

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
NO. 2007-CA-01549

BETTY REED

DEFENDANT/APPELLANT

V.

CHARLES RAY FLORIMONTE

PLAINTIFF/APPELLEE

**BRIEF OF THE APPELLANT**  
**ORAL ARGUMENT REQUESTED**

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MS Bar No. [REDACTED]

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court may evaluate possible disqualification or recusal.

1. Hon. Eugene Love Fair, Jr.  
Chancery Judge of Forrest County
2. Penny Jones Alexander, Esq.  
Attorney for Appellee Charles Ray Florimonte
3. Alexander Ignatiev, Esq.  
Attorney for Appellant Betty Reed
4. Jimmy C. Havard  
Chancery Clerk of Forrest County

  
ATTORNEY FOR APPELLANT

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## **STATEMENT OF THE ISSUE**

**The Chancery Court of Forrest County erred as a matter of law when it found that Florimonte was entitled to actual notice of Reed's tax deed, beyond the legally sufficient process provided by statute.**

## **STATEMENT OF THE CASE**

This matter arises from the Order of the Chancery Court of Forrest County Denying Motion to Alter or Amend, entered on August 6, 2007. Defendant Betty Reed timely perfected her appeal.

### **NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW**

On June 11<sup>th</sup>, 2006, Florimonte, filed his Complaint to Void Tax Sale, to Cancel the Tax Deed and to Remove Cloud on Title, claiming that Reed failed to give adequate notice of the tax sale, and that the affidavit regarding notice was defective. R. at 7-19.

Reed filed her Answer and Counter-Claim against Florimonte for confirmation of the tax sale. R. at 23-25. Pursuant to Mississippi Code Annotated 11-17-1, Reed joined other parties in the litigation, specifically Jim Hood, in his Capacity as the Attorney General for the State of Mississippi, Jimmy C. Havard, in his Capacity as the Chancery Clerk of Forrest County, Mississippi, Jon Mark Weathers, in his capacity as the District Attorney for Forrest County, Mississippi, and any and all other interested parties, all of which either admitted to the allegations in the Counter-Complaint or permitted a default judgment to be had against them. R. at 26-32, 54-66.

The Chancery Court of Forrest County, after a trial on the merits, found that the tax sale was void for the failure of the Chancery Clerk of Forrest County to strictly comply with the notice statute, and ordered that the Defendant be paid a redemption value of \$112.84. R. at 80-94.

## **STATEMENT OF THE FACTS**

On October 2<sup>nd</sup>, 2001, Charles Ray Florimonte, (hereinafter "Florimonte") received a deed to property recorded at Book 872, Page 342, PPIN 3642. Exhibit 1. The property taxes for said property were unpaid from the year 2002 through the year 2005. T. 13-15. On August 25<sup>th</sup>, 2003, the Forrest County Chancery Clerk sold the property to Betty Reed ("Reed") for unpaid taxes. Exhibit 9. Subsequently, two years passed and no other payments or taxes were paid on the property. On July 19<sup>th</sup>, 2005, a Notice of Forfeiture was filed with the Chancery Clerk of Forrest County, which stated that unless the property was redeemed by or before August 25<sup>th</sup>, 2005, the land would vest and become absolute. Exhibit 2.

The office of the Forrest County Chancery Clerk attempted to serve Florimonte with service at the address listed as the Grantee's address on the deed, specifically 1107 West Pine Street, Hattiesburg, MS 39401. Exhibit 3. This service was returned undeliverable and the deputy sheriff could not find Florimonte or any member of his family in the County. Subsequently, the office of the Forrest County Chancery Clerk sent Florimonte a certified letter, return receipt requested, to the same address at 1107 West Pine Street, MS 39401. The letter was returned "vacant", and "not deliverable as addressed and unable to forward." Exhibit 4.

The Forrest County Chancery Clerk published a Notice to Florimonte that the property would be sold for taxes in the Hattiesburg American, the first day of publication being July 9<sup>th</sup>, 2005. Exhibit 5. This notice included his name and the property description. The office of the Forrest County Chancery Clerk then did a search of the



area, including the phone directory, the City Tax Collector records and the City Tax Directory to find Florimonte, but was unable to find him, and filed an affidavit attesting to this. Exhibit 6. On September 12<sup>th</sup>, 2005, the office of the Forrest County Chancery Clerk filed a Tax Deed vesting the property to Betty J. Reed. Exhibit 9.

## **SUMMARY OF THE ARGUMENT**

The chancellor found found that the Sheriff had to give actual notice to Florimonte when attempting the service process and that the affidavit of the Chancery Clerk did not suffice to give notice. A proper review of the case law and the applicable statute demonstrates that the trial court erred as a matter of law. Actual notice is not required to strictly comply with the statute regarding the validity of tax deeds. Neither is there a prescribed form the Chancery Clerk's affidavit. Finally, public policy favors validating tax deeds whose vestiture complies strictly with the statute.

## **ARGUMENT**

This Court should reverse the judgment of the Chancery Court of Forrest County finding that the tax deed of Betty Reed was defective for improper statutory notice by the Chancery Clerk.

## **STANDARD OF REVIEW**

The decisions of a chancellor are reviewed under a two-fold standard of review: questions of fact are reviewed for clear error or abuse of discretion, and questions of law are reviewed *de novo*. *Rush v. Wallace Rentals, LLC*, 837 So. 2d 191, 194 (11) (Miss. 2003) (citing *Bell v. Parker*, 563 So. 2d 594 (Miss. 1990)).

**The Chancery Court of Forrest County erred as a matter of law when it found that Florimonte was entitled to actual notice of Reed's tax deed, beyond the legally sufficient process provided by statute.**

**1. The statute does not require that actual notice be given to the landowner.**

The chancellor found that the Sheriff had to give actual notice to Florimonte when attempting the service process, pursuant to *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So. 2d 679 (Miss. 2006). Secondly, the Court found that the affidavit of the Chancery Clerk did not suffice to give notice because it “appears to be less detailed than in *Lawrence v. Rankin*, 2004 So.2d (2003-CA-00008-COA) in which the Court found failure of a supporting affidavit which described a search even in local Court Records...” A proper review of the case law and the applicable statute demonstrates that the trial court erred as a matter of law. Both the case law and the statute are at odds with the interpretation of the trial court.

The first paragraph of the statute states that:

[t]he clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same.

Miss. Code Ann. § 27-43-3 (Rev. 2005).

The statute also states that “[i]n the event that notice by mail is returned undelivered and **the personal notice as herein above required to be served by the sheriff is returned not found**, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address.” *Id.*, emphasis added. Further, the statute specifically states: “[t]he failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and the sheriff have complied with the duties herein prescribed for them.” *Id.*

Nowhere in the statute is actual notice required. The only requirement is that the Chancery Clerk and Sheriff comply with the statute. The statute simply requires that the Chancery Clerk attempt to serve the land owner through personal service, by registered mail and notice in the newspaper. After that, if they are not served, then it requires that an affidavit be done that reflects the search made by the Chancery Clerk. In the case at hand the Chancery Clerk did not locate the Plaintiff/Counter-Defendant and therefore complied with the third paragraph of the statute.

The chancellor relied upon *Viking Investments, LLC v. Addison Body Shop, Inc.*, when making his ruling that the statute requires actual notice. 931 So. 2d 679 (Miss. 2006). *Viking* is easily distinguishable from the case at hand in that *Viking* dealt

specifically and only with the first requirement of Mississippi Code Annotated. § 27-43-3, not the latter paragraph that deals with the effect of lack of personal service. *Id.* at 682 (¶8). In *Viking* the Defendant was actually served with notice via mail and published against, but he was not personally served with process. *Id.* At 681-2 (¶7). Viking took the position that because the Addison was noticed, no duty arose to make a search and inquiry and thus file any affidavits: “Viking maintains that “a strict reading and interpretation of Mississippi Code annotated § 27-43-3 indicated that both notice by personal service and certified mail must return not found before the duty of further search and inquiry by the Chancery Clerk is triggered.” *Id.* At 680-1 (¶4). The argument in *Viking*, and the sole issue that it dealt with, was whether actual notice by mail made the issue of personal notice via the Sheriff moot. *Id.* The Court in that case ruled that the Chancery Clerk must have a diligent search, if the landowner is not served with both personal service and by mail. *Id.* at 683 (¶10).

In *Rush v. Wallace Rentals, LLC*, the Supreme Court upheld a tax sale where, “In late June or early July of 2000, the Chancery Clerk tried to notify Moffite of the tax delinquency via process served by the Sheriff’s Department. The sheriff’s return on the process (indicating a physical location of 10159 Morgan Road, Meridian, Mississippi 39307) revealed ‘attempted, not found’.” 837 So.2d 191, 192 (¶5) (Miss 2003). In *Lawrence v. Rankin*, the sheriff also did not locate the land owner. 870 So.2d 673 (Miss. Ct. App. 2004). “Following the diligent search, the Sheriff of Jackson County attempted to personally serve Rankin with the notice to landowner. The sheriff’s return indicated that the deputy sheriff was advised that Rankin ‘relocated.’” *Id.* at 675 (¶7). In *Lawrence*

the court did not address the question of actual notice, because actual notice is a red herring.

Actual notice is required by the law in nearly every case in this land before a court has jurisdiction. Actual notice is not required for the confirmation of a tax deed. The statute requires simply that the sheriff attempt to find the land owner, not that he actually perfect process pursuant to Rule 4. The Chancery Clerk must then attempt to perfect service of process by registered mail and publication. The affidavit produced by the Chancery Clerk is not properly made unless service cannot be completed by all accepted conventional means.

The Chancery Clerk failed to perfect service upon Florimonte, and duly filed the affidavit. This is simply the unvarnished truth, and cannot be disputed.

**2. The statute does not require a particular form of supporting affidavit from the Chancery Clerk in the event that personal notice is returned undeliverable.**

While the Court has the discretion to decide what is sufficient regarding the Clerk's affidavit, it wrongly relied upon *Lawrence v. Rankin* to determine the sufficiency of the Clerk's affidavit. 870 So.2d 673 (Miss. Ct. App. 2004). The deed in *Lawrence* was declared void, not because the affidavit was insufficient, but because the Chancery Clerk in that case failed to make an affidavit at all: “[h]owever, after a comprehensive reading of the record, it is undisputed that the Chancery Clerk failed to file the supporting affidavits required by the statute when personal notice is returned undelivered.” *Id.* at 676 (¶13). “The failure of the supporting affidavits renders the tax deed to Lawrence void.” *Id.* at 676 (¶14). The chancellor erred when he determined that *Lawrence*

established the standard by which such affidavits be judged. The Chancery Clerk in that case could have spent weeks searching for the land owner, and expended thousands of dollars that would have availed him not at all, absent the presence of the affidavit.

The only case with an in depth discussion of the sufficiency of the Chancery Clerk's affidavit in a tax deed case is *Rush v. Wallace Rentals, LLC*, 837 So.2d 191 (Miss 2003). The facts and the affidavit in that case are very similar to those in the present case. In *Rush* the Chancery Clerk used a form affidavit which had errors in construction, but sufficed to meet the requirements of the statute, even though the affidavit was partially false. *Rush*, 837 So. 2d 199-200 (¶¶25-7).

Finally, in every case where an affidavit was filed by a Chancery Clerk and the Mississippi Supreme Court has found that a due diligent search was not done there was some affirmative proof shown by the person contesting the tax deed. This could take the form of phone records, tax records or some sort of testimony that if the Chancery Clerk had in fact exercised a due diligent search, that the land owner would have been located. Florimonte put on no proof of this kind. The only evidence in the record established not only that a diligent search failed to find Florimonte, but in fact that he could not be found by the normal diligent means employed since time immemorial by Chancery Clerks of this state. This included the phone directories, Polk directories and testimony by a deputy Chancery Clerk of Court of Forrest County, that he was still incapable of finding Florimonte in the system at the time of trial. Florimonte testified that he did nothing to assist the Chancery Clerk, and did not know how the Clerk could have located another address for him.

In *Hart v. Catoe*, the land owner could easily have been found by the Chancery Clerk due to the fact that he existed in the register of landowners maintained in the Tax Collector's Office and it was undisputed that the Chancery Clerk failed to file the affidavits that were required. 390 So.2d 1001 (Miss 1980). The trial court, in the person of eminent Chancellor Howard L. Patterson, Jr., pointed out that, "the address of the landowner at the time of the statutory notice was given, was on file in the office of the Tax Collector of Forrest County, Mississippi, and was therefore available as a reasonable place of search and inquiry." *Id.* at 1003.

In *Roach v. Goebel*, the court found that a Chancery Clerk's office did not perform a due and diligent search where the Clerk that signed the affidavit stated on the record that she did not perform the due diligent search, repudiating the affidavit itself. 856 So.2d 711 (Miss. Ct. App 2003). "As noted earlier, there was an affidavit from Ms. Ladner in which it was claimed that Ms. Ladner personally examined the phone directories, land records and tax rolls. However, this affidavit was repudiated by Ms. Ladner at Trial." *Id.* at 715 (¶25). Further, in that case the Court found that, based on proof presented by the Defendant, "had the land and tax records been searched as alleged in Ms. Ladner's affidavit, a diligent search should have indicated that on March 31, 1995, Trussell filed an application for homestead exemption." *Id.* at 716 (¶26). ~~To controvert~~ an affidavit by the Clerk, Mississippi has required some sort of affirmative proof that a due and diligent search did not occur. This evidence has generally taken the form of proof that the Chancery Clerk should have found the land owner and had done the search. Florimonte produced no such evidence.



Florimonte could find no case law where an affidavit that was not impeached, or where the party seeking to overturn a tax deed did not put on some sort proof that a due and diligent search was not made, was found to be lacking. Persons attacking a tax deed are under an obligation to present evidence of some kind to refute the affidavit, which Florimonte could not and cannot do.

**3. Public policy favors the affirmation of tax deeds that properly vest.**

Generally, public policy favors the land owner in tax deed matters, and often will allow the original land owner to re-deem the property if the statutory notice has not been properly supported. *Rush, supra et infra*. The deputy Chancery Clerk of Forrest County testified that the affidavit provided in this case was identical to the affidavits for thousands of other parcels of property that have been sold for tax sales in Forrest County in the tenure of the present Chancery Clerk. He further testified that to his knowledge, the Chancery Clerk followed every rule that has been laid out by the state for the proper sale of property by the Chancery Clerk. If this tax deed is invalid, then every other tax deed issued by the Chancery Clerk of Forrest County for the past three decades is suspect.

The land owner, Florimonte, did nothing to assist the Chancery Clerk to locate him. Florimonte stated that he did not know about his obligation to pay the taxes, and further that he had no knowledge of how the address on West Pine ended up on the Deed. Florimonte did not put on any proof as to why the search was insufficient. He did not, in any way, provide any records of how the Chancery Clerk could possibly have located

him. The ludicrousness of Florimonte's attack on the tax deed may best be summed up by this statement from the trial court in *Rush*:

To grant Eloise Moffite [the Defendant] the relief that she seeks would mean that a property owner can provide erroneous information at the time he or she acquires title to land, totally ignore the fact that real property taxes come due every year, make no effort to provide any correct information to the appropriate authorities, and then expect clerks charged with seeking information on seven hundred to a thousand other delinquent taxpayers to go beyond the current information available in their office to find his or her current address. The fact is that the Chancery Clerk did make diligent search and inquiry to find Eloise Moffite in conformance with the requirements of the law.

*Rush, supra* at 199.

Similarly, in this case the Chancery Clerk made diligent search of the records available, following the Sheriff's failure to give notice as required. The affidavit was unambiguous, and unimpeached. Reed's deed should have been confirmed by the trial court, and this Court should overturn the erroneous decision of the Chancellor.

## CONCLUSION

Actual notice is not a requirement of the statute concerning vestiture of tax deeds. The statute contemplates a failure to provide actual notice through conventional service and publication, and in fact creates a fail-safe by affidavit. This affidavit must only be provided if legally sufficient notice, not actual notice, cannot be given to the landowner. Only then must the affidavit be produced.

There is no accepted form for the affidavit. Some affidavits may be checklist; others are fill-in forms. Still others may be individually made for each delinquent taxpayer. But so long as the affidavit is not impeached, its veracity cannot be doubted.

Should the chancellor's decision stand, it would lead to utter chaos. Every tax deed issued by the Chancery Clerk of Forrest County would be suspect, leading to a tidal wave of litigation. The purpose of the affidavit is not to assure notice: on its face, it assures that no notice occurred, and provides proof that a diligent search was made in an attempt to provide that notice. To go behind the affidavit and find that the affidavit was accurate in its particulars, but then determine that it was not sufficient, spits in the face of the statute and equity.

Mississippians tend to forget the primary rule of equity: it is a court of limited recourse and can provide no remedy beyond the law. Thomas Jefferson described the limits of equity in this way:

1. That it cannot take cognisance of any case wherein the common law can give complete remedy.
2. That it cannot interpose in any case against the express letter and intention of the legislature. If the legislature means to enact an injustice, however palpable, the court of Chancery is not the body with whom a correcting power is lodged.

3. That it shall not interpose in any case which does not come within a general description and admit of redress by a general and practicable rule.

Letter to Philip Mazzei, Nov. 1785

Clearly, the Chancellor felt that the law countenanced a palpable injustice. The divestment of property for a failure to pay the ad valorem tax is repugnant to many people, chiefly those who have fallen victim to it. But the statute is clear, and equity must bow to the law, else chaos stirs on the horizon.

It is for these reasons that this Court should overturn the Judgment of the Chancery Court of Forrest County, and confirm the tax deed of Betty Reed.

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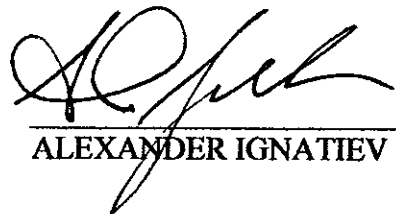
PLAINTIFF/APPELLEE

**CERTIFICATE OF SERVICE**

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi, Ms. Betty Sephton, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 21<sup>st</sup> day of January, A.D. 2008.

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\_\_\_\_\_  
ALEXANDER IGNATIEV

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**CERTIFICATE OF SERVICE**

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this  
day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the  
Appellant to the following:

Hon. Eugene Love Fair, Jr.  
Chancery Judge of Forrest County  
P.O. Box 872  
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THIS the 21st day of January, A.D. 2008.

  
\_\_\_\_\_  
ALEXANDER IGNATIEV