

2008-CA-02123

**SUPREME COURT OF MISSISSIPPI
2008-CA-02123**

REBUILD AMERICA, INC.

APPELLANT

vs.

2008-CA-02123

DAVID ALLISON AND DAVID EARL JOHNSON

APPELLEES

**BRIEF OF APPELLEE DAVID ALLISON, SHERIFF
OF PEARL RIVER COUNTY**

**APPEAL FROM THE CIRCUIT COURT OF PEARL RIVER COUNTY,
MISSISSIPPI, CAUSE NO. 2008-0269H**

ORAL ARGUMENT IS NOT REQUESTED

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REBUILD AMERICA, INC.

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APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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RESPECTFULLY SUBMITTED on this 8th day of October, 2009.

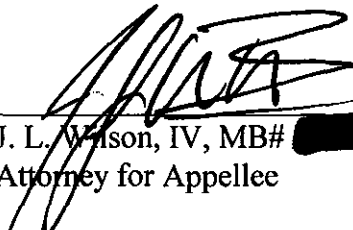

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STATEMENT OF THE ISSUES

- I. No duty – individual, official or otherwise – existed between David Allison and Rebuild America, Inc. concerning the tax sale at issue, and Plaintiff's Complaint fails to state a claim upon which relief may be granted.
- II. The sole proximate cause of Rebuild America, Inc.'s damages, if any, was its own action of purchasing a property with a known invalid conveyance in the chain of title of which Rebuild America, Inc. was aware when it took the warranty-free quitclaim deed. Accordingly, Plaintiff's Complaint fails to state a claim upon which relief may be granted against Sheriff David Allison.
- III. Rebuild America, Inc. has recouped its statutory measure of damages, and Plaintiff's Complaint fails to state any further claim upon which relief may be granted.
- IV. The Mississippi Tort Claims Act bars all claims against Sheriff Allison due to Plaintiff's failure to serve a Notice of Claim or file suit within one year of accrual of the alleged cause of action.
- V. Sheriff Allison is personally immune under the MTCA.
- VI. Rebuild America, Inc. is Judicially Estopped from seeking to prosper from factual allegations that it previously affirmatively denied in another court.

STATEMENT OF THE CASE

A. Nature of Case

The instant case concerns allegations against David Allison as the Sheriff of Pearl River County, Mississippi and David Earl Johnson, the Chancery Clerk of Pearl River County. Plaintiff Rebuild America, Inc. alleges that David Earl Johnson did not issue proper process and serve proper notice in conjunction with a 2003 sale for unpaid 2002 *ad valorem* taxes. Plaintiff alleges that Sheriff David Allison either did not properly serve a Notice of Forfeiture on one of the two delinquent taxpayers or failed to make a return on the service. *R:4¹*. Based on those alleged failures, Rebuild America, Inc seeks to recover numerous elements of damages, including lost profits, from the nullification of the tax sale to the grantee from whom Rebuild America, Inc took an “as is,” “where is,” warranty-free quitclaim deed after having notice of the invalidity of the tax sale. *R: 8*.

B. Course of Proceedings and Disposition Below

Plaintiff filed suit against David Allison on May 27, 2008. *R:4*. Defendant Allison answered the suit on July 14, 2008 and included Motions to Dismiss therein for failure to state a claim and for the failure to comply with the provisions of the Mississippi Tort Claims Act. *R:37*. Sheriff Allison raised the defense that he was not the elected Sheriff of Pearl River County at the time of the incidents alleged, had no involvement with the facts stated in the Complaint, and owed no duty to the Plaintiff. *R:41*. Sheriff Allison also asserted the MTCA bar to individual immunity *R:43*.

Plaintiff responded to Sheriff Allison’s Motion to Dismiss on September 10, 2008. *R:325*. Sheriff Allison rebutted on September 24, 2008 and gave notice that he would rely on matters

¹In compliance with M.R.A.P. 28(e), all citations to the record appear as follows: R ____ refers to the record; ARE ____ refers to the appellee’s record excerpts.

outside the pleadings, thereby invoking the standards announced in MRCP 56, and joined in the Motions to Dismiss of David Earl Johnson. *R:343*. Sheriff Allison sought dismissal for the following bases:

1. David Allison was not the elected sheriff at the time of the actions of which Plaintiff complained and, for that and other reasons, owed no duty to the Plaintiff.
2. Rebuild America proximately caused it's own damages, if there were any, by knowingly purchasing a property which contained an invalid tax sale in the chain of title and of which Rebuild America was specifically aware prior to purchasing the property.
3. Rebuild America had recouped it's statutory measure of damages and no further claim was stated.
4. The Mississippi Tort Claims Act barred all claims against Sheriff Allison due to Plaintiff's failure to serve a Notice of Claim within one year of accrual of the alleged cause of action and the resulting expiration of the statute of limitations.
5. Sheriff Allison was personally immune under the MTCA.

Plaintiff's sole opposition to the Motions to Dismiss was that the Mississippi Tort Claims Act was inapplicable to its claims for damages because it only sought recovery for breaches of "official duties".

The Motions of Sheriff Allison and Chancery Clerk David Earl Johnson were presented to the trial Court on November 14, 2008 at the Lamar County Courthouse in Purvis, MS. Plaintiff conceded the claims against David Allison in his individual capacity, leaving only the claims against him in his official capacity. *T:16:20-23; ARE:1*. After considering the submissions of the parties and hearing argument by each party, the trial court granted the Motions to Dismiss of both Sheriff Allison and David Earl Johnson. *R:489*.

Applying the standard for dismissal under MRCP 12 (b)(6), the trial court found that the Plaintiff's Complaint failed to state a claim because proximate cause was lacking. Because Rebuild America (who wasn't even the original purchaser) was on notice of the defective tax sale at the time it purchased the property, it had no remedy for damages except that set forth by statute. As the amount of statutory damages had been tendered into the registry of the trial court, pursuant to § 27-45-3 Miss. Code Ann. (1972), *as amended*, Plaintiff had recovered its damages allowed by law, and no further claim was stated. Alternatively, the trial Court determined that the MTCA applied to the Plaintiff's claims for damages and that no Notice of Claim was served within one year of the accrual of Plaintiff's cause of action. Accordingly, from the face of the Complaint, the one year MTCA statute of limitations had expired and Defendants were personally immune.

From this ruling, Rebuild America, Inc. appeals.

C. Facts Relevant to the Issues Presented for Review

Robert K. Milner and Patricia K. Milner were the fee simple owners of property bearing parcel number 2159310010301100 in Pearl River County, Mississippi at the time that ad valorem taxes were assessed for 2002. *R: 357; ARE:2*. Those taxes went unpaid, and the tax sale at issue occurred on August 25, 2003 for the delinquent 2002. *R: 357; ARE:2*. David Allison was not the Sheriff of Pearl River County at this time. *R: 478; ARE:14*. At the time of the 2003 tax sale, a deed of trust covering the property at issue existed in favor of Wachovia Bank, N.A. *R:11, 290; Appellant's Briefpage 3*. The party purchasing the property at the 2003 tax sale was also Wachovia Bank, N.A. as the custodian for Magnolia Investors, LLC. *R:358*.

After the August 25, 2003 tax sale, notice of expiration of the redemption period was provided to Robert K. Milner by the Chancery Clerk, as evidenced by the certified mail return receipt

documenting delivery to him in June of 2005. *R:161*. Notice was also provided to the lienholder. *R: 161*. David Allison was not the Sheriff of Pearl River County at this time. *R: 478; ARE:14*. Despite these notices, neither the Milner's or the lienholder redeemed the unpaid taxes.

Magnolia Investors, LLC, Plaintiff's grantor, demanded and received a Clerk's conveyance on September 26, 2005. *R: 357; ARE:2*. Rebuild America, Inc., acquired title to the property at issue by virtue of a Quitclaim Deed and assignment from Wachovia Bank, N.A., for Magnolia Investors, LLC, dated October 18, 2005. *R: 358; ARE 3*. The October 18, 2005 quitclaim deed and assignment from Wachovia Bank, N.A. for Magnolia Investors, LLC to Rebuild America, Inc. specifically provides that the property transfer is made "subject to any outstanding . . . clouds of title not deriving from the grantor." *R: 358; ARE 3*. The property was purchased "as is" "where is" condition without any warranty whatsoever and was made on Rebuild America's "sole judgment and diligent inquiry". *R:358; ARE 3*. The deed specifically acknowledges that the grantor did not make any representation or warranty regarding title to the property other than it was awarded a tax certificate and resulting tax title to the property. *R:358; ARE 3*. David Allison was not the Sheriff of Pearl River County at this time. *R: 478; ARE 14*.

In addition to being on notice of any invalidity of the tax sale at the time it purchased the property, pursuant to the terms of Mississippi law, Rebuild America, Inc. knew of the alleged defects in the tax sale long before it was sued. At that time, Rebuild America was specifically aware of the law regarding tax sales in Mississippi and the statute that controls the process. *R:442;ARE 8; lines 16-21*. They had very substantial experience with tax sales and tax deeds. *R: 438; ARE 7; lines 21-23*. At the time that Rebuild America procured a quitclaim of the property, it had the benefit of examining the documents for the tax sale and tax deed. *R: 438; ARE 7; lines 24-28*. The exact

condition of which the Plaintiff complains as pertains to the allegations against David Allison – the lack of a Sheriff’s return in the tax sale file – was known to them at the time that they took the deed to the property in 2005. *Id.* David Allison was not the Sheriff of Pearl River County at this time. *R:478; ARE 14.*

After obtaining a warranty-free quitclaim deed, Rebuild America began its rebuilding mission in November 2005 by trying to cure its known invalid title (*R 446; ARE:11*) and beginning the eviction process against the Milners. (*R448 ARE:13*). Ultimately, Rebuild America took a quitclaim deed from the Milners on November 3, 2006 in order to “tidy up” their file and obtain a clear chain of title. *R: 436; ARE6; lines 14-18 .*

On November 2, 2006, Rebuild America was sued by the prior owner of the property at issue seeking to set aside the 2005 tax deed. *R:73-76 .* At the trial of the underlying tax sale contest, Rebuild America’s corporate representative testified that the corporation had an opportunity to look at the documents for the tax sale and the tax deed prior to obtaining a quitclaim deed and assignment from Magnolia Investors. *R:438; ARE:17 lines 24-28.* The exact condition of which the Plaintiff complains, the lack of a Sheriff’s return in the tax sale file was known to them at the time that they took the deed to the property. *Id.* Rebuild America had its grantor’s title examined by a title insurance company. *R:444-5; ARE 9-10.* That entity, Tax Title Services was specifically aware of the defects in notice and worked with Rebuild America to try to cure those issues prior to the purchase and at least as early of November, 2005. *R:446-8; ARE 11-13.*

On December 18, 2007, the Chancery Court of Pearl River County set aside the tax sale upon which Rebuild America’s claim of title was predicated and restored the delinquent taxpayer to possession. *R:10-15.* Plaintiff filed the instant suit on May 20, 2008. It is undisputed that the

plaintiff never served a notice of claim on any person associated with David Allison or Pearl River County pursuant to the notice provisions of § 11-46-11 Miss. Code, Ann. (1972), as amended, prior to filing suit. *See, Appellant's Brief, p. 14.* During the pendency of this appeal, the Mississippi Court of Appeals affirmed the Chancery Court's setting aside of the tax sale. *See, Rebuild America, Inc. v. Milner*, 7 So.3d 972 (Miss. App. 2009).

SUMMARY OF THE ARGUMENT

Accepting every allegation asserted by Rebuild America as true, it has failed to state a legally sufficient claim upon which relief can be granted against Sheriff David Allison. Based on:

- Rebuild America, Inc.'s failure to identify a duty owed to it by Sheriff David Allison,
- Mississippi's preemptive law as to proximate cause under the facts alleged by Rebuild America, Inc.,
- Rebuild America, Inc.'s lack of any legally cognizable and unrecouped damages, and
- Rebuild America, Inc.'s failure to comply with the mandatory prerequisites of the Mississippi Tort Claims Act

there are no facts which could ever form a viable claim for relief against Sheriff David Allison upon any legal theory.

At its basest level, Plaintiff's Complaint does not identify any duty owed by David Allison to Rebuild America, Inc. David Allison was not the elected Sheriff of Pearl River County at any time relevant to Plaintiff's allegations. Further, the statutes pertaining to given notice for the expiration of a tax sale redemption period do not create any such duties or rights of action in favor of Rebuild America, Inc. against Sheriff David Allison.

Since Mississippi law regarding tax sales is very detailed and very strictly construed – both of which Rebuild America, Inc. acknowledges that it knew prior to the tax sale conveyances at issue – post-tax sale purchasers are subject to the doctrine of *caveat emptor*. As a purchaser of property with a tax sale and the chain of title is on explicit notice of the validity of the sale from the documents contained in the tax sale file, it purchases subject to any invalidity of the sale. Mississippi law does not create any duty or right of action to recover anything other than what can

fairly said to be the damages proximately caused by the invalid tax sale: return of the monies paid at said sale, plus damages and interest. No further duty is owed to Rebuild America, Inc. by any person or entity.

A close corollary to Rebuilt America's failure to identify a legal duty is their failure to allege any facts which could show that they were proximately caused damages by any act or omission of Sheriff David Allison. In further recognition of the *caveat emptor* doctrine, Mississippi law places the causation for any damages suffered by a purchaser of property with an invalid tax sale in its chain of title squarely on the party whose conduct solely caused those damages. That party is the purchaser who, by the existence of public records available in the Chancery Clerk's office, is charged with knowledge of and takes subject to any deficiency in the tax sale.

The third corollary to this area of law is that the full measure of damages allowed to a purchaser of property subject to an invalid tax sale is specifically limited by Mississippi law. The Chancery Clerk of Pearl River County has tendered that amount into the registry of the Court in this cause. As no further element of damages is statutorily created in favor of Rebuild America under the facts of this case, it states no further legally cognizable claim for damages.

Finally, Rebuild America, Inc.'s efforts to relabel their tort suit and avoid the provisions of the Mississippi Tort Claims Act are not well taken. As they seek monetary damages for the breach of an official duty, their claims fall squarely within the Mississippi Tort Claim Act's exclusive provisions. For their failure to serve a notice of claim within one year of the date their alleged cause of action accrued, their Complaint was properly dismissed. As the statute of limitations has expired – which can be determined from the face of the pleadings herein – dismissal with prejudice was proper. Dismissal was further proper as Sheriff David Allison is entitled to immunity for any claims

asserted against him personally.

Finally, judicial estoppel serves to bar the Plaintiff's attempts at recovery in the instant matter. Rebuild America knowingly purchased a property subject to a tax sale which was invalid based upon the documents contained in the tax sale file. As they were charged with knowledge of the invalidity at the time of their purchase by Mississippi law, their efforts to capitalize on the situation by asserting that the tax sale was valid prevent them from now asserting that they are entitled to damages because the sale was not valid.

ARGUMENT

I. No Duty Existed Between David Allison and Rebuild America

Pursuant to Mississippi law, the tax sale at issue was required to mature for two years prior to the Wachovia Bank as custodian for Magnolia Investors, LLC being able to obtain a clerk's conveyance, during which time the taxpayer may redeem the sale. Prior to maturation, there are specific requirements for notice of the maturation to be given to the defaulting tax payer. Section 27-43-1 et. seq. requires that, between 180 days and 60 days prior to the expiration of the redemption period, notice of the maturing sale must be given to the record owner of the land. One of the notices is issued by the Chancery Clerk to the Sheriff to serve personally and make his return to the Chancery Clerk. The period during which the notice would have to be issued, served and a return made in the instant case would have been between February 25, 2005 and June 25, 2005.

As attested to by his affidavit, David Allison was not the elected Sheriff of Pearl River County at the time of any of the incidents of which Plaintiff complains. *R*: 478; *ARE*. He had no personal involvement with the service of notice and has no personal knowledge of the facts and matters of which the Plaintiff complains. David Allison was elected as Sheriff of Pearl River County

in November of 2007. The Plaintiff has concede the validity of Defendant's assertion that David Allison had no participation whatsoever in the events of which the Plaintiff complains. *T:16*.

Based upon this uncontradicted proof, it is elemental that the Plaintiff cannot state a duty owed by David Allison to Plaintiff; cannot identify a breach thereof by David Allison; and cannot identify damages proximately caused thereby. Accordingly, no claim upon which relief may be granted can be stated against David Allison; no conceivable fact could show that he had any involvement in the events of which Plaintiff complains, and he was properly dismissed from this action with prejudice.

Plaintiff purports to allege a claim for damages (which by definition is an MTCA claim) against the Sheriff Allison in some type of "official capacity" claim on the sheriff's bond. The legal invalidity of this argument is shown in one respect by the fact that Sheriff Allison's bond wouldn't cover any damages caused by the breach of duty by another sheriff or his subordinates. The lack of merit is further shown by Rebuild America, Inc.'s stipulation that its legal theory of recovery is premised solely on "§27-43-3, Miss. Code Ann., and the opinion of the Mississippi Court of Appeals in *Alexander v. Taylor*, 928 So.2d 992 (2006), . . ." See Appellant's Brief, p. 9.

This stipulation as to its theory of recovery dooms Rebuild America's claims in two ways: (1) §27-43-3 does not create any duty in favor of any person or entity concerning notice of expiration of a tax redemption period and which is owed to them by a county sheriff; and (2) correctly applied – not in the misguided manner urged by Rebuild America – the ruling of *Alexander v. Taylor* mandates that Rebuild America's claims must be dismissed pursuant to the MTCA (more on that in the portion of Appellee's Brief discussing the MTCA, below).

Rebuild America's position concedes that no duty was owed to it by the Sheriff of Pearl River County, Mississippi. The provisions of §27-43-3 do not expressly or implicitly contemplate a duty owed by the sheriff or any cause of action against him for any act or omission connected to a sale for outstanding taxes. The reason that tax sale purchasers and subsequent grantees are denied any relief other than the statutory penalty is that a purchaser of property whose title is voided due to a faulty tax sale has acted with actual or constructive knowledge of any defect in the tax sale. No further cause of action exists because the validity of the tax sale -- a potential break in the chain of a purchaser's title -- is determined solely by what is maintained in the record of the tax sale. Because the purchaser is charged with that knowledge of those public records at the time of the purchase, as a matter of law, the statute imposes no duty for anything other than return of the statutory damages -- i.e. the only damages that can legally be said to be proximately caused by either the clerk or sheriff's failure to strictly comply with the notice provisions of §27-43-3.

II. The Sole Proximate Cause of Rebuild America Inc's Damages, If Any, Was its Own Actions in Purchasing a Property with a Known Invalid Conveyance in the Chain of Title

Corresponding to the lack of duty demonstrated above, Rebuild America's claims further fail as a matter of law because it knowingly and voluntarily took on the risk that its title may be voided due to the tax sale in its chain of title. It is an ancient rule in Mississippi Jurisprudence that a purchaser cannot be granted relief based on a defect in title of which he had notice when he contracted. *Hanna v. Harper*, 3 Smedes and M., 793 (Miss. Err. App. 1844).

At a tax sale, purchasers are chargeable with knowledge of the statutory requirements for a valid sale and must be held to have purchased the property subject to such statutory provisions. *Everett v. Williamson*, 143 So. 690 (Miss. 1932). In *Everett*, a piece of property was sold for taxes.

During the redemption period, the owner executed a Deed of Trust which was duly filed in the land records. Subsequent to expiration of the redemption period, the Deed of Trust was foreclosed upon and the land in question was conveyed to Everett at a foreclosure sale. In the suit between Everett and the tax sale purchaser to set aside the tax deed, the Mississippi Supreme Court found that the purchaser at tax sale was chargeable with knowledge of the statutory requirements for a valid sale and any failure to comply therewith.

In *Dead River Fishing & Hunting Club v. Stovall*, 113 So. 336, 337-38 (Miss. 1927), the Mississippi Supreme Court said:

A purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is also bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals in said conveyance contained. **The duty is also imposed on him to examine all deeds and conveyances previously executed and placed of record by his grantor-either immediately or remote-if such deeds or conveyances in any way affect his title.** And if in any such deed or conveyance there is contained any recital sufficient to put a reasonably prudent man on inquiry as to the sufficiency of the title, then he is charged with notice of all those facts which could and would be disclosed by a diligent and careful investigation.

Dead River Fishing & Hunting Club, 113 So. at 337 (emphasis added)

Purchasers at tax sales don't have any legal rights upon the sale being voided because an examination of the tax records by purchasers would accurately reflect the facts of the tax sale.

Roebuck v. Bailey, 166 So. 358, 360 (Miss. 1936). A purchaser at a tax sale buys strictly under the rule of *caveat emptor*. *Parson v. Marshall* 139 So.2d 833, 837 (Miss. 1962) quoting 51 AmJur Taxation §1135:

In the absence of a specific statutory provision to the contrary, neither the state or any public body participating in the sale makes a warranty. Id. If the purchasers' title is ultimately defective for a lack of compliance with the law concerning proceedings leading up to the sale or in the conduct of the sale, that party has no affirmative

remedy other than that which is provided by statute. Id. A failure to secure a good title to the property because of the invalidity of the tax sale does not serve as a basis for the purchaser to recover the amount paid for the property unless some statute provides for a remedy. Id.

According to this rule of law, Magnolia Investors, LLC was chargeable with knowledge of the alleged deficiencies in the tax sale at the time that it received a conveyance. Any person who later purchased the property from Magnolia Investors, LLC is bound by this same knowledge of record. Magnolia Investors, LLC, and any entity claiming through it have no legal damages other than return of the statutory amounts, as they had explicit notice of record of any defects in the tax sale at issue at the time of the first conveyance based on the tax sale.

The instrument from which Rebuild America, Inc. derives its claim of interest in the property further serves to disconnect it from any remedy. That document disavows any right or remedy to Rebuild America because it insulates the predecessors in title from any liability. The October 18, 2005 quitclaim deed and assignment from Wachovia Bank, N.A. for Magnolia Investors, LLC to Rebuild America, Inc. specifically provides that the property transfer is made “subject to any outstanding . . . clouds of title;” specifically acknowledged that the grantor did not make any representation or warranty regarding title to the property other than it was awarded a tax certificate and resulting tax title to the property; that the property was purchased in “as is” “where is” condition without any warranty whatsoever; and that Rebuild America used its “sole judgment and conducted a diligent inquiry”. *R:358; ARE:3.*

Rebuild America has admitted that it was specifically aware of the law regarding tax sales in Mississippi and the statute that controls the process. *R:442; ARE:8; lines 16-21.* Rebuild America has admitted that it had an opportunity to look at the documents for the tax sale and the tax

deed prior to obtaining a quitclaim deed and assignment from Magnolia Investors. *R:438; ARE:7; lines 24-28*. Rebuild America has admitted that the exact condition of which it complains, the lack of a Sheriff's return in the tax sale file, was known to them at the time that they took the deed to the property. *Id.*

In essence, Plaintiff Rebuild America has admitted that they took possession of the property with explicit notice of not only the defect of which they now complain, but also of the strictly construed statutory requirements attendant to a tax sale and redemption. They were absolutely charged with knowledge of the facts of the tax sale at issue and the implications of those facts. Rebuild America is not an uneducated purchaser; its livelihood and "standard procedure" is buying property for delinquent taxes and selling it back to the delinquent taxpayers. *R:436; ARE:6; lines 13-17*. As set forth in Plaintiff's Response to David Earl Johnson's First Motion to Dismiss *R:336*, and as shown by the testimony of their corporate representative *R:246*, Rebuild America, Inc. has bought numerous parcels in Pearl River County alone based on delinquent taxes. Equity demands that an organization which seeks to deprive people of their property by strict application of Mississippi's tax sale laws cannot be rewarded for attempting to capitalize on a tax sale, the alleged invalidity of which it had advance knowledge. Further, application of the plain rules of law announced by the Mississippi Supreme Court deny them that opportunity.

To prove the element of causation, both cause in fact and proximate cause must be shown. *Patterson v. Liberty Assocs., L.P.*, 910 So.2d 1014, 1019 (Miss.2004) (citing *Jackson v. Swinney*, 140 So.2d 555, 557 (Miss. 1962)). Proximate cause has been defined as "cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred." *Patterson*, 910 So.2d at 1019 (quoting *Delahoussaye v.*

Mary Mahoney's, Inc., 783 So.2d 666, 671 (Miss.2001)). Notwithstanding, this "negligence which merely furnished the condition or occasion upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof." *Robison v. McDowell*, 247 So.2d 686, 688 (Miss.1971) (quoting *Hoke v. W.L. Holcomb & Assoc., Inc.*, 186 So.2d 474 (Miss.1966); *Mississippi City Lines, Inc. v. Bullock*, 13 So.2d 34 (Miss. 1943)).

Even assuming that some person for whom David Allison can be held legally liable failed to serve notice on "Robert Milner, et ux", that is not the proximate cause of any damages allegedly suffered by the Plaintiff. The Plaintiff chose to act in the face of known facts for which it is charged with knowledge – both as to their existence and their impact on the validity of the tax sale. This knowledge included other alleged deficiencies in the tax sale, any of which would have voided the conveyance regardless of any act or omission on the part of the sheriff at the time. Any damages suffered by Rebuild America occurred solely as a result of its intentional confrontation of a known risk. It was a risk which could have been avoided at its own choosing. As Rebuild America willingly chose to purchase the property in the face of a disclosed defect in title, that is the sole proximate cause of any injury. In recognition of the absence of causation under these circumstances, Rebuild America is denied any recovery by the law announced in *Everett, Roebuck, and Parson*.

In addition to failing to state a claim upon which relief may be granted, no material issue of fact is present which would establish that any act or omission of David Allison caused or contributed to Plaintiff's alleged damages exists. Accordingly, this matter was properly dismissed as a matter of law.

III. Rebuild America Has Recouped the Full Measure of Statutory Damages

The amount of damages in this type of suit is set by statute. Section 27-45-3 provides that

the remedy for defective tax sale is nothing more than 5% damages on the amount of taxes for which the land was sold and interest on all such taxes and costs at the rate of 1 ½ % per month from the date of the sale. § 27-45-3 Mississippi Code Annotated (1972), *as amended*. There is no provision in the law for the assessment of attorney's fees in this type of case. *Lawrence v. Rankin*, 870 So.2d 673, 677 (Miss. App. 2004). See also *Curtis v. Carter*, 906 So.2d 5, 9-10 (Miss. App. 2004), reversed in part on other grounds, *Curtis v. Carter*, 906 So.2d 758 (Miss. 2005).

The entire amount of damages to which Rebuild America may be due has been tendered into the registry of the Court. Plaintiff states no further claim upon which relief may be granted. Accordingly, the claims against Sheriff Allison were properly dismissed as a matter of law.

IV. The Mississippi Tort Claims Act Bars All Claims Against Sheriff Allison

Rebuild America does not contest the fact that a Notice of Claim has never been served on a Defendant herein, and certainly not within one year of its claims accruing. Plaintiff's position is limited to the contention that the Mississippi Tort Claims Act does not apply to its claims.

The Mississippi Tort Claims Act, §11-46-1 et. seq., has partially waived sovereign immunity for suits against political subdivisions of the state and governmental officials in which money damages are sought for the breach of any duty committed by the government or its employees. § 11-46-5 Mississippi Code Annotated (1972), *as amended*. The remedy provided by the Mississippi Tort Claims Act is exclusive of any other civil action against the governmental entity or employee for the act or omission which gave rise to the claim or suit. § 11-46-7 Mississippi Code Annotated (1972), *as amended*. The Mississippi Tort Claims Act does not discriminate between "official duties", "statutory duties" or any other types of duties to determine its applicability.

Any claim against a governmental entity or its employee to recover damages for any injury is to be brought only under the provisions of the Tort Claims Act. Id. A “claim” is any demand to recover damages from a governmental entity as compensation for injuries. § 11-46-1(a) Mississippi Code Annotated (1972), as amended. An “employee” is any officer of a political subdivision of the state, including elected or appointed officials. Id. at (f). “Injury” means damage to or loss of property or any other injury that a person may suffer that is actionable at law or in equity. Id. at (h).

Efforts to relabel tort suits as something else in order to avoid the provisions of the Mississippi Tort Claims Act Are ineffective. *Alexander v. Taylor*, 928 So.2d 992, 995 (Miss. App. 2006). In seeking to relabel a tort claim for money damages and avoid the MTCA, Rebuild America attempts to characterize its claims against Sheriff Allison as claims seeking damages incurred because Defendant David Allison breached his “official duties” as the Sheriff of Pearl River County, Mississippi (despite the fact that he wasn’t sheriff at the time). However, the Plaintiff has sought recovery of numerous elements of injury which it contends were caused by a breach of a statutory duty by an employee of a political subdivision of the State of Mississippi: – ergo, the MTCA applies. To be sure, Rebuild has shown what it seeks: recovery for reckless disregard – a unique term of art gleaned from the actual language of the MTCA – negligence and gross negligence. *See Appellant’s Brief*, p. 5.

Rebuild America, Inc. unfortunately reads way to much into the *Alexander v. Taylor* decision, or, may not read enough. Rebuild America contents that *Alexander v. Taylor* stands for the proposition that any allegation of a breach of an official duty is not a claim governed by the MTCA. Rebuild America contends that the *Alexander v. Taylor* plaintiffs asserted tort claims which were determined to not be covered by the MTCA. *See Appellant’s Brief*, p. 5. That is an incorrect

determination of the finding of *Alexander v. Taylor*.

In *Alexander*, the plaintiffs asserted three separate classes of claims: claims for **enforcement** of an unperformed statutory duty; claims for a writ of mandamus; and claims for damages based on the breach of the official duties. *Alexander v. Taylor*, 928 So. 2d 992, 995-1000 (Miss. App. 2006). The *Alexander* court determined that the claims for enforcement and for a writ of mandamus were not tort claims governed by the MTCA. However, the court also determined that the claims for damages resulting from the alleged breach of official duty was a tort claim and was governed by the MTCA. *Alexander*, 928 So. 2d at 996-97. That result is outcome determinative in the instant case.

There is no “official duty” that is excepted by the Mississippi Tort Claims Act. To the extent that any claims are asserted against the Sheriff of Pearl River County for monetary damages based on non-performance of a duty, it constitutes a “claim” covered by the Mississippi Tort Claims Act. Allegations against an officer concerning the service of notices pertain to a governmental employee acting in the course and scope of his employment. All acts within the course and scope of a public servant’s scope of employment are “official”. Under its express terms, the Mississippi Tort Claims Act applies by definition to claims that a breach of a duty caused damages and injury such as those made by the instant Plaintiff.

To the extent that the Plaintiff argues that the Pearl River County Sheriff breached a statutory or official duty, it may be arguable as to the applicability of any specific immunity contained in the Mississippi Tort Claims Act. However, the applicability of the Mississippi Tort Claims Act is not legitimately at dispute.

A. Notice Was Not Given and the Statute of Limitations Has Expired

Prior to filing any suit under the Mississippi Torts Claims Act, a notice of claim must be filed

with the Chief Executive Officer of the governmental entity. § 11-46-11(1) *Miss. Code Ann.* (1972), *as amended*. Mississippi law requires strict compliance with the ninety-day notice provision of §11-46-11(1). *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 820 (Miss.2006). Any action begun prior to 90 days after a defendant receives notice of the claim must be dismissed. Any such claim is also governed by a one year statute of limitations. *Id.*

The defect that is plainly fatal to Rebuild America Inc.'s claims is that no Notice of Claim was served and no suit was filed with the year after its alleged cause of action accrued. In a case – which coincidentally holds that allegations that governmental officials failed to properly perform their “official duties” are covered by the MTCA – the Mississippi Court of Appeals held that the date of accrual for actions concerning the alleged failure of a governmental official to perform his or her “official duty” is the date when a party has knowledge of its potential cause of action. *Estate of Spiegel v. Western Sur. Co.*, 908 So.2d 859, 865 (Miss. App. 2005). See also, *Young v. Benson*, 828 So.2d 821, 823 (¶ 8) (Miss. App.2002).

Estate of Spiegel also shows that the Plaintiff's argument concerning accrual of the statute of limitations is without merit. Rebuild America argues that it's cause of action did not accrue until recognition of it's alleged injury was judicially solidified by the Mississippi Court of Appeals' affirmation of the trial court's order voiding the tax sale. However, just as in *Estate of Spiegel*, the instant Plaintiff knew of the alleged breach of official duty and potential cause of action at the time they acquired the property and long prior to the time that litigations was ever instituted against it. The statute of limitations began to run upon Rebuild America, Inc.'s gaining that knowledge.

The period during which the notice of maturing tax sale would have to be issued, served and a return made in the instant case would have been between February 25, 2005 and June 25, 2005.

The statute of limitations begin to run, at the latest, on June 25, 2005. At that time, Rebuild America and the entire world was on notice from the public records of Pearl River County that there were potential problems rendering the tax sale void. Even using the later date of Rebuild America's conscious purchase of property with a known invalid tax sale in the chain of title, October 18, 2005, dictates that the one year statute of limitations passed with no Notice of Claim having been served (to date), and no suit being filed. Accordingly, the statute of limitations for any claim against Pearl River County and its employee, David Allison, has expired. In accord with M.R.C.P. 12(b)(6), this can be determined as a matter of law from the face of the Complaint. Plaintiff's claims were properly dismissed with prejudice as they are barred by the statute of limitations.

V. Sheriff Allison is personally immune under the MTCA.

An employee of a political subdivision or governmental entity cannot be held personally liable for any act or omission occurring within the course and scope of the employee's duties. § 11-46-7 Mississippi Code Annotated (1972), as amended. The Plaintiff has specifically asserted that the acts or omissions of which they complain occurred as part of the Sheriff's official duties. Accordingly, provisions of §11-46-7 provide David Allison with personal immunity and the claims against him were properly dismissed with prejudice.

VI. Rebuild America Is Judicially Estopped from Seeking to Prosper from Factual Allegations That it Previously Affirmatively Denied in Another Court.

Sheriff David Allison joins in the arguments set forth by David Earl Johnson in his brief which demonstrate that Rebuild America is judicially estopped from seeking relief based on facts which it affirmatively denied in prior judicial proceedings.

CONCLUSION

The Plaintiff has failed to state a claim for relief against David Allison and has failed to set forth allegations which, if accepted as true, would allow recovery. David Allison had no involvement in the events of which Plaintiff complains and no duty was owed by him to the Plaintiff. The Plaintiff further fails to state a claim as it got what it paid for – all the rights that its grantor had in the subject property. Rebuild America took a conveyance “subject to” the facts of the tax sale of which it had admitted knowledge. It made its diligent inquiry and knew the law applicable to the facts of the conveyances upon which its rights were premised. Accordingly, nothing David Allison did or did not do proximately caused Plaintiff’s damages. Those damages, if any, have been tendered into the registry of the Court and Plaintiff states no further claim for relief which is cognizable at law.

Additionally, the provisions of the Mississippi Tort Claims Act mandate dismissal of the instant action. The Plaintiff has failed to serve a Notice of Claim within one year of the accrual of its cause of action. Further, the Plaintiff has failed to assert any claims within one year of their accrual. Finally, the Plaintiff’s claims are not cognizable at law against David Allison as he is entitled to personal immunity.

Respectfully submitted this the 8th day of October, 2009.



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CERTIFICATE OF SERVICE

I, J. L. Wilson, IV, of counsel to Defendant David Allison, hereby certify that I have this day mailed, with postage pre-paid, a true and correct copy of the above and foregoing document to:

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CERTIFIED this the 8th of October, 2009.



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