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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

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**James L. Douglas, Jr., and Shiloh Creek, LLC**

**v.**

**Karen Roper, in her capacity as Revenue Commissioner for Calhoun County; Don Hudson, in his capacity as Chairman of the Calhoun County Commission; Calhoun County Commission; Don Armstrong, in his capacity as Property Tax Commissioner of Shelby County; Edward Carter, in his capacity as Finance Manager for Shelby County; Jon Parker, in his capacity as Chairman of the Shelby County Commission; and Shelby County Commission**

**Appeal from Shelby Circuit Court  
(CV-16-900121)**

BOLIN, Justice.

James L. Douglas, Jr., and Shiloh Creek, LLC, appeal from summary judgments entered in favor of Karen Roper, in her capacity as Revenue Commissioner for Calhoun County; Don Hudson, in his capacity as Chairman of the Calhoun County Commission;<sup>1</sup> and the Calhoun County Commission (collectively referred to as "the Calhoun County defendants"); and in favor of Don Armstrong, in his capacity as Property Tax Commissioner of Shelby County; Edward Carter, in his capacity as Finance Manager for Shelby County; Jon Parker, in his capacity as Chairman of the Shelby County Commission; and the Shelby County Commission (collectively referred to as "the Shelby County defendants"), on Douglas's and Shiloh Creek's claims seeking, among other things, excess funds resulting from separate tax sales of real properties owned by Douglas and Shiloh Creek and relief under 42 U.S.C. § 1983.

### I. Facts and Procedural History

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<sup>1</sup>Although J.D. Hess was the Chairman of the Calhoun County Commission at the time the initial complaint was filed, he was succeeded by Don Hudson. We have amended the style accordingly. See Rule 43(b), Ala. R. App. P.; Rule 25(d), Ala. R. Civ. P.

Property taxes are billed on October 1 of each year in this state, and they become delinquent on December 31. § 40-1-3, Ala. Code 1975. Counties in this state have a statutory remedy to collect past-due taxes by selling the property at auction to a purchaser with the highest bid. § 40-10-1 et seq., Ala. Code 1975. Tax sales often generate purchase prices that exceed the minimum-bid amount, which consists of the total of unpaid taxes, accrued interest, and other costs related to the sale of the property. Following a tax sale, the minimum-bid portion of the purchase price paid by the purchaser at the tax sale is distributed to the various taxing authorities who are entitled to receive the taxes owed on the property. If the tax sale generates funds in excess of the minimum-bid amount, those excess funds are held by the county treasurer for distribution pursuant to § 40-10-28, Ala. Code 1975. A landowner may redeem property sold at a tax sale if the owner pays an amount equal to the amount paid by the purchaser at the tax sale (including any funds paid in excess of the minimum-bid amount), plus any subsequent taxes paid by the purchaser, interest payable at 8%, and any additional costs and fees incurred by the purchaser. § 40-10-122, Ala. Code 1975. The excess funds generated from a tax sale are closely related to the right of

redemption, and the recovery of those excess funds is an important part of the redemption process. William S. Hereford & James H. Haithcock III, Money for Nothing: Who is Entitled to Excess Paid at a Tax Sale?, 73 Ala. Law. 424 (2012).

Section 40-10-28, Ala. Code 1975, provides the mechanism by which the landowner at the time of a tax sale can recover the excess funds generated from the tax sale. The version of § 40-10-28 in effect before August 2013 ("the preamendment version of § 40-10-28") provided as follows:

"The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury, and it may be paid therefrom to such owner, agent or representative in the same manner as to the excess arising from the sale of personal property sold for taxes is paid. If such excess is not called for within three years after such sale by the person entitled to receive the same, upon the order of the county commission stating the case or cases in which such excess was paid, together with a description of the lands sold, when sold and the amount of such excess, the county treasurer shall place such excess of money to the credit of the general fund of the county and make a record on his books of the same, and such money shall thereafter be treated as part of the general fund of the county. At any time within 10 years after such excess has been passed to the credit of the general fund of the county, the county commission may on proof made by any person that he is the

rightful owner of such excess of money order the payment thereof to such owner, his heir or legal representative, but if not so ordered and paid within such time, the same shall become the property of the county."

In 2013, the legislature amended § 40-10-28, effective August 1, 2013, to require the landowner at the time of a tax sale to redeem the property sold at the tax sale before the county could pay the owner any excess funds resulting from the tax sale. Section 40-10-28, as amended in 2013, provided, in relevant part:

"(a) On and after August 1, 2013, the excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, including costs and expenses subsequently accruing, shall be paid over to a person or entity who has redeemed the property as authorized in Section 40-10-120[, Ala. Code 1975,] or any other provisions of Alabama law authorizing redemption from a tax sale, provided proof that the person or entity requesting payment of the excess has properly redeemed the property is presented to the county commission within three years after the tax sale has occurred. Until and unless the property is redeemed, the excess funds from the tax sale shall be held in a separate account in the county treasury during the three-year period. If at the end of the three-year period there has been no proper request for the excess funds, those funds and any interest earned on those funds shall be deposited to the credit of the general fund of the county and shall thereafter be treated as part of the general fund of the county. At any time within 10 years after the tax sale has occurred, the county commission shall on proof made by any person or entity that the property has been properly redeemed by the person or entity under the general laws of the state, the county commission shall order the payment of the excess

funds to such person or entity and retain any interest earned on those funds, but if not so ordered and paid within such time, the same shall become the property of the county. Following redemption, any excess funds including interest paid as required by this chapter [i.e., § 40-10-1 et seq., Ala. Code 1975], may be remitted to the tax sale purchaser pursuant to the procedures set forth in this chapter."

In 2014, the legislature again amended § 40-10-28, effective July 1, 2014, to provide, in relevant part:

"(a)(1) The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, including costs and expenses subsequently accruing, shall be paid over to a person or entity who has redeemed the property as authorized in Section 40-10-120[, Ala. Code 1975,] or any other provisions of Alabama law authorizing redemption from a tax sale, provided proof that the person or entity requesting payment of the excess has properly redeemed the property is presented to the county commission within three years after the tax sale has occurred. The county commission may retain any interest earned on those funds. Until and unless the property is redeemed, the excess funds from the tax sale shall be held in a separate account in the county treasury during the three-year period. If at the end of the three-year period there has been no proper request for the excess funds, those funds and any interest earned on those funds shall be deposited to the credit of the general fund of the county and shall thereafter be treated as part of the general fund of the county.

"....

"(b) At any time more than three years but within 10 years after a tax sale, the excess funds arising from the sale shall be paid to either of the following:

"(1) To any person or entity entitled to redeem under Section 40-10-83, [Ala. Code 1975,] or any other provisions of law authorizing redemption from the tax sale, upon proof of a circuit court order granting redemption to the person or entity.

"(2) To the owner of the land at the time of the tax sale or a subsequent owner, upon proof provided to the tax collector or other official performing those duties that the land has been redeemed by negotiated agreement from the purchaser at the tax sale or the purchaser's successor in interest. Proof of negotiated redemption agreement shall include the following:

"a. A copy of a properly recorded deed or conveyance to the redeeming party executed by the party from whom redemption was made.

"b. If the redeeming party was not the owner of the land at the time of the tax sale, a copy of a properly recorded deed or conveyance from the owner at the time of the tax sale to the subsequent owner.

"c. If the party from whom redemption was made is a successor in interest of the tax sale purchaser, a copy of a properly recorded deed or

conveyance from the tax sale purchaser to the successor in interest.

"(c) Upon receipt of proof of redemption as required in subsection (b), the county commission shall order the payment of the excess funds as provided therein and retain any interest earned on those funds. If proof of redemption is not received within 10 years after the tax sale, the excess funds and any interest earned on the funds shall become the property of the county."

As originally proposed, the 2014 amendment to § 40-10-28, like the 2013 amendment, would have applied only to tax sales conducted on or after August 1, 2013. However, the legislature rejected that proposal and passed the 2014 amendment to § 40-10-28 with no date restriction or limitation as to its applicability.

In 2017, the legislature amended § 40-10-28 yet again, effective July 2, 2017, to add subsection (d), which provides as follows:

"(d) Notwithstanding any other provision of law, the process for calculation, distribution, and retention of any excess funds resulting from the sale of real estate for taxes, including any interest earned on the funds, shall be governed by this section and shall apply regardless of when the tax sale occurred. Any prior actions taken regarding excess funds and any interest earned on the funds which were made in good faith reliance pursuant to this section prior to July 2, 2017, are ratified, validated, and affirmed."

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By adding subsection (d), the legislature expressed its intention that the current version of § 40-10-28 "shall apply regardless of when the tax sale occurred."

#### A. Shiloh Creek

On September 15, 2004, Shiloh Creek acquired an interest in certain real property located in Shelby County ("the Shelby County property"). On September 24, 2004, a warranty deed evidencing Shiloh Creek's interest in that property was recorded in the Shelby Probate Court. In 2010, Shiloh Creek failed to pay the property taxes in the amount of \$1,882.73 on the property. On May 2, 2011, Don Armstrong, the Property Tax Commissioner for Shelby County, sold the property at a tax sale for \$25,882.73. The tax sale resulted in a surplus of \$24,000. Armstrong paid those excess funds to Shelby County.

Shiloh Creek neither redeemed the Shelby County property following the tax sale nor called for the excess funds to be paid to it. On April 18, 2014, Shiloh Creek conveyed its interest in that property to Jack Investment Partners, LLC. Jack Investment did not seek to redeem the property once it acquired Shiloh Creek's interest in the

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property. After three years from the date of the May 2011 tax sale, Shelby County placed the excess funds into its general fund.

On November 5, 2014, Jack Investment made a written demand to Armstrong requesting payment of the excess funds pursuant to § 40-10-28 "as in force and applicable at the time of the [May 2011] tax sale."

On November 13, 2014, Armstrong notified Jack Investment by letter that he was denying its request for payment of the excess funds based on § 40-10-28 as amended in 2014. The letter provided in part as follows:

"On its face, the language of the amendment, which became effective July 1, 2014, applies to all excess funds from tax sales and states in subsection (b) that excess funds from tax sales more than three but less than ten years old are to be paid to a party who redeems the property either through court or by a redemption negotiated with the tax purchaser. Although arguments can be made that the amendment should have prospective application only, Mr. Armstrong believes that the Legislature intended it to apply to all excess funds.

"Mr. Armstrong will comply with your request for payment of the excess funds upon your client furnishing evidence of redemption as provided in § 40-10-28 as most recently amended."

On November 24, 2014, Jack Investment made a written demand to the Shelby County Commission requesting payment of the excess funds

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from the tax sale pursuant to § 40-10-28 "as in force and applicable at the time of the [May 2011] tax sale." The Shelby County Commission did not respond to that demand.

B. Douglas

On February 3, 2006, Strategic Municipal Funding, LLC ("SMF"), acting through Douglas as its agent, purchased from the State of Alabama two properties located in Calhoun County ("the Calhoun County properties"). SMF failed to pay the 2006 property taxes on those properties, which resulted in the properties being sold for unpaid taxes in May 2007. SMF, with money loaned to it by Douglas, redeemed both properties in April 2008.

On October 10, 2008, SMF conveyed its interest in the Calhoun County properties to Douglas by quitclaim deeds. Both quitclaim deeds indicate that Douglas paid to SMF \$100 and "other good and valuable consideration" for the properties. Douglas explained that the properties were transferred to him pursuant to an oral agreement that he had with SMF's parent company, Strategic Lien Services, as repayment for loans that he had made to the company. Neither of the quitclaim deeds were recorded until May 13, 2013.

Douglas failed to pay the 2008 property taxes on the Calhoun County properties, and the properties were sold by the county at a tax sale on May 5, 2009. The tax sale resulted in a surplus of \$16,939.96 on one property and \$9,185.35 on the other property. Douglas stated that he had wanted to redeem the two properties sold at the May 2009 tax sale for several years but that he had been financially unable to do so. Douglas stated that he had eventually determined that he could afford to redeem the properties only if he first recovered the excess funds from the May 2009 tax sale. On April 22, 2013, Douglas made a formal request for the excess funds in an e-mail to Karen Roper, the Revenue Commissioner for Calhoun County. Douglas followed up his request for the excess funds with a number of e-mails and telephone calls to Roper's office, and he was told that his request was under review. Roper testified that, when someone makes a claim for excess funds, her office conducts research and gathers information regarding the claim, including determining whether excess funds were actually produced from the tax sale, identifying the property associated with the tax sale, determining who is qualified as the owner of the property sold to receive the excess funds, and conducting certain title work. Roper testified that

her office then turns the information over to the Calhoun County Commission for a determination as to whether the claim for excess funds should be paid. Roper testified that her office will continue to correspond with a claimant regarding the status of the claim and will sometimes inform the claimant of the county commission's decision regarding the claim but that her office makes no decisions on whether claims for excess funds are paid.

An issue arose regarding whether Douglas had been the owner of the Calhoun County properties at the time of the 2009 tax sale and, thus, qualified to receive the excess funds. Wesley Frye, an attorney who assisted in reviewing Douglas's request, testified that his primary concern was whether the transfers to Douglas from SMF were proper or whether the transfers were an attempt to defraud or to steal from SMF. Frye noted certain issues concerning the transfers that caused him to question their validity, mainly the lengthy delay in Douglas's recording the quitclaim deeds to the properties and Douglas's being the individual who had received title to the properties from SMF and his being the individual who had signed the deeds on behalf of SMF. Douglas states that Frye's concern that he had signed the deeds on behalf of SMF was

based on misinformation, because Donald Greetham, SMF's authorized agent, was the individual that actually had signed the deeds on behalf of SMF. According to Frye, Douglas needed to substantiate as legitimate the transfers of the properties from SMF to himself in order to be entitled to the excess funds from the tax sale. Frye testified that he did not know if this was ever communicated to Douglas.

On December 3, 2013, Douglas received a letter from Roper notifying him that the research conducted by her office did not support his request for the excess funds from the May 2009 tax sale because it could not be determined that he had been the owner of the properties at the time of the tax sale. The letter reads as follows:

"I am in receipt of your request for only the excess bids on the above parcels that occurred as a result of the tax sale of each parcel sold in May 2009. I have consulted with our attorneys and, according to them, you do not appear to qualify as the 'owner' of the properties so as to allow you to be entitled to receive the excess bid.

"Our research revealed that it appears that you or your predecessor purchased the State of Alabama's interest in each parcel, but you only received a deed for one of the parcels from the State of Alabama. In addition, it does not appear that any action has been commenced to terminate the original owners' respective interest in either parcel. As such, your interest in both parcels appears to be limited and may not be superior to the original owners. As you may be aware, it is the owner that can make a claim for the excess

bid. Our research does not support your present claim to be the owner of the properties listed above for the purposes of making a claim for the excess bids.

"If this situation changes and you acquire the ownership interest of the owners, or if they convey to you their right to make the claims that you are presenting, please resubmit your claim with supporting information."<sup>2</sup>

Douglas described in his business records Roper's December 2013 letter as "denying my claims for SMF, LLC surplus bid." When asked to identify the letter at his deposition, Douglas stated that it was the "letter from Karen Roper denying my application for the surplus bid." Douglas also notified his attorney in regard to receiving that letter by stating to him: "Hey, I just applied, and they said No."

On February 3, 2016, Douglas sent separate letters to the Calhoun County Commission presenting demands requesting the excess funds resulting from the May 2009 tax sale. Those letters notified the Calhoun County Commission that Douglas had previously made a written request to the Calhoun County Revenue Commissioner's Office for payment of the excess funds pursuant to § 40-10-28, as it was in force and applicable at the time of the May 2009 tax sale, and that that

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<sup>2</sup>It was ultimately determined that Douglas had been the rightful owner of the Calhoun County properties at the time of the May 2009 tax sale.

request subsequently had been denied. The Calhoun County Commission did not respond Douglas's demands.

### C. Course of Proceedings

On February 9, 2016, Douglas and Jack Investment sued Roper, in her capacity as Revenue Commissioner for Calhoun County; J.D. Hess, in his capacity as Chairman of the Calhoun County Commission (see note 1, supra); Don Armstrong, in his capacity as Property Tax Commissioner of Shelby County; and Edward Carter, in his capacity as Finance Manager for Shelby County, seeking relief against those county officials responsible for the accounting and distribution of excess funds generated from tax sales to require that the funds be administered and distributed uniformly and consistently in compliance with § 40-10-28. Douglas and Jack Investment asserted claims pursuant to § 40-10-28 for the payment of the excess funds resulting from the tax sales of the Calhoun County properties and the Shelby County property; asserted claims for damages pursuant to 42 U.S.C. § 1983; sought a judgment declaring, among other things, that the 2013 and 2014 amendments to § 40-10-28 cannot be applied retroactively to prevent the recovery of excess funds generated from a tax sale conducted before August 1, 2013;

and sought injunctive relief enjoining the defendants from wrongfully retaining and withholding the excess funds generated from tax sales.

On January 27, 2017, Douglas and Jack Investment amended their complaint to add as defendants the Calhoun County Commission; Jon Parker, in his capacity as Chairman of the Shelby County Commission; and the Shelby County Commission.<sup>3</sup> Shiloh Creek was substituted as a plaintiff in place of Jack Investment because Jack Investment had conveyed its interest in the Shelby County property back to Shiloh Creek.

On September 20, 2017, Douglas and Shiloh Creek ("the plaintiffs") moved the trial court for a partial summary judgment as to their claims seeking payment of the excess funds. The plaintiffs argued that they qualified as "owners" under § 40-10-28 and that they were entitled to recover the excess funds resulting from the tax sales of the Calhoun County properties and the Shelby County property. The plaintiffs further argued that the 2013, 2014, and 2017 amendments to § 40-10-28, which required an owner at the time of a tax sale to first redeem property sold at the tax sale before the owner could become

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<sup>3</sup>This first amended complaint is the operative complaint in this case.

entitled to a payment of excess funds, were not applicable to their claims seeking excess funds and could not be relied upon to defeat their claims to excess funds.

On January 23, 2018, the Shelby County defendants moved the trial court for a partial summary judgment as to Shiloh Creek's claim seeking excess funds.<sup>4</sup> The Shelby County defendants argued that, under the plain language of the preamendment version of § 40-10-28, Shiloh Creek never "called for" the excess funds, as, they said, was required by the preamendment version of § 40-10-28 in order to accrue the right to the excess funds. The Shelby County defendants further asserted that the procedure available for claiming excess funds under the preamendment version of § 40-10-28 was superseded by the procedure set out in the subsequent amendments to that statute. The Shelby County defendants also argued that, under the preamendment version of § 40-10-28, the determination regarding whether to release

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<sup>4</sup>The Shelby County defendants did not seek a summary judgment on Shiloh Creek's § 1983 claim at this point. The Shelby County defendants also stated that they were not seeking a summary judgment as to the claims seeking declaratory and injunctive relief, stating that those claims were "merely requests for relief, not causes of action."

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excess funds after 3 years, but within 10 years, of a tax sale was firmly within the discretion of the county commission.

Alternatively, the Shelby County defendants argued that, because it was remedial in nature and did not impact vested rights, the 2014 amendment to § 40-10-28 applied retroactively to tax sales occurring before the amendment and that, therefore, Jack Investment's November 2014 request for the excess funds resulting from the 2011 tax sale of the Shelby County property was properly denied because it is undisputed that Jack Investment failed to first redeem the Shelby County property. Accordingly, the Shelby County defendants asserted, Shiloh Creek had no legal entitlement to the excess funds.

On January 24, 2018, the Calhoun County defendants moved the trial court for a summary judgment. The Calhoun County defendants argued that Douglas was notified by Roper, the Calhoun County Revenue Commissioner, in December 2013 that his claim for excess funds pursuant to § 40-10-28 was being denied because it was determined that Douglas did not appear to be the actual owner of the Calhoun County properties. The Calhoun County defendants further contended that Douglas had neither taken any action to provide

additional proof of ownership to Roper nor filed a notice of claim with the Calhoun County Commission within one year as required by § 11-12-8, Ala. Code 1975 ("the statute of nonclaims"). Thus, the Calhoun County defendants argued that Douglas's action to recover excess funds, which was commenced on February 9, 2016, was barred by the statute of nonclaims.

The Calhoun County defendants also argued that, because Douglas's request for excess funds had been denied because it was determined that he had failed to provide adequate proof of ownership, as required by the preamendment version of § 40-10-28, he lacked "standing" to challenge the retroactive application of any amended version of § 40-10-28. The Calhoun County defendants further argued that Douglas's § 1983 claim was barred because it had not been brought within the applicable two-year limitations period.

On April 3, 2018, the trial court conducted a hearing on all pending motions for a summary judgment. On May 15, 2018, the trial court entered an order granting the Shelby County defendants' motion for a partial summary judgment and denying Shiloh Creek's motion for a partial summary judgment. The trial court concluded that the 2014

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and 2017 amendments to § 40-10-28, requiring that a landowner at the time of a tax sale redeem the property before the owner is entitled to any excess funds generated from the tax sale of the property, applied to Shiloh Creek's claim for the excess funds resulting from the tax sale of the Shelby County property even though that tax sale occurred while the preamendment version of § 40-10-28 was in effect. Because Shiloh Creek had not redeemed the property, the trial court determined, Shiloh Creek was not entitled to recover the excess funds resulting from the May 2011 tax sale of the Shelby County property. Further, the trial court determined, even if the preamendment version of § 40-10-28 was applicable to Shiloh Creek's claim for excess funds, that claim would still fail because Shiloh Creek did not timely comply with the express terms of that version of § 40-10-28 by calling for the excess funds within three years of the date of the tax sale.

On May 23, 2018, the trial court entered an order granting the Calhoun County defendants' motion for a summary judgment and denying Douglas's motion for a partial summary judgment. The trial court concluded that Douglas's claim for excess funds under the preamendment version of § 40-10-28 was barred under the statute of

nonclaims because it was brought more than one year after the date of the accrual of the claim. The trial court also found that Douglas lacked "standing" to bring any claim challenging the applicability of the amended versions of § 40-10-28 to him on the basis that, because the preamendment version of § 40-10-28 had been applied to his request for excess funds, he had failed to demonstrate a cognizable injury relating to any of the amendments. Further, the trial court found that Douglas's § 1983 claim was barred by the applicable two-year statute of limitations. Finally, the trial court determined that the 2017 amendment to § 40-10-28 would apply retroactively to bar Douglas's claim for excess funds because he had failed to redeem the Calhoun County properties.

On July 3, 2018, the plaintiffs appealed from the trial court's summary judgments in favor of the Shelby County defendants and the Calhoun County defendants. This Court determined that, because claims remained pending against the Shelby County defendants, all claims had not been adjudicated. On July 9, 2019, this Court remanded the case to the trial court for 28 days for it (1) to make the interlocutory order of May 15, 2018, granting the Shelby County defendants' partial-

summary-judgment motion a final judgment, pursuant to the provisions of Rule 54(b), Ala. R. Civ. P.; (2) to adjudicate the remaining pending claims against the Shelby County defendants and render a final judgment; or (3) to take no action, in which event the appeal would be dismissed as arising from a nonfinal judgment. On August 28, 2019, this Court entered an order dismissing the appeal because there had been no entry of a final judgment from which an appeal could be taken.

On March 2, 2020, the plaintiffs filed a second amended complaint, adding a claim of unjust enrichment and clarifying other claims. On March 16, 2020, the Shelby County defendants and the Calhoun County defendants jointly moved to strike the second amended complaint. On April 22, 2020, the Shelby County defendants moved for a summary judgment as to the remaining claims asserted against them. On May 4, 2020, Shiloh Creek filed a response in opposition to the Shelby County defendants' motion for a summary judgment and moved the trial court to reconsider its order of May 15, 2018, entering a partial summary judgment in favor of the Shelby County defendants. On June 2, 2020, Douglas moved the trial court to reconsider its order of May 23,

2018, entering a summary judgment in favor of the Calhoun County defendants.

On March 8, 2021, the trial court entered an order granting the defendants' joint motion to strike the second amended complaint and denying the plaintiffs' motions to reconsider the summary judgments entered against them. On that same date, the trial court entered an order granting the Shelby County defendants' motion for a summary judgment as to the remaining claims asserted against them. In doing so, the trial court expressly adopted and relied upon the reasoning stated in the order entering a summary judgment in favor of the Calhoun County defendants. The plaintiffs appeal.

## II. Standard of Review

This Court has set forth the appropriate standard of review in this case as follows:

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light

most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

### III. Discussion

#### A. Shiloh Creek

##### 1. Claim for Excess Funds

Shiloh Creek argues on appeal, as it did in the trial court, that its claim against the Shelby County defendants for the excess funds resulting from the May 2011 tax sale of the Shelby County property is governed by the preamendment version of § 40-10-28. The preamendment version of § 40-10-28 did not require the owner of property sold at a tax sale to redeem that property before the owner was entitled to recover any excess funds resulting from the tax sale. However, beginning in August 2013, each amended version of § 40-10-

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28 required the owner of property sold at a tax sale to first redeem the property before that owner could recover any excess funds resulting from the tax sale. Because it is undisputed that neither Shiloh Creek nor Jack Investment redeemed the Shelby County property, Shiloh Creek cannot prevail on its claim for the excess funds if any of the post-August 2013 amended versions of § 40-10-28 are retroactively applicable. Thus, Shiloh Creek argues that the amended versions of § 40-10-28 cannot be applied retroactively and that the preamendment version of § 40-10-28 is the operative version of the statute governing its claim for the excess funds.

The trial court concluded in its order entering a summary judgment in favor of the Shelby County defendants on this issue that the amended versions of § 40-10-28 were retroactively applicable and that, therefore, Shiloh Creek could not prevail on its claim for excess funds because it had not first redeemed the Shelby County property. The trial court went on to conclude that even if the amended versions of § 40-10-28 were not retroactively applicable and Shiloh Creek's claim for the excess funds was governed by the preamendment version of § 40-

10-28, Shiloh Creek's claim would still fail pursuant to the express terms of the preamendment version of § 40-10-28.

a. Retroactive Application of Amendments to § 40-10-28

This Court has stated:

"Generally, retrospective application of a statute is not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as prospectively. See Kittrell v. Benjamin, 396 So. 2d 93, 94 (Ala. 1981) (citing City of Brewton v. White's Auto Store, Inc., 362 So. 2d 226, 227 (Ala. 1978) (providing that we 'indulge every presumption in favor of construing actions of the legislature to have a prospective operation unless the legislature's intention is otherwise stated in express terms, or [its actions] clearly, explicitly, and unmistakably permit of no other meaning')). In this case, the 2009 AIGA Act does not expressly address whether the legislature intended that [Ala. Code 1975,] § 27-42-5(7)(defining 'high net worth insured') and (11) (defining 'net worth') have retroactive application. Regardless, whether a statute may be applied retroactively turns on whether the statute affects substantive or procedural rights. Ex parte Burks, 487 So. 2d 905, 907 (Ala. 1985); Kittrell, 396 So. 2d at 95 (a statute can have retroactive application if it affects procedural as opposed to substantive rights). Substantive laws are those that create, enlarge, diminish, or destroy vested rights. See Ex parte Bonner, 676 So. 2d 925, 926 (Ala. 1995). 'Substantive law' is '[t]he part of law that creates, defines, and regulates the rights, duties, and powers of parties,' Black's Law Dictionary 1567 (9th ed. 2009), as opposed to 'adjective, procedural, or remedial law,' which is "'favored by the courts, and [its] retrospective application is not obnoxious to the spirit and policy of the law,'" and which is 'exemplified by [laws] that "'impair no contract or vested right, [and do not disturb past transactions,] but preserve

and enforce the right and heal defects in existing laws prescribing remedies.'" Ex parte Bonner, 676 So. 2d at 926 (quoting Ex parte Burks, 487 So. 2d at 907, and Jones v. Casey, 445 So. 2d 873, 875 (Ala. 1983), quoting in turn Dickson v. Alabama Mach. & Supply Co., 18 Ala. App. 164, 165, 89 So. 843, 844 (1921))."

Alabama Ins. Guar. Ass'n v. Mercy Med. Ass'n, 120 So. 3d 1063, 1068 (Ala. 2013) (some emphasis added). Property rights are considered to be "vested rights." See Vestavia Plaza, LLC v. City of Vestavia Hills, No. 2:11-cv-4152-TMP, Sept. 9, 2013 (N.D. Ala. 2013) (not reported in Federal Supplement) ("[T]here can be little question that ownership of real property and the 'bundle' of rights associated with its use are well-recognized and protected property interests for due process purposes under the constitution."); Ex parte L.J., 176 So. 3d 186, 203 (Ala. 2014)(Bolin, J., concurring in the result)(observing that "vested rights" are "contract or property rights"); and Bryson v. Central Elec. Co., 402 So. 2d 922, 924 (Ala. 1981) ("In order to become vested, the right must be ... a property right...." (quoting 1A J. Sutherland, Statutes and Statutory Construction § 23.34 at 283 (Sands ed. 1972))).

Shiloh Creek argues that, under the preamendment version of § 40-10-28, the owners of property sold for unpaid taxes have been historically able to recover excess funds generated by the tax sale

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without first having to redeem the property. Shiloh Creek states that, to overcome this historical practice, the Shelby County defendants had to show that the amended versions of § 40-10-28 altered the preamended version of § 40-10-28 by retroactively imposing the new redemption requirements. Shiloh Creek argues that, for the amended versions of § 40-10-28 to be retroactively applied, the Shelby County defendants had to demonstrate that Shiloh Creek's right to the excess funds was not a "vested" or "substantive" right under Alabama law because retroactive legislation cannot abridge vested or substantive rights. It is undisputed that Shiloh Creek had a vested interest in the property that it owned. The question presented is whether Shiloh Creek had a vested interest in the excess funds generated from the tax sale of its property, so as to prevent the retroactive application of the amendments to § 40-10-28 requiring that the property first be redeemed before Shiloh Creek could make a claim for the excess funds generated from the tax sale.

Shiloh Creek states that an owner's right to excess funds generated from a government tax sale dates back centuries and has its

origins in the protection of private property from government overreach in Magna Carta.

In addressing an issue similar to the issue before this Court, the Michigan Supreme Court has discussed the origin of a property owner's right to excess funds realized from a tax sale as follows:

"Like the founders of our nation, Michigan has historically held property rights in the highest regard. Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars, wrote that the 'right to private property is a sacred right; ... it was the old fundamental law, springing from the original frame and constitution of the realm.'

"[P]roperty is recognized as such by the law, and nothing else is or can be. Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.[]

"Drawing on Sir William Blackstone, Justice Cooley further recognized that the Magna Carta 'guaranteed' the protection of private property against government overreach. Just as the Magna Carta guaranteed property owners due process of law, so too did the sacred text limit the King's ability to take his subject's property, real or personal, under principles of eminent domain. Thus, it is without surprise that private-property rights have been protected from unlawful government takings in every version of this state's Constitution.

"This state's common law is adopted from England, and to identify such law this Court may consider original English cases and authorities.' Our review of English common law

supports the notion that an owner of real or personal property has a right to any surplus proceeds that remain after property is sold to satisfy a tax debt. Just as the Magna Carta protected property owners from uncompensated takings, it also recognized that tax collectors could only seize property to satisfy the value of the debt payable to the Crown, leaving the property owner with the excess. In fact, although the 'mode of collecting the land tax in England was by distress,' it was a well-recognized principle that any excess property sold to satisfy a tax debt would be paid back to the owner. Further, Blackstone explained that in the context of bailments, whenever the government seized property for delinquent taxes, it did so subject to 'an implied contract in law' to either return the property if the tax debt was paid or 'to render back the overplus' if the property was sold to satisfy the delinquent taxes."

Rafaeli, LLC v. Oakland Cnty., 505 Mich. 429, 462-64, 952 N.W.2d 434, 454-55 (2018) (footnotes omitted; emphasis added). The Michigan Supreme Court concluded in Oakland County that Michigan's common law recognized a former property owner's right to collect the excess funds that are generated from a tax sale of property and that that right is "'vested' such that [it] is to remain free from unlawful governmental interference." 505 Mich. at 471, 952 N.W.2d at 459.

Like Michigan, Alabama law is based on English common law. § 1-3-1, Ala. Code 1975; Ex parte Kelley, 296 So. 3d 822, 836 (Ala. 2019) (Parker, C.J., concurring specially). Alabama also places a strong emphasis on an individual's fundamental right to property. In Smith v.

Smith, 254 Ala. 404, 409, 48 So. 2d 546, 549 (1950), this Court stated that "it should never be forgotten that the right to control one's property is a sacred right which should not be taken away without urgent reason." Alabama's strong commitment to an individual's right to property is confirmed by this state's constitution, which states that "the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property." Art. I, § 35, Ala. Const. 1901 (Off. Recomp.).

This state has long recognized a property owner's right to the excess funds generated from a tax sale of his or her property. Section 541, Ala. Code 1886, a predecessor of § 40-10-28, provided that the proceeds arising from a tax sale "shall be applied to the payment of the expenses of the sale, and of the taxes and fees due from such tax-payer, and any balance remaining shall be paid to the owner of the property." This Court recognized in McDuffee v. Collins Bros., 117 Ala. 487, 23 So. 45 (1898), that this early codification of the principle that a property owner is entitled to the excess funds resulting from a tax sale found in §

541 was "merely declaratory of the law as it already existed."<sup>5</sup> McDuffee, 117 Ala. at 492, 23 So. at 46 (emphasis added). See also First United Bank v. McCollum, 178 So. 3d 372, 376 (Ala. 2014) (holding that the conveyance of real property not only transfers the property itself but also all rights appertaining thereto, including the right of an owner to receive excess funds resulting from a tax sale).

This Court has also recognized that the excess funds that result from a tax sale are representative of the property itself. In McDuffee, James Cannon owned a mule that he had mortgaged to Collins Brothers & Co. to secure a debt. The mule was subsequently seized by the tax collector and sold to satisfy Cannon's tax debt. The tax sale resulted in a surplus after the taxes and costs of the sale were paid. Both Cannon, as the "general owner" of the mule, and Collins Brothers, as the mortgagee, claimed the excess funds. The tax collector paid the excess funds to Cannon. Collins Brothers then brought suit to recover the excess funds. In determining that Collins Brothers, as the mortgagee, was the rightful owner of the excess funds, this Court stated:

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<sup>5</sup>Although the McDuffee Court construed § 541, Ala. Code 1886, the operative Code section when McDuffee was decided was § 4012, Ala. Code 1896. The relevant language was the same in both statutes.

"[T]he mortgage debt did not mature until some months after the institution of the suit, but the mortgage expressly stipulated that the mortgagees should have the right to take the property into their possession whenever they might think it necessary to do so, either before or after the maturity of the debt.

"We think it clear that the plaintiffs were entitled to the money. They were the legal owners of the mule, with the right to its immediate possession, subject to the superior right of the tax collector to seize and sell for taxes. As against any one other than that officer, they could have maintained trespass or trover for any wrongful taking or conversion of the mule. Boswell v. Carlisle, 70 Ala. 244 [(1881)], and authorities cited. The surplus proceeds in the hands of the tax collector represented the property. The right of the mortgagees to the property, as against Cannon, at the time of the seizure and sale attached to the surplus and they were entitled, on demand, to receive it, as they would have been entitled to demand and receive the property itself, had there been no conversion of it into money through the processes of a paramount lien."

McDuffee, 117 Ala. at 491, 23 So. at 46 (emphasis added). Other courts have also held that excess funds resulting from a forced sale represent the property sold. See Roy v. Roy, 233 Ala. 440, 172 So. 253 (1937)(holding that, when a real-estate mortgage has been foreclosed, any surplus proceeds beyond those necessary to satisfy the mortgage retain the character of the real estate for the purpose of determining who is entitled to receive them); NYCTL 1998-1 Trust v. Gabbay, 16 Misc. 3d 732, 735, 842 N.Y.S.2d 262, 265 (Sup. Ct. 2007)(observing that

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it is a "bedrock principle" of law that, following a tax sale, any excess funds resulting from the sale "stand[] in the place of the land for purpose of distribution among persons who have vested interests or liens on the property"); Grand Teton Mountain Invs., LLC v. Beach Props., LLC, 385 S.W.3d 499, 503 (Mo. Ct. App. 2012)(holding that a surplus resulting from a mortgage-foreclosure sale represents the owner's equity in the property and stands in place of the foreclosed property subject to the liens and interests that were attached to the property); and NYCTL 1998-2 Trust v. Avila, 130 A.D.3d 993, 994, 14 N.Y.S.3d 487, 488 (App. Div. 2015) (noting that excess funds resulting from a tax sale "stand in the place of the land for all purposes of distribution among persons having vested interests or liens" on the property).

Based on the foregoing, we conclude that the right of a property owner to recover excess funds that are generated from a tax sale is a vested right that existed at common law. Property rights are vested rights. See Vestavia Plaza, supra; Ex parte L.J., supra; and Bryson, supra. The excess funds stand in the place of the property and are representative of the owner's vested ownership interest in the property.

Accordingly, an owner has a vested interest in the excess funds that result from a tax sale. Because an owner has a vested interest in the excess funds resulting from a tax sale, the amendments to § 40-10-28 -- which burden the owner's vested right to the excess funds by imposing upon the owner the often expensive and uncertain requirement of redeeming the property before claiming the excess funds -- cannot be applied retroactively to prevent an owner from claiming the excess funds. See Alabama Ins. Guar. Ass'n, *supra*.<sup>6</sup> Accordingly, Shiloh Creek was not required to first redeem the Shelby County property before calling for excess funds that resulted from the tax sale.

b. Shiloh Creek's Claim for Excess Funds Under the Preamendment  
Version of § 40-10-28

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<sup>6</sup>The parties discuss in their appellate briefs whether the legislature intended for the amendments to § 40-10-28 to apply retroactively. We need not address those arguments because we have determined that the amendments to § 40-10-28 affect a vested right of Shiloh Creek, which prevents the amendments from being applied retroactively. See Alabama Ins. Guar. Ass'n, 120 So. 3d at 1068 (holding that, regardless of whether the legislature expressed an intent that a statute have retroactive application, retroactive application of a statute turns on whether the statute affects substantive or procedural rights). See also Ex parte F.P., 857 So. 2d 125, 137 (Ala. 2003) ("An act that is expressly retroactive will be given retroactive effect unless it impairs vested rights.").

Having determined that the amendments to § 40-10-28 cannot be applied retroactively to require that Shiloh Creek first redeem the Shelby County property before making a claim for excess funds, we must next determine whether Shiloh Creek can prevail on its claim for excess funds under the express terms of the preamendment version of § 40-10-28. As mentioned above, the trial court found that, even if the amendments to § 40-10-28 were inapplicable to Shiloh Creek's claim for excess funds, that claim would still fail under the preamendment version of § 40-10-28 because Shiloh Creek did not timely comply with the express terms of that version of the statute by calling for the excess funds within three years of the date of the tax sale.

We note the following:

"When interpreting a statute, a court must first give effect to the intent of the legislature. BP Exploration & Oil, Inc. v. Hopkins, 678 So. 2d 1052 (Ala.1996).

"The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute. League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974). In this ascertainment, we must look to the entire Act instead of isolated phrases or clauses; Opinion of the Justices, 264 Ala. 176, 85 So. 2d 391 (1956).'

"Darks Dairy, Inc. v. Alabama Dairy Comm'n, 367 So. 2d 1378, 1380 (Ala. 1979) (emphasis added). To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction. Ex parte Waddail, 827 So. 2d 789, 794 (Ala. 2001). If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala. 1996)."

City of Bessemer v. McClain, 957 So. 2d 1061, 1074-75 (Ala. 2006).

The preamendment version of § 40-10-28 provided, in relevant part:

"The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner ... or into the county treasury, and it may be paid therefrom to such owner ... in the same manner as to the excess arising from the sale of personal property sold for taxes is paid. If such excess is not called for within three years after such sale by the person entitled to receive the same, ... the county treasurer shall place such excess of money to the credit of the general fund of the county ..., and such money shall thereafter be treated as part of the general fund of the county. At any time within 10 years after such excess has been passed to the credit of the general fund of the county, the county commission may on proof made by any person that he is the rightful owner of such excess of money order the payment thereof to such owner, ... but if not so ordered and paid within such time, the same shall become the property of the county."

(Emphasis added.) The Shelby County defendants argue that, based on the plain and express terms of the preamendment version of § 40-10-28, the absolute right to recover the excess funds is conditioned upon the funds being "called for" by the owner of the funds within three years after the tax sale. Shiloh Creek did not call for the excess funds within three years of the tax sale. The Shelby County defendants further argue that, because Shiloh Creek did not call for the excess funds within three years of the tax sale, the plain terms of the preamendment version of § 40-10-28 required the county treasurer to place the excess funds in the county's general fund. The Shelby County defendants continue by asserting that the preamendment version of § 40-10-28 provided that, once the excess funds had been placed in the county's general fund, payment of the funds thereafter was within the discretion of the Shelby County Commission, noting that the preamendment version of § 40-10-28 expressly stated that, "[a]t any time within 10 years after such excess has been passed to the credit of the general fund of the county, the county commission may ... order the payment thereof to such owner." (Emphasis added.) The Shelby County defendants conclude that, because Shiloh Creek did not call for the excess funds within three

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years of the tax sale and those excess funds had been placed in the county's general fund, Shiloh Creek is not automatically entitled to the payment of the excess funds, because it was within the discretion of the county commission as to whether to pay the excess funds to Shiloh Creek.

Shiloh Creek argues that the trial court erred in concluding that the Shelby County Commission had the discretion to deny its claim for excess funds. Specifically, Shiloh Creek argues that the trial court premised its holding on the term "may " found in the last sentence of the preamendment version of § 40-10-28:

"At any time within 10 years after [the excess funds have] been passed to the credit of the general fund of the county, the county commission may on proof made by any person that he is the rightful owner of such excess of money order the payment thereof to such owner, ... but if not so ordered and paid within such time, the same shall become the property of the county."

(Emphasis added.) The trial court reasoned that "[t]o read 'may' as 'shall' would render the distinction made by the Legislature between the limited three-year period and the following ten-year period meaningless" and that, if the intent of the preamendment version of § 40-10-28 had been to require the return of the excess funds to the owner

"during both the three year and ten-year periods, it would have simply provided for one thirteen year period." Shiloh Creek argues that the county cannot claim ownership of the excess funds until 10 years after the excess funds have been transferred from the county treasury to the county general fund. Shiloh Creek states that the trial court's interpretation of the statute "turns the original version of § 40-10-28 on its head," because, it says, the preamendment version of the statute makes it clear that the counties "shall" pay the excess funds "over to the owner."

Initially, we note that Shiloh Creek omits in its argument to this Court the remainder of the first sentence in § 40-10-28, which states: "or into the county treasury." The sentence reads in whole as follows: "The excess arising from the sale of any real estate remaining after paying the amount of the decree of sale, and costs and expenses subsequently accruing, shall be paid over to the owner, or his agent, or to the person legally representing such owner, or into the county treasury." However, the phrase "or into the county treasury" neither diminishes the owner's claim or rights to the excess funds nor conveys to the county any ownership claims or rights to the excess funds. In

discussing a precursor of § 40-10-28, § 541, Ala. Code 1886, this Court explained the purpose of the statute requiring that excess funds be paid to the county treasurer:

"The gist of that section is the succeeding authority given to the collector to deposit the balance with the county treasurer, or probate judge, if there be no treasurer, if the owner is not present at the sale, or being present refuses to receive it. The purpose was to relieve the collector of the duty of seeking the owner and paying him the balance, or of retaining it in his hands if the owner should refuse to receive it."

McDuffee, 117 Ala. at 492, 23 So. at 46. If excess funds were paid to the county treasurer under the preamendment version of § 40-10-28, the county treasurer simply held the funds for the owner pending the owner's call for the funds. If the owner made no call for the excess funds within three years, the county treasurer, upon order of the county commission, was directed that he or she "shall place" the excess funds "to the credit of the general fund of the county." Shiloh Creek did not call for the excess funds within three years after the tax sale of the Shelby County property, and the excess funds were placed in the general fund to the credit of the county. We must now address the question whether the Shelby County Commission had discretion to

return the excess funds to Shiloh Creek, upon proper proof of ownership, once the funds were placed in the general fund.

The attorney general has issued an opinion addressing this precise issue:

"[The] second question contemplates whether the term 'may,' as used in [the preamendment version of] section 40-10-28, requires the county commission to return excess funds from a tax sale when the request comes within 10 years of the money being deposited in the general fund of the county. Essentially, you question whether it is in the county's discretion to return the excess funds.

"Typically, '[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning.' See, generally, IMED Corp. v. Sys. Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). Section 40-10-28 states in the first sentence that '[t]he excess arising from the sale of any real estate ... shall be paid over to the owner, or his agent, ... or into the county treasury, and it may be paid therefrom to such owner, ... in the same manner as ... property sold for taxes is paid.' Ala. Code § 40-10-28 (2011) (emphasis added). If the excess is not called for within three years after the tax sale, this section provides that the excess is transferred to the credit of the county general fund. Id.

"The statute further provides that '[a]t any time within 10 years after the excess has passed to the credit of the general fund,' the rightful owner of the excess is entitled to be paid the funds if the owner provides proof to the county that he is the rightful owner. The last sentence of this section makes it clear that the money paid to the county only becomes the property of the county 10 years after the excess has been paid to the county and the rightful owner has not claimed the funds. Id.

"Based on the limited context in which it is used in this statute, the term 'may' does not bestow discretion to the county commission to refuse to pay over excess funds arising from the disposition of real estate sold during the 10 years the funds are held by the county commission. Instead, the term 'may' further clarifies that the return of excess funds after the three-year period is no longer a perfunctory task that may be handled by the revenue commissioner. Once the funds have been transferred to the county treasury, the rightful owner must provide proof of ownership to the county commission, and the claim must be made during a 10-year period of time.

"Moreover, the Alabama Department of Revenue has advised taxing officials for decades that section 40-10-28 requires the return of excess funds. It is established law that an interpretation of its authorizing legislation by an administrative body is entitled to great weight. Ex parte State Dep't of Revenue, 683 So. 2d 980, 983 (Ala. 1996)."

Ala. Att'y Gen. Op. No. 2016-027 (Mar. 26, 2016). "An attorney general's opinion is not binding upon this Court, although it can be persuasive authority." T-Mobile S., LLC v. Bonet, 85 So. 3d 963, 978 (Ala. 2011). "'While opinions of the Attorney General do not have the force and effect of law and are only advisory in nature, they are entitled to great weight.'" Mobile Cnty. Constables Ass'n, Inc. v. Alabama Dep't of Pub. Safety, 670 So. 2d 28, 29 (Ala. 1995) (quoting trial court's order).

We agree with the attorney general's interpretation of the preamendment version of § 40-10-28 and find the attorney general's

opinion to be persuasive. The preamendment version of § 40-10-28 required that excess funds resulting from a tax sale "shall be paid over to the owner ... or into the county treasury." This Court explained in McDuffee, supra, that the original purpose of paying excess funds into the county treasury was to relieve the tax collector of the duty of seeking out the owner and paying him or her the excess funds if the owner was not present at the sale or if the owner was present but refused to receive the excess funds. Under the preamendment version of § 40-10-28, if excess funds are paid to the county treasury, they can then be paid from the county treasury to the owner in the same manner as funds derived from other property sold for taxes is paid, if the excess funds are called for by the owner within three years after the tax sale. However, if the excess funds are not called for within three years after the tax sale, the county treasurer is required to place the excess funds "to the credit of the general fund of the county," and the excess funds are treated as part of the county's general fund. Thereafter, any time within 10 years after the excess funds have been passed to the credit of the general fund of the county, the county commission may, on proof made by any person that he or she is the rightful owner of the excess

funds, order the payment of the funds to such owner. We agree that the use of the word "may" in this limited context does not convey upon the county commission the discretion to retain the excess funds; rather, the word "may" as used in this context merely clarifies that the owner can recover the excess funds once the funds have been transferred to the credit of the general fund only upon providing proof of rightful ownership to the county commission and denotes that the return of the excess funds is no longer a simple task left to the revenue commissioner. If this Court were to interpret the word "may" otherwise in this context, an unwarranted windfall to the county, defeating the protected property rights of the rightful owner, would result, and we do not believe this to be the intent of the legislature in enacting § 40-10-28. Accordingly, we conclude that the Shelby County Commission does not have the discretion to deny Shiloh Creek's claim for excess funds under the terms of the preamendment version of § 40-10-28, so long as Shiloh Creek provides proof that it is the rightful owner of such excess funds.

## 2. § 1983 Claim

Shiloh Creek has not raised an argument on appeal regarding its § 1983 claim. Arguments not raised in an appellant's initial brief are

deemed waived. See Brown ex rel. Brown v. St. Vincent's Hosp., 899 So. 2d 227 (Ala. 2004). Accordingly, we consider that claim waived.

## B. Douglas

### 1. Claim for Excess Funds

Douglas, like Shiloh Creek, argued in the trial court that the 2013, 2014, and 2017 amendments to § 40-10-28, which required an owner of property sold at a tax sale to first redeem the property before the owner would be entitled to a payment of excess funds, were not retroactively applicable to his claim seeking excess funds and could not be relied upon to defeat his claim to excess funds. Like Shiloh Creek, Douglas contended that the preamendment version of § 40-10-28 was applicable to his claim for excess funds. The Calhoun County defendants argued in their motion for a summary judgment, among other things, that Douglas's claim for excess funds was barred by the statute of nonclaims. The trial court agreed and entered a summary judgment in favor of the Calhoun County defendants, finding that Douglas's claim for excess funds was barred by the statute of nonclaims. Douglas argues on appeal that the trial court erred in determining that his claim for the excess

funds generated from the tax sale on the Calhoun County properties was barred by the statute of nonclaims.

Section 6-5-20(a), Ala. Code 1975, provides that "[a]n action must not be commenced against a county until the claim has been presented to the county commission, disallowed or reduced by the commission and the reduction refused by the claimant." The statute of nonclaims, § 11-12-8, provides, in pertinent part, that "[a]ll claims against counties must be presented for allowance within 12 months after the time they accrue or become payable or the same are barred...."

"There is no restriction to the type of suit that may be brought against the county -- tort or contract. The only requirements that must be met regarding a suit against a county are set out in §§ 6-5-20(a), 11-12-5, 11-12-6, and 11-12-8, Code 1975[,] requiring presentment of an itemized, verified claim, to the county commission within twelve months of accrual, and acted on within ninety days prior to commencement of the suit."

Wheeler v. George, 39 So. 3d 1061, 1088 (Ala. 2009) (quoting Cook v. St. Clair Cnty., 384 So. 2d 1, 5 (Ala. 1980)).

The trial court determined that, on April 22, 2013, Douglas requested the excess funds resulting from the tax sale of the Calhoun County properties and that he was notified by Roper in writing on December 13, 2013, that his request for the excess funds was being

denied on the basis that it could not be determined that he was the rightful owner. The trial court further determined that Douglas's claim for the excess funds accrued on December 13, 2013, when his request for the excess funds was purportedly denied and that he was required by statute of nonclaims to file a notice of claim with the Calhoun County Commission by December 13, 2014. Because Douglas did not file a notice of claim with the Calhoun County Commission until February 3, 2016, the trial court concluded that he was statutorily barred from asserting claims arising from the denial of the excess funds under the preamendment version of § 40-10-28. Douglas raises several arguments on appeal challenging the trial court's reliance upon the statute of nonclaims to conclude that his claim for excess funds was untimely. We find one of those arguments to be dispositive of the issue.

Douglas argues that the trial court erred in concluding that his claim for excess funds was barred by the statute of nonclaims because, he says, he filed his claim for the excess funds with the Calhoun County Commission within the 10-year period provided in the preamendment version of § 40-10-28 and, therefore, the statute of nonclaims does not operate to bar his claim for excess funds.

In May 2009, the Calhoun County properties were sold for unpaid taxes, resulting in excess funds. As discussed earlier, pursuant to the preamendment version of § 40-10-28, an owner has three years from the date of the sale to call for the payment of the excess funds from the county treasury. If the owner does not call for the payment of the excess funds from the county treasury within three years from the date of the sale, the preamendment version of § 40-10-28 requires that the county treasurer place the excess funds into the county's general fund. It is undisputed that Douglas did not call for the excess funds from the county treasury within the three years provided for in the preamendment version of § 40-10-28. Rather, Douglas, on April 22, 2013, requested payment of the excess funds via an e-mail to Roper, the Calhoun County Revenue Commissioner.

On December 3, 2013, Douglas received a letter from Roper notifying him that the research conducted by her office did not support his request for the excess funds because it could not be determined that he had owned the Calhoun County properties at the time of the tax sale. The letter provides, in relevant part:

"I am in receipt of your request for only the excess bids on the above-parcels that occurred as a result of the tax sale

of each parcel sold in May 2009. I have consulted with our attorneys and, according to them, you do not appear to qualify as the 'owner' of the properties so as to allow you to be entitled to receive the excess bid.

"....

"If this situation changes and you acquire the ownership interest of the owners, or if they convey to you their right to make the claims that you are presenting, please resubmit your claim with supporting information."

Although Roper testified that, in her position as revenue commissioner, she gathers information regarding a claim for excess funds and does research, including title work, to determine whether the claimant is the rightful owner of the excess funds, she forwards all of that information to the county commission and the county commission makes the determination as to whether the claimant is entitled to the excess funds. Indeed, this is entirely consistent with the preamendment version of § 40-10-28, which expressly provided that, "[a]t any time within 10 years after such excess has been passed to the credit of the general fund of the county, the county commission may on proof made by any person that he is the rightful owner of such excess of money order the payment thereof to such owner." (Emphasis added.) Pursuant to the preamendment version of § 40-10-28, it is the county commission,

not the county revenue commissioner, that is vested with the authority to determine whether a claimant is entitled to excess funds once the excess funds have been transferred to the credit of the county's general fund three years after the date of the tax sale. We note that Roper testified that her office will sometimes inform a claimant that a claim for excess funds has been denied by the county commission; however, nothing in Roper's letter to Douglas indicates that the county commission had taken action to deny his claim or that Roper was acting on behalf of the county commission in any way. The letter was signed by Roper in her capacity as the "Calhoun County Revenue Commissioner," and it specifically states that Roper was in receipt of Douglas's request for excess funds and that Roper had consulted with the county attorneys regarding his request. Because Roper, in her position as revenue commissioner, was not vested with the authority pursuant to the preamendment version of § 40-10-28 to deny a claim for excess funds, her December 3, 2013, letter was ineffectual as a denial of Douglas's claim for excess funds, and, even assuming, without deciding, that the statute of nonclaims is applicable, Roper's letter did not trigger

the running of the one-year period to file a claim provided in the statute of nonclaims.

On February 3, 2016, Douglas filed a claim for excess funds with the Calhoun County Commission. That filing accomplished two things. First, and most importantly, the filing constituted a claim for the payment of the excess funds from the county commission pursuant to the preamendment version of § 40-10-28. Second, the filing satisfied the requirements of § 6-5-20. On February 9, 2016, Douglas sued the Calhoun County defendants before the county commission had issued a determination on his February 3 claim for excess funds. However, any defect caused by Douglas's commencing this action before his claim was acted on by the county commission was cured when the claim was not acted on by the county commission and, thus, was deemed denied after 90 days. See § 6-5-20(b) (providing that a claim not acted on by the county commission within 90 days is deemed disallowed at that time). When a party, like Douglas, presents a claim to a county commission and then sues the county commission before action is taken by the county commission on that claim, "once the ninety days expire[s]

without action, the disallowance occur[s], and the defect [is] cured." Marshall Cnty. v. Uptain, 409 So. 2d 423, 425 (Ala. 1981).

Based on the forgoing, we conclude that Douglas's claim for the excess funds was not barred by the statute of nonclaims and that his action commenced on February 9, 2016, was timely.

## 2. § 1983 Claim

Douglas's § 1983 claim in this action is based on his allegation that the Calhoun County defendants, acting under color of state law, engaged in an illegal "taking" of his property by interpreting and applying the preamendment version of § 40-10-28 in the manner in which they did and by denying his claim for excess funds. Douglas argues that, although state law determines the statute of limitations applicable to § 1983 claims, federal law determines when the cause of action accrues. Dunn v. Dunn, 219 F. Supp. 3d 1100, 1118-20 (M.D. Ala. 2016) (citing Wallace v. Kato, 549 U.S. 384, 388 (2007)). The appropriate statute of limitations for federal claims under 42 U.S.C. § 1983 is the statute generally applicable to personal-injury actions in the forum state. Owens v. Okure, 488 U.S. 235, 240-41 (1989). The applicable limitations period for personal-injury actions in Alabama is

two years. § 6-2-38, Ala Code 1975. Accrual of a § 1983 claim occurs when the plaintiff knows or should know that he or she has suffered the injury that forms the basis of his or her complaint and can identify the person who inflicted the injury. Dunn, 219 F. Supp. 3d at 1119 (citing Chappell v. Rich, 340 F.3d 1279, 1283 (11th Cir. 2003)); see also Smith v. City of Gardendale, 508 So. 2d 250, 252 (Ala. 1987). When there is any doubt regarding whether a § 1983 claim may be time-barred, it is improper, as a matter of law, to dismiss the claim based on a statute of limitations. See Weaver v. Firestone, 155 So. 3d 952, 954 (Ala. 2013); Tobiassen v. Sawyer, 904 So. 2d 258, 262 (Ala. 2004); Payton v. Monsanto Co., 801 So. 2d 829, 834 (Ala. 2001).

As discussed above, Douglas filed his claim for excess funds with the county commission on February 3, 2016. Douglas filed the complaint in this case, which included his § 1983 claim, on February 9, 2016. The county commission did not act on Douglas's claim, so that claim was deemed denied after 90 days. § 6-5-20(b). Douglas's § 1983 claim accrued at that time. Any defect caused by Douglas's commencing this action before the county commission had acted on his claim for excess funds was cured when that claim was denied after 90 days. Uptain,

supra. Accordingly, we conclude that Douglas's § 1983 claim was timely filed.

### 3. "Standing"

The Calhoun County defendants argue that Douglas does not have "standing" to challenge the retroactive application of the amendments to § 40-10-28 to his claim for excess funds because, they say, the preamendment version of § 40-10-28 was properly applied to his claim for excess funds. The Calhoun County defendants contend that, as a matter of law, a plaintiff cannot challenge a statute that has not been applied to him or her. See J.L.N. v. State, 894 So. 2d 751, 754-55 (Ala. 2004); McCord v. Stephens, 295 Ala. 162, 164, 325 So. 2d 155, 164 (1975).

Douglas sought payment of the excess funds pursuant to the preamendment version of § 40-10-28. As an alternative to its ruling that Douglas's claim for excess funds was barred by the statute of nonclaims, the trial court further ruled that Douglas lacked "standing" to bring any claim challenging the applicability of the amended versions of § 40-10-28 to him because, it determined, the preamendment version of § 40-10-28 had been properly applied to his claim for excess funds and, thus, he

had failed to demonstrate a cognizable injury relating to the application of any of the amended versions of the statute.

Douglas states that the elements required for standing are: (1) an injury in fact; (2) a causal connection between the injury and the defendant's conduct; (3) and a likelihood that the injury could be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Douglas contends that he has satisfied those elements because he made a claim for excess funds; that claim was denied by operation of law and the Calhoun County defendants continue to hold the excess funds even though they have conceded that he is the owner of the excess funds for purposes of § 40-10-28; and that a judgment in his favor enforcing his right to the excess funds would redress the harm caused by the Calhoun County defendants' retention of the excess funds.

Because we have determined above that the right of a property owner to recover excess funds is a vested right and the amendments to § 40-10-28 cannot be applied retroactively to prevent an owner from claiming excess funds, it is unnecessary for this Court to determine whether Douglas has "standing" to challenge the application of the

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amendments to § 40-10-28 to his claim for excess funds. Accordingly, we pretermitt further consideration of this issue.

### Conclusion

Based on the foregoing, we reverse the summary judgments entered in favor of the Shelby County defendants and the Calhoun County defendants on Shiloh Creek's and Douglas's claims for excess funds resulting from the tax sales of their respective properties and on Douglas's § 1983 claim, and we remand this case for further proceedings.

**REVERSED AND REMANDED.**

Parker, C.J., and Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.