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**

BRIEF OF APPELLANT

APPEAL FROM THE CHANCERY COURT OF PEARL RIVER COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the 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. David Earl Johnson, Chancery Clerk of Pearl River County, Mississippi, Appellee;
3. David Allison, Sheriff of Pearl River County, Mississippi, Appellee;
4. Henry, Barbour, DeCell & Bridgforth, Ltd., inclusive of attorney Kimberly P. Turner, Attorney of Record for Appellant;
5. Upshaw, Williams, Biggers, Beckham & Riddick, LLC, inclusive of attorney J. L. Wilson, IV, Attorney of Record for Appellee, David Allison; and
6. Williams, Williams & Montgomery, inclusive of attorney Joseph H. Montgomery, Attorney of Record for Appellee, David Earl Johnson.

Respectfully submitted,
REBUILD AMERICA, INC.

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

By: _____
Kimberly P. Turner (MBN 10079)

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STATEMENT OF THE CASE

This Appeal is taken from that Order Granting Motions to Dismiss entered by the Circuit Court of Pearl River County, Mississippi on November 25, 2008, by which the Honorable Prentiss G. Harrell dismissed, with prejudice, a claim based upon an asserted breach of duty asserted against David Earl Johnson, as Chancery Clerk of Pearl River County, and David Allison, as Sheriff of Pearl River County, pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. (R. at 000489-000494, Tr. at p. 25).

The lower court case was initiated by the filing of a Complaint on May 27, 2008, in which Appellant, Rebuild America, Inc., sought damages from David Earl Johnson, as Chancery Clerk of Pearl River County, and David Allison, as Sheriff of Pearl River County, joint and severally, arising out of and resulting from a breach of duty to satisfy those statutory obligations as set forth within § 27-43-3, Miss. Code Ann. (R. at 000004 - 000016).

Numerous Motions to Dismiss based upon Rule 12(b)(6) of the Mississippi Rules of Civil Procedure were filed on behalf of each appellee, to which Rebuild America filed its separate

responses in opposition thereto. (R. at 000037 - 000045, 000057-000303, 000325-000342). Rebuild America served upon Appellees Interrogatories, Requests for Production of Documents and Requests for Admission upon Appellees; however, neither responded to such discovery, filing a Motion to Stay Discovery pending hearing upon Motions to Dismiss, which motion was granted at the hearing held November 14, 2008. (R. 000048 - 000056, 000304 - 000305, 000306 - 000308).

Hearing was held upon Motions to Dismiss on November 14, 2008, at which Appellees urged the court to dismiss the action, with prejudice, based upon (1) the Mississippi Tort Claims Act, (2) failure to state a claim, and (3) judicial estoppel and election of the remedies. (Tr. at pp. 5-6). From the bench, the lower court announced its ruling, relying in part upon § 27-43-3, Miss. Code Ann., in which it is stated that " . . . should the clerk inadvertently fail to send notices as prescribed in this section, then such sale shall be void and the clerk shall not be liable to the purchaser/owner on refund o the purchaser money paid." (Tr. at p. 18). Despite additional argument from Rebuild America, it was apparent that the lower court intended to dismiss the action, with prejudice, regardless of the basis, stating that "[t]he case against Johnson individually and as the clerk I'm going to allow to be dismissed. I'm not sure how I'm going to dismiss it." (Tr. at p. 19).

An Order Granting Motions to Dismiss was entered by the court on November 25, 2008, specifically stating therein that the Court did not consider additional materials submitted by Appellees, but confined its decision to the consideration of the allegations as set forth in the Complaint. (R. at 000490). Rebuild America, Inc. filed its Notice of Appeal on December 29, 2008, together with its Designation of the Record and Certificate of Compliance with Rule 11(b)(1) of the Mississippi Rules of Appellate Procedure. (R. at 000495).

STATEMENT OF FACTS

This case arises from those damages sustained by Appellant, Rebuild America, Inc., resulting from Judgment Setting Aside Tax Sale and Deed, entered in the case of *Robert K. Milner and wife, Patricia K. Milner, et al. v. Rebuild America, Inc.*, bearing Pearl River County Chancery Cause No. 06-0552-GN-TH, based upon the lower court's finding of the Chancery Clerk's "failure to notify Patricia K. Milner, individually", of the expiration of the redemption period; "failure to send the lienholder's notice to the address shown on the recorded instrument; and the lack of a sheriff's return on the notice", all as required by § 27-43-3, Miss. Code Ann. (R. at 000006, 000010 - 000015).

The case of *Milner, et al. v. Rebuild America, Inc.* arose 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 Robert K. Milner and Patricia K. Milner (hereinafter referred to as the "Property") (R. at 000290). At the time of the 2003 tax sale, 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 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"). (R. at 000290). Between April 20, 2001 and December 11, 2001, said Deed of Trust was assigned by "Mississippi Assignment of Deed of Trust" on seven (7) separate occasions, with the last assignment from Mid-State Trust X, as Assignor, to First Union National Bank, as Assignee,

dated December 11, 2001, and recorded in the office of the Chancery Clerk of Pearl River County, Mississippi on December 17, 2001 at 9:45 a.m. in Book 1193 at Page 266. (R. at 000291).

With no redemption having been made the two (2) years following the August 25, 2003 tax sale, the Chancery Clerk of Pearl River County provided notice of forfeiture, via certified mail, return receipt requested, to the lienholder of record by assignment, First Union National Bank, which was received by First Union National Bank on June 19, 2005, as evidenced by receipt returned to the Chancery Clerk. (R. at 000291). With no redemption having been made on or before August 25, 2005, the Property was finally sold and forfeited by Robert K. Milner and Patricia K. Milner, as well as by the lienholder of record by assignment, 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. (R. at 000291 - 000292). 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 Rebuild America, Inc. (R. at 000292).

On November 2, 2008, Robert K. Milner, Patricia K. Milner and Wachovia Bank, N. A., as successor in interest to First Union National Bank, as Indenture Trustee, filed their Complaint which sought to set aside the August 25, 2003 tax sale and subsequent conveyance to Rebuild America. (R. at 000289). Following trial held upon the merits on November 29, 2007, the Chancery Court of Pearl River County entered Judgment Setting Aside Tax Sale and Deed. (R. at 000010 - 000015). Rebuild America 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 000289).

Given the Records Search Certificate provided by the office of the Chancery Clerk of Pearl River County and Judgment Setting Aside Tax Sale and Deed in the case of *Milner, et al. v. Rebuild America, Inc.*, Rebuild America initiated the instant action against David Earl Johnson, in his capacity as Chancery Clerk of Pearl River County, and David Allison, in his capacity as Sheriff of Pearl River County, seeking relief by reason of the breach of their respective statutory duties and obligations as set forth within § 27-43-3, Miss. Code Ann. (R. at 000004 - 000016). Rebuild America did not premise its claim upon the Mississippi Tort Claim Act, but solely contemplated and therefore wholly relied upon § 27-43-3, Miss. Code Ann., intending to assert reckless disregard, negligence and/or gross negligence evidenced by the repeated failure of the Chancery Clerk to provide the requisite notice to landowners and lienholder, as opposed to the inadvertence provided for within said statute.

At the time of filing the instant action in the Circuit Court of Pearl River County, Mississippi, *Milner, et al. v. Rebuild America* was pending on appeal to the Mississippi Court of Appeals, with Judgment affirming the lower court's Judgment Setting Aside Tax Sale and Deed rendered subsequent to the Order Granting Motions to Dismiss by the lower court herein, and therefore, during the pendency of the instant appeal.

SUMMARY OF THE ARGUMENT

The lower court committed reversible error in failing to apply the correct legal standard in granting, with prejudice, the Motions to Dismiss of Appellees. In making such a decision, the pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears to a *certainty* that the plaintiff is entitled to *no relief under any set of facts* that could be proved in support of the claim. *See Children's Medical Group, P. A. v. Phillips.*, 940 So. 2d 931, 933 (¶ 5)(Miss. 2006*), citing and quoting, in part,* M.R.C.P. 12(b)(6) cmt (emphasis added). Rebuild America alleged facts sufficient, and, if afforded the opportunity through discovery, could substantiate its claim by the evidence of a breach of duty arising out of the failure of the Chancery Clerk and Sheriff to comply with those statutory duties set forth within § 27-43-3, Miss. Code Ann. Thus, Rebuild America respectfully requests this Court reverse the dismissal, with prejudice, and remand the case to the lower court, with instruction to proceed with discovery and adjudication upon its merits.

ARGUMENT

I. STANDARD OF REVIEW

A motion to dismiss based upon Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, granted or denied by the lower court, is reviewed by the appellate court de novo. *Jordan v. Wilson*, 5 So. 3d 442 (¶ 13)(Miss.2008) (citing *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1211 (¶ 8)(Miss. 2001)(citing *City of Tupelo v. Martin*, 747 So. 2d 822, 829 (¶ 26)(Miss. 1999); *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988 (¶ 54)(Miss. 2004). Such a standard of review is logical, given that within this context, there was no evidence proffered by either party by reason of a pending motion to stay outstanding discovery served by

Rebuild America upon Appellees, and the lower court made no findings of fact.

The trial court did, however, abuse his discretion, was manifestly wrong and applied an erroneous legal standard. *Mississippi Dept. of Human Services v. S.W.*, 974 So. 2d 253, 257 (¶ 8)(Miss. Ct. App. 2007)(citing *Jones v. Mississippi Transp. Com'n*, 920 So. 2d 516, 518 (¶ 11)(Miss. 2003). Though it is unclear from the transcript of the hearing held upon Appellees' Motions to Dismiss on November 14, 2008 upon what legal basis the court intended to substantiate its granting of said motion(s), it is abundantly clear from the onset that the trial court simply intended to dismiss said action, regardless of whether the legal justification therefor was manifestly wrong or clearly erroneous. Such an abuse of discretion is evident from the following statements to and/or exchanges between the court and Rebuild America:

> ***THE COURT:*** . . . The case against Johnson individually and as the clerk I'm going to allow to be dismissed. **I'm not sure how I'm going to dismiss it.** (Tr. at p. 19)(emphasis added).
>
> * * * * *
>
> ***REBUILD AMERICA:*** . . . The citation that you said, "inadvertently." And that's our point. This was not mere inadvertence. They don't know what they're doing. They don't know how to do a noticing. We have at least ten cases where they've done it incorrectly. They don't know to send separate notices to each of the landowners. They're not doing it inadvertently, they are doing it intentionally and in direct misfeasance in their office. There's no way to hold them accountable unless you allow us to proceed on such – the lawsuit. (Tr. at p. 19).
>
> * * * * *
>
> ***THE COURT:*** Mr. Coleman, take out the word "inadvertently" of the statute.

"Should the clerk fail to send notices." It's still going to read the same. (Tr. at p. 20).

REBUILD AMERICA: But, Your Honor, I think "inadvertently" is the key word. And if you take it out, then yes. But inadvertently means a mistake or an accident or something that he [David Earl Johnson, Chancery Clerk] just didn't do because he knew he was supposed to but on this occasion he didn't do it. He [David Earl Johnson, Chancery Clerk] never does it. (Tr. at p. 20).

THE COURT: You put more of a reading into that than I do. (Tr. at p. 20).

In choosing the intended result, the trial court applied inconsistent and erroneous legal theories in order to achieve the intended result. In do so, the lower court abused its discretion and disregarded the most relevant legal standard, that which applied to its consideration of a Rule 12(b)(6) motion to dismiss.

II. THE LOWER COURT JUDGE ERRED, AS A MATTER OF LAW, IN DISMISSING THE CLAIM OF REBUILD AMERICA, INC., WITH PREJUDICE, BASED UPON RULE 12(b)(6) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

A motion to dismiss pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure is decided on the face of the pleadings alone, but the Court's inquiry is not limited to the specific allegations of the Complaint. *Poindexter v. S. United Fire Ins. Co.*, 838 So. 2d 964, 966 (Miss. 2003); *Hartford Cas. Ins. Co.*, 826 So. 2d at 1211 (¶ 15). The pleaded allegations of the complaint must be taken as true, and a dismissal should not be granted unless it appears to a *certainty* that the plaintiff is entitled to *no relief under any set of facts* that could be proved in support of the claim. (emphasis added). *Children's Medical Group, P. A.*, 940 So. 2d at 933 (¶ 5), *citing and quoting, in part,* M.R.C.P. 12(b)(6) cmt.; *Stuckey v. Provident Bank*, 912 So. 2d 859, 865 (Miss. 2005)(a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim,

and in applying this rule, a motion to dismiss should not be granted unless it appears *beyond a reasonable doubt* that the plaintiff will be unable to prove any set of facts in support of the claim)(emphasis added); *Poindexter*, 83 So. 2d at 966 (a dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief).

A motion to dismiss for failure to state a claim contemplates a high degree of speculation by the reviewing court. *Children's Medical Group, P. A.*, 940 So. 2d at 934. This Court must consider whether *any* set of facts could support the claim of Rebuild America for the breach of duty asserted against David Earl Johnson and David Allison, and also, whether the factual allegations averred within the Complaint provide Rebuild America with a viable claim for relief based upon any possible theory. *See Doss v. South Central Bell Tel. Co.*, 834 F. 2d 421, 424 (5th Cir. 1987)(. . . the fact that a plaintiff pleads an improper legal theory does not preclude recovery under the proper theory. When presented with a Rule 12(b)(6) motion to dismiss, the district court must examine the complaint to determine if the allegations provide for relief on any possible theory) (internal quotations and citations omitted).

In filing its Complaint, Rebuild America relied upon § 27-43-3, Miss. Code Ann., and the opinion of Mississippi Court of Appeals in *Alexander v. Taylor*, 928 So. 2d 992 (2006), which presented a plausible legal theory, given no consideration by the lower court, sufficient to defeat a Rule 12(b)(6) motion to dismiss. *Alexander v. Taylor* was a case in which the purchasers of real properties at tax sale brought an action against the chancery clerk and his bonding company, arising out of the clerk's refusal to issue tax deeds to said purchasers on the ground that the properties were subsequently redeemed. Whereas the Circuit Court of Marshall County dismissed the action on the basis of the one-year statute of limitation under the Mississippi Tort Claims

Act, the Mississippi Court of Appeals, though affirming the lower court's dismissal, determined that certain claims asserted by the appellants therein were governed by different relevant statutes of limitation.

Analogous to the claim asserted by Rebuild America in its Complaint, Alexander and Newsome likewise asserted a tort claim against the Chancery Clerk, arising from his failure to follow proper procedures for redemption. As Appellees herein, the defense in *Alexander v. Taylor* argued that all tort suits against the county and its officials are covered by the one-year statute of limitations by virtue of the Mississippi Tort Claims Act. In response, the Mississippi Court of Appeals stated that,

> [i]t is self-evident that only those suits "subject to" the Tort Claims Act are controlled by that Act's statute of limitations. Efforts to re-label tort suits as something else in order to avoid some part of the Act are ineffective, as this quoted language indicates. **Yet that is not the same thing as a statutory assertion that there are no suits other than in tort that can be brought against governmental offices and officials.**

Id. at 995-996 (¶ 10)(emphasis added).

> The Mississippi Tort Claims Act followed a convoluted path that began with the Supreme Court's abolishment of judicially-created sovereign immunity and a simultaneous invitation to the Legislature to adopt statutory rules. Before this enactment, there were statutes that permitted suits on various kinds of claims against the state government and its subdivisions. Any suits formerly brought under those statutes in tort must now be filed under the Mississippi Tort Claims Act. **However, these other statutes remain for actions that are not in tort.**

Id. at 996 (¶11) (internal citations omitted)(emphasis added).

The claim of Alexander and Newsome, arising from the Chancery Clerk's failure to reimburse said appellants for 1994 taxes, was not one in tort. *Id.* at 998 (¶ 25). In holding the general three (3) year statute of limitation applicable to this particular claim, the Court explained the distinction between a cause of action arising in tort versus that which arises out of 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.**

Id. at 998 (¶¶ 25, 26)(emphasis added).

As Alexander and Newsome premised their claim against the Chancery Clerk upon a failure to comply with a statutory duty, Rebuild America premised its claim against Appellees, David Earl Johnson and David Allison, upon a failure to comply with those duties and obligations imposed by § 27-43-3, Miss. Code Ann. This claim did not seek to recover the Property by virtue of the underlying Chancery Clerk Conveyance; thus, Appellees' defense based upon those cases set forth within ¶¶ 3, 4, 5 and 6 of the lower court's Order Granting Motions to Dismiss are irrelevant and inapplicable. (R. at 000490 - 000491). This claim 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 the one-year statute of limitation applicable. (R. at 000492 - 000493). This claim was based upon a breach of duty, subject to a general three (3) year statute of limitation, and legally cognizant by virtue of the *Alexander v. Taylor*. The lower court applied an erroneous legal standard in granting Appellees' Motions to Dismiss, with prejudice, since it is readily apparent that Rebuild America could indeed prove facts and offer law to support its claim. *See* M.R.C.P. 12(b)(6) cmt.; *Stuckey*, 912 So. 2d at 865 (a Rule

12(b)(6) motion to dismiss tests the legal sufficiency of a claim, and in applying this rule, a motion to dismiss should not be granted unless it appears *beyond a reasonable doubt* that the plaintiff will be unable to prove any set of facts in support of the claim)(emphasis added). Rebuild America respectfully requests that the dismissal of its action, with prejudice, be reversed, and the case remanded to the lower court.

III. THE LOWER COURT JUDGE ERRED, AS A MATTER OF LAW, IN DISMISSING THE CLAIM OF REBUILD AMERICA, INC., WITH PREJUDICE, BASED UPON SECTION 27-43-3, MISS. CODE ANN.

It is uncontroverted that § 27-43-3, Miss. Code Ann. imposes upon the Chancery Clerk and Sheriff certain duties and obligations which each must fulfill; a failure to do so, gives rise to a cause of action based upon a breach of duty. *See Alexander v. Taylor*, 928 So. 2d at 998 (¶ 25). In granting Appellees' Motions to Dismiss, the lower court quoted, in part, the last sentence of § 27-43-3, Miss. Code Ann., which states that "[s]hould the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid." In response, Rebuild America simply stated that David Earl Johnson's failure to provide the notice(s) required by § 27-43-3, Miss. Code Ann. was not the result of mere inadvertence, to which the lower court replied, ". . . . take out the word 'inadvertently' of the statute. 'Should the clerk fail to send notice.' It's going to read the same". (Tr. at pp. 19 - 20). It was not within the lower court's authority to legislate, nor re-write statute. Conversely, it was incumbent upon the lower court to contemplate, giving Rebuild America the benefit of every favorable inference, whether it was possible for Rebuild America to offer additional facts and evidence to prove that the acts and/or omissions of the Chancery Clerk were the result of gross negligence as opposed to inadvertence.

It is Rebuild America's contention that the failure on the part of David Earl Johnson was

not inadvertent, but constituted a reckless disregard and/or gross negligence, evidenced by a systematic and consistent disregard of his statutory duties as set forth within § 27-43-3, Miss. Code Ann. (R. at 000007 - 000008). To maintain this claim of breach of duty, Rebuild America need not prove the elements of negligence, but may rely upon *Alexander v. Taylor*, in which the Mississippi Court of Appeals held that the clerk's failure to comply with one of his statutory duties constituted "misfeasance in office" and permitted a suit against the clerk on his official bond. *Id.* at 998 (¶ 25). Thus, the statute itself, i.e. § 27-43-3, Miss. Code Ann., together with the Judgment Setting Aside Tax Sale and Deed entered by the Pearl River Chancery Court in *Robert K. Milner, et al. v. Rebuild America*, offered fact and law sufficient to withstand a Rule 12(b)(6) motion to dismiss.

IV. THE LOWER COURT JUDGE ERRED, AS A MATTER OF LAW, IN DISMISSING THE CLAIM OF REBUILD AMERICA, INC., WITH PREJUDICE, BASED UPON THE MISSISSIPPI TORT CLAIM ACT, THE NOTICE REQUIRED THEREUNDER PRECEDING THE FILING OF A CLAIM AND THE APPLICABLE STATUTE OF LIMITATION.

Rebuild America neither premised its claim upon the Mississippi Tort Claims Act (hereinafter "MTCA"), nor concedes now that the same falls within the MTCA. However, should this Court determine that its cause of action indeed is subject to the MTCA, Rebuild America maintains that the lower court was in error in granting Appellees' Motions to Dismiss based upon either the lack of notice prior to filing its action or the statute of limitation.

Contrary to the Order entered in this case granting the Motions to Dismiss of Appellees, the the lower court did not find that the one-year statute of limitation had expired, barring Rebuild America from maintaining a claim under the MTCA. In fact, the court specifically stated, in response to a direct inquiry regarding the statute of limitation, that,

> [t]he chancery court's judgment has been appealed by Rebuild to the Supreme

Court. And even if the case were not barred by the previous-recited reasons, I don't think your complaint would be ripe for consideration in this court until that's heard anyway.

(Tr. at 23). Thus, the lower court was of the opinion that the cause of action had not yet accrued, and would not accrue until this Court's consideration and judgment upon the then-pending appeal of *Robert K. Milner, et al. v. Rebuild America.* At the time of filing its Complaint in the Circuit Court of Pearl River County, *Robert K. Milner, et al. v. Rebuild America* was pending on appeal to the Mississippi Court of Appeals, with Judgment affirming the lower court's Judgment Setting Aside Tax Sale and Deed rendered subsequent to the Order Granting Motions to Dismiss by the lower court herein, and therefore, during the pendency of the instant appeal. Thus, accrual of the cause of action herein only began upon this Court's opinion and judgment affirming the Chancery Court's Judgment Setting Aside Tax Sale and Deed, with the one-year statute of limitation beginning to run therefrom, tolled by virtue of the pendency of the Circuit Court action and now this appeal.

Though Rebuild America did fail to provide written notice to either the Chancery Clerk or Sheriff of Pearl River County, Mississippi ninety (90) days prior to filing its action, dismissal with prejudice was unwarranted and legally erroneous. Similar to that ninety (90) day notice required prior to initiating an action arising under the Mississippi Tort Claims Act, § 15-1-36(15), Miss. Code Ann. (Rev.2003), precludes a plaintiff from initiating an action against a healthcare provider based upon professional negligence until the plaintiff gives said provider sixty (60) days written notice of his intent to sue.

In the case of *Nelson v. Baptist Memorial Hospital-North Mississippi, Inc.*, 972 So. 2d 667, 672-673 (Miss. 2007), the plaintiffs made no effort to serve notice to the defendant

healthcare provider sixty (60) days prior to filing the original complaint as required by § 15-1-36(15), Miss. Code Ann. (Rev. 2003). The lower court dismissed the plaintiffs' complaint **with prejudice**. Citing *Arceo v. Tolliver*, 949 So. 2d 691 (¶ 16)(Miss. 2006) and *Pitalo v. GPCH-GP, Inc.*, 933 So. 2d 927, 929 (¶¶ 6-7)(Miss. 2006), the reviewing court reversed the lower court's granting of dismissal with prejudice, finding that the plaintiffs' failure to file sixty days notice did not rise to the level of egregiousness sufficient to warrant dismissal with prejudice. *Nelson*, 972 So. 2d at 674 (¶ 22)(dismissal with prejudice is extreme and harsh, and only the most egregious cases warrant such dismissals). Thus, the Court held, consistent with *Arceo* and *Pitalo*, that **dismissal without prejudice** was proper when a plaintiff failed to serve notice upon a medical provider defendant at least sixty (60) days prior to initiating an action.(emphasis added). *Nelson*, 972 So. 2d at 672-674 (¶¶ 15-16, 22).

In reliance upon *Arceo, Pitalo* and *Nelson*, Rebuild America therefore submits that, even though dismissal may have been warranted by reason of its failure to provide the requisite written notice prior to filing its action (assuming applicability of the MTCA), dismissal with prejudice was unwarranted. If the lack of notice is to comprise a basis for dismissal in this cause, such dismissal must be without prejudice.

CONCLUSION

For the above and foregoing reasons, Appellant, Rebuild America, Inc., respectfully requests that the Order Granting Motions to Dismiss be reversed, with the case remanded to the lower court with instructions to proceed upon the merits of the case. Rebuild America requests such further relief and guidance as may be proper in the circumstances.

Respectfully submitted, this the 17th day of July, 2009.

REBUILD AMERICA, INC.

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

By: _____
KIMBERLY P. TURNER (MBN [redacted])

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 Brief of Appellant, to the following:

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DATED, this the 17th day of July, 2009.

_____
KIMBERLY P. TURNER (MBN [redacted])