iowa  
2009)

Iowa Code § 446.15

Iowa Code chapter 447

Iowa Code § 447.9

Iowa Code (1997) § 447.9

Iowa Code § 447.10

Iowa Code § 447.12

Iowa Code § 448.1

Iowa R. Civ. P. 1.981(3)

Fifth and Fourteenth Amendments to the U.S. Constitution

Iowa Constitution Art. 1, § 9

### **ROUTING STATEMENT**

The Appellee requests that this case be transferred to the Court of Appeals. This case presents the application of existing legal principles and is appropriate for summary disposition.

In the final Order that is the subject of this appeal, the district court relied on the Court of Appeals holding in *Nicholson v. HF05*, 778 N.W.2d 218 (Table), No. 08-1418 (Iowa Ct. App. December 17, 2009). *Nicholson* is a case in which the factual and legal issues are virtually indistinguishable from the case at hand.

## **ARGUMENT**

### **ISSUE II**

**IOWA’S STATUTORY SCHEME PROVIDES AN ADEQUATE PROCEDURAL DUE PROCESS FRAMEWORK AND IS FACIALLY CONSTITUTIONAL.**

### **ISSUE III**

**IOWA’S TAX SALE PROCEDURES PROVIDE FOR ADEQUATE NOTICE IN COMPLIANCE WITH SUBSTANTIVE DUE PROCESS.**

### **ISSUE IV**

**IOWA CODE § 447.9 TAX SALE PROCEDURES PROVIDE FOR ADEQUATE NOTICE IN COMPLIANCE WITH DUE PROCESS RIGHTS PROTECTED UNDER IOWA’S CONSTITUTION.**

Appellant’s Brief sets forth three separate statements (under the headings II, III and IV) that the Appellant represents to be separate issues presented for review. In reality, the Appellant has raised only one legal issue for appellate review.

Each of the argument sections under issue headings II, III and IV of Appellant’s Brief are set forth under the sub-heading “Scope of Review,”

in which the Appellant makes the same argument that the notice procedures mandated by Iowa Code chapter 447 are unconstitutional on their face in violation of the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution and Iowa Constitution Art. 1, § 9. It is important initially to recognize that the Appellant does not dispute that the Appellee followed all of the notice procedures mandated by chapter 447, but contends that those procedures themselves are unconstitutional on their face.

Because all of the Appellant's arguments under the issues categorized in Appellant's Brief under the separate issue headings II, III and IV, concern the same limited argument that the notice procedures mandated by chapter 447 are unconstitutional on their face, the Appellee in Appellee's Brief has grouped all three issue headings together in its argument section and has addressed its argument to the single legal issue raised and re-raised by issue headings II, III and IV in Appellant's Brief.

A. Statement Addressing How the Issue was Preserved for Appellate Review

The Appellee agrees with the statements in Appellant's Brief addressing how the issue was preserved for appellate review.

B. Statement Addressing the Scope and Standard of Appellate Review



The Appellee disagrees with the Appellant's statement addressing the scope and standard of appellate review. The Appellant's statement is improperly broad and improperly incorporates the Appellant's entire legal argument on the issue.

The scope and standard of appellate review of the district court's summary judgment ruling is for correction of errors of law. This is an action to set aside a tax sale deed. Actions to set aside tax sale deeds arise in equity and generally are reviewed de novo. *See Strong v. Jarvis*, 524 N.W.2d 675, 677 (Iowa Ct. App. 1994). But when a case in equity is dismissed by summary judgment, appellate review is for correction of errors at law. *See Koenigs v. Mitchell Cty. Bd.*, 659 N.W.2d 589, 592 (Iowa 2003). The district court properly grants summary judgment when the record reveals "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). If the dispute only "concerns the legal consequences flowing from undisputed facts," summary judgment is appropriate. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006) (citation omitted).

### C. Argument

In each of the Appellant's argument sections under issue headings II, III and IV of Appellant's Brief, the Appellant makes the identical argument

that the notice procedures mandated by Iowa Code chapter 447 are unconstitutional on their face in violation of the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution and Iowa Constitution Art. 1, § 9. It is important initially to recognize that the Appellant does not dispute that the Appellee followed all of the notice procedures mandated by chapter 447, but contends that those procedures themselves are unconstitutional on their face. The Appellee will begin its analysis of this issue by discussing the notice procedures of chapter 447 that are applicable in this case.

This case involves a 48.77-acre parcel of farmland in Floyd County as to which real estate taxes were not paid in 2017 by the then-owner, the Appellant Gary V. Kluender, Jr. (“Kluender”). Kluender testified that he received a few statements from the Floyd County Treasurer advising that the taxes were delinquent. Order Regarding Motions for Summary Judgment (“Order”), App. 019.

Pursuant to Iowa Code § 446.15, the Appellee Plum Grove Investments, Inc. (“Plum Grove”) purchased a tax sale certificate to the subject parcel at a tax sale conducted by the Floyd County Treasurer on June 17, 2017. Order, App. 019-020.

If a parcel is not redeemed within one year and nine months after the tax sale, the tax sale certificate holder is entitled to serve a 90-day notice of expiration of right of redemption and file an affidavit showing such service with the county treasurer. Iowa Code §§ 447.9, 447.10 and 447.12. Iowa Code § 447.9(1) requires that the notice must be “signed by the certificate holder or the holder’s agent or attorney, stating the name of the purchaser, and that the right of redemption will expire and a deed for the parcel be made unless redemption is made within ninety days from the completed service of the notice.” If redemption subsequently does not take place within the 90-day redemption period following the filing of the affidavit of service with the county treasurer, the certificate holder is entitled to receive a treasurer’s deed from the treasurer. Iowa Code § 448.1.

Pursuant to Iowa Code § 447.9(1), the tax sale certificate holder is required to serve the 90-day notice of expiration on the owner of the subject parcel, by mailing copies of the notice by regular and certified U.S. mail, postage prepaid, addressed to the owner at the owner’s “last known address.” As the owner of the subject parcel in this case, Kluender was entitled to service of notice. The facts are undisputed that Plum Grove mailed redemption notices by regular and certified mail addressed to

Kluender at 1915 Cheyenne, Ionia, IA 50645, his last known address and the address where he was still receiving mail. Order, App. 020.

Iowa Code § 447.9(1) directs that service is “deemed completed when the notice is deposited in the mail and postmarked for delivery.” In its Order in this case, the district court properly held that there is no statutory requirement that the notice must be actually received, as service is deemed completed immediately upon mailing.

In its Order, the district court found as a matter of undisputed fact that Plum Grove filed an affidavit of service of notice of expiration of right of redemption that showed service of notice on Kluender as follows:

Mike Klemme, president of Plum Grove Investments, Inc., states in an affidavit [filed with the Floyd County Treasurer on April 16, 2020] that on April 14, 2020, he mailed certified letters and regular letters providing notice of expiration of redemption. . . .

The notice was sent to Gary Kluender’s last known address at 1915 Cheyenne, Ionia, 50645. Apparently, Kluender’s house at this property had been destroyed in a fire, but Kluender said he was still receiving mail at this address. In addition to the certified mail and regular mail that was sent to 1915 Cheyenne, Ionia, the same notice was sent by ordinary mail and certified mail to Gary Kluender, Jr., at 2460 Mitchell Line, Orchard, Iowa, 50460. This apparently was the address where the land was located. Defendant’s Exhibit 1 filed and submitted in this case shows there are certified mail receipts dated April 14, 2020, to person in possession, 2460 Mitchell Line, Orchard, Iowa, 50460, Gary V. Kluender, Jr., 2460 Mitchell Line, Orchard, Iowa 50460, and Gary V. Kluender, Jr., 1915 Cheyenne, Ionia, Iowa, 50645. Gary Kluender, however, contends that he never received these mailings or the

notice of expiration of right of redemption. Exhibit 4 is a return-to-sender envelope from the mailing to Gary V. Kluender, Jr., at 1915 Cheyenne, Ionia, Iowa, 50645. This reflects that postage was paid on April 14, 2020. The unclaimed notice has a date of June 26, 2020. Factually Kluender does not dispute either the affidavit of Mike Klemme or the evidence shown by the certified mail receipt as shown in Exhibit 1.

Order, App. 020-021.

In its Order, the district court further found as a matter of undisputed fact as follows:

During the next 90 days, Gary Kluender did not address his unpaid taxes or take any actions to redeem his property from the tax sale. A tax sale deed was filed at the recorder on August 11, 2020, reflecting that the property was granted and sold to Plum Grove Investments, Inc.

Order, App. 021.

Kluender admits that Plum Grove satisfied the requirements of Iowa Code §§ 447.9(1) and 447.9(2) that notice must be served by both regular and certified mail addressed to the person's last known address. However, Kluender argues that it is not sufficient that the notice was properly addressed and mailed, but that only personal service of notice can satisfy the principles of procedural due process and that by failing to mandate personal service of notice, the notice procedures of chapter 447 are facially unconstitutional.

At this point, it is important to examine the legislative history surrounding the notice procedures of chapter 447. The legislative history of a statute is instructive of legislative intent. *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 248 (Iowa 2008). Prior to 1999, personal service of notice of expiration of right of redemption was mandated by § 447.9 (Code of Iowa, 1997), which specifically required the certificate holder to serve the notice “in the manner provided for the service of original notices in R.C.P. 56.1.” In 1999, HF 474 was signed into law by the Governor on April 15, 1999, to change the notice requirements from personal service to service by regular and certified mail. The 1999 notice amendment was a carefully considered and intentional act of the legislature and has remained in place for the past 22 years. Kluender asks the appellate court to usurp the power of the legislature by effectively repealing a law that has remained in effect for more than two decades. Kluender has no constitutional right to such relief from the court.

The legislature acted constitutionally in amending § 447.9 to substitute notice by regular and certified mail for notice by personal service. The legislature recognized, and the district court properly held in this case, that personal service is not mandated by due process principles. Constitutional due process is satisfied if the sender’s “effort” in mailing

notice is “reasonably calculated” to apprise a party of the action, and actual receipt of mailed notice is not constitutionally mandated. *Dusenbery v. U.S.*, 534 U.S. 161, 170-73 (2002). The core concepts of due process are notice, foreseeability, and in particular, right to fair warning. *U.S. v. Egenberger*, 424 F.3d 803, 805 (8<sup>th</sup> Cir. 2005).

In *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471 (Iowa 1973), the Iowa Supreme Court determined that the level of due process depends upon the time frame involved in each particular case. Under the particular facts in *Smith*, a statute limited a right to appeal an unemployment decision to seven days after the date of mailing. *Id.* at 473. The Court held that this time frame did not afford sufficient due process to allow a claimant effectively to take action to pursue his rights. *Id.* at 473-74.

In *War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714 (Iowa 2009), the Iowa Supreme Court again addressed the *Smith* issue of a reasonable time frame. The statute provided for seven days notice by certified mail service of a forcible entry and detainer action, and the Court held that such notice was unconstitutional because it did not provide sufficient due process to the tenants. *Id.* at 721.

Kluender argues that the *War Eagle* holding should be applied to the facts of this case. However, the Iowa Court of Appeals holding in *Nicholson v. HF05*, 778 N.W.2d 218 (Table), No. 08-1418 (Iowa Ct. App. December 17, 2009) properly distinguished the § 447.9 notice requirements from those in *War Eagle*. *Nicholson* is a case in which the relevant factual and legal issues are virtually indistinguishable from the case at hand. Both cases involved a constitutional challenge to the requirement of § 447.9 for service of notice by two separate means, regular and certified mail.

The Court of Appeals distinguished the seven-day notice period set by the *War Eagle* statute with the 90-day notice period set by § 447.9. In the case at hand, the district court relied on the judgment of the Court of Appeals, concluding as follows:

The time period allowed to redeem property after a tax sale is much longer. Here, after the initial purchase of the tax certificate on June 19, 2017, no action could be taken for one year and nine months. After the notice of right of redemption, an additional 90 days is allowed before final title is vested with the tax sale certificate purchaser. In this case, Gary Kluender had from June 19, 2017, until 90 days after April 14, 2020, to address his unpaid taxes and to redeem the property.

In *Nicholson*, the Court of Appeals declared that the United States Supreme Court “rejected the notion that due process required the homeowner to receive actual notice” in its decision in *Jones v. Flowers*, 547 U.S. 220, 226 (2006). 778 N.W.2d 218 at \*3. The Court of Appeals



held that the requirement of § 447.9 for notice by two separate means, regular and certified mail, provided sufficient notice under constitutional requirements, under circumstances where the tax sale certificate holder “simultaneously sent its notices by certified mail and by regular mail and there was no indication that the regularly mailed notice came back as undeliverable.” 778 N.W.2d 218 at \*3.

As in *Nicholson*, the undisputed facts in the case at hand are that Plum Grove mailed notices to Kluender by both regular and certified mail, and that only the certified mailing went unclaimed. The court held a telephone hearing on April 23, 2021, and a Telephone Hearing Transcript was filed with the court on July 2, 2021 and identified as Exhibit 11 to Plum Grove’s Brief in support of its Motion for Summary Judgment. App. 042-069. The Transcript sets forth testimony by Kluender in which Kluender admits that he was receiving mail addressed to him at the 1915 Cheyenne Avenue, Ionia, IA 50645 address at the time that Plum Grove mailed notices addressed to him at that address on April 14, 2021. Ex. 11, p. 13, ln. 7-18; App. 054. Confirmation of the mailing of notices to Kluender at that address is evidenced by the Affidavit of Mailing attached as page 3 to the Affidavit of Service of Notice of Expiration of Right of Redemption filed with the court on July 2, 2021 and identified as Exhibit 8

to Plum Grove’s Brief in support of its Motion for Summary Judgment. App. 041. Therefore, the facts are undisputed that Plum Grove mailed notice by both regular and certified mail to Kluender at the 1915 Cheyenne address and that Kluender received mail at the 1915 Cheyenne address to which notices were mailed.

Furthermore, there is no evidence in the record to refute the presumption that regular mail notice was actually delivered at that address. Defendant’s Exhibit 4, filed with the court on April 30, 2021 (and previously on December 7, 2020), is a copy of the envelope containing the certified mail notice mailed by Plum Grove addressed to Kluender at his 1915 Cheyenne address, which envelope was returned to Plum Grove by the Post Office with a sticker stating “Return to Sender – Unclaimed – Unable to Forward.” App. 038. There is no showing in the record that the separate envelope containing the regular mail notice was returned to Plum Grove. Accordingly, based on the undisputed facts, the appellate court must presume as a matter of law that, because the regular mail notice was properly addressed and mailed, the notice was properly delivered.

### **CONCLUSION**

The appellate court should affirm the district court’s Order Regarding Motions for Summary Judgment in all respects. The district

court correctly ruled that Plum Grove properly served Kluender with notice of expiration of right of redemption by regular and certified mail addressed to a current address at which Kluender was receiving mail. The service of notice by mail conformed to the mandates of Iowa Code § 447.9 and was constitutional under the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution and Iowa Constitution Art. 1, § 9.

**REQUEST FOR NONORAL SUBMISSION**

In the final Order that is the subject of this appeal, the district court relied on the Court of Appeals holding in *Nicholson v. HF05*, 778 N.W.2d 218 (Table), No. 08-1418 (Iowa Ct. App. December 17, 2009). *Nicholson* is a case in which the relevant factual and legal issues are virtually indistinguishable from the case at hand. The legal issues are basic and support summary disposition. No purpose would be served by oral argument.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE

PLUM GROVE INVESTMENTS, INC.

### **CERTIFICATE OF COST**

I hereby certify that the cost of printing the foregoing Appellee's Final Brief was \$ 0.00 (exclusive of sales tax, postage and delivery).

*/s/ James E. Nervig*

### **CERTIFICATE OF COMPLIANCE**

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 2,935 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2018 edition of Microsoft Word in 14 point font plain style.

*/s/ James E. Nervig*