

**SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

REBUILD AMERICA, INC.

APPELLANT

VS.

CASE NO. 2009-CA-00126

ESTATE OF DANIEL A. WRIGHT, DECEASED

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY,
MISSISSIPPI, FIRST JUDICIAL DISTRICT**

**BRIEF OF THE APPELLEE,
ESTATE OF DANIEL A. WRIGHT, DECEASED**

ORAL ARGUMENT NOT REQUESTED

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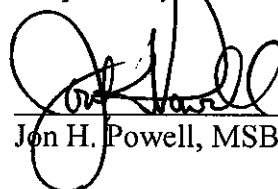
APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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.

- (A) Rebuild America, Inc., Plaintiff-Appellant.
- (B) Kimberly P. Turner, Counsel for Plaintiff-Appellant.
- (C) Joseph M. Gianola, Jr., Counsel for Plaintiff-Appellant.
- (D) Estate of Daniel A. Wright, Deceased, Defendant-Appellee.
- (E) Jon H. Powell, Counsel for Defendant-Appellee.

Respectfully Submitted,



Jon H. Powell, MSB

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I. STATEMENT OF THE ISSUES

As set forth in Appellant's brief, the issues before the Court are:

- A. Did the Chancery Court err by determining that the Chancery Clerk failed to comply with the statutory notice procedure set forth in Mississippi Code Annotated Section 27-43-3?
- B. Did the Chancery Court err in failing to award damages and interest to Rebuild America, Inc. pursuant to Mississippi Code Annotated Sections 27-45-3 and 27-45-27?

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal requires the Court to determine whether the Chancery Clerk of Hinds County, Mississippi complied with her statutory duties set forth in Mississippi Code Annotated Section 27-43-1 *et seq.* (1972, as Amended) in providing all of the required notices to the record landowner prior to the expiration of the redemption period following the sale of real property for taxes.

The Chancery Clerk caused the Deputy Sheriff of Hinds County to attempt to serve the property owner personally. Being unable to locate the property owner at the subject property, the Deputy Sheriff taped the notice to the door of the property subject to the tax sale. The Chancery Clerk also attempted to notify the property owner by certified mail, return receipt, and by publication in the newspaper.

Being unable to personally serve the property owner in conformity with Rule 4 as required by the statute, the Chancery Clerk completed a certificate (not an affidavit) stating that they made "diligent effort to locate" Wright by checking the phone directory, city tax directory, and "other." (Record at 15.) Although the property owner's name, telephone number, and

property address were located in two separate local telephone directories (See Record at 177 - 180.), and the property owner's personal residence address was listed on the tax rolls in the tax assessor's office as being 48 Cascades Circle West, Clinton, MS 39056 (See Record at 176.), no additional attempts were made by the Chancery Clerk to notify the property owner of the redemption period.

Given the failure to fully comply with Mississippi Code Annotated Section 27-43-1, *et seq.*, in giving of the required notice to Wright, the subject tax sale was insufficient to convey title to the purchaser at the tax sale, and therefore the tax sale is void as a matter of law. Because there is no genuine issue of material fact, the Chancery Court properly granted summary judgment to the property owner in this matter.

B. Course of Proceedings and Disposition in the Court Below

The Hinds County Chancery Clerk issued a Tax Deed to the subject property to Wachovia Cust Sass Muni V DIR. Wachovia Cust Sass Muni V DIR conveyed its interest in the subject property to Rebuild America, Inc., the Appellant herein. Rebuild America, Inc. filed its Complaint to Quiet and Confirm Tax Title in the Chancery Court of Hinds County, Mississippi (First Judicial District) against Daniel A. Wright *et al.*, in Chancery Cause Number G2007-2193 S/2. During the pendency of the proceedings and while discovery was being conducted, Daniel A. Wright died, and the Estate of Daniel A. Wright, Deceased was properly substituted as the proper party defendant. (Record at 118.) After discovery had been conducted, both parties filed Motions for Summary Judgment. A hearing on both parties' Motions for Summary Judgment was held before the Honorable William H. Singletary on December 8, 2008. On December 10, 2008, the Chancery Court entered its Order Granting Defendant's (Appellee herein) Motion for Summary Judgment and denying Plaintiff's (Appellant herein) Motion for Summary Judgment.

(Record at 196.) The Chancery Court entered a Final Judgment in this matter on December 19, 2008. (Record at 203.) Rebuild America, Inc. filed its Notice of Appeal on January 20, 2009. (Record at 205.)

C. Statement of the Facts

Appellee Estate of Daniel Wright (hereafter "Wright") is the owner of the following described parcel of real property:

A certain parcel of land situated in the NW 1/4 of Section 8, Township 5 North, Range 1 East, Hinds County, Mississippi, and being more particularly described by metes and bounds as follows, to-wit:
Commencing at the point of intersection of the line between the East 1/2 and the West 1/2 of the NW 1/4 of Section 8, T5N, R1E, Jackson, Hinds County, Mississippi and the South right-of-way line of Hill Avenue; run thence East along the said South right-of-way line, 1321.50 feet to a point; thence leaving the said South right-of-way line run South 01 degrees 09 minutes West 681.90 feet to a point, run thence South 89 degrees 17 minutes East 610.40 feet to a point, run thence South 14 degrees 56 minutes East 671.79 feet to a point; run thence North 76 degrees 36 minutes West 937.76 feet to a point; run thence South 89 degrees 00 minutes West 184.89 feet to the Point of Beginning; run thence South 16 degrees 34 minutes East 325.30 feet to a point on the Northerly right-of-way line of US Highway 80; run thence North 71 degrees 12 minutes West along said Northerly right-of-way line 99.10 feet to a point; thence leaving the said Northerly right-of-way line of US Highway 80 run North 16 degrees 34 minutes West 290.80 feet to a point; run thence North 89 degrees 00 minutes East 83.05 feet to the Point of Beginning

Also known as:

BEG INT E/L HATTIESBURG ST & N/L HWY 80 NW/LY 290.8 FT E/LY 83.5 FT SE/LY 325.3 FT W/LY 98.1 FT TO POB SW 1/4 SEC 8 T5N R1E
Parcel: 219-0001-001 PPIN 2341

The real property is also known as Tax Parcel #219-1-1. The street address of the real property is 1980 Highway 80 West, Jackson, Mississippi 39204.

On January 1, 2005, the 2004 ad valorem taxes became due on the subject property.

Wright failed to pay the 2004 taxes, and the subject property was sold by Eddie Fair, Tax

Collector, for taxes in August 2005, to Wachovia Cust Sass Muni V DIR. After the tax sale, the taxes were not redeemed by Wright during the following two years.

On May 23, 2007, a Sheriff's Notice was issued by the Chancery Clerk of Hinds County notifying Wright of the 2005 tax sale (for the 2004 taxes). However, the Sheriff did not serve Wright with the Notice but taped the Notice to the door of the building on the subject property. This is not a method of service of process allowed or recognized as valid under Rule 4 of the Mississippi Rules of Civil Procedure. The Deputy Sheriff executed a return of service on July 12, 2007 which stated :

"I have this date executed the within writ of summons on Wright Daniel A the within named defendant, by posting a true copy of the same on a door of defendant's usual place of abode in my county at the premises known as 1980 Hwy 80 W in the city of Jxn. The said defendant could not be found in any county, nor could I find any member of said defendant's family over the age of sixteen years, willing to receive the same at his usual place of abode." (Record at 13.)

Wright's usual place of abode is 48 Cascades Circle West, Clinton, MS 39056, as evidenced by the tax rolls of Hinds County (Record at 190.) and two local telephone directories (Record at 177-180.).

Also on May 23, 2007, the Chancery Clerk mailed via certified return receipt, return receipt requested an "Owner's Notice" to Wright. The letter was mailed to the subject property's address being 1980 Highway 80 West, Jackson, MS. The return receipt was signed by Cathy Burkes on June 5, 2007. (Record at 145.)

On June 18, 2007, the Chancery Clerk caused to be published in *The Clarion Ledger* a notice of the tax sale. (Record at 14.)

On behalf of the Chancery Clerk, a deputy clerk named "D. Sheriff" executed a certification (not an affidavit) which states that he or she "made a diligent effort to locate the

above named person(s) whose property is involved in Tax Sale No. 2341" by checking the phone directory, the city tax directory, and other." This certification is undated, and there has been no evidence presented as to when this certification was prepared or signed. (Record at 15.)

When Wright failed to receive the proper redemption notice as required by statute and therefore failed to redeem the 2004 property taxes, the Chancery Clerk issued a Tax Deed attempting to convey title to the subject property to Wachovia Cust Sass V DIR on September 10, 2007. The Tax Deed was recorded in Book 6770 at Page 743 in the land records in the office of the Hinds County Chancery Clerk. (Record at 9.) Thereafter, Rebuild America purportedly acquired title via "Quitclaim Deed and Assignment" from U.S. Bank National Association as successor in interest to Wachovia Bank as custodian for Sass Muni V, which was recorded in Book 6791 at Page 354 in the land records in the office of the Hinds County Chancery Clerk. (Record at 6.)

On December 3, 2007, Rebuild America filed its Complaint to Quiet and Confirm Tax Title. (Record at 1.) During discovery, Rebuild America admitted in its responses to Wright's Interrogatories 8 and 10 that the only evidence of the Chancery Clerk's providing notice to Wright in accordance with Rule 4 of the Mississippi Rules of Civil Procedure was the Sheriff's return stating that he posted the notice on the door to the subject property. (Record at 191, 192.) Additionally, Rebuild America admitted in its Responses to Requests for Admissions Number 1 that "the documentation which evidence the notice provided Daniel A. Wright speaks for itself." (Record at 193.)

Both Rebuild America and Wright each filed their Summary Judgment Motions, and a hearing was held on December 8, 2008 before Honorable William H. Singletary. (Hearing Transcript at 1.) After consideration of the motions and arguments from counsel, the Chancery

Court issued its Order Granting Defendant's Motion for Summary Judgment on December 10, 2008, in which the Court held that Wright was never personally served with notice and that there is no substantive evidence that the Chancery Clerk conducted a diligent search for Wright. (Record at 196-202.) As a result, Rebuild America's Motion for Summary Judgment was denied. The Final Judgment was entered on December 19, 2008. (Record at 203-204.)

On January 20, 2009, Rebuild America filed its Notice of Appeal. (Record at 205.)

The Court did not award Rebuild America damages to reimburse it for payment of taxes, interest or other expenses incurred by Rebuild America. That issue was not raised by Rebuild America as an issue in the Chancery Court, as no mention was made in Rebuild America's Motion for Summary Judgment, in Rebuild America's Response to Wright's Motion for Summary Judgment, or at the December 8, 2008 hearing on the motions for summary judgment.

III. SUMMARY OF THE ARGUMENT

The tax sale is void due to failure of the Chancery Clerk to provide the required notice pursuant to the relevant statutory and case law. Additionally, the Chancery Clerk failed to make diligent efforts in attempting to locate Wright. As such, no genuine issue of any material fact existed, and Wright was entitled to a judgment as a matter of law and the Chancery Court's granting of summary judgment in this matter was proper. Furthermore, Rebuild America is not entitled to recover or seek reimbursement of the taxes, interest and expenses it incurred as a result of Wright's failure to pay the ad valorem taxes because the issue was not raised as an issue before the Court in any motion or response to motion, and the appellate courts cannot decide any issues not first raised at the trial court level.

IV. ARGUMENT

A. Standard of Review

The appellate courts employ a de novo standard of review in reviewing from trial courts matters disposed of on summary judgment. *Mantachie Natural Gas Dist. v. Miss. Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss. 1992).

“A trial court may grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *M.R.C.P. 56(c)*. A fact is material if it “tends to resolve any of the issues, properly raised by the parties.” *Webb v. Jackson*, 583 So.2d 946, 949 (Miss.1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So.2d 431, 433 (Miss.1988)). “The focal point of our standard for summary judgment is on material facts.” *Warren ex rel. v. Glascoe*, 880 So.2d 1034, 1036 (Miss. 2004). The moving party bears the burden of showing that no genuine issue of material fact exists. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990). The evidence must be viewed in the light most favorable to the nonmoving party. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So.2d 658, 661 (Quoting *Pace v. Financial Security Life of Mass.*, 608 So.2d 1135 (Miss. 1992)). If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in that party's favor. *Id.* However, to avoid the entry of an adverse judgment, the party opposing the motion for summary judgment must present “significant probative evidence demonstrating the existence of the triable issue of fact.” *Fraye v. Southern Farm Bureau Casualty Ins. Co.*, 915 So.2d 486, 493 (Miss. Ct. App. 2005) (quoting *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988)). “The party opposing the motion must be diligent and ‘may not rest upon the mere allegations or denials of the pleadings, but instead the

response must set forth specific facts showing there is a genuine issue for trial.” *Cousin v. Enter. Leasing Company - South Cent. Inc.*, 948 So.2d 1287 (Miss. 2007) (quoting *Harrison v. Chandler-Sampson Ins. Inc.*, 891 So.2d 224, 228 (Miss. 2005)). Rule 56(e) of the Mississippi Rules of Civil Procedure states in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

On appeal, “[i]f any triable issues of fact exist, the lower court’s decision to grant summary judgment will be reversed.” *Box v. State Farm Mut. Auto. Ins. Co.*, 692 So.2d 54, 55 (Miss.1997).

B. The Chancery Court properly granted summary judgment to Wright in that the Chancery Clerk failed to comply with the notice requirements of Mississippi Code Annotated Section 27-43-3 (1972, as Amended)

The controlling statute regarding land forfeitures for delinquent taxes is Miss. Code Ann. § 27-43-3 which reads as follows:

The clerk shall issue the notice to the sheriff of the county of the reputed owner’s residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sales record. The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.

If said reputed owner is a nonresident of the State of Mississippi, then the clerk shall mail a copy of said notice thereto in the same manner as hereinabove set out

for notice to a resident of the State of Mississippi, except that personal notice served by the sheriff shall not be required.

Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as hereinabove required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out. If personal notice is again issued and it is again returned not found and if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit noted on the tax sales record. If the clerk is still unable to ascertain the reputed owner's street or post office address after making search and inquiry for the second time, then it shall not be necessary to issue any additional notice but the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record.

Should 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.

Mississippi courts have emphasized the importance of complying with this statute prior to divesting the property owner of his/her rights. "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners." *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003). "Any deviation from the statutorily mandated procedure renders the sale void." *Id.* "Under this guidance, we have held that the statutory notice requirements of § 27-43-3 must be strictly construed in favor of landowners." *Moore v. Marathon Asset Management, LLC*, 993 So.2d 1017, 1019-20 (citing *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991); *Norwood v. Moore*, 932 So.2d 63, 66 (Miss. Ct. App. 2006); *Lawrence v. Rankin*, 870 So.2d 673, 676 (Miss. Ct. App. 2004); *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003).

The Mississippi Supreme Court has held that “§ 27-43-3 requires redemption notice be given by personal service, by mail, and by publication in the appropriate newspaper.” *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d 679, 681 (Miss. Ct. App. 2006); *DeWeese Nelson Realty, Inc. v. Equity Service Co.*, 502 So.2d 310, 312 (Miss. 1986). The Court held in *Deweese Nelson Realty v. Equity Service Co.* that “Construing Miss. Code Ann. § 27-41-55 (Supp. 1985) and Miss. Code Ann. § 27-43-3 (Supp. 1985) together, notice must be given by personal service, mail and publication before a landowner’s rights are finally extinguished by the maturing of a tax deed.” *Deweese Nelson Realty Inc. v. Equity Service Co.*, at 314.

“Accordingly, all three forms of notice are required under the statute in order for the tax sale to be valid.” *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d at 681; *Deweese Nelson Realty Inc. v. Equity Service Co.*, 502 So.2d at 312.

(1) No Rule 4 Notice

The specific methods for perfecting personal service are set out in Rule 4 of the Mississippi Rules of Civil Procedure. Rule 4(d) describes the procedure for personal services as follows:

(d) Summons and Complaint: Person to Be Served. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

- (A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or
- (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, **by leaving a copy of the summons and complaint at the defendant’s usual place of abode with the defendant’s spouse or some other person of the defendant’s family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint**

(by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this matter is deemed complete on the 10th day after such mailing.

Wright was never given personal notice as required by the statute and Rule 4 of the Mississippi Rules of Civil Procedure. It is admitted by Rebuild America on Page 5 of its Memorandum Brief in Support of its Motion for Summary Judgment that Deputy Sheriff Dusty Bailey posted a copy of the redemption notice on the door of the business at the property address. (Record at 128.) It is also admitted in Rebuild America's responses to Wright's Request for Admissions that the proof of service provided by the deputy speaks for itself with regard to personal service of Wright. (Record at 193.) It is further admitted by Rebuild America in its Responses to Interrogatories numbered 8 and 10 that Rebuild America relies on the Sheriff Deputy's proof of service for its assertion that Rule 4 notice was provided to Wright. (Record at 191, 192.) In *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d 679 (Miss. Ct. App. 2006), this method was specifically regarded by the Court as inadequate for the purposes of personal service relating to redemption notices. The Mississippi Appeals Court invalidated the tax sale stating the following reason:

"Here the record indicates that the deputy sheriff posted the notice to Addison's business when he was unable to successfully locate Addison on the premises. Posting a notice to the property when the intended recipient cannot be located is clearly not one of the methods for perfecting personal service under Rule 4. ... In short, we find that Addison was not given adequate notice of the expiration of the redemption period because he never received personal service as mandated by Rule 4. Therefore, in accordance with the dictates of section 27-43-3, we find that the chancery court was correct in its ruling that the tax sale of Addison's property was void." *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d 679, 682 (Miss. App. 2006).

As in *Viking*, Wright was never personally served with the redemption notice pursuant to Rule 4. The Deputy Sheriff posted the redemption notice at the building on the subject property.

(Record at 55.) This method was held inadequate in *Viking* to effect service of the redemption notice pursuant to Rule 4, and it is likewise inadequate here.

(2) Clerk Failed to Make Diligent Search and Inquiry

The Chancery Clerk failed to make diligent search and inquiry in trying to locate an alternate address for Wright when the Deputy Sheriff was unable to serve Wright.

The only evidence of the Clerk's purported attempt to search for an additional address was a certificate (not an affidavit) prepared and signed by a deputy clerk "D. Sheriff" which states that he or she "made a diligent effort to locate the above named person(s) whose property is involved in Tax Sale No. 2341" by checking the phone directory, the city tax directory, and other." (Record at 15.) This certificate is not dated, and there was no evidence presented by Rebuild America as to when this certificate was prepared or signed.

Additionally, the certificate is suspect at best with regards to its evidentiary value. The Court has stated that to avoid the entry of an adverse judgment, the party opposing the motion for summary judgment (i.e., Rebuild America) must present "significant probative evidence demonstrating the existence of the triable issue of fact." *Fraye v. Southern Farm Bureau Casualty Ins. Co.*, 915 So.2d 486, 493 (Miss. Ct. App. 2005) (quoting *Reich v. Jesco, Inc.*, 526 So.2d 550, 552 (Miss. 1988)). There was no significant probative evidence presented to the Court which demonstrates that deputy clerk D. Sheriff conducted the diligent search and inquiry. In fact, significant probative evidence was presented to the Chancery Court by Wright that no diligent search and inquiry was made by the Clerk. Wright presented the Hinds County tax roll (Record at 176.) which provides Wright's home address as well as two local telephone directories, one from 2006 and one from 2007 (not 2008 as Rebuild America's Appellant's Brief erroneously asserts on pages 14-15) that list Wright's name, address and telephone number

(Record at 177-180.). The tax roll and two telephone directories directly rebut and refute any assertion by Rebuild America that the Chancery Clerk conducted any search as deputy clerk D. Sheriff certifies. D. Sheriff simply could not have checked the telephone directory and the city tax directory. If such search would have been conducted D. Sheriff would have discovered Wright's address.

Rebuild America argues that the telephone directories and the tax roll does not list Wright's name exactly as on the tax roll for the subject property. The tax roll listing of Wright on the subject property is for "Daniel A. Wright." The tax roll for Wright's home and the telephone directories list Wright as "Dan A. Wright." While Rebuild America is correct in that the listings are not *exactly* the same, it is reasonable and not unduly burdensome for the Chancery Clerk to look at "Dan A. Wright" and know that "Dan A. Wright" is possibly (even probably) the same person as "Daniel A. Wright." The argument by Rebuild America that the Court's requiring assumptions and inferences to be made by the Chancery Clerk is beyond what the Clerk is obligated to do by statute is tenuous. The statute dictates what must be done by the Clerk to provide redemption notice to the property owner. The statute requires that the Clerk make **diligent** search and **inquiry** - not go through the motions of creating and checking off a checklist. "Diligent search and inquiry" does not mean looking for an exact match to the name listed on the tax roll, nor has the Court ever held such. However, diligent search and inquiry does require that the Clerk act as more than just a computer trying to match exact names. In this case, it is not unduly burdensome or unreasonable to expect that the Chancery Clerk in this matter look at the name "Dan A. Wright" or "Dan Wright" and consider that it may be the diminutive of "Daniel A. Wright." Certainly these basic considerations are encompassed in what the legislature intended when they used they crafted the statute by using such terms as "diligent search and inquiry."

The intent of the statute is to provide notice to the property owner. The statute is written so that Wright receive actual redemption notice. When Wright was not served with redemption notice in keeping with Rule 4, the Chancery Clerk was obligated to make a diligent search and inquiry as required by Mississippi Code Annotated Section 27-43-3. The Chancery Clerk having failed to do so, the tax sale is therefore void. Further, Rebuild America did not present any significant probative evidence that the Chancery Clerk made diligent search and inquiry, and did not rebut at the hearing on the motions for summary judgment the evidence presented to the Court by Wright that no diligent search and inquiry was made. As a result, the Court properly granted summary judgment to Wright holding the tax sale void.

(3) Clerk Failed to Make Affidavit

The certificate prepared and signed by “D. Sheriff” is repeatedly referred to by Rebuild America as an affidavit. (See Transcript at 12-13; Appellant’s Brief at 13-15.) This reference to the certificate being an affidavit is false. The certificate is not sworn to and is not an affidavit as required by Mississippi Code Annotated Section 27-43-3. Black’s Law Dictionary, Sixth Edition (Centennial Edition), defines Affidavit as “a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.” The certificate is not an affidavit, as it is not sworn to under oath or affirmation, and no one authorized to give and take oaths confirmed that D. Sheriff swore or affirmed to the facts asserted in the certificate. Therefore, because the certificate signed by D. Sheriff is not an affidavit as required by the statute, the Chancery Clerk did not comply with Mississippi Code Annotated Section 27-43-3, and the tax sale is thus void.

(4) The Chancery Court's Granting of Summary Judgment was Proper

No genuine issue of material fact exists or was presented by Rebuild America which contradicts the sheriff's return stating that the notice was posted on the door. Rebuild America admits this in its' Response to Request for Admission No. 1, Plaintiff's Response to Interrogatory No. 8 and No. 10, and in its Motion for Summary Judgment.

No genuine issue of material fact exists or was presented that the Chancery Clerk made a diligent search and inquiry for Wright. Rebuild America did not present any significant evidence of probative value which makes this an issue of fact. However, Wright presented significant evidence of probative value that the Chancery Clerk did not make a diligent search and inquiry.

No genuine issue of material fact exists or was presented that the Chancery Clerk made an affidavit as to the diligent search and inquiry for Wright. The certification signed by deputy clerk D. Sheriff is not an affidavit. No evidence was presented that D. Sheriff swore or affirmed that he or she made any diligent search and inquiry to any person authorized to administer and take oaths, and such oath was not confirmed having been taken before such officer.

As stated earlier, the controlling case law states that any failure to comply strictly with the statute renders the tax sale void. "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners." *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003). "Any deviation from the statutorily mandated procedure renders the sale void." *Id.* "Under this guidance, we have held that the statutory notice requirements of § 27-43-3 must be strictly construed in favor of landowners." *Moore v. Marathon Asset Management, LLC*, 993 So.2d 1017, 1019-20 (citing *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991); *Norwood v. Moore*, 932 So.2d 63, 66 (Miss. Ct. App. 2006); *Lawrence v. Rankin*, 870 So.2d 673, 676 (Miss. Ct. App. 2004); *Roach v. Goebel*, 856 So2d 711, 716 (Miss. Ct. App. 2003)). The

Mississippi Supreme Court has stated that “§ 27-43-3 requires redemption notice be given by personal service, by mail, and by publication in the appropriate newspaper.” *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d 679, 681 (Miss. Ct. App. 2006); *DeWeese Nelson Realty, Inc. v. Equity Service Co.*, 502 So.2d 310, 312 (Miss. 1986). “Construing Miss. Code Ann. § 27-41-55 (Supp. 1985) and Miss. Code Ann. § 27-43-3 (Supp. 1985) together, notice must be given by personal service, mail and publication before a landowner’s rights are finally extinguished by the maturing of a tax deed.” *Deweese Nelson Realty Inc. v. Equity Service Co.*, at 314. “Accordingly, all three forms of notice are required under the statute in order for the tax sale to be valid.” *Viking Investments, LLC v. Addison Body Shop, Inc.*, 931 So.2d at 681; *Deweese Nelson Realty Inc. v. Equity Service Co.*, 502 So.2d at 312.

Therefore, based on the relevant and controlling case law and the fact that no genuine issue of material fact exists or was presented by Rebuild America with regards to the fact that (1) Wright was never personally served with the redemption notice, (2) that the Chancery Clerk did not make diligent search and inquiry, and (3) that the Chancery Clerk did not make an affidavit as to the diligent search and inquiry, the tax sale was properly held void and the Chancery Court properly granted Wright summary judgment.

C. The Chancery Court did not err in failing to award damages and interest to Rebuild America, Inc. pursuant to Mississippi Code Annotated Sections 27-45-3 and 27-45-27

For the first time, Rebuild America raises the issue regarding the awarding of damages and interest to Rebuild America. This issue was not raised at the trial court at the hearing on the motions for summary judgment, nor was it properly raised by Rebuild America on motion following the Chancery Court’s ruling granting Wright summary judgment. Stated otherwise, no reference is made by Rebuild America on plea in its motion for summary judgment or in its

response to Wright's motion for summary judgment, nor after the Court's granting of summary judgment.

Wright does not deny that properly raised, Rebuild America would otherwise be entitled to present to the Court its claim for damages and interest pursuant to the relevant statute. However, this matter was not raised at the Chancery Court level during the pleading of the dispositive summary judgment motions, at the hearing on the summary judgment motions, nor by motion after the Court ruled on the summary judgment motions. Nowhere in the motions, responses to motions, or at the hearing on the motions for summary judgment is the claim for damages and interest mentioned. Instead, Rebuild America chose to file its notice of appeal in this matter, abandoning any claim it may have on appeal to the matter of damages and interest under the relevant statute. Therefore, Rebuild America is not entitled to raise as error its claim for damages and interests for the first time on this appeal, as the Chancery Court did not have an opportunity to address the alleged error.

The Mississippi Courts have long held that a trial court will not be put in error for a matter not presented to it for decision. See *Crowe v. Smith*, 603 So.2d 301 (Miss. 1992); *Parker v. Miss. Game and Fish Comm'n*, 555 So. 2d 725 (Miss. 1989); *Mills v. Nichols*, 467 So.2d 924 (Miss. 1985); *Bender v. North Meridian Mobile Home Park*, 636 So.2d 385 (Miss. 1994); *Nationwide Mut. Ins. Co. v. Tillman*, 161 So.2d 604 (Miss. 1964); *Southern v. Mississippi State Hospital*, 853 So.2d 1212 (Miss. 2003); *Brown v. Miss. Transp. Comm'n*, 749 So.2d 948 (Miss. 1999); *In re Dissolution of Marriage of De St. Germain*, 977 So.2d 412 (Miss. Ct. App. 2008); *Kelley v. Day*, 965 So.2d 749 (Miss. Ct. App. 2007); *Mimmitt v. Allstate County Mut. Ins. Co., Inc.*, 928 So.2d 203 (Miss. Ct. App. 2006); *Marshall Durbin Food Corp. v. Baker*, 909 So.2d 1267 (Miss. Ct. App. 2005). Further, the Mississippi Courts have long held that a party is not

allowed to raise an issue for consideration by the appellate courts for the first time on appeal, and that same is deemed waived and procedurally barred. *Luse v. Luse*, 992 So.2d 659 (Miss. Ct. App. 2008); *Educational Placement Services v. Wilson*, 487 So.2d 1316 (Miss. 1986); *Seaney v. Seaney*, 218 So.2d 5 (Miss. 1969); *A.H. George & Co. v. Louisville & N.R. Co.*, 40 So. 486 (Miss. 1906); *Natural Father v. United Methodist Children's Home*, 418 So.2d 807 (Miss. 1982); *Bender v. North Meridian Mobile Home Park*, 636 So.2d 385 (Miss. 1994); *Adams v. City of Clarksdale*, 48 So. 242 (Miss. 1909); *Zurich American Ins. Co. of Illinois v. Beasley Contracting Co., Inc.*, 779 So.2d 1132 (Miss. Ct. App. 2000); *Mitchell v. Finley*, 137 So. 330 (Miss. 1931); *Gale v. Thomas*, 759 So.2d 1150 (Miss. 1999); *Daniels v. Bains*, 967 So.2d 77 (Miss. Ct. App. 2007); *Jones v. Fluor Daniel Services Corp.*, 959 So.2d 1044 (Miss. 2007); *Birrages v. Illinois Cent. R.R. Co.*, 950 So.2d 188 (Miss. Ct. App. 2006); *Alley v. Northern Ins. Co.*, 926 So.2d 906 (Miss. 2006); *Brown v. Thompson*, 927 So.2d 733 (Miss. 2006); *Harbin v. Chase Manhattan Bank*, 871 So.2d 764 (Miss. Ct. App. 2004); *Prestridge v. City of Petal*, 841 So.2d 1048 (Miss. 2003); *Lemon v. Miss. Transp. Comm'n*, 735 So.2d 1013 (Miss. 1999); *Adams v. Board of Supervisors of Union County*, 170 So. 684 (Miss. 1936); *Anderson v. Leland*, 48 Miss. 253 (Miss. 1873); *Wilburn v. Wilburn*, 991 So.2d 1185 (Miss. 2008); *Fitch v. Valentine*, 959 So.2d 1012 (Miss. 2007); *Miss. Mun. Liability Plan v. Jordan*, 863 So.2d 934 (Miss. 2003); *New Bellum Homes, Inc. v. Swain*, 806 So.2d 301 (Miss. Ct. App. 2001); *Boyles v. Miss. State Oil * Gas Bd.*, 794 So.2d 149 (Miss. 2001); *Zimmerman v. Three Rivers Planning and Dev. Dist.*, 747 So.2d 853 (Miss. Ct. App. 1999); *Henry v. Moore*, 9 So.3d 1146 (Miss. Ct. App. 2008); *Raines v. Bottrell Ins. Agency, Inc.*, 992 So.2d 642 (Miss. Ct. App. 2008); *Koestler v. Koestler*, 976 So.2d 372 (Miss. Ct. App. 2008); *Hudson v. Palmer*, 977 So.2d 369 (Miss. Ct. App. 2007); *Burns v. Haynes*, 913 So.2d 424 (Miss. Ct. App. 2005).

The Chancery Court of Hinds County cannot be held in error on the matter of whether Rebuild America is entitled to any damages or interest because Rebuild America failed to raise these claims before the Court at the trial level. Stated otherwise, when Rebuild America failed to present its claims for damages and interest at the trial court level, Rebuild America waived any claims it may have to damages and interest, and said claims are therefore procedurally barred and cannot be first raised here on appeal.

V. CONCLUSION

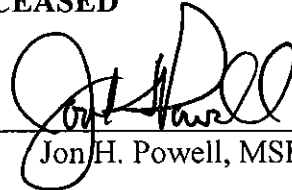
The Chancery Court correctly held as a matter of law that the tax sale is void due to failure of the Chancery Clerk to provide the required notice pursuant to the relevant statutory and case law. No genuine issue of any material fact existed, and Wright was entitled to a judgment as a matter of law and the Chancery Court's granting of summary judgment in this matter was proper. Furthermore, Rebuild America is not entitled to recover or seek reimbursement of the taxes, interest and expenses it incurred as a result of Wright's failure to pay the ad valorem taxes because the issue was not raised as an issue before the Chancery Court in any motion, response to motion, or motion following the Court's granting Wright summary Judgment. Therefore, Rebuild America waived its claim to such taxes, interest and expenses and is procedurally barred from asserting the claim for the first time on appeal, and the appellate courts cannot decide any issues not first raised at the trial court level.

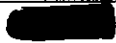
This the 6th day of August, 2009.

Respectfully Submitted,

**THE ESTATE OF DANIEL A. WRIGHT,
DECEASED**

By: _____



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CERTIFICATE OF SERVICE

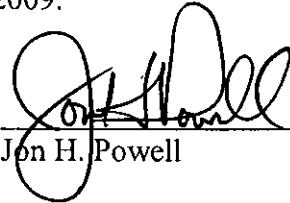
This is to certify that I have this day caused to be mailed, via first class U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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So certified, this the 6th day of August, 2009.



Jon H. Powell