**ORAL ARGUMENT — 1/08/98**
**97-0309**
**CLINT ISD V. CASH INVESTMENTS, INC.**

GRAY: This case initially started as a delinquent tax case. Clint ISD filed suit and was granted judgment for approximately $68,000 in delinquent taxes on a little over 1,000 acres of property in El Paso County. The property had an adjudged valued of a little over $1.1 million. The sheriff conducted a tax foreclosure sale and the sheriff accepted Cash Investment's bid of $360. Clint denied the purchaser, Cash Investments request for tax certificates on the property, because giving those tax certificates would have had the effect of extinguishing Clint's statutory and constitutional liens on the property.

SPECTOR: Was additional money to be paid? I don't quite understand that.

GRAY: No. $360 was the bid, and the sheriff awarded the property for that amount.

SPECTOR: But wouldn't it have been subject to the judgment lien?

GRAY: No. When a tax foreclosure sale is conducted, you are selling the property for the taxes.

SPECTOR: I read somewhere that the amount of the taxes were tendered to the school district?

GRAY: In El Paso you have the Clint ISD, and their taxes and their tax office was separate at the time of the delinquent tax judgment, separate from the city office that collected for El Paso County.

Clint proceeded, took their judgment, had the sale. Then in that intervening time, Clint closed their tax office and the city tax collector collected the taxes on behalf of the county and Clint. For everybody. Cash Investments went and said: "How much do we owe on the county taxes?" Because for reasons that are unclear in the record, the county dismissed out of the delinquent tax suit even though they had some taxes owing. They went to the county and said: "How much do we owe you county to release your liens?" And the tax collector said: "We won't release our liens unless you get Clint to release their liens. And Clint would not release their liens because they did not want to extinguish those statutory liens.

SPECTOR: But if the amount of the taxes was tendered, even though it was after the sale, would Clint accept the...

GRAY: Yes ma'am if the full amount had been tendered.

SPECTOR: And it has not been?

GRAY: No ma'am. Cash Investments filed a declaratory judgment action to determine the validity of its title since Clint would not give the tax certificates. The TC ruled that the sheriff's sale and sheriff's deed to Cash Investments were void and that no title shall pass. And the El Paso CA on a split decision reversed in part and reversed and rendered in part.

The two points that I want to focus on first is, and what I believe is the determinative issue, and where I believe that the CA got a little bit off tract is on the order of sale that the court issued. The court issued an order of sale that very unambiguously identified Clint ISD as the only entity which could purchase that property at the tax foreclosure sale for less than the judgment amount. In relevant part the order of sale stated: None of said property shall be sold to any party other than a taxing unit which is a party to the suit.

Not only is this unambiguous it does not conflict with §33.50(b) of the Texas Property Tax Code, which is where I believe the El Paso court got off track a little bit in their opinion. There are two reasons I believe that you don't really even have to look at 33.50. Number 1 is, the order of sale stands on its own. But 2, even if you accept Cash Investment's argument that §33.50 was a restriction on to whom the property may be sold, and that that statutory restriction did not include a restriction to third party purchasers, but was a restriction only on the owner of the property or someone with an interest in the property for purchasing the property for less than the minimum bid, you don't really have to look at 33.50. 33.50 really does nothing more than impose a statutory minimum, a floor. The legislature has said: "In order to protect the public purse, the property may not be sold to anyone for less than the minimum bid."

HANKINSON: What authority do you have for our interpreting 33.50 as providing a floor or a minimum since that language is not expressly used in the statute?

GRAY: Number 1, just a clear reading of the statute that it says that: "To whom the property may or may not be sold." And when you read that, that says that it may not be sold to , and if I read it giving in to construction, which I don't agree with, but I give the construction that Cash Investment urges, that that statute says: that it's a restriction against selling to the owner or an individual, but not to an individual that was a party to the suit, had an interest, but not to a third party. The legislature says: "You may not sell it to that class of persons." But there's nothing and no issue has been raised. They didn't challenge the TC's authority to further restrict the class of persons to whom the property can be sold. And the order of sale very unambiguously stated that Clint was the only person or the only entity to whom the property could be sold for less than the minimum bid.

ENOCH: Are you saying that a taxing authority that initiates a foreclosure on its tax lien gets the judgment, get an order of sale to the sheriff, that somehow someone can go in and buy from the sheriff that piece of property, and that automatically extinguishes the lien of the authority that

brought the tax suit?

GRAY: Yes.

ENOCH: So unlike a regular foreclosure of a lending institution or anybody else, their lien survives to the extent that whatever is paid at the foreclosure doesn't cover that...I mean if some individual buys it out of the foreclosure and whatever they pay doesn't satisfy that lien, there is some "subject to" that occurs here isn't there?

GRAY: I may not have been real clear, because in the statute under the Property Tax Code there are two liens. And you have personal liability, and then you have your en rem on the property. The lien on the property is extinguished, otherwise no one would buy the property...the property Tax code says you can sell the property for one of two amounts, the lesser of these two amounts. One is the taxes due; and the other costs associated with the judgment. And that's normally what the delinquent tax attorney finds himself in that situation. But there are sometimes where the value of the property is less than the total amount of taxes due. And in those instances, when you sell the property for that adjudged value, you have a tax lien up here, you sell the property for this amount, if that purchaser bought the property at the lower adjudged value amount, and then had to turn around and still pay these taxes, the entity would never be able to sell that property, never be able to get their money. Now what the law does allow is for them to proceed on that deficiency against the person who has personal liability.

ENOCH: So what this statute really does, at least from your position, the taxing authority doesn't have to personally be there at the foreclosure sale in order to force any independent bidder to bid higher than their tax lien?

GRAY: That's correct.

ENOCH: And so the sheriff under this sale had no authority to allow the property to be sold for less than what implicitly was the bid by the taxing authority?

GRAY: Yes. And in fact, I believe that that is set out fairly clearly in §34.01 of the Property Tax Code. Chapter 34, the Property Tax Code is the chapter that deals with both tax sales and tax resales. And this court in 1942 in *Danciger v. State* looked at a pre-codification. The Property Tax Code was codified right before 1979, and it's part of the continual codification process. Art. 73.28, which was the predecessor statute to §34.01(c) of the Tax Code, the SC in 1942 held that, "It imposed a duty on the sheriff to bid the property for the taxing unit in the amount of the judgment if no other bidder bids that much." Now the CA in reading their opinion said: "Well we can distinguish the *Danciger* case from the case at bar because that was a no bid case." Unfortunately, that's not a correct reading of *Danciger*. *Danciger* was not a no bid. What the court said in *Danciger* was is that no bid does not mean no bid. That no bid means that if there's no bidder who bids the amount of the judgment against the land, then it's bid off to the sheriff. In other words, if there's no

adequate bid or if there's no sufficient bid. Sufficient being defined as, "enough to satisfy the judgment."

Now when the statute was codified some 40 years later, the language was changed somewhat when it was codified.

OWEN: Are we looking at a drafting error essentially?

GRAY: No, I don't believe so. I think it was just cleaning up the language a little bit. Since the court said "no bidder" means "no bidder," I think that the drafters at the legislative council just stated that, "If sufficient bid is not received," meaning the same thing is what the *Danciger* court said, that "if sufficient bid is not received, the officer making the sale shall bid the property off to a taxing unit that is a party, etc." So pre-code you had "if no bidder," and with 34.01(c) you said: "If no sufficient bid." But that's after the SC said that "no bid" means "no bid that is for that minimum amount."

HECHT: If we were looking only at 33.50(b) wouldn't you lose?

GRAY: No.

HECHT: Why not?

GRAY: For several reasons. I think that the most important reason is that you don't have to look at 33.50(b) at all.

HECHT: No. I am saying if that's the only place we look, we forget what the judgment says and we don't worry about the conflict if there is one with 34.01...

GRAY: But you can't. To have a valid sale, it's based on the judgment, the order and the statute.

HECHT: I understand that's the argument.

GRAY: I just want to make sure we're clear that I'm not entirely comfortable with the hypothetical. But, no, you still don't. Because I think that the main reason is that 33.50(b) was likewise codified when the Property Tax Code came about, and it came from §73.45.

HECHT: Yes, but they added to the suit.

GRAY: Yes. But if recall the entire codification process which we have been doing since the 60's, and there is legislative history throughout, and particularly in dealing with the Property Tax Code and these sections of the Property Tax Code, there was no legislative intent to

change the meaning of these statutes. And in fact, in my brief under Point of Error No. 3, I set that out, that there was no legislative intent.

OWEN: That's what I meant by drafting. Is it your position that what happened in 33.50(b) was a drafting error when they recodified the statute?

GRAY: To the extent that someone would now read that language and give it new or different meaning than the predecessor statute, then yes, I do. But I believe that they were doing nothing more than making it clear, which is oftentimes what in codifying statutes that have been amended over the course of several decades when you then turn around and codify them the attempt is not to change the meaning or the intent, but to clean them up.

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RESPONDENT

HUGHES: I think Clint's contention in a nutshell is that the sheriff could not legally sale to Cash Investments for less than the taxes owed in this case. I think the only way that Clint can prevail in this case is if the minimum bid provision in 33.50(b) applies to Cash who is not an owner of the property, and who is not a party to the underlying tax suit.

HANKINSON: Isn't the threshold question whether or not the sheriff conducted the sale in accordance with the order of sale in the judgment?

HUGHES: Yes, that is a factor.

HANKINSON: And if the sheriff did not, then is the sale void?

HUGHES: I think that would be true, but the sheriff did in this case. Let me point out the language in the order of sale that allowed the sheriff to give the bid as he did. The order of sale commanded the sheriff to sell the property to the highest bidder for cash. And then it had three (3) exceptions for when a minimum bid would apply. Those exceptions were: to the owner of said property; 2) to anyone having an interest in the property; and 3) to any party other than a taxing unit which is a party to the suit.

Now, if we use rules of construction and look at these different terms here we have "do not sell to anyone having an interest in the party, yet do not sell to any party other than a taxing unit." We have to give different meanings to those different terms because if the court intended do not sell to anyone other than a taxing unit it would have used that term "anyone," as it did in the previous clause "do not sell to anyone with an interest in the property."

HANKINSON: So it's your position there's an ambiguity then in the order, so the sheriff did comply with it?

HUGHES: Yes, the sheriff did comply with the order.

HECHT: Who else was a party to the suit?

HUGHES: The parties to the suit would be the taxing unit and the taxpayer.

HECHT: So that's the owner and the taxpayers. So how can you say there is anybody else if you were going to give it additional meaning, who else would it be? Nobody else is a party to it.

HUGHES: Anyone with an interest in the property. There may be like a mortgage holder.

HECHT: They are not a party to the suit.

HUGHES: Right. They would be covered by anyone with an interest therein.

HECHT: You're saying the third category has to mean somebody else when it says "to any party other than a taxing unit, which is a party to the suit." But nobody else could be a party to the suit except the taxing unit and somebody that owned an interest in the property who are already covered by 1 and 2?

HUGHES: There may be like a mortgage company that was not a party to the suit. And they would be _____ to anyone having an interest therein. So there are differences between those three categories.

I think for 33.50(b) to apply in this case, this court will have to rule that the language "party to the suit" means anyone in the world, or anyone, or a person. Now what Clint contends is that you must construe 33.50(b) this phrase "party to the suit" to mean anyone in the world, because that was the legislative intent. And there are 4 reasons why that is wrong. The first is the language of the statute itself. And the language here in 33.50(b) is clear. It says: "The minimum bid provision applies to anyone having an interest in the party, and a party to the suit other than a taxing unit." So, that language is clear and I think it shows the legislative intent. Further elsewhere in the Tax Code the legislature has used that term "party to the suit" to reflect that it means a party to an underlying tax suit. But furthermore, the legislature knew when to make a minimum bid provision universal. In the case of abandoned property, the Tax Code allows a taxing unit to seize that property and sell it under a tax warrant. And in that case the Code says in §34, "When you sell this property, the minimum bid provision applies to everyone except if you sell to a charitable organization." So the legislature knew when to make a universal application of this minimum bid provision. They didn't do that. There's no similar language in 33.50(b) to make the application universal.

When you have specific classes designated in a statute as 33.50(b) does, the

intent of the legislature is to exclude all others from the application of that statute, or the application of the minimum bid provision. And that's what happened here.

HECHT: Is it your view that 33.50 is mandatory and exclusive, that the order must contain this language and can't contain any other restrictive language?

HUGHES: That is right. And that is because when you make that provision and apply it only to certain classes, you must necessarily exclude that application to others.

HECHT: So this order doesn't quite say that. It doesn't attract the same language?. So what's the result of that?

HUGHES: What it did, the order said: "an owner and anyone having an interest therein." And of course the statute says: "well anyone having an interest in the property." So owner would be included with anyone having an interest therein. So the order is essentially the same as the statute.

HANKINSON: What legal authority do you have for your position that if the statute is mandatory and exclusive in that the order of sale must track or be in accordance with the statute?

HUGHES: It's the language of the statute itself which says the order must contain this language. And in it's the intent that you have in the statute when it designates a certain class and necessarily excludes persons outside of that class for its application.

OWEN: I want to ask you about 34.01(c). What does "sufficient bid" mean? What would an insufficient bid be?

HUGHES: It's our position that insufficient bid would be a bid by an owner or a party to the tax suit that did not meet the minimum bid requirements.

OWEN: Why wouldn't it mean the taxing authority, because in that case it's just bid back to the taxing authority? Isn't that kind of circular?

HUGHES: You may have instances where you have a taxing authority that was not a party to the suit. They could come bid at the tax sale, but they would have to meet the minimum bidder.

OWEN: Why would the legislature want to prohibit a party from bidding below the judgment or below the market value; and in that circumstance say it goes back to the taxing authority, but then let the world come in and bid $2 for a $2 million piece of property and extinguish the lien. What's the logic behind that?

HUGHES: The purpose of the statute is to prevent the taxpayer or someone having an interest in the property, such as a taxing unit that wasn't a party from coming in and getting the property for less than the taxes owed.

OWEN: Or the market value?

HUGHES: Or the market value. We don't want a taxpayer coming in and getting the property for less than the taxes owed at the tax sale just because no one else bid on it. And what that does is it protects the taxing unit.

SPECTOR: Well it doesn't get their taxes paid does it?

HUGHES: And this is a point you brought up earlier was the taxing unit not only has the lien on the property, it has a right to sell the property and get the money that comes from that sale, the taxing unit also has a personal judgment against the taxpayer. So if there is any deficiency after the sale, the taxing unit can go get the rest of its money from the taxpayer himself.

OWEN: But why would the legislature want to prohibit a party from bidding under the market value and not also prevent the public from paying $2 for a $2 million piece of property? Why is that in the legislature's best interest to say: "Well anybody can come in and bid an offer of $2 and we don't care and extinguish the lien?

HUGHES: I think it's because the taxing unit can easily protect itself by attending the sale. If they don't like the amount that the highest bid is, then they can go ahead and bid in and have it struck off for the amount of taxes owed or the market value of the property.

HECHT: But you could do that with the owner. You could prevent the owner from buying that for too little by just showing up at the sale?

HUGHES: That's correct.

HECHT: So why should you have to show up at a sale to a non owner but not to a sale to an owner?

HUGHES: I think what the legislature was doing was saying: "Well it's real simple for the taxing unit to show up at the sale and protect itself."

OWEN: You wouldn't need 34.01(c) if that were the case, because there's no point in making the sheriff strike it off the taxing authority to have to show up every time anyway?

HUGHES: I think that's the reason that 34.01(c) and 33.50(b) have to be read in conjunction. And that is that a bid is only insufficient if it doesn't meet the minimum bid provision

of 33.50(b). And that is because if you say that a bid is never sufficient unless it meets the minimum bid provision, well then 33.50(b) doesn't mean anything. It's mere surplusage. It has no meaning. It shouldn't even be in there. Of course we have to intend the legislature meant for it to have some meaning.

ABBOTT: Assuming if you would that the taxing unit did make a bid here, and they made a bid for the amount of the taxes owed; and therefore, they got the property. What then would they do with the property?

HUGHES: They have the right later to sell the property.

ABBOTT: In other words, the taxing units typically are not in the business of holding a whole bunch of property are they?

HUGHES: That's correct.

ABBOTT: They dispose of this property because they don't want to hold it. And when they would turn around and dispose of the property, I take it there wouldn't be any limitations on the amount of bid they could receive?

HUGHES: That's my understanding.

ABBOTT: In other words, could they turn around and then sell it after they bid for it at this particular auction sale, could they turn around and sell it for $360, because that's the most they could get for it?

HUGHES: That I don't know. I do know in *Syntax* in a case out of this court, this court held that if they do subsequently sell it for more than the taxes owed they remit the excess back to the taxpayer. I don't know what the converse is on that.

ABBOTT: Let's assume that the taxing unit showed up at this particular auction; they saw Cash's bid of $360, and said: "that there is no way we are going to let that happen." We're going to bid it at the amount of taxes owed." If they do that, once they bid it for the amount of taxes owed and they in essence buy it back for that amount, do they still at that time have the cause of action against the tax debtor?

HUGHES: I'm not sure, but I do not think they would at that point because they have bid in. It's been struck off for that amount.

ABBOTT: But if they had sold it for $360, then they would still have the cause of action against the tax debtor for the difference between the amount of taxes owed and the amount that was bid on the property?

HUGHES: That is correct. Any deficiency they would have a personal action against the taxpayer. Another reason that 34.01, the sufficiency statute has to be read in conjunction with 33.50(b), is that if you say in 34.01 that a bid is only sufficient when it meets the minimum bid provision, well then it contravenes the language in the minimum bid statute, 33.50(b), which limits that provision to three classes. But there's also a procedural problem in this case, not a problem, but would lead us to that. Here the party stipulated there were no irregularities in the sale accept for Clint's contention that the sale had to be for the minimum bid. And this court held in *State Mortgage Corp. v. Ludvig,* 48 S.W.2d 950 that the mere insufficiency of a price at a tax sale is not enough to render that sale void. You have to have some procedural irregularity that causes that small price, or inadequate price. So only if 33.50(b) applies to Cash Investments, who is not an owner, didn't hold an interest in the property, was not a party to the tax suit, is there some irregularity in the sale that resulted in the _____ price? And that's why this case is not like *Danciger*. If you notice in *Danciger* there the order of sale did apply a minimum bid to anyone. That's not in this case. But also the court in *Danciger* did not specifically explicitly said: "We are not considering the impact of 73.45(b), which was the predecessor to 33.50(b), because that was not raised below as an issue." But I think if the court had considered that they would have had to consider that: "Well wait a minute, here the legislature has specifically limited the minimum bid provision." How does that relate to what are saying a "no bid" is and how we are interpreting that? Because to say, "you always have to bid the minimum" would be in contradiction to 33.50(b).

There was stipulated here that there were no irregularities in the sale. 33.50(b), the minimum bid provision, does not apply to Cash by its terms. And we request that the SC affirm the judgment of the CA, or in the alternative, that you remand to the CA to consider the other issues that were not decided by the court.

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REBUTTAL

WOOD: At the outset we commend the court for taking up this matter. In the face of it it doesn't look very important, but it is. Obviously the court has recognized that. For every construction or Canon there's always an equal and _____ construction that you can put on it. And we always end up arguing nice Black _____ law, Rules of Statutory Construction on both sides. In fact, I witnessed the first arguments today here, and I noticed that we were doing the same thing with construction of contracts from deeds.

ABBOTT: Why would the argument that's made by Cash not make good sense if in fact it turned out that if the taxing authority made a bid on the property for the amount of taxes owed, then later turned around and sold the property, it would no longer have the ability to go against the tax debtor for the deficiency, because under the current structure they could still go after the debtor for the deficiency?

WOOD: They could go after the defunct corporation or somebody who obviously didn't have the money to pay the bills. They do retain. If it's struck off to the taxing unit they do have the ability to pursue the owner if that owner can be found, if there's any assets to be had in that corporation that owned the property.

OWEN: They don't have to credit the amount?

WOOD: They would have to credit the amount

OWEN: So they would net a loss there. In other words they would have given up the right to seek a deficiency to that difference?

WOOD: They would have gotten a complete amount of taxes and costs due under those circumstances assuming that they were able to collect that.

OWEN: In the respondent's brief they make the argument that in virtually no sheriff's sale is there a bidder who makes a bid for more than the market value or more than the judgment, that the bid is typically less in either of those two things and the property is struck off to that bidder?

WOOD: That simply is not true. In fact school districts and we've got all sorts of taxing units here, and in many instances in Harris county for instance we will have maybe 8 to 10 taxing units that will have delinquent taxes on a single piece of property. And in most instances, the vast majority of instances it is not struck off to a taxing entity. It is bought for more than the taxes and costs due. This is an exceptional situation, not the rule. And if they say that in their brief they are just simply not correct.

What we've got here is really pretty simple. The first point is that what controls is the notice of sale, the order of sale that is put out by the court. The language in that notice of sale is consistent with *Rhodes* and *Mills* that we've cited in our brief. They both are cases of longstanding that says "the order of sale controls." Now beyond that, what we have here is really very simple. We can cite rules of statutory construction going both ways. But what I believe courts are to do, and I think what the courts normally do is they look at the entire scheme. They look at what the scheme is intended to accomplish and they apply a common sense construction to what the legislature surely meant in those situations. And in this case, we are talking about a nonsubstantive revision in a code that respondent is claiming is changing at least 40 years worth of outstanding law.