

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-02123

REBUILD AMERICA, INC.

APPELLANT

VERSUS

DAVID EARL JOHNSON, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
CHANCERY CLERK OF PEARL RIVER
COUNTY, MISSISSIPPI, AND DAVID ALLISON,
INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS SHERIFF OF PEARL RIVER
COUNTY, MISSISSIPPI

APPELLEES

*REPLY OF APPELLANT TO BRIEF OF APPELLEE,
DAVID EARL JOHNSON, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CHANCERY
CLERK OF PEARL RIVER COUNTY, MISSISSIPPI*

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

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TABLE OF CONTENTS

Table of Contents	ii.
Table of Cases, Statutes and Other Authorities	iii.
Argument	1
I. Individual Liability of David Earl Johnson	1
II. The Lower Court Erred, as a Matter of Law, in Granting Johnson's Motion to Dismiss Based Upon Rule 12(b)(6) of the Mississippi Rules of Civil Procedure	1
III. The Claim(s) of Rebuild America Are Not Subject to the Mississippi Tort Claims Act	3
IV. A Claim Under the Mississippi Tort Claims Act Is Not Yet Time-Barred	5
V. Judicial Estoppel is Inapplicable	7
Conclusion	8
Certificate of Service	9

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Albert G. Brown v. Sterling H. Lester</i> , 1850 WL 2204 (Miss. Err. & App. 1850)	3
<i>Alexander v. Taylor</i> , 928 So. 2d 992 (Miss. 2006)	3, 4, 5
<i>Reed v. Heard</i> , 53 So. 400 (Miss. 1910)	6
<i>State of Mississippi v. Baker</i> , 1872 WL 4303 (Miss. 1872)	3
<i>Steward v. Dogan</i> , 21 So. 2d 292, 293 (Miss. 1945)	6
<i>Wallace v. Lyle</i> , 37 So. 460 (Miss. 1904)	6
 <u>Statutes</u>	
Mississippi Code Annotated § 27-43-3 (Rev. 2005)	1, 2, 5, 6, 7
Mississippi Code Annotated § 9-5-131 (Rev. 2003)	2, 4
 <u>Other Authorities</u>	
M.R.C.P. 12(b)(6)	6, 8, 9, 11
 <u>Secondary Sources</u>	
<i>Black's Law Dictionary</i> (6 th ed.)	2

ARGUMENT

I. INDIVIDUAL LIABILITY OF DAVID EARL JOHNSON.

As was stated to the lower court during the hearing held upon Defendants' Motions to Dismiss on November 14, 2008, Appellant, Rebuild America, Inc. (hereinafter "Rebuild America") did not seek imposition of individual liability upon David Earl Johnson (hereinafter "Johnson"), but sought to maintain an action based upon Johnson's official bond, as Chancery Clerk of Pearl River County, Mississippi, arising out of and resulting from his breach and failure to perform those duties statutorily imposed upon him by § 27-43-3, Miss. Code Ann. (R. 000004 - 000016). Rebuild America therefore did not assign error herein to the lower court in its dismissal, with prejudice, of those claims which were initially asserted against Johnson individually.

II. THE LOWER COURT ERRED, AS A MATTER OF LAW, IN GRANTING JOHNSON'S MOTION TO DISMISS BASED UPON RULE 12(b)(6) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

A. Johnson is Imposed with the Duties of His Office, the Performance of Which is Owed to the Public.

Johnson, as Chancery Clerk of Pearl River County, is required to fulfill the duties of his office, inclusive of those statutorily imposed duties, such as set forth within § 27-43-3, Miss. Code Ann., for the benefit of the public. A failure to perform as required by statute constitutes a breach of that duty owed to the public, which includes not only the individual residents of the State of Mississippi, but also those Mississippi-domestic entities and foreign entities, qualified to do business and doing business in the State of Mississippi pursuant to a Certificate of Authority.

As Chancery Clerk of Pearl River County, Johnson is, by definition, a public servant. A

“public official” is a person who, upon being issued a commission, taking required oath, enters upon, for a fixed tenure, a position called an office where he or she exercises in his or her own right some of the attributed of sovereign he or she serves **for the benefit of public**. *Black’s Law Dictionary*, 1230 (6th ed. 1991). Rebuild America is a foreign corporation, authorized to do business and doing business within the state of Mississippi. Though engaged in the often-thought-of unpleasant and unpopular business of purchasing properties for outstanding and unpaid county and/or city taxes, its business confers a benefit upon this state through the investment of significant monies in several Mississippi counties, thereby contributing to the accumulation of operating capital for these counties and also, saving the State from this obligation which it assumes should no person or entity purchase a property for outstanding and unpaid county and/or city taxes. Rebuild America, as every individual and/or entity domiciled within this state, is entitled to rely and trust upon the faithful performance of Mississippi’s public officials. Johnson undoubtedly owed Rebuild America a duty to fully perform the duties of his office and to fulfill those duties, imposed upon him and clearly enumerated by Mississippi statute.

B. Rebuild America is Not Limited to those Damages Provided by § 27-43-3, Miss. Code Ann.

Section 27-43-3, Miss. Code Ann.¹ sets forth those damages owed to a tax sale purchaser or owner “should the clerk **inadvertently** fail to send notice as prescribed by this section.” (emphasis added). The failure of Johnson to provide the statutorily required notice(s) of § 27-43-3, Miss. Code Ann., was not inadvertent, but constituted a consistent, systematic and gross disregard by Johnson of those statutory duties imposed upon him by § 27-43-3, Miss. Code Ann.,

¹ Appellee Johnson erroneously cites to § 27-45-5, Miss. Code Ann.

as evidenced by the testimony elicited at the trial of *Milner, et al. v. Rebuild America, Inc.* by Johnson's deputy clerk charged with providing such notice, who testified as to a procedure which did not fulfill the requirements of said statute and Mississippi case law interpreting the same.

This action was brought to recover damages for a breach of the official bond of Johnson, as Chancery Clerk of Pearl River County. Each Chancery Clerk is required, by statute, to provide a bond, which may be put in suit by any person injured by said clerk's failure to perform. § 9-5-131, Miss. Code Ann.; *Albert G. Brown v. Sterling H. Lester*, 1850 WL 2204 (Miss. Err. & App. 1850); *State of Mississippi v. Baker*, 1872 WL 4303 (Miss. 1872). The condition of the bond is for the faithful performance and discharge of all duties of the office, and all acts and things, required by law, or incident to, the said office. "Whatever, therefore, is a duty required by law, is covered by the condition; and a failure to discharge a duty which is required, is a breach of the bond, for which the injured party may recover damages commensurate to the injury." *Albert G. Brown v. Sterling H. Lester*, 1850 WL at *1.

Such that Rebuild America's claims were dismissed pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, no discovery was conducted and no opportunity was afforded Rebuild America to produce evidence of those damages sustained by Rebuild America as a result of Johnson's breach of his statutory duties. Its remedy is the equivalent of actual damages sustained, and are not limited by § 27-43-3, Miss. Code Ann.

III. THE CLAIM(S) OF REBUILD AMERICA ARE NOT SUBJECT TO THE MISSISSIPPI TORT CLAIMS ACT.

Subsequent to the passage of the Mississippi Tort Claims Act in 1983, the Mississippi Court of Appeals considered the case of *Alexander v. Taylor*, 928 So. 2d 992 (Miss. 2006), in which the Court determined that the plaintiff's suit against the chancery clerk arising by said

clerk's failure to reimburse a tax sale purchaser subsequent to redemption, was "a suit on the clerk's bond for failure to comply with a statutory duty," and was therefore, not subject to the one (1) year statute of limitation applicable to a claim arising under the Mississippi Tort Claims Act.

Specifically, the Court held the general three (3) year statute of limitation applicable to the plaintiff's claim in *Alexander*, explaining the distinction between a cause of action arising in tort and that resulting from a clerk's failure to comply with a statutory duty:

This is a claim that a public official failed to comply with one of his statutory duties, namely, to pay a debt owed by operation of the tax sale statutes and specifically those regarding redemption . . . Failure to make the required payments constitutes "misfeasance in office" and permits a suit against the clerk on his official bond. A broader statute makes the chancery clerk's bond responsible to 'cover all [the clerk's] official acts, and all moneys which may come into his hands according to law or by order of the court or chancellor.' Miss. Code Ann. § 9-5-131 (Rev. 2002)

The suit against the clerk for failing to reimburse the tax sale purchaser after redemption is a suit on the clerk's bond for failure to comply with a statutory duty. There is no specific statute of limitations for a suit to enforce one of a public official's duties.

Alexander, 928 So. 2d at 998 (¶¶ 25, 26)(emphasis added).

The claim of Rebuild America against Johnson, in his official capacity as Chancery Clerk of Pearl River County, is identical in substance to that claim considered by this Court in *Alexander v. Taylor*. In response, Johnson states that the argument of Rebuild America, predicated upon *Alexander v. Taylor*, must fail because Rebuild America did not join the bonding company in its suit as did the plaintiff in *Alexander v. Taylor*.

Such an attempt to distinguish the instant action from *Alexander v. Taylor* is self-serving and clearly without merit since it was Johnson who precluded discovery by Motion to Stay filed prior to and scheduled for hearing simultaneous with his Motion(s) to Dismiss on November 14, 2008; thus, Rebuild America had no knowledge of and no opportunity to ascertain the identity of

the bonding company prior to hearing upon Johnson's Motion(s) to Dismiss. In fact, Rebuild America was advised, prior to hearing, by Johnson's counsel that he had no bond whatsoever, in violation of the statutory requirement therefor.

Further, if joinder of the bonding company was deemed necessary by Johnson, a motion to dismiss pursuant to Rule 19 of the Mississippi Rules of Civil Procedure provided the appropriate recourse, in response to which the lower court may have granted Rebuild America leave by which to amend its Complaint so as to name said company as a party defendant or granted dismissal, without prejudice. Regardless, the inability of Rebuild America to name and include Johnson's bonding company as a party defendant in its suit does not distinguish the claim of Rebuild America from that of *Alexander v. Taylor* and did not warrant dismissal by the lower court, with prejudice.

As the plaintiff in *Alexander v. Taylor* premised his claim against the Chancery Clerk upon a failure to comply with statutory duty, Rebuild America premised its claim against Johnson upon his failure to comply with the statutory duties imposed by § 27-43-3, Miss. Code Ann. This claim against Johnson, in his official capacity as Chancery Clerk of Pearl River County, is not subject to the Mississippi Tort Claims Act; thus, Rebuild America is not required to provide written notice ninety (90) days prior to filing its action, nor is a one (1) year statute of limitation applicable. This claim, in its entirety, is based upon a breach of duty of Johnson, subject to a general three (3) year statute of limitation, and with clear merit sufficient to withstand a Rule 12(b)(6) Motion to Dismiss.

IV. A CLAIM UNDER THE MISSISSIPPI TORT CLAIMS ACT IS NOT YET TIME-BARRED.

Contrary to that stated within the Order Granting Motions to Dismiss, the property the

subject of *Milner, et al. v. Rebuild America, Inc.*², was purchased on August 25, 2003, by Wachovia Bank, N.A., as custodian for Magnolia Investors, LLC, the predecessor in interest and title to Rebuild America. As of this date, noticing was neither required nor performed by the Chancery Clerk of Pearl River County; thus, no error or defect existed at the time of purchase of said property.

At the time of a purchase for taxes, **perfect** title is vested in the purchaser, without the right of possession and subject only to the right of redemption. *Steward v. Dogan*, 21 So. 2d 292, 293 (Miss. 1945); *Wallace v. Lyle*, 37 So. 460 (Miss. 1904)(emphasis added). Absent redemption, delivery of a Chancery Clerk's Conveyance or Tax Deed shall not be "invalidated in any court except by proof that the land was not liable to sale for taxes, or that the taxes for which the land was sold had been paid before sale, or that the sale had been made at the wrong time or place." *Reed v. Heard*, 53 So. 400, 402 (Miss. 1910).

Mississippi precedent supports the position of Rebuild America, that it held perfect title in the property the subject of *Milner, et al. v. Rebuild America, Inc.*, until the Chancery Court of Pearl River Court, Mississippi entered its Final Judgment setting aside the conveyance by tax deed and subsequent conveyance to Rebuild America. Only upon final disposition of *Milner, et al. v. Rebuild America, Inc.* did the one (1) year statute of limitation begin to run, assuming the claim(s) of Rebuild America are indeed subject to the Mississippi Tort Claims Act. To determine otherwise would result in the ridiculous proposition that action should have been brought against Johnson by Rebuild America prior to any legally recognized challenge to its title,

² It is failure of Johnson, as Chancery Clerk of Pearl River County, to provide the noticing required by § 27-43-3, Miss. Code Ann., prior to expiration of the redemption period, to Mr. and Mrs. Milner, the owners of the property the subject of *Milner, et al. v. Rebuild America, Inc.*, which gives rise to the claim(s) of Rebuild America against Johnson herein.

and, more importantly, prior to any actual damage sustained by Rebuild America.

This action against Johnson was initiated by Rebuild America prior to final disposition of *Milner, et al. v. Rebuild America, Inc.*, with the Court of Appeals affirming the lower court's Judgment Setting Aside Tax Sale and Deed subsequent to the Order Granting Motions to Dismiss by the lower court herein on November 14, 2008. Thus, the claims of Rebuild America are not barred by the one (1) year statute of limitation if, in fact, such claims are within the purview of the Mississippi Tort Claims Act.

V. JUDICIAL ESTOPPEL IS INAPPLICABLE.

Johnson's argument presumes that Rebuild America, on a whim, has voluntarily chosen to assert a cause of action against Johnson, which is premised upon an argument allegedly contradictory to that advanced in *Milner, et al. v. Rebuild America*. To the contrary, Rebuild America asserted alternative arguments within *Milner*, as evidenced by the pleadings filed therein, specifically the Answer and Counterclaim of Rebuild America in which Rebuild America requested alternative relief should the lower court set aside the tax deed and subsequent conveyance.

In *Milner*, Rebuild America sought to prove that the procedure in place within the Chancery Clerk's office of Pearl River County was sufficient, and did comply with Mississippi statute. To that end, it was Rebuild America which called to testify Johnson at the *Milner* trial, who offered his deputy clerk in his stead. It was the Chancery Court of Pearl River County, upon hearing the testimony and arguments of counsel, receiving the evidence proffered at trial, which determined that Johnson did not provide the requisite notice prior to expiration of redemption, in accordance with § 27-43-3, Miss. Code Ann.

Contrary to case cited by Johnson, in which a plaintiff claimed in one suit that he was

injured by a red truck and then in a later suit claimed he was injured by a blue truck, Rebuild America has not voluntarily changed its claim, but has had its claim dictated by the judgment of the Chancery Court of Pearl River County. Rebuild America is not "playing fast and loose" with the judicial process, but is seeking indemnity and accountability from Johnson for his failure to fulfill his duties as Chancery Clerk of Pearl River County.

Johnson should not be afforded complete immunity for his failure to fulfill his duties as a public official, and for his utter disregard of those statutory duties imposed upon him as the elected, and entrusted Chancery Clerk of Pearl River County, Mississippi. In no other instance is an individual, public or private, shielded from liability or consequence resulting from a failure and/or refusal to comply with Mississippi statute. Johnson should be no exception.

CONCLUSION

Based upon the above and foregoing argument, together with that argument set forth and contained within the Brief of Appellant, Rebuild America, Inc. respectfully requests the Order Granting Motions to Dismiss be reversed by the Court, with the case remanded to the Circuit Court of Pearl River County, Mississippi, with instruction to proceed upon the merits of the case. Rebuild America requests such further relief as may be proper in the circumstances.

Respectfully submitted, this the 25th day of November, 2009.

REBUILD AMERICA, INC.

By and Through Counsel:
HENRY, BARBOUR, DECELL & BRIDGFORTH, LTD.

By: _____


KIMBERLY P. TURNER

CERTIFICATE OF SERVICE

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

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