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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANEVE CO., INC. AND TAX PARCEL NO. 26-028.20-054, Defendant Below, Appellant, v. THE CITY OF WILMINGTON, a municipal corporation of the State of Delaware, Plaintiff Below, Appellee.	)	C.A. No. 485,2014
READWAY, INC. and TAX PARCEL NO. 26-013.30-183, Defendant Below, Appellant, v. THE CITY OF WILMINGTON, a municipal corporation of the State of Delaware, Plaintiff Below, Appellee.	)	
THE REVOCABLE TRUST OF WALTER LOWICKI DATED AUGUST 18, 1999, STANLEY C. LOWICKI, UNKNOWN HEIRS OF WALTER LOWICKI and TAX PARCEL NO. 26-005.40-022, Defendant Below, Appellant,	)	

v.	)
	)
THE CITY OF WILMINGTON, a municipal corporation of the State of Delaware,	)
Plaintiff Below,	)
Appellee.	)

PLAINTIFF BELOW/APPELLEE CITY OF WILMINGTON'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In August 2012, Plaintiff City of Wilmington ("the City") filed the within captioned monition actions in the Superior Court against properties owned by Defendants Janeve Co., Inc. (1309 West Street), Readway, Inc. (1309 North Lincoln Street) and the Revocable Trust of Walter Lowicki (2600 West 18th Street) (collectively "Defendants"). On October 26, 2012, Defendants filed a Motion to Set Aside Monition and Quash Sheriff's Sale ("Motion to Set Aside"), to which the City responded.

On December 14, 2012, the parties appeared before Commissioner Lynne M. Parker. Commissioner Parker ordered the parties to provide written submissions regarding the issues raised in Defendants' Motion to Set Aside. The parties appeared before Commissioner Parker again on February 26, 2013, at which time Commissioner Parker decided all issues presented by Defendants, except the issue involving Superior Court Civil Rule 41(a) for which the Commissioner requested further information. In her ruling, Commissioner Parker denied Defendants' Motion to Set Aside with the exception of requiring the City to attach affidavits to its monitions. On September 11, 2013, Commissioner Parker issued a written Opinion and Order denying Defendants' Motion to Set Aside.

On March 12 and September 30, 2013, Defendants filed Motions for

Reconsideration of the Commissioner's Orders ("Motion for Reconsideration") to the Honorable Paul R. Wallace. The City responded and requested the stay of sheriff's sale be lifted. On June 13, 2014, the Superior Court issued an Opinion and Order denying Defendants' Motion for Reconsideration and affirming the Commissioner's findings and recommendations. The Superior Court granted the City's Motion to Lift the Stay.

On June 20, 2014, Defendants filed a Motion for Reargument of the Superior Court's Order. On June 27, 2014, Defendants filed a Motion for New Trial and to Alter or Amend a Judgment under Rule 59. The City responded to both Motions. On August 6, 2014, Defendants filed an Emergency Motion to Stay the Sheriff Sale. On August 8, 2014, the Superior Court issued an Opinion and Order denying all Defendants' Motions.

Defendants appeal the Superior Court's June 13, 2014 Order denying their Motion for Reconsideration.

SUMMARY OF ARGUMENT

1. The assessment of the vacant property registration fee by the City, pursuant to 1 *Wilm. C.* §4-27, 120, when unpaid by a property owner, creates a ten year lien against the property under 25 *Del. C.* §2903(a) which the City may enforce through monition within the ten year period. The three year statute of limitations of 10 *Del. C.* §8106 does not apply to said monition action. Defendants' statement that the three year statute of limitations under 10 *Del. C.* §8106 applies, and that 25 *Del. C.* §2903(a) does not create a ten year lien for vacant property fees is **DENIED**.

2. Defendants are not entitled to a trial by jury in a monition action because a writ of monition is a statutory remedy that did not exist at common law. Defendants' statement that a debtor has a right to demand and obtain a jury trial in a court of law in a monition action is **DENIED**.

3. Defendants are barred by Supreme Court Rule 8 from arguing, on appeal, the issue that certain amounts in the monition are not "final" because they raised the issue for the first time in their post-judgment motion. However, even if the Court permits Defendants' argument, the Superior Court did not abuse its discretion when it denied Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment as to the issue that the vacant registration fee assessed in 2004 was not final because Defendants raised this issue for the first time

in a post-judgment motion, Defendants failed to meet their burden entitling them to relief under Rule 59, and the case involving the 2004 fee is closed. Defendants' statement that there are disputed amounts in the present monition which are the subject of a previously filed action, thus precluding sheriff sale of the property is **DENIED**.

4. Superior Court Civil Rule 41(a) does not bar the filing of the monition against 1309 North Lincoln Street because the City filed motions to vacate the two previously filed monition actions involving this property, and the Superior Court, through an order, vacated the writs of monitions. Therefore, there is no adjudication on the merits under Rule 41(a) for purposes of res judicata. Defendants' statement that Rule 41(a) "creates res judicata" is **DENIED**.

STATEMENT OF FACTS

In August 2012, Plaintiff City of Wilmington filed three separate monition actions in the Superior Court against properties owned by Defendants Janeve Co., Inc. (1309 West Street), Readway, Inc. (1309 North Lincoln Street) and the Revocable Trust of Walter Lowicki (2600 West 18th Street). (B1-37). The monition actions for all three properties primarily consist of delinquent vacant property registration fees assessed against Defendants under chapter 4, section 4-27, 120 of the Wilmington City Code. However, the monition against 1309 North Lincoln Street also includes delinquent water/sewer charges (B 6-7), and the monition against 2600 West 18th Street includes expenditures by the City for "exterior improvements" to the property (B14, 18-19).

By way of background, the properties at issue have been vacant since approximately 2003 and 2004, although for a brief period 1309 West Street was occupied. (B8-11, 20-27, 33-37). Consistent with 1 *Wilm. C.* §4-27, 120 entitled "Annual Registration of Vacant Buildings and Registration Fees," the City assessed the properties an annual vacant registration fee based upon the total number of years each property remained vacant. (*Id.*). Between 2005 and 2008, Defendants regularly appealed the imposition of the fees to the Licenses and Inspections Board of Review ("the Board") pursuant to their right to appeal under the ordinance, receiving full

evidentiary hearings before the Board. *See* 1 *Wilm. C.* §4-27, 120(b)(4). (B84-218). Following each hearing, the Board issued a detailed, written decision which Defendants then appealed to the Superior Court under a writ of certiorari. (B219-250).[1] In each writ, Defendants raised a panoply of objections and arguments concerning the vacant registration fee. Each writ was denied by the Superior Court. In turn, Defendants then appealed the Superior Court's decisions to this Court. In each case, this Court affirmed the Superior Court's decision.[2]

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[1] Defendants did not file writs of certiorari for the 2009, 2010 and 2011 fees. (B 82-83).

[2] *Adjile, Inc. v. City of Wilmington,* 2004 Del. Super. LEXIS 384 (Del. Super Ct. Nov. 30, 2004), *aff'd* 2005 Del. LEXIS 192 (Del. May 12, 2005); *Adjile, Inc. v. City of Wilmington,* 2007 Del. Super. LEXIS 404 (Del. Super Ct. Jun. 29, 2007), *aff'd* 2008 Del. LEXIS 121 (Del. Mar. 13, 2008); *Adjile, Inc. v. City of Wilmington,* 2008 Del. Super. LEXIS 230 (Del. Super Ct. Jun. 30, 2008), *aff'd* 2009 Del. LEXIS 103 (Del. Feb. 26, 2009); *Javene Co., Inc. v. City of Wilmington,* 2009 Del. Super. LEXIS 189 (Del. Super Ct. May 7, 2009), *aff'd* 2010 Del. LEXIS 4 (Del. Jan. 6, 2010); *Adjile, Inc. v. City of Wilmington,* 2010 Del. Super. LEXIS 136 (Del. Super Ct. Mar. 31, 2010), *aff'd* 2010 Del. LEXIS 669 (Del. Dec. 28, 2010).

Despite the rulings by the Superior Court and this Court, Defendants failed to pay the outstanding vacant registration fees, thus prompting the City to file the above referenced monitions.[3]

[3] Following the Superior Court's decision denying Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment, Defendants paid all the amounts due in the underlying monitions to stop the sale of the properties at sheriff's sale.

ARGUMENT

ARGUMENT I

A. QUESTION PRESENTED

WHETHER THE SUPERIOR COURT ERRED IN HOLDING THE ASSESSMENT OF VACANT PROPERTY REGISTRATION FEES BY THE CITY OF WILMINGTON CREATES A TEN YEAR LIEN ON A PROPERTY UNDER 25 *DEL. C.* §2903(a), NOT LIMITED BY THE THREE YEAR STATUTE OF LIMITATIONS OF 10 *DEL. C.* §8106.

(Plaintiff presented this question to the trial court for consideration. *See* Plaintiff's Response in Opposition to Defendants' Opening Brief (submitted to Commissioner Lynne M. Parker)(B11, 80); Transcript of Feb. 26, 2013 hearing before Commissioner Lynne M. Parker (A126-27); Plaintiff's Responses in Opposition to Defendants' Motion for Reconsideration of the Commissioner's Order (B259-261, 280-282)).

B. STANDARD AND SCOPE OF REVIEW

The Superior Court's interpretation of a statute is a question of law which this Court reviews *de novo*. *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009). The Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principles." *Id.*

C. MERITS OF ARGUMENT

Defendants argue the three year statute of limitations found in 10 *Del. C.* §8106

applies to the monitions filed by the City, and, therefore, the City may only collect those delinquent vacant registration fees accruing three years prior to the filing of the City's monitions. As the City argued below, and as the Superior Court held, 25 *Del. C.* §2903(a), not 10 *Del. C.* §8106, applies to the assessment of vacant registration fees, thus creating a ten year lien against Defendants' properties for the unpaid vacant registration fees which may be collected through monition and sheriff's sale within the ten year period. In response, Defendants argue §2903(a) only applies to taxes, and vacant registration fees are not taxes. Defendants' argument is without merit and contrary to both the clear language of 25 *Del. C.* §2903(a) and case law.

The issue of whether the vacant registration fee constitutes a tax was addressed and decided by the Superior Court as far back as 1985 in *City of Wilmington v. Roleta Inc. Intern'l*, 1985 Del. Super. LEXIS 1166, at *1-2 (Del. Super. Ct. Mar. 25, 1985). In *Roleta*, the Court held:

> A fair reading of the ordinance involved indicates that it is an effort by the City Council of Wilmington to provide a form of taxation and registration intended to identify vacant houses within the City limits.... [T]his Court... conclud[es] that the ordinance here is merely an exercise of the City's traditional powers to impose business excise taxes and is authorized under the City Charter as well as pursuant to the City's general police powers. *Id.*

Although *Roleta* addressed an earlier version of the vacant registration ordinance, the Court in *Adjile, Inc. v. City of Wilmington* applied the holding in *Roleta* to the vacant

property registration ordinance at issue in the present appeal, finding that the ordinance was constitutional and a proper exercise of the City's authority under the Wilmington City Charter. *Adjile, Inc. v. City of Wilmington,* 2004 Del. Super. LEXIS 384, at *5-7 (Del. Super Ct. Nov. 30, 2004), *aff'd*, 2005 Del. LEXIS 192 (Del. May 12, 2005). In fact, Readway, Inc., an appellant herein, was a plaintiff in the *Adjile* matter and raised the argument then that the vacant registration fee was a tax, albeit an allegedly unlawful tax.

Most recently in *City of Wilmington v. McDermott*, the Superior Court again addressed the issue of whether vacant registration fees were taxes, and further, whether the City could collect delinquent vacant registration fees through the monition and sheriff's sale process. *City of Wilmington v. McDermott*, 2008 Del. Super. LEXIS 309, at *1 (Del. Super. Ct. Aug. 26, 2008), *aff'd*, 2009 Del. LEXIS 186 (Del. Apr. 21, 2009). In concluding vacant registration fees constitute a lien upon the property which may be collected through the monition process, the *McDermott* Court found that 1) unpaid vacant registration fees constitute automatic liens under 25 *Del. C.* §2901(a); and 2) vacant registration fees are a tax or special assessment. *Id.* at *5,7. Given the relevance of this holding to the issue herein, the Superior Court in the matter at bar appropriately relied upon *McDermott*.

Defendants argue that the Superior Court's reliance on *McDermott* is misplaced

because *McDermott* "does not rule that vacant property fees are a tax." However, Defendant's statement is inaccurate. In quoting *McDermott*, Defendants omit that portion of the court's holding specifically stating vacant property registration fees are a type of tax. (*See* Def. Op. Br. p. 7). *McDermott* actually held as follows:

> The Annual Registration of Vacant Buildings and Registration Fees City Ordinance has been found to be an effort by City Council to provide a form of taxation. The Ordinance is a proper exercise of the City's traditional powers to impose business excise taxes, authorized under the City Charter as well as pursuant to the City's general police powers. Registration fees have been found by Delaware courts not to be an unlawful tax. Regardless of whether vacant property fees are taxes *per se*, vacant property fees plainly are special assessments. The funds collected from vacant property owners specifically benefit the owners by financing in part the additional City services required to protect the value and security of the vacant building. Vacant property fees are necessary to pay for the enhancement of public services to address problems created by vacant buildings. Therefore, the Court finds that vacant property fees are taxes or special assessments, subject to collection by monition and sheriff's sale. *Id.* at *7-8 (internal citations omitted).

McDermott, similar to prior cases on this issue, clearly held vacant property registration fees are taxes. *McDermott* further states vacant registration fees are also unquestionably special assessments. In essence, *McDermott* held there is no difference whether one refers to vacant registration fees as a tax or special assessment because they are treated the same for purposes of monition and sheriff's sale.

Additionally, the statutory language of §2903(a) clearly imposes a ten year lien

upon a property for purposes of collecting unpaid vacant registration fees. Title 25, section 2901(a)(1) of the Delaware Code states:

> Except as otherwise provided, "lien" or "liens" as used in this section shall arise whenever the following charges, as defined in this section, are levied or imposed by the State or any political subdivision thereof... and such charges become due:
>
> ***
>
> j. Fees imposed by law or ordinance of any political subdivision of the State, which shall include, without limitation, municipal corporations, for registration of ownership of any vacant buildings located within the political subdivision, the imposition of which fees is final and non-appealable.

Title 25, section 2901(a)(3) states in pertinent part "...the liens created by this section are levied or imposed only upon that parcel of real property against or upon which such charges have been levied or imposed.... The liens created by paragraph (a)(1)j. of this section shall have preference and priority with respect to all other liens on such real property as of the time such fees become final and non-appealable." Title 25, section 2903(a) entitled "Duration of Lien" states: "In New Castle County all taxes assessed against real estate shall continue a lien against the real estate within the County for 10 years...."

When deciding questions involving statutory construction, the Court must "ascertain and give effect to the intent of the legislature." *Dambro*, 974 A.2d at 129. "Because a statute passed by the General Assembly must be considered as a whole

and not in parts, each section should be read in light of all others in the enactment." *Id*. at 30. The Court has held the "golden rule of statutory interpretation... is that unreasonableness of the result produced by one among possible interpretations... is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Id.*, quoting *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985). Further, if the statute is unambiguous, "then there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'" *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp'l, Inc.,* 36 A.3d 336, 342-43 (Del. 2012).

In the present matter, the language of §2901(a)(1)j. and §2901(a)(3) unambiguously provide that vacant registration fees constitute a priority lien on the property. Further, the language of §2903(a) clearly imposes a ten year lien upon a property when the property owner fails to pay vacant registration fees. Thus, as the Superior Court concluded, "[t]he plain meaning, therefore, must control: the failure by Defendants to pay vacant property fees results in a lien assessed against their properties that will remain on the properties for a minimum of 10 years." *City of Wilmington v. Janeve Co., Inc.*, 2014 Del. Super. LEXIS 298, at *13 (Del. Super. Ct. Jun. 13, 2014).

Defendants, in support of their argument that §2903(a) does not apply to vacant

registration fees (and thus, the three year statute of limitations in 10 *Del. C.* §8106 is applicable), points to 25 *Del. C.* §2901(b)(7) which provides that a Notice of Lien, if filed, shall be effective for three years. (Def. Op. Br. at p. 9). Not only does the language of §2901(b)(7) *not* support Defendants' argument, §2901(b)(7) actually undermines Defendants' argument. Section 2901(b)(7) states that a Notice of Lien (if one is filed) shall be effective for three years, "unless the political subdivision files a subsequent Continuation of Lien.... A Continuation of Lien will be effective for a period of 3 years following the initial 3-year period of the Notice of Lien...." Although §2901(b)(7) allows the filing of only one Continuation of Lien, it permits the filing of a new Notice of Lien for the same charges, thereby potentially extending the lien on the property beyond six years. The filing of the new Notice of Lien would simply change the priority date of the lien. Clearly then, the legislature intended the charges listed in Chapter 29, and the liens arising therefrom, would not be subject to the three year statute of limitations found in 10 *Del. C.* §8106.

Lastly, Defendants cite *Mayor and Council of Wilmington v. Durham*, 153 A.2d 568 (Del. Super. Ct. 1959) and *Mayor and Council of Wilmington v. Dukes*, 157 A.2d 789 (Del. 1960) for the proposition that the three year statute of limitations applies to fees, including vacant registration fees, imposed by the City. Defendants' reliance upon these cases is misplaced. *Dukes* and *Durham* addressed the collection

of delinquent business license fees, and were *personal* actions against *individuals*. The present matter is not a personal action, but rather an *in rem* action against the properties. Additionally, unlike vacant property registration fees, professional business license fees such as those at issue in *Dukes* and *Durham* are not listed in 25 *Del. C.* §2901(a), and they are not liens on the property which the City may collect through monition and sheriff's sale of the property.

In sum, 25 *Del. C.* §2903(a) imposes a ten year lien upon a property for delinquent vacant registration fees. Therefore, the three year statute of limitations under 10 *Del. C.* §8106 does not apply to the monitions filed by the City for the collection of the unpaid vacant registration fees, and the City's monitions were not time-barred.

ARGUMENT II

A. QUESTION PRESENTED

WHETHER THE SUPERIOR COURT ERRED IN HOLDING DEFENDANTS ARE NOT ENTITLED TO TRIAL BY JURY BECAUSE A WRIT OF MONITION IS PURELY A STATUTORY ACTION.

(Plaintiff presented this question to the trial court for consideration. *See* Plaintiff's Responses in Opposition to Defendants' Opening Brief (submitted to Commissioner Lynne M. Parker)(B78-79); Transcript of Feb. 26, 2013 hearing before Commissioner Lynne M. Parker (A128); Plaintiff's Responses in Opposition to Defendants' Motions for Reconsideration of the Commissioner's Order (B261-263, 282-284)).

B. STANDARD AND SCOPE OF REVIEW

The Court reviews *de novo* the Superior Court's determinations regarding questions of law or constitutional violations. *Sykes v. State*, 2015 Del. LEXIS 62, at *18 (Del. Jan. 30, 2015).

C. MERITS OF ARGUMENT

In the court below, Defendants argued the City's attempt to collect unpaid vacant registration fees is a "simple debt action," and as such, they are entitled to a trial by jury. However, Defendants' argument is without merit because a writ of monition is a statutory remedy not existing at common law. Therefore, Defendants are not entitled to a jury trial before the City can proceed with the sheriff's sale of

their properties.

It is well established that an individual has a right to a jury trial if the right existed at common law. *Claudio v. State*, 585 A.2d 1278, 1296 (Del. 1991) ("'trial by jury shall be as heretofore,' i.e. the provision in the 1776 Delaware Constitution perpetuating the guarantee of trial by jury as it existed at common law."), *citing Nance v. Rees*, 161 A.2d 795, 799 (Del. 1960). The present matter involves the collection of unpaid vacant registration fees through a monition action and sheriff's sale. It is an *in rem* action where the City has the statutory authority to sell Defendants' properties in order to satisfy its lien. No such action existed at common law, and Defendants have failed to provide authority to the contrary.

Defendants argue that even though the subject monitions are brought under a statute, common law principles apply. (Def. Op. Br. p. 14). In support of their argument, Defendants cite *Reynolds v. Reynolds*, 237 A.2d 708 (Del. 1967). However, *Reynolds* involves the Superior Court's denial of a divorce decree brought on the grounds of extreme cruelty because the wife failed to sustain her burden of proof. *Reynolds* did not involve any issues related to trial by jury, let alone whether an individual has a present right to a jury trial when none existed at common law. Thus, *Reynolds* has no bearing on this issue.

Likewise, *Vaughan v. Veasy*, 125 A.2d 251 (Del. Super. Ct. 1956), also cited

by Defendants, does not support their argument. *Vaughan* involved the interpretation of the Timber Trespass Act, and whether the Act intended to eliminate the right to trial by jury for trespass actions. *Vaughan* does not aid Defendants, but rather supports the City's position because trespass was an action at common law subject to the right to trial by jury. There is no similarity between the issue in *Vaughan* and the issue before this Court.

Defendants also cite *Durham* and *Dukes* for the proposition that "Delaware Cases require the City to prove its claim for debt in the ordinary manner of discovery and fact resolution by stipulation and trial." (Def. Op. Br. at 15). As explained *supra*, however, *Durham* and *Dukes* are inapplicable to this matter because they involve personal debt actions, not *in rem* proceedings.

In further support of their theory, Defendants cite to Wilmington City Code §4-140 relating to the institution of law suits and service of process. (As a point of clarification, §4-140 is contained in neither the Code nor the Charter, but rather in the "Related Laws" section.). Section 4-140, however, relates to the filing of actions to collect delinquent taxes against *a person*. Section 4-140 states, in part:

> [T]he said suit shall be against the person to whom the land or personal property is assessed, or in case the land or personal property is owned by any person to whom it is not assessed, then the suit may be entered

> against the owner or owners of said land or personal property , or against any other person whose duty it is to pay the said tax. Related Laws of the City of Wilm. §4-140.

Again, the action at issue in the present matter is *not* an action against the person, but rather an action *in rem* against the properties. It is a writ of monition. Thus, Division 3 of the Related Laws entitled "***Additional*** Tax Collection Method" applies. (Emphasis added). Section 4-181 states: "In addition to all existing methods and authority for the collection of taxes or special assessments due to the city, the following method and authority is hereby established...." What follows is the process for the filing of a monition against the property for purposes of sheriff's sale. As is well established, the monition process does not require a trial by jury, and Division 3 does not provide for one. *See also*, *State v. Moore*, 1982 Del. Super. LEXIS 1038, at *3 (Del. Super. Ct. Sept. 23, 1082)("The use of summary proceedings, whereby the assessment may be given the force of a judgment without judicial intervention, has been held to be a constitutionally valid expedient for the collection of taxes....").

In their Opening Brief, Defendants raise matters completely irrelevant to the issue of whether they are entitled to a jury trial. For example, Defendants point to *Schadt v. Latchford*, 843 A.2d 689 (Del. 2004), a case involving the constitutionality of the City's sidewalk ordinance, and the City "Instant Ticketing" program related to the imposition of a $50 civil penalty for sanitation violations. Neither issue has any

relevance to the question at hand, i.e. whether Defendants are constitutionally entitled to a jury trial in a statutory monition proceeding. In addition to their lack of relevance, the Court should not entertain Defendants' arguments based upon these matters because Defendants did not fairly present them to the court below. Supreme Court Rule 8 precludes Defendants from raising the arguments in their appeal, except when the interests of justice require the Court to consider and determine the issue. In the present matter, the interests of justice does not require the Court to consider the issue. Defendants had ample opportunity to raise these arguments before Commissioner Parker and in their Motion to Reconsider the Commissioner's Order, but did not do so. Instead, Defendants raised these issues for the first time in their Motion for Reargument dated June 20, 2014 and Motion for New Trial and to Alter or Amend a Judgment under Rule 59 dated June 27, 2014. (B288-290; A132-134). Raising arguments for the first time in a motion for reargument or motion to alter judgment, without satisfying the standards for said motions, does not constitute a fair presentation of the issue to the court below. *State v. Abel*, 68 A.3d 1228, 1232 (Del. 2013)(held state could not argue, on appeal, a theory raised for the first time in a motion for reargument because under Rule 8, the court declines to address questions not fairly presented to the trial judge).

For the same reason, the Court should not consider Defendants' arguments

related to *City of Wilmington v. Diamond State Port Corp.*, 2014 Del. Super. LEXIS 427 (Del. Super. Ct. Aug. 15, 2014). Defendants contend the City was "compelled to sue in Superior Court to prove a storm water bill against a property owner who denies, like Readway, that money is owed factually. Discovery must take place with the resolution of fact to be made by an independent fact finder, court or jury." (Def. Op. Br. p. 22). Notwithstanding the fact that Defendants failed to raise this issue until their Motion for Reargument and should not be permitted to raise it herein, *Diamond State Port Corp*. was not a monition action. It was a declaratory judgment and contract action involving the City and a State created entity, Diamond State Port Corp., regarding the construction of the Port of Wilmington Acquisition Agreement as it relates to the payment of storm water fees. Therefore, this case is not relevant to whether Defendants are entitled to a jury trial in a monition action, and to the extent Defendants are attempting to argue the City is constrained to use only one method of collection (one involving discovery and trial), Defendants' argument is contrary to the statutory authority granted to the City permitting it to collect delinquent charges through monition and sheriff's sale.

Lastly, Defendants attempt to draw into their argument disputed charges other than the vacant registration fees (i.e. water billing charges and property maintenance charges), stating they are entitled to a trial to determine whether these are valid

charges. Again, Defendants raised this argument for the first time in their Motion for Reargument (A132-133; B287-288), and they should not be permitted under Rule 8 to argue this issue herein. But again, notwithstanding this fact, Defendants were actually afforded the opportunity to be heard on the appropriateness of these charges by Commissioner Parker in the proceeding below. Commissioner Parker stated Defendants would have a full hearing on Defendants' opposition to the monition, stating Defendants must present all their defenses and the City must "make its case" that the amounts are due. The purpose of the hearing was to determine whether the debt was due. (B39-42). Rather than raise their objections to all the charges encompassed by the monition, Defendants chose only to dispute the vacant property registration fees. (B58).

In sum, a writ of monition is a statutory remedy not existing at common law. Therefore, Defendants are not entitled to a jury trial before the City can proceed with the sheriff's sale of their properties. Further, although Defendants argue they are entitled to a trial wherein they would have an opportunity to dispute the charges and the City would be put to its burden of proof, Defendants ignore the indisputable fact that over the years, they have repeatedly appealed to the Board of Licenses and Inspections Review as provided by 1 *Wilm. C.* §4-27, 120 (b) (4) and sought review by the Superior Court and this Court of the Board's decisions. Thus, while

Defendants are not entitled to a jury trial, they have repeatedly availed themselves of the appropriate judicial process, and have unquestionably receive all the process due to them. (*See* B82-250).

ARGUMENT III

A. QUESTION PRESENTED

WHETHER DEFENDANTS MAY ARGUE, ON APPEAL, THE ISSUE THAT CERTAIN AMOUNTS IN THE MONITION ARE NOT "FINAL" WHEN THE ISSUE WAS RAISED FOR THE FIRST TIME IN A POST-JUDGMENT MOTION. IF SO, WHETHER THE SUPERIOR COURT ERRED IN DENYING DEFENDANTS' MOTION FOR REARGUMENT AND MOTION FOR NEW TRIAL AND TO ALTER OR AMEND A JUDGMENT WHEREIN DEFENDANTS RAISED FOR THE FIRST TIME THE ARGUMENT THAT THE VACANT REGISTRATION FEE ASSESSED IN 2004 WAS NOT FINAL.

(Plaintiff presented this question and the argument that all vacant registration fees were "final" to the trial court for consideration. *See* Plaintiff's Response in Opposition to Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment (B71-72, 82, 283, 296-297).

B. STANDARD AND SCOPE OF REVIEW

The Court reviews a trial court's denial of motions for reargument, new trial and to alter or amend a judgment for abuse of discretion. *Maddox v. Issaacs*, 2013 Del. LEXIS 461 (Del. Sept. 10, 2013); *Hessler, Inc. v. Farrell*, 260 A.2d 701 (Del. 1969). Because this issue arose in the context of a Superior Court Rule 59 motion, the standard of review is not *de novo* as Defendants contend, instead it is an abuse of discretion standard.

C. MERITS OF ARGUMENT

For the first time in their Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment, Defendants raised the issue that the vacant registration fee billed on November 15, 2004 in the amount of $500 and assessed to 2600 West 18th Street (B27, 82)[4] is not final and unappealable, and, therefore, the monition cannot proceed. (A132; B289). Given that Defendants failed to raise this argument in their Motion to Set Aside before Commissioner Parker or their Motion for Reconsideration, Supreme Court Rule 8 bars Defendants from raising this issue on appeal. Issues raised in post-judgment motions do not constitute questions fairly presented to the trial court. *State v. Abel*, 68 A.3d 1228, 1232 (Del. 2013)(held state could not argue, on appeal, a theory raised for the first time in a motion for reargument because under Rule 8, the court declines to address questions not fairly

[4] The November 2004 fees were the subject of the Board of Licenses and Inspections Review's decision dated October 18, 2005, which Defendants attempted to appeal to the Superior Court. The monitions filed for 1309 West Street and 1309 North Lincoln Street do not include vacant registration fees billed on November 15, 2004. The November 15, 2004 billed to 1309 West Street was waived, and no fee was assessed to 1309 North Lincoln Street in 2004. (B8-11, 33-37, 83).

presented to the trial judge). However, if the Court determines Rule 8 does not bar Defendants' argument, the Superior Court appropriately denied Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment because Defendants failed to establish any of the elements entitling them to relief under Rule 59.

The purpose of a motion for reargument is to afford the trial court an opportunity to correct errors prior to appeal. *Kovach v. Brandywine Innkeepers Ltd. P'ship*, 2001 Del. Super LEXIS 373, at *3-4 (Del. Super. Ct. Oct. 1, 2001). A motion for reargument must be denied unless the court has overlooked a controlling precedent or legal principle, or it has misapprehended the law or facts such that it would affect the outcome of the decision. *Id.* at *4. To succeed on a motion to alter or amend a judgment under Super. Ct. Civ. R. 59(d), the movant must establish one of the following: "1) an intervening change in controlling law; 2) the availability of new evidence not previously available; or 3) the need to correct clear error of law or to prevent manifest injustice." *Lafferty-Eaton v. T.D. Bank NA*, 2014 Del. Super. LEXIS 98, at *8 (Del. Super. Ct. Feb. 20, 2014). Whether to grant a motion for reargument or a motion to alter or amend the judgment is within the sound discretion of the trial court. *Brown v. Weiler*, 1998 Del. LEXIS 339, at *3 (Del. Sept. 15, 1998).

The Superior Court did not err in denying Defendants' Motion for three

reasons. First, Defendants raise this issue for the first time in a post-judgment motion. Rule 59 is not a device for raising new arguments that could have been raised in prior briefing, or to string out the length of time. *Plummer v. Sherman*, 2004 Del. Super. LEXIS 7, at *4-5 (Del. Super. Ct. Jan. 14, 2004), citing *Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett Co.*, 2003 Del. Super. LEXIS 27, at *3-4 (Del. Super. Ct. Jan. 17, 2003). Clearly, Defendants had knowledge of the denial of the Petition for Certiorari and subsequent Motion for Reargument filed in case number 05A-11-001, yet they failed to raise this argument in their submissions to Commissioner Parker or in their Motion for Reconsideration of the Commissioner's Order. Therefore, this information is not "new evidence" previously unavailable, and the Superior Court could not have misapprehended the law or facts on a matter not presented to it.

Second, contrary to Defendants' assertion that case 05A-11-001 remains "open," it appears from the Superior Court docket that the matter was "closed" on January 6, 2006. (B309).

Lastly, if Defendants believed this matter to have remained pending, it was incumbent upon Defendants to move the proceedings forward at that time. Instead, Defendants raise this issue over *nine years* later, following annual appeals to the Superior Court and this Court between 2006 through 2009 relating to vacant

registration fees assessed to this property. (*See* footnote 2, *supra*). Thus, even if Defendants' argument had been properly raised to the court below, the argument is without merit because the fee is "final and unappealable." Case number 05A-11-001 is "closed," and Defendants failed to timely proceed with that matter.

Given the above, the Superior Court did not abuse its discretion in denying Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment on the issue that the 2004 vacant registration fee is not "final." Indeed, the vacant registration fee is final and unappealable, and the City properly included it in the monition.

ARGUMENT IV

A. QUESTION PRESENTED

WHETHER THE SUPERIOR COURT ERRED IN HOLDING THAT SUPERIOR COURT CIVIL RULE 41(A) DOES NOT BAR THE FILING OF THE MONITION AGAINST 1309 NORTH LINCOLN STREET BECAUSE THE CITY OBTAINED AN ORDER FROM THE COURT TO VACATE PRIOR MONITIONS FILED AGAINST THE PROPERTY.

(Plaintiff presented this question to the trial court for consideration. *See* Plaintiff's Responses in Opposition to Defendants' Opening Brief (submitted to Commissioner Lynne M. Parker)(B74); Plaintiff's Responses in Opposition to Defendants' Motion for Reconsideration of the Commissioner's Order dated March 21, 2013 and Oct. 7, 2013 (B276-280); Plaintiff's Responses in Opposition to Defendants' Motion for Reargument and Motion for New Trial and to Alter or Amend the Judgment (B294-295)).

B. STANDARD AND SCOPE OF REVIEW

Whether the Superior Court erred in formulating or applying legal precepts is a question of law, and the standard of review is *de novo*. *Delaware Alcoholic Beverage Wholesalers v. Ayers*, 504 A.2d 1077, 1081 (Del. 1986).

C. MERITS OF ARGUMENT

Defendants argue Plaintiff's monition action against 1309 North Lincoln Street owned by Defendant Readway, Inc. filed on August 29, 2012 must be dismissed

because it is barred under Super. Ct. Civ. R. 41(a). Defendants assert the City is barred because it dismissed two prior monitions filed against 1309 North Lincoln Street (A115-116; 122-123), and Rule 41(a) provides that a second notice of dismissal acts as an adjudication upon the merits barring the third monition. Defendants' argument is without merit.

Rule 41(a)(1) states in pertinent part:

> [A]n action may be dismissed by the plaintiff **without order of court** (I)... by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment whichever first occurs or (II) by filing a stipulation of dismissal signed by all the parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court... an action based on or including the same claim. (Emphasis added).

According to the clear language of Rule 41(a)(1), the "twice dismissal rule" only applies when a party files "a notice of dismissal" or "stipulation of dismissal," and no order from the Court is sought. In the present matter, the City did not file a notice of dismissal or stipulation of dismissal. Rather, it filed a Motion to Vacate the Writ of Monition in each instance, seeking the court's permission to vacate the writs issued by the court. (A115-116; 122-123). In each instance, the court granted the City's motion and issued an order. (*Id.)* Dismissal of an action by order of the court

is not considered an adjudication on the merits and, therefore, cannot act as a bar to the filing of a subsequent action. *See* Rule 41(a)(2).

Defendants cite to *Charlton v. Gallo*, 2009 Del. Super. LEXIS 212 (Del. Super. Ct. May 29, 2009) and *Mills v. State Farm Mut. Auto. Ins. Co.*, 1999 Del. Super. LEXIS 124 (Del. Super. Ct. June 8, 1999) for the proposition that a court order may act as a "Notice of Dismissal" for purposes of Rule 41(a)(1). However, neither case stands for this principle. In *Charlton*, the opinion merely indicates plaintiff filed a Notice of Dismissal, nothing more. *Charlton*, 2009 Del. Super. LEXIS 212, at *1. In *Mills*, the Court dismissed plaintiff's claim pursuant to a motion to dismiss, a situation clearly outside the scope of Rule 41(a)(1). *Mills*, 1999 Del. Super. LEXIS 124, at *4.

Further, Defendants' reliance on *In re Chi-Chi's, Inc.*, 338 B.R. 618 (Bankr. D. Del. 2006) is misplaced. The party in *In re Chi-Chi's, Inc*. filed a stipulation of dismissal and a notice of dismissal. The party did not seek an order from the court vacating its action. The analysis conducted by the court in *In re Chi-Chi's, Inc.* is not triggered in the present matter because the City obtained an order from the court to vacate the monitions. Therefore, the City does not fall within the scope of Rule 41(a)(1).

In the present matter, the City sought to vacate the previous monitions because

the monitions did not reflect the current delinquent charges owed to it due to Defendants' actions in contesting the vacant registration fees through administrative appeals and writs of certiorari. (A115, 122). As Defendants are aware, there was never an intent to release Defendants from their obligation to pay the vacant registration fees. Rather, the City's intent was to file a monition containing an accurate accounting of the charges due.

As stated by the *In re Chi-Chi's, Inc.* Court, the purpose of the two dismissal rule is "to prevent unreasonable abuse and harassment" by a party attempting to "secur[e] numerous dismissals without prejudice" so as to engage in "duplicative, wasteful and harassing litigation." *Id.* at 625. A court may apply the rule to avoid prejudice to a party or abuse of the judicial system. *Id.* The concern underlying the rule is simply not present in the current matter, and Defendants' conclusory statement that "[o]ne only needs to review the various dockets brought by the City of Wilmington vs. Readway to see that multiple filings by the City was a real burden on the principals at Readway" is insufficient to demonstrate prejudice. As the Superior Court correctly held, "[t]he City was forced to update its monition to reflect the current fee amount owed by Readway because of Readway's systematic pattern of delay, not out of any desire to cause prejudice to Readway or harm to the judicial system." *City of Wilmington v. Janeve Co.*, 2014 Del. Super. LEXIS 298, at *10 (Del.

Super. Ct. June 13, 2014). Defendants should not be able to now benefit from their dilatory behavior by invoking the provisions of Rule 41(a).

/s/ Rosamaria Tassone-DiNardo
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