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COURT OF APPEALS

STATE OF NEW YORK

MAC NAUGHTON,

Appellants,

-against-

No. 222

WARREN COUNTY, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
November 14, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 222, Mac
2 Naughton v. Warren County.

3 Counselor?

4 MR. MAC NAUGHTON: Good afternoon. May it
5 please the court, I'm James Mac Naughton and I'm
6 appearing here pro se. I ask for reservation of five
7 minutes of time for rebuttal.

8 CHIEF JUDGE LIPPMAN: Yes, you've got it,
9 counselor, go ahead.

10 MR. MAC NAUGHTON: Thank you. There is a
11 constitutional difference between sending notice of a
12 lawsuit and thinking about - - -

13 CHIEF JUDGE LIPPMAN: What are your
14 responsibilities here in this situation?

15 MR. MAC NAUGHTON: Well, my responsibil - -
16 -

17 CHIEF JUDGE LIPPMAN: What - - - what do
18 you see, as a person who pays bills before, tax bills
19 - - -

20 MR. MAC NAUGHTON: Yes.

21 CHIEF JUDGE LIPPMAN: - - - and then stops
22 getting bills, what's your responsibility in that
23 situation from a common sense perspective? Forget
24 what the statute says. You know you have to pay
25 taxes. What goes through your mind when that

1 happens, and what is it your obligation to do?

2 MR. MAC NAUGHTON: My obligation is - - -
3 actually my right - - -

4 CHIEF JUDGE LIPPMAN: Go ahead.

5 MR. MAC NAUGHTON: - - - is to due process.
6 Okay? And my right to due process is separate from
7 my obligation to pay taxes.

8 CHIEF JUDGE LIPPMAN: Yes, yes. But what
9 I'm saying is, from the most common sense
10 perspective, putting aside the legal requirements or
11 lack of on their part, or your entitlement; what goes
12 through your mind where you pay taxes on a piece of
13 property for a number of years, and then you stop
14 getting the notices?

15 MR. MAC NAUGHTON: As a - - -

16 CHIEF JUDGE LIPPMAN: What does that say to
17 you as the person who owns this property?

18 MR. MAC NAUGHTON: As a practical matter -
19 - -

20 CHIEF JUDGE LIPPMAN: Yes, that's what I
21 mean.

22 MR. MAC NAUGHTON: - - - okay, without
23 reference to the Constitution or to the statute.

24 CHIEF JUDGE LIPPMAN: As a practical
25 matter, what goes through - - -

1 MR. MAC NAUGHTON: As a practical - - -

2 CHIEF JUDGE LIPPMAN: - - - your head?

3 MR. MAC NAUGHTON: - - - matter, like
4 everybody else on a given day, I have my hierarchy of
5 issues I have to deal with. I've got a law practice;
6 I've got kids; I've got church activities; I own a
7 home.

8 JUDGE GRAFFEO: But this was about four
9 years that you didn't get a tax bill. And knowing
10 that there's a risk that happens to any landowner who
11 doesn't pay their real property taxes, did you have
12 any obligation to check and make sure?

13 MR. MAC NAUGHTON: The penalty I pay is
14 that I lose my property for - - - in a tax sale.
15 That's a different issue of my entitlement to due
16 process. If - - - due process is a weighing
17 analysis.

18 JUDGE GRAFFEO: Did you ever - - -

19 MR. MAC NAUGHTON: And if you - - -

20 JUDGE GRAFFEO: - - - did you ever send
21 them a written notice - - -

22 MR. MAC NAUGHTON: Oh, yes.

23 JUDGE GRAFFEO: - - - that you changed your
24 address?

25 MR. MAC NAUGHTON: Oh, yes. Oh, yes. Now

1 - - -

2 JUDGE CIPARICK: But they had no record.

3 JUDGE GRAFFEO: I thought there was a
4 handwritten note and bill?

5 JUDGE CIPARICK: They had no record.

6 MR. MAC NAUGHTON: There was. My wife,
7 when she sent the bill, put a handwritten note in
8 with the bill telling them about the change of
9 address.

10 JUDGE SMITH: But she - - - but she didn't
11 keep a copy?

12 MR. MAC NAUGHTON: No, she didn't keep a
13 copy.

14 JUDGE SMITH: You can under - - - I mean,
15 without impugning her credibility, you can understand
16 the problem that everyone's going to say, oh, I put a
17 - - - I sent a note, and I don't have a copy. I mean
18 - - -

19 MR. MAC NAUGHTON: I understand that. But
20 here's - - - but here's the approach that this court
21 needs to take. The court has to understand that
22 Jones has overruled Kennedy in two very significant
23 respects. Okay? The first respect is the difference
24 in due process. Jones says - - -

25 JUDGE CIPARICK: Well, the legislature has

1 - - - our legislature has recognized certain of those
2 issues, and they've amended the statute. But this is
3 under the earlier statute, correct?

4 MR. MAC NAUGHTON: This is under Jones.
5 Jones applies, because we're here today and Jones - -
6 -

7 JUDGE SMITH: But that's not everything.

8 MR. MAC NAUGHTON: - - - applies today.

9 JUDGE SMITH: - - - but it's under the
10 Constitution as interpreted within Jones. Everyone
11 agrees with you. But as far as the - - -

12 JUDGE CIPARICK: Right. We have a statute.

13 JUDGE SMITH: - - - statutory matter - - -

14 JUDGE CIPARICK: Right.

15 JUDGE SMITH: - - - it's under the old
16 statute.

17 MR. MAC NAUGHTON: It wasn't - - - it
18 wasn't under the old statute. The old statute had no
19 process for this - - - in this case.

20 JUDGE SMITH: All we're suggesting, it
21 couldn't be a consti - - - the statute in force - - -

22 JUDGE CIPARICK: Hindsight.

23 JUDGE SMITH: - - - at the time that these
24 notices were sent was the predecessor, not the
25 present one.

1 MR. MAC NAUGHTON: What ha - - - they
2 followed - - -

3 JUDGE SMITH: That's correct?

4 MR. MAC NAUGHTON: - - - they followed the
5 statute and then they were confronted with a
6 situation that the statute had not anticipated - - -

7 JUDGE SMITH: Before you run out of time,
8 can you just tell - - - what rule - - - I mean, what
9 is the rule that taxing authorities should follow? I
10 mean, don't the people who work in these offices have
11 to know what they're supposed to do? Can you tell us
12 - - -

13 MR. MAC NAUGHTON: Real simple.

14 JUDGE SMITH: - - - precisely what they
15 have to do?

16 MR. MAC NAUGHTON: Put the notice in the
17 envelope, address it at the occupant at the last
18 known address or the recipient. Real simple.

19 JUDGE SMITH: So after - - - you're saying
20 the Constitution basically requires that "Occupant"
21 be on the envelope?

22 MR. MAC NAUGHTON: That notice has to go
23 out the door. And in fact, notice did go - - -

24 JUDGE SMITH: Well, no - - -

25 MR. MAC NAUGHTON: - - - out the door in

1 this case, but only to county residents.

2 JUDGE GRAFFEO: How would you have gotten
3 notice if they sent it to "Occupant"?

4 MR. MAC NAUGHTON: I knew the people that
5 bought my house. I was - - -

6 JUDGE GRAFFEO: What if they didn't tell
7 you?

8 MR. MAC NAUGHTON: At least I would have a
9 chance. Under the cir - - - under the path that they
10 followed, there was no chance, zero chance - - -

11 JUDGE GRAFFEO: But - - -

12 MR. MAC NAUGHTON: - - - I had even less
13 chance as if publication had been done.

14 JUDGE GRAFFEO: - - - if that's a rule,
15 what about other property owners? I mean - - -

16 MR. MAC NAUGHTON: I'm not here for other
17 property owners.

18 JUDGE GRAFFEO: Other - - -

19 MR. MAC NAUGHTON: I'm here for myself.

20 JUDGE GRAFFEO: Well, we're doing a rule
21 that's going to affect all the municipalities in New
22 York State, so we're asking - - -

23 MR. MAC NAUGHTON: Well, it's going to - - -

24 -

25 JUDGE GRAFFEO: - - - what's the - - -

1 MR. MAC NAUGHTON: - - - affect the
2 municipalities - - -

3 JUDGE GRAFFEO: - - - what's the practical
4 rule?

5 MR. MAC NAUGHTON: - - - it's going to go
6 affect the municipalities on whatever processes they
7 followed prior to 2006. Okay? And with respect to
8 that, the circumstances of this case are so unique,
9 I'm not aware of any other person bringing a case
10 like mine for denial of due process under the old
11 statute.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. MAC NAUGHTON: There has been no - - -

14 THE COURT: Okay, counselor. You'll have
15 your rebuttal time.

16 MR. MAC NAUGHTON: Thank you.

17 CHIEF JUDGE LIPPMAN: Thank you.

18 Counselor?

19 MS. DEFIO KEAN: Good afternoon. May it
20 please the court, Elena DeFio Kean from Towne, Ryan &
21 Partners, on behalf of the County of Warren.

22 CHIEF JUDGE LIPPMAN: Counsel, the - - -
23 Mr. Mac Naughton says he's entitled to due process.
24 Do you have any doubt that he is?

25 MS. DEFIO KEAN: Well, he's absolutely

1 entitled to due process.

2 CHIEF JUDGE LIPPMAN: Did he have due
3 process in this case?

4 MS. DEFIO KEAN: Yes, he did.

5 CHIEF JUDGE LIPPMAN: How did he have due
6 process?

7 MS. DEFIO KEAN: Due process is a system
8 that is designed to reasonably ensure notice. But
9 due process, under Kennedy and under Jones, doesn't
10 say that you have to go to extraordinary means to
11 make sure that every single person - - -

12 JUDGE SMITH: Was it really this hard to
13 track this family down? I mean, under Mullane,
14 you're supposed to use the means that someone who
15 actually wanted to find him would have used. If
16 you've been desperate to find the Mac Naughtons,
17 don't you think you could have found them?

18 MS. DEFIO KEAN: Well, I guess the question
19 becomes is, what - - - do we set up a different
20 standard for every single taxpayer?

21 JUDGE SMITH: Well, how about - - -

22 MS. DEFIO KEAN: The Town has - - -

23 JUDGE SMITH: - - - what about checking
24 with the post office? Couldn't you just have said -
25 - - asked the post office for the forwarding address?

1 MS. DEFIO KEAN: It wasn't a system that
2 was put in place at that time. Typically, we'd think
3 they would.

4 JUDGE SMITH: But shouldn't - - - wouldn't
5 - - - isn't that some - - - if you - - - if it were
6 really very important to you to find Mr. Mac
7 Naughton, wouldn't you have at least checked with the
8 post office for his forwarding address?

9 MS. DEFIO KEAN: I think what had to be
10 done was there is a balancing between what a
11 municipality is required to do and what a taxpayer's
12 obligation is - - -

13 JUDGE SMITH: Okay. Well - - -

14 JUDGE CIPARICK: What were you required to
15 do at that time?

16 JUDGE SMITH: - - - what's so hard about
17 that?

18 JUDGE CIPARICK: What were you required to
19 do?

20 MS. DEFIO KEAN: What a municipality was
21 required under the statute, was to check the land
22 records, was to check the surrogate records, was to
23 check the county records, which they did.

24 JUDGE CIPARICK: And you did that?

25 MS. DEFIO KEAN: They did that.

1 Additionally, while they couldn't say what they did
2 specifically in Mr. Mac Naughton's case - - - because
3 it's important to note that by the time that this was
4 brought to this attention, he didn't call until
5 October of '03. This was almost four and a half plus
6 years after - - -

7 JUDGE SMITH: Well, but if you - - - but if
8 you didn't do what the Constitution requires you to
9 do in 1998, then it doesn't matter when he called,
10 does it?

11 MS. DEFIO KEAN: No. But I would sug - - -
12 I would not concede that we didn't do what the
13 Constitution required. We did - - -

14 JUDGE SMITH: And if you did, it also
15 doesn't matter when he called. If you complied with
16 the Constitution, great; and if you didn't - - - and
17 if you didn't, it doesn't matter when the phone call
18 came.

19 MS. DEFIO KEAN: That is correct. But I
20 think it goes to - - - I think it goes to the burden.
21 And here's the other thing that I would like to
22 answer, is that in addition to that, the Second
23 Assistant County Attorney testified that the general
24 practice at the time was, in addition to that, was
25 for them to check local records that was available,

1 such as - - -

2 JUDGE CIPARICK: You also published, right?
3 He also published?

4 MS. DEFIO KEAN: He published; correct.
5 And those were - - - that's critical. And here's
6 why. Because - - -

7 CHIEF JUDGE LIPPMAN: But were they
8 reasonably designed to notify him to get to them? I
9 think the question that Judge Smith asked you before,
10 you're taking away someone's property. It's a pretty
11 significant step. Wouldn't it behoove the
12 municipality to take some kind of a reasonable
13 approach to actually putting them on notice when you
14 know that there's very little chance that what you
15 did - - - or there's a very good chance, at least,
16 that you wouldn't get notice?

17 MS. DEFIO KEAN: Under - - -

18 CHIEF JUDGE LIPPMAN: What - - - shouldn't
19 you go a little bit further in a situation like this,
20 where you're going to sell the property. I mean,
21 isn't that - - -

22 MS. DEFIO KEAN: I don't disagree with you.
23 But I think that they did that. I think they did
24 that. They checked the voter registrations. They
25 checked the phone books.

1 CHIEF JUDGE LIPPMAN: But you had a New
2 Jersey address to begin with.

3 MS. DEFIO KEAN: Well, I guess the question
4 is, are we then - - -

5 CHIEF JUDGE LIPPMAN: But isn't that a
6 critical factor, that you knew this is a New Jersey
7 address?

8 MS. DEFIO KEAN: Do you think - - - but I
9 think if we follow that logic, then the concept is,
10 is that if you're out of state, you get a higher
11 level of search than somebody that maybe lives in - -
12 -

13 CHIEF JUDGE LIPPMAN: What about if the
14 concept is - - -

15 MS. DEFIO KEAN: - - - Albany gets.

16 CHIEF JUDGE LIPPMAN: - - - that there's
17 got to be a reasonable effort to notify them?

18 MS. DEFIO KEAN: I think that there was a
19 reasonable effort. And there's just so much a
20 municipality can do. I think - - -

21 CHIEF JUDGE LIPPMAN: A reasonable effort,
22 but not necessary designed to really notify them when
23 you know that you have a New Jersey address.

24 MS. DEFIO KEAN: I think the thing that is
25 critical is - - - and this court said, even in

1 Kennedy - - - is that notice has to be reasonable,
2 but it doesn't mean that it's going to get every
3 single potential taxpayer. Because to do so would
4 put an unnecessary burden on municipalities. It's -
5 - -

6 JUDGE CIPARICK: Did Jones change the
7 burden in any way?

8 MS. DEFIO KEAN: I think - - -

9 JUDGE CIPARICK: Jones v. Flowers?

10 MS. DEFIO KEAN: I actually have a
11 different take on that than counsel, quite frankly,
12 because I think, if you look at the intro to Jones,
13 the reason that the court took the Jones v. Flowers
14 case was to deal with distinctions in different
15 states, and in fact, cited Kennedy as the one that
16 was different from the Michigan case.

17 JUDGE PIGOTT: Well, one of the things that
18 it seemed to me - - - and maybe you can correct me if
19 I'm wrong - - - the Arkansas procedure was
20 nonjudicial, that - - -

21 MS. DEFIO KEAN: Oh, Arkansas, I'm sorry.

22 JUDGE PIGOTT: The only thing that happened
23 there is that if you don't pay your taxes, at some
24 point the commissioner then does what he does. But
25 there's no court intervention whatsoever. And of

1 course here, we have an entire statute that compels
2 you to do service by publication as a last resort,
3 and then there was, of course, a judgment, and then
4 the judgment gets filed, and then there's the sale.
5 So there's all that process that's due and done. But
6 then, as your opponent raises, it then gets down to
7 simply the notice post-judgment.

8 MS. DEFIO KEAN: Correct. And I think the
9 other thing in Jones, is we're more akin to Jones
10 than we realize.

11 And I just have to clarify one thing before
12 I sit down, because I do recognize I will be getting
13 to my time shortly. And that is, the issue of
14 "Occupant", counsel has suggested that we would have
15 met Jones, we would have given him due process, if we
16 had simply mailed "Occupant" to his New Jer - - - his
17 prior New Jersey address.

18 JUDGE SMITH: Jones does actually
19 specifically mention that as a possibility, doesn't
20 it?

21 MS. DEFIO KEAN: Correct. But it doesn't
22 say to the last known address of the property owner,
23 it says to the property. In that case, was the - - -
24 in Jones, the last address was the address which - -
25 -

1 JUDGE SMITH: Why is that - - -

2 MS. DEFIO KEAN: - - - in fact, was being
3 foreclosed.

4 JUDGE SMITH: - - - why is that a
5 significant distinction? Why is it reasonable to
6 address it to "Occupant" at the property, but not to
7 "Occupant" at last known address?

8 MS. DEFIO KEAN: There is definitely a
9 reasonable distinction. Here's what that is. It's
10 because the whole concept in Jones was that if you
11 mailed the Occupant notice to the address in which
12 the property was being foreclosed, that the person
13 who was affected by it might actually find the
14 person.

15 In this case, what is there to suggest that
16 almost five years after the sale of the property the
17 residents in New Jersey who have lived there for five
18 years, would search down the individual from a notice
19 that they received from Warren County, New York?

20 JUDGE SMITH: I see that point. I guess I
21 still am not sure why you say it was not reasonable
22 for you to check with the post office. What's the
23 unreasonable burden about asking the post office if
24 they've got an address for the Mac Naughtons?

25 MS. DEFIO KEAN: I think at that point,

1 that was not a typical practice that was involved.

2 JUDGE SMITH: I didn't say typically.

3 Jones says you've got to go beyond the typical
4 practices. Arkansas was doing its typical practices,
5 too. The question is why this wasn't a reasonable
6 one that you should have done?

7 MS. DEFIO KEAN: Well, I guess what we can
8 say, there's a lot of things to be said about
9 hindsight being 20/20, and they did the things that
10 they thought were reasonable at that time, which was
11 to check these other areas.

12 JUDGE GRAFFEO: If they had contacted the
13 post office, would they have determined a forwarding
14 address?

15 MS. DEFIO KEAN: That is unclear from the
16 record. I'm sure counsel would say yes, but there is
17 nothing that's been developed in the record that I
18 can - - -

19 JUDGE SMITH: Is it a reasonable inference
20 that if - - - we know - - - we do know from the
21 record that he had a forwarding - - - that the mail
22 was forwarded to the correct office until the
23 forwarding - - - the correct address, until the
24 forwarding order expired. Isn't it a reasonable
25 inference that the post office had the right address?

1 MS. DEFIO KEAN: Perhaps. But then the
2 question is, how do we know how many times - - -
3 chains down the line. And I guess the question
4 becomes, is looking - - - it's very easy to always
5 figure out what you should have done after the fact.
6 You can say that in any setting; now, you know,
7 looking at this ten years later, what they could have
8 done. You can only work with what reasonably
9 understood and reasonably followed, designed to get
10 as much notice to everyone that was out there.

11 JUDGE READ: So you're saying we don't
12 really know, and there's nothing in the record to
13 tell us how long, I guess, the post office retains an
14 expired - - -

15 MS. DEFIO KEAN: There's nothing in this
16 record that I am aware of that would suggest that.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 Thank you.

19 MS. DEFIO KEAN: Thank you very much.

20 CHIEF JUDGE LIPPMAN: Counsel?

21 MR. SILVESTRI: If it please the court, my
22 name is John Silvestri. I represent the respondents
23 Asendorfs, who are the good-faith purchasers - - -

24 JUDGE CIPARICK: Purchasers.

25 MR. SILVESTRI: - - - for value. I believe

1 that my clients, who did due diligence in searching
2 the record on this at the time they purchased, had a
3 right to rely upon real property tax law in existence
4 at the time they purchased. And in this case, the
5 County did follow real property tax law and all of
6 the procedures required.

7 So they paid value to the County for that
8 property, and they had a right to rely on that law.

9 JUDGE SMITH: So your argument is that even
10 if Mr. Mac Naughton wins, he should only get damages,
11 he shouldn't get the property back?

12 MR. SILVESTRI: Correct.

13 JUDGE SMITH: And the damages should be
14 against the County?

15 MR. SILVESTRI: The damages should be
16 against the County. But more than that, I don't
17 think Jones should be given retroactive effect. What
18 counsel is asking for here is not for a balancing of
19 the respons - - -

20 JUDGE CIPARICK: Has Jones really changed
21 the laws that existed?

22 MR. SILVESTRI: I don't believe it does.

23 JUDGE CIPARICK: Right.

24 MR. SILVESTRI: I - - - maybe I'm
25 misinterpreting my opponent's argument, but I think

1 he's saying that Jones does change the law and
2 required a higher standard than that was followed at
3 this - - -

4 JUDGE SMITH: Well, but - - -

5 MR. SILVESTRI: - - - particular time.

6 JUDGE SMITH: - - - it applied to the
7 parties in Jones. It applied to Mr. Jones and Mr.
8 Flowers. Why shouldn't it apply to Mr. Mac Naughton
9 and the County of Warren?

10 MR. SILVESTRI: There's a very big
11 difference. In that particular case, the mail was
12 returned unclaimed. As a practitioner for many
13 years, I know people do the ostrich head in the sand
14 routine when they receive unpleasant notices and they
15 ignore it. So when something's returned unclaimed -
16 - -

17 CHIEF JUDGE LIPPMAN: So what's the
18 difference between unclaimed and this case?

19 MR. SILVESTRI: Well, in this case, it was
20 undeliverable as addressed.

21 CHIEF JUDGE LIPPMAN: Right. So what's - -
22 -

23 MR. SILVESTRI: Forwarding order - - -
24 forwarding order - - - there's an indication that the
25 person has moved from that address, so sending

1 further notices to that address is going to be of no
2 particular effect. It's not a case where they still
3 owned the property and were renting it out. It was
4 undeliverable as addressed, forwarding order has been
5 cancelled. That's an indication that the person has
6 moved and is no longer there. I think that's a huge
7 difference between Jones and the present case.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.
9 Thanks.

10 MR. SILVESTRI: Thank you.

11 MR. MAC NAUGHTON: Judge Smith, on your
12 point about the post office, okay? The post office
13 has a manual. It's called the DMM. And it provides
14 that when you put in a forwarding address, they hold
15 it for twelve months. It also provides a very simple
16 method for the sender to get the correct address.
17 When you go home tonight pick up your junk mail and
18 look at it. In the upper left-hand corner is an
19 endorsement that says "Address correction requested".
20 That's all you have to do to put on your letter to
21 get the post office to tell you who the new - - -
22 what the address is of every recipient.

23 CHIEF JUDGE LIPPMAN: So what should they
24 have done? What should the county have done?

25 MR. MAC NAUGHTON: At a minimum, they

1 should have put "Address correction requested" when
2 they sent out the letter. I wouldn't even say the
3 minimum. At a minimum, what they should have done
4 was put some kind of notice out the door. They did
5 it for county residents. They're sitting here
6 complaining about the burden.

7 JUDGE PIGOTT: Well, that's just - - - I
8 think their argument is they did more. In other
9 words, it's not because they - - - excuse me - - -

10 MR. MAC NAUGHTON: No, no.

11 JUDGE PIGOTT: Excuse me.

12 MR. MAC NAUGHTON: No, no.

13 JUDGE PIGOTT: Excuse me. Let me finish -
14 - - can I finish - - -

15 MR. MAC NAUGHTON: I'm sorry.

16 JUDGE PIGOTT: - - - my thought. What
17 they're arguing is, we complied with due process
18 under the real property tax law. What we then did
19 was we overdid it with some. And their argument is
20 what you're now saying is, because we tried to do
21 more, you're saying you somehow were disadvantaged,
22 because you moved out of state, didn't tell them, and
23 didn't pay your taxes.

24 MR. MAC NAUGHTON: No, that's not quite
25 accurate.

1 JUDGE PIGOTT: Okay. What is their
2 argument because - - -

3 MR. MAC NAUGHTON: All right. They
4 complied - - -

5 JUDGE PIGOTT: - - - because that's what I
6 felt summarized it.

7 MR. MAC NAUGHTON: - - - with the statute -
8 - - they complied with the statute; the notice came
9 back undelivered. So at that point in time, they had
10 complied with the statute, but had not given notice.
11 And from there, they winged it. Okay?

12 They say they went back and searched the
13 public record. The only evidence of that is the
14 affidavit of Ms. Neminger (ph.) who says it's the
15 late 1990s. She wasn't even there. She was
16 speculating on what happened before she even came.
17 But let's assume for the moment that they did, in
18 fact, do the search. They searched for everybody,
19 and then they sent out personal service to the county
20 residents.

21 JUDGE SMITH: So when you say - - - when
22 you said they should have sent a notice out the door,
23 you mean they should have handed it to a process
24 server?

25 MR. MAC NAUGHTON: Or mailed it to the

1 occupant. They should have sent something - - -

2 JUDGE PIGOTT: Well, mailed - - -

3 MR. MAC NAUGHTON: - - - out the door. In
4 the absence of that, there's no notice. There's no
5 chance of - - -

6 JUDGE PIGOTT: Mr. Mac Naughton - - -

7 MR. MAC NAUGHTON: - - - notice.

8 JUDGE PIGOTT: - - - mailing to the
9 occupant, if I understand Flowers right, was what the
10 Chief Judge Roberts was talking about in response to
11 the dissent saying that Jackson made some comment
12 about something similar. And I don't think anybody
13 thinks that "Occupant" is going to get - - - I mean,
14 if you do that, you're probably going to get more
15 lawsuits saying all they did was mail it to the
16 occupant, and everyone knows that that doesn't even
17 make it from the mailbox to the kitchen table - - -

18 MR. MAC NAUGHTON: I can't - - -

19 JUDGE PIGOTT: - - - I'm almost done. I'm
20 almost done.

21 MR. MAC NAUGHTON: Okay.

22 JUDGE PIGOTT: And then - - - and it gets
23 tossed away, so there's nothing to do. What I wanted
24 to add to that, though, is this. Warren County, I
25 have no idea how big it is, but I don't think it's as

1 big as Erie, Onondaga, Chautauqua, Monroe, where
2 there are thousands of pieces of property and parcels
3 that are done. The statute is designed to take care
4 of all of them. And there are people - - - I'm from
5 Buffalo - - - who live in Ontario. You want them to
6 search New Jersey. I suspect that while in your
7 papers you say all they had to do was check the
8 voting records in New Jersey - - - I suspect, then,
9 that what we'd have to - - - we'd say to comply not
10 just for you but for everybody, that we've got to do
11 it in all states and probably, at least, Canada.

12 MR. MAC NAUGHTON: No. I'm saying that the
13 burden, the level of burden - - - they're complaining
14 about the burden. Okay? First off, it's a
15 disingenuous complaint, because they assumed that
16 burden, but for county residents. They set their own
17 bar.

18 CHIEF JUDGE LIPPMAN: So does it - - - is
19 it of no significance in terms of what they have to
20 do? It doesn't matter what state you're in, what
21 country you're in, they have to pursue - - - your
22 basic argument is what they do for Warren County,
23 they have to do for a New Jersey resident, for a - -
24 -

25 MR. MAC NAUGHTON: No, my - - -

1 CHIEF JUDGE LIPPMAN: - - - Michigan
2 resident?

3 MR. MAC NAUGHTON: - - - my argument - - -

4 CHIEF JUDGE LIPPMAN: What is your
5 argument?

6 MR. MAC NAUGHTON: All right. My argument
7 is that they set their own level of what their burden
8 was.

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. MAC NAUGHTON: Okay. And once they set
11 their own level for what the burden is, they have to
12 do it for everybody. If you're going to discriminate
13 between county and noncounty residents, then it's
14 subject to strict scrutiny, under both the due
15 process and equal protection clauses. Once you set
16 that level - - - they chose to set that level.

17 JUDGE PIGOTT: You said in your - - - you
18 said you were not asserting an equal protection
19 argument.

20 MR. MAC NAUGHTON: I said I'm asserting due
21 process. But there's an equal protection component
22 that's inherent in due process.

23 JUDGE PIGOTT: "Plaintiffs are not
24 asserting a separate equal protection claim."

25 MR. MAC NAUGHTON: That's right. But - - -

1 JUDGE PIGOTT: Okay.

2 MR. MAC NAUGHTON: - - - but there is an
3 equal protection component of due process, whether I
4 characterize it as a due process claim or - - -

5 JUDGE CIPARICK: So every - - -

6 MR. MAC NAUGHTON: - - - an equal
7 protection claim - - -

8 JUDGE CIPARICK: - - - absent - - -

9 JUDGE PIGOTT: There's no discovery on
10 that. That's the point. You took some documents and
11 did some additions and subtractions and said denial
12 of equal protection - - -

13 MR. MAC NAUGHTON: I took - - -

14 JUDGE PIGOTT: Let me finish.

15 MR. MAC NAUGHTON: Okay.

16 JUDGE PIGOTT: But you did not question the
17 County Attorney or anyone with respect to an equal
18 protection claim, because it wasn't there, right?

19 MR. MAC NAUGHTON: The County attorneys
20 didn't remember what happened.

21 JUDGE PIGOTT: No, I said you didn't
22 question the County Attorney with respect to an equal
23 protection claim, because you were not asserting one.

24 MR. MAC NAUGHTON: No. I did not question
25 the County Attorney with respect to an equal

1 protection claim, because - - -

2 JUDGE SMITH: Could I ask - - -

3 MR. MAC NAUGHTON: - - - he claimed he
4 didn't know anything about - - - he didn't remember
5 anything - - -

6 JUDGE SMITH: Can I just - - -

7 MR. MAC NAUGHTON: - - - about what
8 happened.

9 JUDGE SMITH: - - - could I ask on a
10 different subject? What is the - - - the bottom line
11 here is that you've lost the house. They sold it, I
12 gather for 3,700 dollars?

13 MR. MAC NAUGHTON: It was a vacant piece of
14 land.

15 JUDGE SMITH: Sorry?

16 MR. MAC NAUGHTON: Vacant piece of land.

17 JUDGE SMITH: Okay, I'm sorry, not the
18 house; the land.

19 MR. MAC NAUGHTON: Yes.

20 JUDGE SMITH: But they sold it for 3,700
21 dollars?

22 MR. MAC NAUGHTON: Yes.

23 JUDGE SMITH: Do you get the 3,700 less
24 your taxes or - - -

25 MR. MAC NAUGHTON: Do I get the 3,700

1 dollars less my taxes? No, I think - - - I think
2 fairness dictates that we basically go back and undo
3 it - - -

4 JUDGE SMITH: No, I'm not talking about if
5 you win the case. I mean, if you lose the case.

6 MR. MAC NAUGHTON: If I lose the case?

7 JUDGE SMITH: They keep the 3,700?

8 MR. MAC NAUGHTON: Oh, no. I think if I
9 lose the case, and the - - - if I lose the case, then
10 that's whatever it is between the county and the
11 Asendorfs.

12 JUDGE SMITH: I'm just - - - I'm really
13 just asking if it's like - - - is this like a normal
14 foreclosure sale, where there's a - - -

15 JUDGE PIGOTT: Surplus money?

16 JUDGE SMITH: - - - the creditor pays
17 himself, and then the excess is for the owner. Or is
18 this a forfeiture where they get to keep the whole
19 thing?

20 MR. MAC NAUGHTON: I don't know. You'd
21 have to address that to the appellees. I don't - - -
22 they have made no cross-claims.

23 CHIEF JUDGE LIPPMAN: Okay, counsel - - -

24 JUDGE PIGOTT: Before you go - - -

25 CHIEF JUDGE LIPPMAN: Oh, Judge Pigott,

1 yes.

2 JUDGE PIGOTT: Yes. Did you ever consider
3 filing a motion to vacate the judgment?

4 MR. MAC NAUGHTON: No, I did not. And the
5 reason I did not is because, as you saw from the
6 record, I did try to prosecute this case in federal
7 court, and the Second Circuit said bring it up under
8 this statute.

9 JUDGE PIGOTT: But if you had - - - the
10 reason I ask is, if you'd made a motion to vacate
11 saying, you know, that you didn't have proper
12 service, that would have been addressed at that time.
13 And but of course, you would also have had to assert
14 a viable defense.

15 MR. MAC NAUGHTON: I still would have had
16 the same notice issues. I did not, in fact, get
17 notice of the post-judgment. There's nothing in the
18 record that shows that service of that was ever
19 attempted. So I - - - you know - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
21 you.

22 MR. MAC NAUGHTON: Thank you.

23 CHIEF JUDGE LIPPMAN: Thank you all.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Mac Naughton v. Warren County, et al., No. 222 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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