Reversed and Rendered and Memorandum Opinion filed June 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00062-CV

BRYAN INDEPENDENT SCHOOL DISTRICT AND BRAZOS COUNTY, Appellants

V.

BRAD CUNE, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 48867-CV

M E M O R A N D U M O P I N I O N

Appellants, Bryan Independent School District and Brazos County, appeal an order awarding excess proceeds from a property-tax foreclosure sale to appellee, Brad Cune, as assignee of the purported former property owner, George Earl Jenkins. In three issues, appellants contend Cune did not prove the assignor was entitled to the excess proceeds and Cune failed to claim the proceeds within the time period prescribed by statute. We reverse and render.

I. BACKGROUND

In 1999, appellants sued George Earl Jenkins, Delores Jenkins, and Vernell King, alleging they owned or had an interest in certain real property on which taxes were delinquent and seeking foreclosure of appellants' tax lien.[1] On November 30, 2000, the trial court signed a judgment ordering foreclosure and sale of the property. The sale was conducted on May 6, 2003. After disbursement of proceeds for payment of past due taxes and various fees associated with the sale, there remained excess proceeds of $14,781.86, which the sheriff paid to the district clerk. Within thirty days after receipt of the excess proceeds, the district clerk sent documents entitled "Notice of Excess Funds," via certified mail, return receipt requested, to the defendants at the addresses set forth in the petition and to all parties' attorneys.

On March 26, 2008, Cune filed a "Motion To Release Excess Proceeds Subject To Tax Code §34.04 Via Assignment," alleging that "George Earl Jenkins" assigned the right to excess proceeds to Cune and attaching an affidavit of assignment. Each appellant filed pleadings, asserting Cune's claim was barred by the statute of limitations and requesting that it be paid the excess proceeds.

On September 11, 2008, the trial court held a hearing on Cune's motion and, at the conclusion, announced that it granted the motion. On the same day, the trial court signed an order awarding the excess proceeds to Cune. Appellants filed a motion for new trial. At a hearing, the trial court orally denied the motion but did not sign a written order.

II. ANALYSIS

A. Applicable Law

Chapter 34 of the Texas Tax Code prescribes the procedures for tax sales and redemption. *See* Tex. Tax Code Ann. §§ 34.01–34.23 (Vernon 2008 & Supp. 2009). Proceeds of a tax sale are applied first to various expenses associated with the tax suit and sale, then to the taxing unit for certain expenses, and then to taxes, penalties, interest, attorney's fees, and other amounts awarded under the judgment. *Id.* § 34.02(a). Excess

[1] The City of Bryan was also a plaintiff in the suit but is not a party to this appeal.

proceeds are paid to the clerk of the court issuing the warrant or order of sale. *See id.* § 34.02(d).

Section 34.03 imposes certain duties on the clerk of the court with respect to "Disposition of Excess Proceeds." The clerk is required to perform the following actions upon receipt of excess proceeds:

> (1) if the amount of excess proceeds is more than $25, before the 31st day after the date the excess proceeds are received by the clerk, send by certified mail, return receipt requested, a written notice to the former owner of the property, at the former owner's last known address according to the records of the court or any other source reasonably available to the court, that:
>
> (A) states the amount of the excess proceeds;
>
> (B) informs the former owner of that owner's rights to claim the excess proceeds under Section 34.04; and
>
> (C) includes a copy or the complete text of this section and Section 34.04; and
>
> (2) regardless of the amount, keep the excess proceeds . . . for a period of two years after the date of the sale unless otherwise ordered by the court.

Id. § 34.03(a).

Section 34.04 governs "Claims for Excess Proceeds." A person, including a taxing unit, may file a petition in the court that ordered the seizure or sale setting forth a claim to the excess proceeds. *Id.* § 34.04(a). The petition must be filed before the second anniversary of the date of the sale of the property. *Id.* At the hearing, the trial court must order that the excess proceeds be paid according to certain priorities to each party "that establishes its claim to the proceeds." *Id.* § 34.04(c). The last payee outlined in the list of priorities is "each former owner of the property, as the interest of each may appear . . . ." *Id.* § 34.04(c)(5).[2] Further, a former owner may assign his interest in excess proceeds to another person if certain requisites are satisfied. *See id.* § 34.04(f)–(h). An order

[2] In the present case, it is apparently undisputed that there were no claims asserted by persons or entities in the first four categories with priority relative to the excess proceeds.

under this section directing that all or part of the excess proceeds be paid to a party is appealable. *Id.* § 34.04(e).

Finally, under section 34.03(b), if no claimant establishes entitlement to the proceeds within two years from the date of sale, "the clerk shall distribute the excess proceeds to each taxing unit participating in the sale in an amount equal to the proportion its taxes, penalties, and interests bear to the total amount of taxes, penalties, and interest due all participants in the sale." *Id.* § 34.03(b).

B. Issues

In their first issue, appellants contend Cune failed to establish his claim to the proceeds, as assignee of Jenkins, because he failed to prove Jenkins was a former owner of the property or the amount of his ownership interest, considering there were several defendants to the delinquent-tax suit. *See id.* § 34.04(c). Appellants' second and third issues are interrelated and concern their contention that Cune was not entitled to the proceeds because he failed to file his motion within two years after sale of the property. *See id.* § 34.04(a). Appellants raised this issue at the hearing on Cune's motion.[3]

At the hearing, Cune did not dispute that neither he nor Jenkins filed a request for the excess proceeds within the prescribed two-year period. Indeed, in his motion, Cune acknowledged the sale occurred approximately five years before filing of the motion. Instead, Cune advanced two reasons he was nonetheless entitled to the proceeds, as assignee of Jenkins: (1) Jenkins did not receive notice of his right to claim the proceeds until more than two years after the sale; and (2) equity demanded award of the proceeds

[3] Appellants, as well as a sister court, refer to this two-year period as a "statute of limitations" or "limitations" period." *See Franks v. Woodville Indep. Sch. Dist.*, 132 S.W.3d 167, 171 (Tex. App.—Beaumont 2004, no pet.). We do not necessarily agree that this period is a statute of limitations in the classic sense, i.e. an affirmative defense that a taxing unit or other person or entity must raise to defeat a claimant's request, because: (1) the two-year requirement is included within the actual provision authorizing, and specifying the requirements for, a claim and thus could arguably be construed as an element of the claim; *see* Tex. Tax. Code Ann. § 34.04(a); and (2) the requirement that the clerk distribute the excess proceeds to "each taxing unit participating in the sale . . ." if no party makes a claim within the two-year period, *id.* § 34.03(b), indicates the trial court is not authorized to award the proceeds to a person who later makes an untimely claim simply because no other person or entity opposed it as untimely. Nonetheless, we need not decide whether application of the two-year period is an affirmative defense because appellants did raise the issue, but we will refer to it as the "two-year requirement."

to Jenkins because the taxing units were paid in full. Cune advances an additional equitable argument on appeal, contending he is entitled to the funds because appellants did not timely request them.

We need not decide whether Cune proved Jenkins was a former owner of the property or the amount of his interest because we conclude the claim was barred by the two-year requirement.[4]

C. The Two-Year Requirement

Preliminarily, we note that Cune correctly asserts appellants did not timely request findings of fact and conclusions of law. Thus, Cune suggests we may uphold the trial court's order because it made all implied findings necessary to support a conclusion he was entitled to the proceeds, including a finding that Jenkins did not receive the clerk's notice of his right to claim the proceeds.

In the absence of findings of fact and conclusions of law, we indeed imply the trial court found all facts necessary to support its judgment that are supported by the evidence. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 251–52 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). The implied findings may be challenged on appeal for legal and factual sufficiency when, as in this case, the appellate record includes the reporter's and clerk's records. *BMC Software Belg., N.V*, 83 S.W.3d at 795; *Vickery*, 5 S.W.3d at 252.

[4] Although we do not directly address whether Cune proved Jenkins was a former owner, we note the record itself contains confusion regarding the identity of the "Jenkins," through whom Cune claimed the proceeds, which touches on the issue regarding the untimely claim. Several months before Cune filed, through his current attorney, the motion at issue, a party named "George Earl Jenkins Jr." filed, through a different attorney who represented the defendants in the tax suit, a petition seeking the excess proceeds. This party alleged that his father, "George Earl Jenkins," died in 1986, leaving "George Earl Jenkins Jr." as his sole heir. This petition is the only mention in the record of a "George Earl Jenkins *Jr.*" The party claiming the right to the proceeds is referred to as "George Earl Jenkins" or "Jenkins," with no "Jr.," in the documents relating to the tax suit and sale, the pleadings filed relative to Cune's motion, at the hearings on the motion, and in the parties' briefs. Cune has not explained the identity of the "Jenkins" claiming the proceeds or why "Jr." filed a petition without further reference to him in the record. Thus, it is unclear whether Cune claims the proceeds as assignee of the original owner or as assignee of the son/heir but "Jr." was merely omitted from his name relative to the request. Regardless of which "Jenkins" is assignor, no petition was filed on his behalf within two years of the tax sale.

However, in this case, the trial court recited findings in its order as follows: "[Cune] has complied with all statutory requirements to allow disbursement of the excess tax revenue that is the subject of this suit. Specifically the court finds that: - The tax burden that is the subject of this suit has been satisfied; - [Cune] obtained a valid assignment and is therefore entitled to the excess proceeds."

Findings of fact or conclusions of law should not be recited in a judgment but should be filed as a separate document; if findings are made in the judgment and conflict with findings separately filed under Texas Rules of Civil Procedure 297 and 298, the latter control for appellate purposes. Tex. R. Civ. P. 299a; *see also* Tex. R. Civ. P. 297, 298. However, our court and the Waco Court of Appeals, from which the present case was transferred, have recently stated that findings recited in an order or judgment will be accorded probative value so long as they do not conflict with findings recited in a separate document. *See In the Interest of C.A.B.*, 289 S.W.3d 874, 880–81 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *In re Sigmar*, 270 S.W.3d 289, 295 n.2 (Tex. App.—Waco 2008, orig. proceeding [mand. denied]) (both citing *In re U.P.*, 105 S.W.3d 222, 229 n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

Moreover, at both hearings, the trial court explained the reason for its ruling. At the original hearing, after the parties made opening arguments but before presentation of any evidence, the trial court announced it would rule in Cune's favor and stated, "Equitably speaking, the man's property was sold" and "To me, in fairness, he gets the money if you-all [appellants] have been paid." At the motion-for-new-trial hearing, the court reiterated that Jenkins should receive the funds because he was a "destitute," older man and the tax liabilities had been satisfied.[5] The court acknowledged the two-year requirement and that its ruling was "on shaky ground" for appellate purposes but opined equities sometimes "clash" with "technicalities of the statute and the law."

We recognize that comments made by the trial court at the conclusion of a bench trial do not substitute for findings of fact and conclusions of law. *See In re W.E.R.*, 669

[5] Cune's attorney represented to the trial court that, although Cune had been assigned Jenkins's rights, Jenkins would receive some share of the proceeds.

S.W.2d 716, 716 (Tex. 1984). However, in this case, the findings in the trial court's order effectively mirrored the oral comments. In particular, there was no dispute regarding validity of the assignment to Cune. Thus, the only other finding recited in the order—that the tax burden had been satisfied—confirms the trial court concluded this fact alone warranted award of the proceeds to Jenkins, and Cune as assignee, despite the untimely request. We will review this conclusion as a legal question because satisfaction of the tax burden is not disputed. *See BMC Software Belg., N.V.*, 83 S.W.3d at 794.

Although we understand the trial court's concerns, Cune cites, and we find, no provision in Chapter 34 allowing a court to abrogate the statutory guidelines for distribution of excess proceeds, including the two-year requirement for making a claim, based on equitable considerations. *See* Tex. Tax Code Ann. §§ 34.01–34.23. Clearly, the existence of *excess* proceeds available to the former owner, as the last distributee in the order of priorities, entails the tax burden has been satisfied. *See id.* § 34.04(c)(5). Yet the legislature chose to impose a time limit for a party, even the former owner, to pursue a claim to the proceeds. *See id.* § 34.04(a).

Moreover, the trial court made no express finding on Cune's contention that his request was not time-barred because Jenkins failed to receive the clerk's notice of his right to claim the proceeds. Nonetheless, we will address this contention. In his brief, Cune asserts, "[w]hile Mr. Jenkins and Mr. Cune do not dispute the timeframe as to the two year period in which to file this suit, in order for the statute to run, proper notice must be given." However, Cune cites no authority to support this proposition. Chapter 34 contains no exception to the two-year requirement if a claimant did not receive the clerk's notice. *See* Tex. Tax Code Ann. §§ 34.01–34.23. We decline to read an additional provision into the statute that the legislature did not include.[6]

[6] Appellants correctly assert that, at the hearing on Cune's motion, he presented no evidence Jenkins did not receive the clerk's notice. Appellants also argue Jenkins admitted receipt of the notice in his affidavit of assignment. In contrast, Cune contends the clerk's record shows Jenkins did not receive the notice and the affidavit contained no such admission. We need not address these disputes because Cune cites no authority allowing tolling of the two-year requirement if he did not receive the notice.

In fact, the two-year period is not triggered by the date that the clerk sent the notice or the former owner received the notice but by the date of the sale of the property. *See id.* § 34.04(a). Further, the clerk is required only to send the notice to the "*last known address* according to the records of the court or any other source reasonably available to the court." *See id.* § 34.03(a) (emphasis added). The clerk is not required to verify that this "last known address" is actually the correct address of the former owner at the time the clerk mails the notice. *See id.* Additionally, the provision requiring the clerk to distribute the proceeds to "each taxing unit participating in the sale . . ." if no person files a petition claiming the proceeds within the two years does not also mandate that the clerk first verify all former owners received notice. *See id.* § 34.03(b). These provisions indicate the legislature did not intend for application of the two-year deadline to depend on whether, or when, the claimant received the clerk's notice.

To the extent Cune suggests that the general discovery rule should apply, we reject this contention. The discovery rule, when applicable, defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). The discovery rule is "a very limited exception" to accrual when an injury is both inherently undiscoverable and objectively verifiable. *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 279 (Tex. 2004).

For the following reasons, we cannot conclude Jenkins's right, if any, to claim the excess proceeds was inherently undiscoverable: the claim followed foreclosure and sale of Jenkins's own property, according to his allegation he was an owner; the delinquent-tax suit, foreclosure, sale of the property, and existence of excess proceeds were matters of public record; and the clerk also sent timely notice regarding the excess proceeds to the attorney appointed to represent the defendants, including Jenkins, in the tax suit—the same attorney who did file a petition seeking the proceeds on behalf of "George Earl Jenkins Jr." five years later—and the record confirms the attorney received the notice.

Cune suggests that Jenkins's right to due process under the United States Constitution would be violated if Jenkins's claim for the proceeds were time-barred

because he will be deprived of his property without proper notice. However, this case is not a proceeding to set aside the judgment ordering foreclosure and sale of the property due to lack of notice. Rather, because the foreclosure and sale were completed, Jenkins moved into the position of a claimant seeking affirmative relief, i.e. recovery of funds held by the clerk, under a statute requiring that he, like any other claimant, satisfy certain prerequisites. *See* Tex. Tax Code Ann. § 34.04.[7]

Finally, Cune advances another argument for upholding the order on equitable grounds, although he did not present this contention in the trial court; he asserts his request was "predicated by the inaction of the taxing authorities" because they "had ample opportunity" to file a motion requesting the proceeds, but did not do so until Cune filed his motion.

Under section 34.04, a taxing unit is included within the entities who may file a petition to claim the excess proceeds. *Id.* § 34.04(a). In the list of distributees entitled to the proceeds under section 34.04, a taxing unit has precedence over a former owner if it asserts a claim for "any taxes, penalties, or interest that have become due or delinquent on the subject property subsequent to the date of the judgment or that were omitted from the judgment by accident or mistake" or "any unpaid taxes, penalties, interest, or other amounts adjudged due under the judgment that were not satisfied from the proceeds from the tax sale." *Id.* § 34.04(c)(2), (4). Therefore, a taxing unit making a claim for these amounts must do so within two years of the sale. *See id.* § 34.04(a), (c)(2), (4).

However, appellants did not request the proceeds under section 34.04—but pursuant to section 34.03(b), which provides that "the clerk shall distribute the excess proceeds to each taxing unit participating in the sale . . ." if no claimant establishes entitlement to the proceeds within two years from the date of sale. *Id.* § 34.03(b). Therefore, this provision mandates distribution of the excess proceeds by default to the taxing units participating in the sale, irrespective of whether any taxes, penalties, or

[7] At the hearing, Cune suggested for the first time that Jenkins also did not receive notice of the underlying tax sale, and Cune reiterates this contention on appeal. Because the motion before the trial court was not a proceeding to set aside the tax sale, but only a claim for excess proceeds, the contention regarding lack of notice of the tax sale is immaterial to our analysis.

interest remain due, if no party timely makes a claim under section 34.04. *See id.* Section 34.03(b) imposes no obligation on the taxing unit to even request the proceeds pursuant to this provision after expiration of the two-year period. *See id.* Rather, the clerk has a ministerial duty to distribute the proceeds to each taxing unit participating in the sale if no party establishes entitlement to them under section 34.04. *See id.* §§ 34.03(a); 34.04; *see also Franks v. Woodville Indep. Sch. Dist.*, 132 S.W.3d 167, 171 (Tex. App.—Beaumont 2004, no pet.) (recognizing that distribution to a taxing unit under section 34.03(b) does not involve a judicial determination but is a ministerial process conducted by the clerk after a judicial determination on a party's claim to the funds under section 34.04). Cune cites no provision allowing a former owner who fails to timely request excess proceeds under section 34.04 to nonetheless recover the funds because they were not distributed to the taxing unit pursuant to section 34.03(b) within a reasonable time after expiration of the two-year period.[8]

In sum, we conclude the trial court erred by awarding the excess proceeds to Cune, as assignee of Jenkins, because neither Cune nor Jenkins filed a request within two years after sale of the property. Accordingly, we sustain appellants' second and third issues.

We reverse the trial court's order and render judgment denying Cune's motion to release the excess proceeds.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.

[8] Because disbursement to a taxing unit under section 34.03(b) does not involve a judicial determination and appellants seek no affirmative appellate relief regarding their request for the proceeds, we make no disposition concerning their ability to now obtain the funds in light of our disposition on Cune's motion. We merely outline the duty imposed under section 34.03(b) to negate Cune's suggestion he is entitled to the proceeds because appellants failed to timely request them under this provision.