

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2008-CA-00121**

**REBUILD AMERICA, INC.**

**APPELLANT**

**VERSES**

**ROBERT K. MILNER AND WIFE,  
PATRICIA K. MILNER AND WACHOVIA  
BANK, N.A., SUCCESSOR IN INTEREST  
TO FIRST UNION NATIONAL BANK, AS  
INDENTURE TRUSTEE**

**APPELLEES**

---

***BRIEF OF APPELLANT, REBUILD AMERICA, INC.***

---

---

***APPEAL FROM THE CHANCERY COURT OF PEARL  
RIVER COUNTY, MISSISSIPPI***

---

***ORAL ARGUMENT REQUESTED***

**KIMBERLY P. TURNER, ESQ  
E. BARRY BRIDGFORTH, ESQ.  
HENRY, BARBOUR, DECELL & BRIDGFORTH, LTD.  
774 Avery Boulevard North  
Post Office Box 4681 (Jackson, 39296)  
Ridgeland, Mississippi 39157  
Telephone: 601.991.2231  
Telecopier: 662.796.0255**

**ATTORNEYS FOR APPELLANT**

**IN THE SUPREME COURT OF MISSISSIPPI**

**CASE NO. 2008-CA-00121**

**REBUILD AMERICA, INC.**

**APPELLANT**

**VERSES**

**ROBERT K. MILNER AND WIFE,  
PATRICIA K. MILNER AND WACHOVIA  
BANK, N.A., SUCCESSOR IN INTEREST  
TO FIRST UNION NATIONAL BANK, AS  
INDENTURE TRUSTEE**

**APPELLEES**

**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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

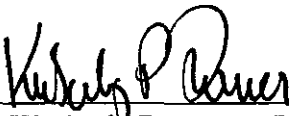

1. Rebuild America, Inc., Appellant;
2. Robert K. Milner, Appellee;
3. Patricia K. Milner, Appellee;
4. Wachovia Bank, N.A., as Successor in Interest to First Union National Bank, Appellee;
5. Henry, Barbour, DeCell & Bridgforth, Ltd., inclusive of attorney Kimberly P. Turner, Attorney of Record for Appellant; and

6. Robison and Harbour, inclusive of attorney W. Stewart Robison, Attorney of Record for Appellee(s).

Respectfully submitted,  
REBUILD AMERICA, INC.

By and Through Counsel:

HENRY, BARBOUR, DECELL & BRIDGFORTH,  
LTD.

By:   
Kimberly P. Turner (MBN )

## TABLE OF CONTENTS

Certificate of Interested Persons .....	ii
Table of Contents .....	iv
Table of Cases, Statutes and Other Authorities .....	v
Statement of Issues .....	1
Statement of the Case .....	1
Statement of Facts .....	3
Summary of the Argument .....	6
Argument .....	9
I. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN OVERRULING THE MOTION TO DISMISS OF DEFENDANT, REBUILD AMERICA, INC., AND THEREAFTER ALLOWING PLAINTIFFS, ROBERT K. MILNER AND PATRICIA K. MILNER, TO MAINTAIN THE LOWER COURT ACTION AND PRESENT EVIDENCE AND TESTIMONY THEREIN AS TO THE ALLEGED INSUFFICIENCY OF THE NOTICING PROVIDED BY THE PEARL RIVER CHANCERY CLERK PRIOR TO EXPIRATION OF THE RESPECTIVE REDEMPTION PERIOD AND PRIOR TO FORFEITURE OF THE PROPERTY .....	9
II. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE QUITCLAIM DEED EXECUTED BY PLAINTIFFS, ROBERT MILNER AND PATRICIA MILNER, TO DEFENDANT REBUILD AMERICA, INC., DATED NOVEMBER 3, 2006 AND RECORDED IN THE LAND RECORDS OF THE CHANCERY CLERK OF PEARL RIVER COUNTY IN BOOK 920 AT PAGE 550, SAID CONVEYANCE DELIVERED SUBSEQUENT TO THE DATE OF THE PREVIOUS CHANCERY CLERK'S CONVEYANCE OF SEPTEMBER 26, 2005 AND SUBSEQUENT TO THE INITIATION OF THE LOWER COURT ACTION FILED NOVEMBER 2, 2006 .....	11
III. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE AUGUST 25, 2003 TAX SALE, CHANCERY CLERK'S CONVEYANCE TO WACHOVIA BANK, N.A. FOR MAGNOLIA INVESTORS, LLC AND SUBSEQUENT QUITCLAIM DEED AND ASSIGNMENT TO DEFENDANT, REBUILD AMERICA, INC., DATED OCTOBER 18, 2005 .....	13
Conclusion .....	15
Certificate of Service .....	16

**TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Campbell v. State Highway Commission</i> , 54 So. 2d 654 (Miss. 1951) .....	11
<i>Covington v. Butler</i> , 242 So. 2d 444 (Miss. 1970) .....	11
<i>Day v. Davis</i> , 8 So. 203 (Miss. 1886) .....	11
<i>Gober v. Chase Manhattan Bank</i> , 918 So. 840 (Miss. App. 2006) .....	9
<i>Lamar Life Ins. Co. v. Billups</i> , 169 So. 32 (Miss. 1936) .....	9
<i>Longmire v. Mars, et al.</i> , 86 So. 753 (Miss. 1921) .....	11
<i>Osborne, et ux. v. Harrison</i> , 447 So. 2d 122 (Miss. 1984) .....	9
 <u>Statutes</u>	
Mississippi Code Annotated § 27-43-3 (Rev. 2005) .....	9, 10, 13
Mississippi Code Annotated § 27-43-7 (Rev. 2005) .....	9, 10, 13
Mississippi Code Annotated § 27-43-11 (Rev. 2005) .....	9





### **STATEMENT OF ISSUES**

- I. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN OVERRULING THE MOTION TO DISMISS OF DEFENDANT, REBUILD AMERICA, INC., AND THEREAFTER ALLOWING PLAINTIFFS, ROBERT K. MILNER AND PATRICIA K. MILNER, TO MAINTAIN THE LOWER COURT ACTION AND PRESENT EVIDENCE AND TESTIMONY THEREIN AS TO THE ALLEGED INSUFFICIENCY OF THE NOTICING PROVIDED BY THE PEARL RIVER CHANCERY CLERK PRIOR TO EXPIRATION OF THE RESPECTIVE REDEMPTION PERIOD AND PRIOR TO FORFEITURE OF THE PROPERTY.
- II. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE QUITCLAIM DEED EXECUTED BY PLAINTIFFS, ROBERT MILNER AND PATRICIA MILNER, TO DEFENDANT REBUILD AMERICA, INC., DATED NOVEMBER 3, 2006 AND RECORDED IN THE LAND RECORDS OF THE CHANCERY CLERK OF PEARL RIVER COUNTY IN BOOK 920 AT PAGE 550, SAID CONVEYANCE DELIVERED SUBSEQUENT TO THE DATE OF THE PREVIOUS CHANCERY CLERK'S CONVEYANCE OF SEPTEMBER 26, 2005 AND SUBSEQUENT TO THE INITIATION OF THE LOWER COURT ACTION FILED NOVEMBER 2, 2006.
- III. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE AUGUST 25, 2003 TAX SALE, CHANCERY CLERK'S CONVEYANCE TO WACHOVIA BANK, N.A. FOR MAGNOLIA INVESTORS, LLC AND SUBSEQUENT QUITCLAIM DEED AND ASSIGNMENT TO DEFENDANT, REBUILD AMERICA, INC., DATED OCTOBER 18, 2005.

### **STATEMENT OF THE CASE**

This Appeal is taken from that Judgment Setting Aside Tax Sale and Deed entered by the Chancery Court of Pearl River County, Mississippi on December 18, 2007, in which the Honorable James H. C. Thomas, Jr. voided, set aside and held for naught an August 25, 2003 tax sale of certain real property previously owned by Plaintiffs, and also, voided, set aside and held for naught a separate, subsequent conveyance by Plaintiffs, Robert Milner and Patricia Milner, to Defendant, Rebuild America, by Quitclaim Deed recorded in the office of the Chancery Clerk of Pearl River County, Mississippi in Land Deed Book 920 at Page 550. (R. at pp. 39-44). .

The lower court case was initiated by the filing of a Complaint on or about November 2,



2008, in which Plaintiffs, Robert K. Milner, Patricia K. Milner and Wachovia Bank, N.A., as Successor in Interest to First Union National Bank, sought to set aside a 2003 tax sale of certain real property located in Pearl River County, Mississippi, and subsequent conveyance of the same to Defendant, Rebuild America, Inc. (R. at pp. 2-14). In response and opposition to the Complaint, Defendant, Rebuild America, Inc., filed its Motion to Dismiss based upon the lack of standing of Plaintiffs, Robert K. Milner and Patricia K. Milner, to maintain the underlying action, together with its Answer with Affirmative Defenses to Plaintiffs' Complaint and separate Counterclaim seeking the eviction of Plaintiffs, Robert K. Milner and Patricia K. Milner, from the subject property. (R. at pp. 15-31).

Though the Motion of Defendant, Rebuild America, Inc., was properly scheduled for hearing on June 20, 2007, no hearing took place on this date, and no Order was entered by the Court upon the pending Motion. (R. at pp. 34-35). On the date on which the action was scheduled for trial, Defendant, Rebuild America, Inc., renewed its pending Motion to Dismiss both within chambers prior to the commencement of the trial upon the record, and on the record upon the commencement of the trial. (Tr. at pp. 5-11). After overruling Defendant's Motion to Dismiss, the trial commenced and concluded on November 29, 2007.

Subsequent to receipt of the lower court's Judgment Setting Aside Tax Sale and Deed, Defendant, Rebuild America, Inc., filed its Notice of Appeal on January 14, 2008, together with Designation of the Record and Certificate of Compliance with Rule 11(b)(1) of the Mississippi Rules of Appellate Procedure. (R. at pp. 45-50).

### **STATEMENT OF FACTS**

This case arises from the August 25, 2003 tax sale to Wachovia Bank, N.A., for Magnolia Investors, LLC, for unpaid ad valorem taxes for the year ending 2002 of that certain real property previously owned by Plaintiffs, Robert K. Milner and Patricia K. Milner, situated in Pearl River County, Mississippi, more particularly described as follows, to-wit:

Begin at the Northeast corner of Lot 48 of H. E. Allen's Addition to the City of Poplarville, as per plat thereof on file in the Office of the Chancery Clerk of Pearl River County, Mississippi; thence run South 17 ½ feet; thence run West 200 feet for the point of beginning of the land conveyed hereby; thence run West 200 feet; thence run South 100 feet; thence run East 200 feet; thence run North 100 feet to the Place of Beginning, being a part of the SW 1/4 of NE 1/4 of Section 31, Township 2 South, Range 15 West, Pearl River County, Mississippi,

hereinafter referred to as the "Property". (Trial Ex. 1). At the time of the 2003 tax sale, Plaintiff Wachovia Bank, N.A. as successor in interest to First Union National Bank held a lien against the Property by virtue of an original Deed of Trust executed by Plaintiffs, Robert K. Milner and Patricia K. Milner, in favor of W. Stewart Robison, as Trustee for Jim Walter Homes, Inc., as Beneficiary thereof, securing an original principal indebtedness in the amount of One Hundred Ninety-Eight Thousand Nine Hundred and No/100 Dollars (\$198,900.00), and recorded in the land records of the office of the Chancery Clerk of Pearl River County, Mississippi on January 8, 2001 at 9:19 a.m., in Book 904 at Page 67 (hereinafter the "Deed of Trust"). ( Trial Ex. 2).

Between April 20, 2001 and December 11, 2001, said Deed of Trust was assigned by "Mississippi Assignment of Deed of Trust" on seven separate occasions, specifically as follows: (1) on April 20, 2001, from Jim Walter Homes, Inc., as Assignor, to Mid-State Homes, Inc., as Assignee, recorded in the office of the Chancery Clerk of Pearl River County, Mississippi on June 20, 2001 at 9:35 a.m., in Book 930 at Page 228; (2) on April 20, 2001, from Mid-State Homes, Inc.,

as Assignor, to Mid-State Trust IX, as Assignee, recorded in the aforesaid office on June 20, 2001 at 9:36 a.m., in Book 930 at Page 229; (3) on April 20, 2001, from Mid-State Trust IX, as Assignor, to First Union National Bank, as Assignee, recorded in the aforesaid office on June 20, 2001 in Book 930 at Page 230 (Tr. at pp. 30-33; Trial Ex. 12); (4) on December 11, 2001, from First Union National Bank and Mid-State Trust IX, as Assignors, to Mid-State Trust X, as Assignee, recorded in the aforesaid office on December 17, 2001 at 9:45 a.m., in Book 965 at Page 84; (5) on December 11, 2001, from Mid-State Trust X, as Assignor, to First Union National Bank, as Assignee, recorded in the aforesaid office on December 17, 2001 at 9:45 a.m., in Book 965 at Page 86; (6) on December 11, 2001, from First Union National Bank, and Mid-State Trust IX, as Assignors, to Mid-State Trust X, as Assignee, recorded in the aforesaid office on December 17, 2001 at 9:45 a.m., in Book 1193 at Page 263; and (7) on December 11, 2001, from Mid-State Trust X, as Assignor, to First Union National Bank, as Assignee, recorded in the aforesaid office on December 17, 2001 at 9:45 a.m., in Book 1193 at Page 266. (Trial Ex. 2, 3).

With no redemption having been made the two (2) years following the August 25, 2003 tax sale, the Chancery Clerk of Pearl River County, Mississippi provided notice of forfeiture, via certified mail, return receipt requested, to the lienholder by assignment, First Union National Bank, to that address as set forth by Mississippi Assignment of Deed of Trust dated April 20, 2001 and recorded in the aforesaid office in Book 930 at Page 230, which was received by First Union National Bank on June 19, 2005, as evidenced by the receipt returned to the Chancery Clerk. (R. at p. 28; Trial Ex. 4, 12). With no redemption having been made on or before August 25, 2005, the Property was finally sold and forfeited by Plaintiffs, Robert K. Milner and Patricia K. Milner, as well as by the lienholder by assignment, Plaintiff Wachovia Bank, N.A., as successor in interest to First Union National Bank, by virtue of Chancery Clerk's Conveyance to Magnolia Investors, LLC, dated

September 26, 2005 and recorded in the land records of the Chancery Clerk's office in Book 886 at Page 161. (Trial Ex. 8 ). By Quitclaim Deed and Assignment dated October 18, 2005, Wachovia Bank, N.A. for Magnolia Investors, LLC conveyed all right, title and interest in and to the Property to Defendant, Rebuild America, Inc. (Trial Ex. 9).

Subsequent to its acquisition of the Property in October, 2005, Plaintiff, Rebuild America, Inc., initiated communication with Plaintiff, Patricia K. Milner, by virtue of written correspondence and oral communication via telephone. (Tr. at pp. 47-49, 70-74). Open communication between Plaintiff, Patricia K. Milner, and Defendant, Rebuild America, Inc., continued through November of 2006, during which Patricia K. Milner stated an intent and desire to purchase the Property from Rebuild America, Inc. and execute a Quitclaim Deed in favor of Rebuild America, Inc. so as to qualify for the necessary financing based upon an unquestionable and clear chain of title. (Tr. at pp. 74-75). During this same time period, Plaintiffs, Robert K. Milner and Patricia K. Milner, consulted with an independent attorney, the Honorable Edwin Francis Tullos. (Tr. at pp. 50-51). One day after the filing of the Complaint to Set Aside the August 25, 2003 tax sale and subsequent conveyance by Quitclaim Deed and Assignment to Rebuild America, Inc., Robert Milner and Patricia Milner executed a Quitclaim Deed unto Rebuild America, Inc., said conveyance properly recorded in the land records of the Chancery Clerk of Pearl River County, Mississippi on December 4, 2006 at 9:43 a.m., in Book 920 at Page 550. (R. at pp. 29-30; Trial Ex. 10).

### SUMMARY OF THE ARGUMENT

The trial court erred, as a matter of law, in overruling the Motion of Defendant, Rebuild America, Inc., stating no legitimate reason therefor, and consequently allowing Plaintiffs, Robert K. Milner and Patricia K. Milner to proffer evidence and testimony at trial as to the alleged insufficiency of that notice provided to them prior to expiration of the redemption period and forfeiture of the Property, and setting aside that Quitclaim Deed voluntarily executed by Robert Milner and Patricia Milner to Rebuild America. Rebuild America premised its Motion to Dismiss upon the lack of standing of Plaintiffs, Robert K. Milner and Patricia K. Milner, to maintain the lower court action by reason of their conveyance of all right, title and interest in and to the Property by Quitclaim Deed to Rebuild America, dated November 3, 2006, and properly recorded in the land records of the Chancery Clerk of Pearl River County, Mississippi in Book 920 at Page 550. (R. at pp. 15-31).

Mississippi law requires a party bringing an action to set aside a tax sale to prove title in him or herself, or such interest as will warrant the action. Plaintiffs, Robert K. Milner and Patricia K. Milner, voluntarily transferred all right, title and interest they may have had subsequent to the Chancery Clerk's Conveyance of September 26, 2005 to Rebuild America as of the date of the quitclaim conveyance, thereby relinquishing any right to challenge the preceding tax sale. (R. at p. 29; Trial Ex. 10). Thus, Robert K. Milner and Patricia K. Milner had no standing to maintain the lower court action and, consequently, any evidence or testimony proffered by either pertaining to the alleged deficiencies in that notice provided either by the Chancery Clerk of Pearl River County prior to forfeiture of the Property was wholly irrelevant and inadmissible at trial.

Additionally, Plaintiffs, Robert K. Milner and Patricia K. Milner did not seek, within the Complaint to Set Aside Tax Sale, Tax and Subsequent Deed, to set aside that Quitclaim Deed

executed in favor of Rebuild America, Inc. (R. at pp. 2-12). As such, the matter was not properly before the Court and was therefore outside of the lower court's discretion to set aside said conveyance. Even assuming, *arguendo*, that it was within the lower court's province to contemplate the conveyance by Plaintiffs, Robert Milner and Patricia Milner, to Defendant, Rebuild America, Inc., the court erred, as a matter of law, in setting aside said conveyance by reason of inadequate consideration and the alleged absence of legal representation. (R. at pp. 42, 44).

In the absence of fraud, which was neither plead nor proven by the evidence adduced at trial by Robert Milner or Patricia Milner, a voluntary conveyance of land cannot be set aside at the instance of the grantor because of a failure of consideration. Though the absence of legal representation also does not provide a valid basis upon which to set aside a conveyance, the testimony of Plaintiff Patricia Milner and Ms. Tiffany Cone, corporate representative of Defendant, Rebuild America, Inc., clearly established, without contradiction, that Robert Milner and/or Patricia Milner was in contact with and given the benefit of legal counsel from the Honorable Edwin Francis Tullos, during the same period of time of communication between said plaintiff and Defendant, Rebuild America, Inc. pertaining to the execution of the Quitclaim Deed in connection with the stated intent of Patricia Milner to purchase the Property. (Tr. at pp. 50-51).

The lower court lastly erred, as a matter of law, in concluding that there had not been substantial compliance with the statutory notice requirements of the maturation of the August 25, 2003 tax sale and consequent forfeiture of the Property by Chancery Clerk's Conveyance to Magnolia Investors, LLC. (R. at p. 43). The only relevant inquiry to the Court's determination as to the adequacy of the noticing provided by the Chancery Clerk of Pearl River County was that pertaining to the notice provided to the lienholder, First Union National Bank (a/k/a Plaintiff, Wachovia Bank, N.A., as successor in interest to First Union National Bank).

Whereas the Chancery Clerk is required to provide three (3) forms of notice to the reputed landowner pursuant to Mississippi statute prior to expiration of the redemption period and forfeiture of property, only notice by certified mail, return receipt requested is required to be provided to a lienholder. The original lienholder in this case, namely Jim Walter Homes, Inc., was not the lienholder of record at the time immediately preceding forfeiture of the Property by virtue of a series of assignments of the underlying Deed of Trust. The address derived by the Pearl River Chancery Clerk was indeed an address provided within one of the seven separate assignments filed in the land records and, more importantly, was a valid address for said lienholder as evidenced by the return receipt maintained by the Chancery Clerk and proffered as evidence at trial. (Trial Ex. 4, 12). Thus, the statutory notice provided to First Union National Bank was sufficient to apprise said lienor of the date on which the redemption period was to expire, and, given said lienor's failure to redeem the Property prior to that date, the August 25, 2003 tax sale and consequent Chancery Clerk's Conveyance to Magnolia Investors, LLC are valid.

## ARGUMENT

**I. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN OVERRULING THE MOTION TO DISMISS OF DEFENDANT, REBUILD AMERICA, INC., AND THEREAFTER ALLOWING PLAINTIFFS, ROBERT K. MILNER AND PATRICIA K. MILNER, TO MAINTAIN THE LOWER COURT ACTION AND PRESENT EVIDENCE AND TESTIMONY THEREIN AS TO THE ALLEGED INSUFFICIENCY OF THE NOTICING PROVIDED BY THE PEARL RIVER COUNTY CHANCERY CLERK PRIOR TO EXPIRATION OF THE REDEMPTION PERIOD AND PRIOR TO FORFEITURE OF THE PROPERTY.**

The court below incorrectly overruled the Motion to Dismiss of Rebuild America, Inc., Appellant herein, because the Plaintiffs, Robert K. Milner and Patricia K. Milner, had no legal standing to maintain the lower court action. Under Mississippi law, it is necessary, in order to have standing to sue to remove a tax deed as a cloud on title, that the plaintiff prove title in himself or herself, or such interest as will warrant the action. *Osborn v. Harrison*, 447 So. 2d 122, 123 (Miss. 1984). Regardless of whether the August 25, 2003 tax sale and subsequent Chancery Clerk's Conveyance dated September 26, 2005 divested Robert and Patricia Milner of title to the Property, said appellees voluntarily conveyed all right, title and interest therein to Appellant, Rebuild America, Inc. by separate Quitclaim Deed dated November 3, 2006. (Trial Ex. 10).

Having no standing to initiate the Chancery Court action, neither the argument(s) nor testimony of either Robert or Patricia Milner was relevant nor admissible at trial. It is long settled that a tax sale in which a lienor fails to receive notice is void as to that lienor. *Gober v. Chase Manhattan Bank*, 918 So. 840 (Miss. App. 2006), citing *Lamar Life Ins. Co. v. Billups*, 169 So. 32, 35-36 (Miss. 1936); Miss. Code Ann. § 27-43-11 (Rev. 2005). The notice required by the Chancery Clerk to be provided to the reputed landowner pursuant to Miss. Code Ann. § 27-43-3 is separate and distinct from that notice required to be provided to the lienholder pursuant to Miss. Code Ann. § 27-43-7.



Whereas, a challenge to the validity of a tax sale maintained by a previous landowner would rely upon the sufficiency of the noticing provided by the Chancery Clerk in accordance with Miss. Code Ann. § 27-43-3, i.e., notice of forfeiture by certified mail, return receipt requested, by personal service of process and by publication, a challenge to the validity of a tax sale maintained by a previous lienholder would rely upon the sufficiency of the noticing provided by the Chancery Clerk in accordance with Miss. Code Ann. § 27-43-7, i.e. notice of forfeiture by certified mail, return receipt requested.

Since the previous landowners, Robert K. Milner and Patricia K. Milner, voluntarily conveyed their interest in and to the Property by separate Quitclaim Deed, executed and delivered subsequent to the date of the Chancery Clerk's Conveyance of September 26, 2005, each relinquished his or her respective right to challenge the August 25, 2003 tax sale and subsequent conveyances. Moreover, by the voluntary conveyance of all right, title and interest in and to the Property by Robert and Patricia Milner, the statutory basis upon which each may have challenged the August 25, 2003 tax sale was likewise relinquished and could not be maintained by Plaintiff, Wachovia Bank, N.A., as successor in interest to First Union National Bank. Therefore, the court's consideration of the noticing requirements imposed upon the Chancery Clerk by Miss. Code Ann. § 27-43-3, given the lack of standing of Robert K. Milner and Patricia K. Milner, was reversible error.

**II. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE QUITCLAIM DEED EXECUTED BY PLAINTIFFS, ROBERT MILNER AND PATRICIA MILNER, TO DEFENDANT REBUILD AMERICA, INC., DATED NOVEMBER 3, 2006 AND RECORDED IN THE LAND RECORDS OF THE CHANCERY CLERK OF PEARL RIVER COUNTY IN BOOK 920 AT PAGE 550, SAID CONVEYANCE DELIVERED SUBSEQUENT TO THE DATE OF THE CHANCERY CLERK'S CONVEYANCE OF SEPTEMBER 26, 2005 AND SUBSEQUENT TO THE INITIATION OF THE LOWER COURT ACTION FILED NOVEMBER 2, 2006.**

The Chancery Court was incorrect in holding that the quitclaim conveyance from Robert Milner and Patricia Milner to Rebuild America, Inc., dated November 3, 2006, be set aside and held for naught based upon an alleged lack of adequate consideration and absence of legal representation. (R. at p. 4). In the absence of fraud, a voluntary conveyance of land cannot be set aside at the instance of the grantor because of a failure of consideration. *Covington v. Butler*, 242 So. 2d 444 (Miss. 1970); *Campbell v. State Highway Commission*, 54 So. 2d 654 (Miss. 1951), *quoting Longmire v. Mars, et al*, 86 So. 753, 754 (Miss. 1921)(a total failure of consideration for a voluntary conveyance, in the absence of fraud, is no ground for a cancellation of a deed); *Day v. Davis*, 8 So. 203 (Miss. 1886)(a voluntary conveyance of land cannot be vacated, at the instance of the grantor thereof, upon the mere ground that it was made without any consideration; nor will such grantor be permitted to dispute the existence of the consideration expressed in the deed).

The Quitclaim Deed executed by Robert Milner and Patricia Milner itself recites the consideration, stating:

FOR AND IN CONSIDERATION OF THE SUM OF ten dollars (\$10.00), cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of all of which is hereby acknowledged, the undersigned, Robert Milner and Patricia Milner, hereinafter referred to as Grantee, all of its right, title and interest in that certain parcel situated in Pearl River County, Mississippi, subject to that certain sale for 2002 ad valorem taxes, resulting in the vesting of said property by Chancery Clerk's Conveyance to Magnolia Investors, LLC dated September 26, 2005 and filed for record in the office of the Chancery Clerk of Pearl River County, Mississippi in Book 886 at Page 161, more particularly described as follows, to wit: \*\*\* . (Ex. 10).

No testimony or evidence was proffered at trial by Plaintiffs, Robert Milner or Patricia Milner, upon whom the burden of proof is placed, to establish whether the cash consideration recited in the deed was paid or not. It was neither proven at trial by the evidence nor contended within the Complaint to Set Aside Tax Sale and Deed that the conveyance was not a voluntary action or that either Robert Milner or Patricia Milner was induced to sign the deed by fraud. (R. at pp. 2-12). In fact, the Complaint to Set Aside Tax Sale and Deed made no allegation whatsoever pertaining to the quitclaim conveyance from Robert Milner and Patricia Milner to Rebuild America, Inc. and clearly did not seek to do so.

Likewise, there is no basis in law to set aside a conveyance based upon alleged absence of legal representation. However, such a finding by the lower court is factually inaccurate such that Patricia Milner testified that "I called Mr. [Edwin] Tullos because I did not know what I was supposed to be doing. I have two children, and I was trying to maintain to keep a roof over their heads and keep us in a home. That was my main concern". (Tr. at p. 47). Mrs. Milner further stated that "If I had questions, I called and I asked him about that." (Tr. at p. 51). Thus, Patricia Milner had the benefit of legal counsel beginning from the first contact from Rebuild America, Inc. in November or December, 2005 and continuing through the date on which the Quitclaim Deed was executed and delivered to Rebuild America, Inc.

Given the failure of Plaintiffs, Robert K. Milner and Patricia K. Milner, to allege fraud or seek to set aside the separate quitclaim conveyance to Rebuild America, Inc., dated November 3, 2006, within the Complaint to Set Aside Tax Sale and Deed, the lower court was without authority to render its judgment as a matter of law setting aside said conveyance. Furthermore, the findings of the lower court are factually inaccurate and its judgment incorrect as a matter of law.

**III. THE CHANCELLOR ERRED, AS A MATTER OF LAW, IN SETTING ASIDE THE AUGUST 25, 2003 TAX SALE, CHANCERY CLERK'S CONVEYANCE TO WACHOVIA BANK, N.A. FOR MAGNOLIA INVESTORS, LLC AND SUBSEQUENT QUITCLAIM DEED AND ASSIGNMENT TO DEFENDANT, REBUILD AMERICA, INC. DATED OCTOBER 18, 2005.**

Despite its misplaced consideration of the noticing requirements imposed upon the Chancery Clerk by virtue of Miss. Code Ann. § 27-43-3, the lower court dedicated two (2) sentences within its six (6) page opinion to substantiate its Judgment to set aside the tax sale of August 25, 2003 and subsequent Chancery Clerk's Conveyance dated September 26, 2005 based upon Miss. Code Ann. § 27-43-7, which comprised the only appropriate inquiry of the court. (R. at p. 43). Distinct from and contrary to the three (3) forms of noticing required to be provided by the Chancery Clerk to the reputed landowner pursuant to Miss. Code Ann. § 27-43-3 prior to expiration of a redemption period, Miss. Code Ann. § 27-43-7 requires only that written notice of the same be provided to lienholders of record by certified mail, return receipt requested, "to the post-office address of the lienors, if such address is set forth in the instrument creating the lien, otherwise to the post-office address of said lienors, if actually known to the clerk, . . .".

The Deed of Trust, which constituted the original instrument creating the lien upon the Property previously owned by Robert K. Milner and Patricia K. Milner, was executed in favor of Jim Walter Homes, Inc., securing an original principal indebtedness in the amount of One Hundred Ninety-Eight Thousand Nine Hundred and No/100 Dollars (\$198,900.00). ( Trial Ex. 2). Said Deed of Trust was assigned seven separate times by seven separate instruments, within a six (6) month time period of time, between and among Mid-State Trust IX, Mid-State Trust X and First Union National Bank, with confusion apparently existing among the Assignor(s) and Assignee such that the sixth and seventh assignments are duplicative of the fourth and fifth assignments.

Rather than utilize the address set forth for First Union National Bank within the seventh

Mississippi Assignment of Deed of Trust recorded in Book 1193 at Page 266, the Chancery Clerk of Pearl River County utilized the address for First Union National Bank contained within the third Mississippi Assignment of Deed of Trust recorded in Book 930 at Page 230 for the purpose of providing statutory notice of the impending forfeiture of the Property, via certified mail, return receipt requested. The receipt was returned to the Chancery Clerk, signed as delivered to First Union National Bank on June 19, 2005. (Trial Ex. 4).

No evidence or testimony was proffered by Wachovia Bank, N.A., as successor in interest to First Union National Bank, or any corporate representative thereof that notice was not, if fact, received by First Union National Bank as indicated by the receipt returned to the Chancery Clerk. Thus, the statutory notice provided by the Chancery Clerk, via certified mail, was actually received by First Union National Bank, as evidenced by the return receipt retained by the Chancery Clerk's office. (Trial Ex. 4). If, perhaps, the Chancery Clerk received return of the statutory notice, as unclaimed or undeliverable, and no further action or due diligence had been taken by the Chancery Clerk to ascertain an alternate post office address for said lienholder, then perhaps the argument advanced by Wachovia Bank, N.A., as successor in interest to First Union National Bank, should have been successful. This was not the case. The Chancery Clerk followed the dictates of the statute and successfully provided notice to First Union National Bank, prior to the expiration of the redemption period and prior to forfeiture of the Property. The lower court therefore erroneously concluded that there was no substantial compliance and, likewise, erroneously concluded, as a matter of law, that the August 25, 2005 tax sale and subsequence Chancery Clerk's Conveyance of September 26, 2005 be set aside and held for naught.

**CONCLUSION**

For the above and foregoing reasons, Appellant, Rebuild America, Inc., respectfully requests that the Judgment Setting Aside Tax Sale and Deed be reversed and rendered, thereby vesting in Rebuild America, Inc. perfect title by virtue of the Chancery Clerk's Conveyance to Magnolia Investors, LLC, Quitclaim Deed and Assignment from Magnolia Investors, LLC to Rebuild America, Inc., and Quitclaim Deed and Assignment from Robert Milner and Patricia Milner to Rebuild America.

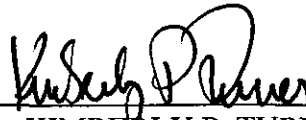
Respectfully submitted, this the 31st day of July, 2008.

REBUILD AMERICA, INC.

By and Through Counsel:

HENRY, BARBOUR, DECELL & BRIDGFORTH, LTD.

By: \_\_\_\_\_



KIMBERLY P. TURNER (MB) [REDACTED]

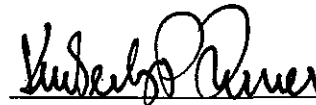
Kimberly P. Turner, Esq.  
E. Barry Bridgforth, Esq.  
Henry, Barbour, DeCell & Bridgforth, Ltd.  
774 Avery Boulevard North  
Post Office Box 4681 (Jackson, 39296)  
Ridgeland, Mississippi 39157  
Telephone: 601.991.2231  
Telecopier: 662.796.0215

**CERTIFICATE OF SERVICE**

I, Kimberly P. Turner, do hereby certify that I have this date served by First Class United States mail, postage prepaid thereon, a true and correct copy of the above and foregoing Record Excerpts, to the following:

W. Stewart Robison  
Robison & Holmes, PLLC  
Attorney for Appellees  
Post Office Drawer 1128  
McComb, Mississippi 39649-1128

DATED, this the 31st day of July, 2008.



KIMBERLY P. TURNER (MBN )