

**IN THE SUPREME COURT OF MISSISSIPPI
APPEAL NO. 2010-CA-00220**

JAMES E. FERGUSON

APPELLANT

VS.

DELORIS FERGUSON

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT OF
DESOTO COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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I. CERTIFICATE OF INTERESTED PERSONS.

The undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Senior Chancellor Percy L. Lynchard, Jr., DeSoto County Chancery Court, Hernando, Mississippi.
2. W. E. "Sluggo" Davis, DeSoto County Chancery Court Clerk, Hernando, Mississippi.
3. Joey Treadway, DeSoto County Tax Collector, Hernando, Mississippi.
4. Sheriff Bill Rasco, DeSoto County Sheriff, Hernando, Mississippi.
5. Parker Pickle, DeSoto County Tax Assessor, Hernando, Mississippi.
5. Graves & Palmertree, PLLC, Attorneys for Appellee, 2446 Caffey Street, Suite 1A, Hernando, Mississippi.
6. Deloris Ferguson, Appellee, 2200 Bolin Road, Hernando, Mississippi.
7. Bridgforth & Buntin, Attorneys for Appellant 5293 Getwell Road, Southaven, Mississippi.
8. James E. Johnson, Appellant, 793 King Road, Memphis, Tennessee.

DATED this the 18th day of August, 2010.

DELORIS FERGUSON

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IV. STATEMENT OF ISSUES.

- I. **WHETHER THE CHANCERY COURT PROPERLY RULED THAT THE STATUTORY REQUIREMENTS OF A TAX SALE WERE SATISFIED.**
- II. **WHETHER THE CHANCERY COURT PROPERLY APPLIED THIS COURT'S HOLDING IN RUSH V. WALLACE RENTALS TO THE UNDISPUTED FACTS.**

V. STATEMENT OF THE CASE.

A. THE NATURE OF THE CASE.

On October 8, 2008, Appellant James E. Johnson filed his Complaint To Set Aside Chancery Clerk's Conveyance Land Sold For Taxes, To Cancel And Set Aside Tax Sale, To Allow For Redemption Of Property Sold For Taxes, To Remove Cloud Upon Title, For Declaratory Judgment And Other Relief against Appellee Deloris Ferguson in the Chancery Court of DeSoto County, Mississippi, Cause No. 08-10-2138¹. Appellant Johnson alleged that the sale of his property, Parcel No. 2084-17600.0-0003.02 (hereinafter "the Property"), for the payment of *ad valorem* taxes was not conducted in accordance with the requirements of Mississippi Code Annotated and requested that the sale be set aside, that the deed transferring all right and title to the Property to Appellee Ferguson be set aside, and that Appellant Johnson be allowed to pay all delinquent *ad valorem* taxes owed on the Property. (R. 5-18)

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On October 8, 2008, Johnson filed his Complaint To Set Aside Chancery Clerk's Conveyance Land Sold For Taxes, To Cancel And Set Aside Tax Sale, To Allow For Redemption Of Property Sold For Taxes, To Remove Cloud Upon Title, For Declaratory Judgment And Other Relief against Ferguson in the Chancery Court of DeSoto County,

¹ As noted below, Appellee Ferguson subsequently initiated a separate action by filing her Complaint To Quiet And Confirm Tax Title with the Chancery Court of DeSoto County, Mississippi, Cause No. 08-12-2533, under which both actions were consolidated by the Agreed Order Consolidating Cases entered by the Chancery Court of DeSoto County, Mississippi, on December 24, 2008.

Mississippi, Cause No. 08-10-2138, and, on November 19, 2008, Ferguson filed her Answer in response to the same. (R. 5-22)

On December 3, 2008, Ferguson filed her Complaint To Quiet And Confirm Tax Title with the Chancery Court of DeSoto County, Mississippi, Cause No. 08-12-2533. (R. 23-27) The two cases were consolidated by an Agreed Order Consolidating Cases entered by the DeSoto County Chancery Court on December 24, 2008. (R. 32-33)

Thereafter the parties engaged in discovery, and on July 8, 2009, Ferguson filed her Motion For Summary Judgment and accompanying Memorandum Brief In Support Of Motion For Summary Judgment seeking to have title to the Property quieted and confirmed in Ferguson on the basis that the tax sale was properly conducted in accordance with Mississippi Law and that any lack of notice complained of by Johnson was the direct fault of Johnson's willful and purposeful failure to maintain current and accurate records of his address with the proper public authorities. (R. 41-141)

On November 4, 2009, Johnson filed his Response to Appellee Ferguson's Motion For Summary Judgment and also filed his own Counter-Motion For Summary Judgment alleging, among other things, that the Property was not offered for sale in separate tracts, that the statutory requirements of the sale were not complied with, and that Johnson was not given adequate notice of the tax sale. (R. 146-166, 192-199).

After the filing of Reply Memorandums by both Ferguson (R. 167-180) and Johnson (R. 200-209) in support of their respective Summary Judgment Motions, the DeSoto County Chancery Court entered an Order Granting Summary Judgment in favor of Ferguson on January 12, 2010, finding that this Court's opinion in Rush v. Wallace Rentals, LLC, 827 So.2d 191 (Miss. 2003), controlled the facts of this case and warranted summary judgment in favor of Ferguson. (R. 210)

Thereafter, on January 27, 2010, the DeSoto County Chancery Court entered both an Order Amending Judgment to reflect that Johnson's Counter-Motion For Summary Judgment was denied (R. 226), and also a Final Judgment To Quiet And Confirm Tax Title quieting and confirming all right and title to the Property in Ferguson (R. 227-231).

On February 4, 2010, Johnson filed his Notice Of Appeal with the DeSoto County Chancery Court initiating the appeal now before this Court. (R. 232-233).

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

On or about November 20, 1986, Appellant James Johnson purchased the property located at 3567 Horn Lake Road, Nesbit, Mississippi, Parcel No. 2084-1700.0-00003.02 (hereinafter "the Property"), at a tax sale. (R. 48, 52) Appellant Johnson was the owner of record of the Property from 1986 through 2008 when the Property was sold to Appellee Deloris Ferguson at a tax sale. (R. 48, 52, 64) At the same time, Johnson also owned the adjoining property located at 3671 Horn Lake Road, Nesbit, Mississippi. (R. 52-66, 109)

During this time period Johnson requested that all notices sent by the DeSoto County Tax Assessor, DeSoto County Tax Collector, and the DeSoto County Chancery Clerk regarding the Property be sent to the adjoining property's address of 3671 Horn Lake Road, Nesbit, Mississippi. (R. 51, 93, 99, 106-108, 116-118, 121-122, 127) Johnson has maintained that address with those offices in spite of the fact that he admittedly purchased a home at 793 King Road, Memphis, Tennessee, on October 10, 1990, and has lived at that address for the last twenty (20) years. (R. 107-108, 176)

In spite of the fact that Johnson admittedly lives at the King Road address in Memphis, Tennessee, he has consistently maintained a driver's license issued by the State of Mississippi which lists his resident address as 3671 Horn Lake Road, Nesbit, Mississippi. (R. 111-114) Johnson has also registered to vote in DeSoto County, Mississippi, and lists the 3671 Horn Lake

Road, Nesbit, Mississippi, address as his resident address for that purpose. (R. 122-124)

All of these things have led to all mail or other notices sent by any office in DeSoto County, Mississippi, to Johnson to be sent to the 3671 Horn Lake Road, Nesbit, Mississippi, address, and Johnson admits that this is what he has always intended to happen. (R. 121-122) In fact, Johnson testified that even now he would still like for all mail addressed to him to be sent to the address at 3671 Horn Lake Road, Nesbit, Mississippi. (R. 125-127) Johnson states this in spite of the fact that he, admittedly, does not actually live at the 3671 Horn Lake Road address and only has some purported vague, future plans to move back to that address. (R. 124-125)

Additionally, two of Johnson's children live at the 3671 Horn Lake Road, Nesbit, Mississippi, address, and these children routinely accept mail on his behalf which he picks up on a regular basis. (R. 125-126, 151-156) Trenese Franklin and her husband Howard Franklin live on the parcel located at 3671 Horn Lake Road and Johnson's son, Terrell Johnson, at that time resided on the parcel which makes up the Property which is the subject of this appeal. (R. 151-156)

Johnson confirmed in deposition testimony that he understands the property taxes are due and payable every year on the Property. (R. 119-120) However, during the time period in which Johnson has owned the Property, he has on numerous occasions failed to timely pay the property taxes due and was forced to redeem the taxes on the Property. A list of the redemptions Johnson was required to make is as follows:

	<u>Tax Year</u>	<u>Date Sold</u>	<u>Date Redeemed</u>
(a)	1993	August 29, 1994	September 6, 1994
(b)	1994	August 28, 1995	September 29, 1995
(c)	1995	August 26, 1996	September 30, 1996
(d)	1996	August 31, 1998	September 29, 1998

(e)	1998	August 30, 1999	December 13, 1999
(f)	1999	August 28, 2000	June 5, 2002
(g)	2000	August 27, 2001	June 5, 2002
(h)	2001	August 26, 2002	April 19, 2004
(i)	2002	August 25, 2003	June 17, 2005
(j)	2003	August 30, 2004	June 17, 2005/

(R. 49, 53-63)

On or about August 26, 2006, the Property was again sold to pay delinquent taxes for the 2005 tax year. Ferguson was the successful bidder. (R. 49, 64) However, this time Johnson failed to redeem the 2005 property taxes, and, as a result, a Chancery Clerk's Conveyance Land Sold For Taxes (hereinafter the "Tax Deed") was granted to Ferguson on September 26, 2008. (R. 49, 64)

Shortly after the transfer of the property by way of the Tax Deed, on or about October 27, 2008, Ferguson also paid the property taxes due on the Property for the 2006 and 2007 tax years which Johnson had also failed to pay. (R. 49, 66-67)

The tax sale of the Property for payment of the 2005 property taxes was not the first time such a sale had been commenced on the Property for nonpayment of taxes by Johnson. (R. 49, 53-63) In fact, on at least three previous occasions (1999, 2001, and 2002 tax years) notices of the tax sale were provided to Johnson as provided for by *Miss. Code Ann. § 27-43-1 (1975) et seq.*, and the delinquent property taxes on the Property were redeemed by Johnson within the statutory period for doing so. (R. 49-50, 67-80)

For the 1999 tax year the delinquent tax notice sent by certified mail was returned "unclaimed" and the notice served by the DeSoto County Sheriff's Office was posted on the door of the home located at 3671 Horn Lake Road, Nesbit, Mississippi, on June 4, 2002, consistent

with Johnson's request to all public offices in Desoto County that all notices be delivered to that address. Johnson redeemed those taxes on June 5, 2002. (R. 50, 58, 67-71)

For the 2001 tax year the notice sent by certified mail was signed for by Howard Franklin and the notice was served by the DeSoto County Sheriff's Office by personal delivery to an unnamed individual located at 3671 Horn Lake Road, Nesbit, Mississippi, on April 19, 2004. Johnson redeemed those taxes on April 19, 2004. (R. 50, 60, 72-76)

For the 2002 tax year the notice sent by certified mail was signed for by Howard Franklin and the notice served by the DeSoto County Sheriff's Office was posted on the door of the home located at 3671 Horn Lake Road, Nesbit, Mississippi, on May 6, 2005. Johnson redeemed those taxes on June 17, 2005. (R. 50, 61, 77-80)

In a scenario identical to the sale of the 1999 taxes, the notice of the tax sale regarding the delinquent 2005 property taxes was also sent to Johnson at the same address as the three previous notices, 3671 Horn Lake Road, Nesbit, Mississippi. (R. 49-51, 58-61, 63-64, 67-90) The notice sent by certified mail was returned "unclaimed", and the notice served by the DeSoto County Sheriff's Office was posted on the door of the home located at 3671 Horn Lake Road, Nesbit, Mississippi, on May 1, 2008. (R. 50, 81-90) However, unlike years past, Johnson did not redeem the 2005 taxes. (R. 50, 63-64, 81-90)

Upon receipt of the "unclaimed" notice, a second search for an updated address of Johnson was performed by the Chancery Clerk's office which included a search of the phone book, car tag records, homestead records, voter registration records, and a general internet search. (R. 50-51, 81) That search did not locate any address for Johnson other than the one located at 3671 Horn Lake Road, Nesbit, Mississippi, which had previously been identified by Johnson as the address to which notices were to be sent, and at which address Johnson previously received notices as evidenced by his numerous prior redemptions. (R. 50-51, 81)

Additionally, and specifically, a search of the homestead records showed that Johnson had registered the property located at 3671 Horn Lake Road, Nesbit, Mississippi, as his homestead property as early as 1992 and has maintained that status ever since. (R. 51, 91-98) However, upon discovering that Johnson does not actually reside in the residence located at 3671 Horn Lake Road, DeSoto County revoked Johnson's claim for homestead exemption rights on the property. (R. 190)

In contest of this sale Johnson admitted in deposition testimony that he is aware the property taxes must be paid on the property, and that when his daughter, Trenese Franklin, moved to the 3671 Horn Lake Road address, she took over payment of the taxes on both parcels of property (the Property and the adjoining parcel located at 3671 Horn Lake Road). (R. 120, 151-152, 155) Mrs. Franklin stated in an affidavit submitted by Johnson that it was her belief that she was paying the taxes on both parcels of property when she paid the 2005 taxes on the parcel located at 3671 Horn Lake Road, but later learned otherwise. (R. 155) Furthermore, Johnson, Franklin, and Terrell Johnson all testified (through deposition or affidavit) that they never received notice of the confirmation of the tax sale in 2008 by mail or personal service, but none contest that notice was mailed by the DeSoto County Chancery Clerk or that service was attempted by the DeSoto County Sheriff. (R. 151-156) Otherwise, Johnson claims that the sale was not sufficient for failure of the DeSoto County Tax Collector to offer the parcel of property in small subsections, enter a proper affidavit, or provide constitutional due process although Johnson does not dispute any of the underlying facts on which the DeSoto County Chancery Court based its Order Granting Summary Judgment. (R. 192-199)

Based on these undisputed facts, and taking into account all claims and defenses raised by Johnson in his Counter-Motion For Summary Judgment with supporting affidavits, the DeSoto County Chancery Court found that because of Johnson's willful actions, the case of Rush

v. Wallace Rentals, LLC, 837 So.2d 191 (Miss. 2003), was controlling in this case, that the tax sale was validly conducted, and Johnson was provided with constitutionally sufficient due process. (R. 210) The Chancery Court further denied Johnson's request for summary judgment and vested title to the Property in Ferguson. (R. 226-231)

VI. SUMMARY OF THE ARGUMENT.

Johnson's appeal alleges that the DeSoto County Chancery Court improperly granted summary judgment to Ferguson and also improperly denied Johnson's Counter-Motion For Summary Judgment. Johnson does not contend that there is a genuine issue of material fact requiring a trial of this matter, but, based on the undisputed facts as presented in each party's respective Motion For Summary Judgment, Johnson should have been granted summary judgment and the Tax Deed declared void.

As stated in the Order Granting Summary Judgment issued by Honorable Chancellor Percy Lynchard, "the statutory requirements for a valid tax sale have been met by the Chancery Clerk, Sheriff, and Tax Collector for DeSoto County, Mississippi..." (R. 210) The DeSoto County Chancery Clerk took all reasonable actions necessary to comply with *Miss. Code Ann. § 27-43-1, et seq.* Johnson's failure to receive actual notice is not a defense to the validity of the tax sale as noted in *Miss. Code Ann. § 27-43-3* (2007). Furthermore, pursuant to the aforementioned statute, there is no requirement that Johnson was to be served with personal notice of the tax sale confirmation as Johnson was not a resident of the State of Mississippi. Additionally, following a hearing on both Motions, the Chancellor took the matter under advisement, and, following a careful review of the undisputed facts as presented by both parties, the Chancellor determined that this Court's prior decision in Rush was controlling. Consequently, the Chancery Court properly granted summary judgment to Ferguson.

The DeSoto County Chancery Clerk's affidavit is valid and enforceable pursuant to *Miss. Code Ann.* § 27-43-3 (2007). The affidavit clearly stated that the Clerk took reasonable measures to locate Johnson for purposes of providing notice of confirmation of the tax sale. The Clerk also clarified the extent of these actions in an affidavit to the DeSoto County Chancery Court attached to Ferguson's Motion For Summary Judgment. (R. 48-51) Furthermore, by Johnson's own admission the Clerk sent all notice to the proper address at 3671 Horn Lake Road, Nesbit, Mississippi, even though, again by his own admission, Johnson had lived at 793 King Road in Memphis, Tennessee, for almost twenty years by the time these notices were sent. Therefore, Johnson was given proper notice under the statute.

Furthermore, the form of the Chancery Clerk's affidavit is more than sufficient to meet the standards set by *Miss. Code Ann.* § 27-43-3 (2007) and by the opinions of this Court as it is clearly a sworn statement made before a person authorized to administer oaths. See Wilcher v. State, 863 So. 2d 776, 828 (Miss. 2003); Russell v. State, 849 So.2d 95, 109 (Miss. 2003).

Additionally, The DeSoto County Tax Collector had no duty to sell the Property in smaller subdivisions than the fifteen and 5/10 (15.5) acre parcel that made up the Property. Johnson's interpretation of *Miss. Code Ann.* § 27-41-59 (1994) would require that any parcel of property, no matter how small, be offered for sale in smaller subdivisions before being sold as a whole. Such an interpretation would create an untenable situation in which almost no tax sale could comply with the statutory requirements. In fact, this Court's interpretation of previous versions of the statute have never imposed a duty to subdivide a parcel of property as small as the Property at issue in this appeal. Furthermore, the statute clearly states that any error made by the DeSoto County Tax Collector in failing to subdivide the property is harmless and is not sufficient to set aside the Tax Deed. See *Miss. Code Ann.* § 27-41-59 (1994).

Lastly, the Chancery Court's reliance upon this Court's opinion in Rush v. Wallace Rentals, LLC, 837 So.2d 191 (Miss. 2003), was proper. Just as in Rush, Johnson intentionally engaged in a shell game in which he hid his actual residence from the Chancery Clerk, Tax Assessor, and Tax Collector of DeSoto County thereby eliminating the possibility that he could ever get actual notice of the tax sale. Of course, during this entire time, Johnson continued to apply for and enjoy the benefit of homestead exemption on the adjacent property located at 3671 Horn Lake Road, Nesbit, Mississippi. Furthermore, much as in Rush, Johnson has attempted to use this deception for his own gain in seeking to set aside the tax sale. This Court's holding in Rush warrants affirmation of the DeSoto County Chancery Court's granting of summary judgment to Appellee Ferguson.

VII. ARGUMENT.

A. STANDARD OF REVIEW.

This matter comes before the Court on the Chancellor's grant of summary judgment to Ferguson and the denial of Johnson's Counter-Motion For Summary Judgment. The standard of review employed by this Court in reviewing a trial court's decision on a motion for summary judgment is well-settled:

We review summary judgments de novo. This de novo standard of review will determine whether there exists a genuine issue of material fact which could preclude entry of summary judgment. The appellate court may not reverse the trial court's decision unless it appears "that triable issues of fact remain when the facts are viewed in the light most favorable to the non-moving party."

Hardy v. Brock, 826 So.2d 71, 74 (Miss. 2002) (citations omitted).

B. THE CHANCELLOR'S DECISION.

The Chancellor entered an Order Granting Summary Judgment to Ferguson on January 12, 2010.² The Chancellor's Order was subsequently encompassed in a Final Judgment To Quiet And Confirm Tax Title to be filed in the land records of Desoto County, Mississippi. (R.227-231)

In its Order Granting Summary Judgment (R.210), the Chancellor stated:

The Court finds that the case of **Rush v. Wallace Rentals, LLC**, 837 So.2d 191 (Miss. 2003), is controlling. The Court further finds that the statutory requirements for a valid tax sale have been met by the Chancery Clerk, Sheriff and Tax Collector for Desoto County, Mississippi, and that the Defendant has not been deprived of any Due Process Rights due him under the United States Constitution.

In the Order Granting Summary Judgment to Ferguson, the Chancellor made no written findings as to the specific facts which were presented to the Court by the parties with the two competing Motions For Summary Judgment. However, the Chancellor did expressly find that "there is no genuine issue of material fact" (R.210), and the Chancellor's decision was therefore based on undisputed facts which the Chancellor applied to applicable legal precedent. See, e.g., Prescott v. Prescott, 736 So.2d 409, 415-16 (Miss. Ct. App. 1999) ("Where the trial court failed to make any specific findings of fact, this Court will assume that the issue was decided consistent with the judgment and these findings will not be disturbed on appeal unless manifestly wrong or clearly erroneous.") (citations omitted).

In Hardy v. Brock, 826 So.2d 71 (Miss. 2002), this Court affirmed the trial court's grant of summary judgment where the lower court's judgment was similarly based on undisputed facts evidenced from the record:

² Subsequent to entry of this Order, the Court entered an Order Amending Judgment which specified that the (Cross) Motion For Summary Judgment filed on behalf of Johnson was denied. (R.226) There were no other "amendments" to the original Order.

The homeowners assert that the circuit court erred in granting Brock's summary judgment in accordance with Rule 56(c) of the Mississippi Rules of Civil Procedure. However, Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

In its final judgment granting Brock summary judgment, the court determined the homeowners presented no genuine issue of material fact. Therefore, the trial court concluded that Brock was entitled to a summary judgment as a matter of law. The trial court's decision was based on the following facts taken from the record: (a) land records evidencing that the corporation acted in a corporate capacity; (b) minutes memorializing annual meetings of the corporation's organization; (c) share certificates evidencing Brock and Buchanan's stock ownership as shareholders in the corporation; (d) the corporation's certificate of incorporation issued by the Mississippi Secretary of State; (e) evidence illustrating when the corporation purchased the subdivision from Robert M. Buchanan, Jr.; and (f) evidence illustrating that the corporation acted as the owner and developer of the subdivision after its purchase. **These facts constituted such probative evidence as to validate the circuit court's final judgment to grant Brock summary judgment.**

Hardy, 826 So.2d at 74-75 (emphasis added).

Additionally, as previously recognized by this Court, the disputed "legal significance" of undisputed facts is not grounds for reversal of a lower court's grant of summary judgment. See Reynolds v. Amerada Hess Corp., 778 So.2d 759, 763 (Miss. 2000). In Reynolds, 778 So.2d at 761-63, the parties argued as to whether the plaintiff oil and gas producer continued to own surface rights in property owned by the defendants. In affirming the lower court's grant of summary judgment to the plaintiff/producer, this Court found that defendants "identify no specific material facts as being in dispute but instead **address only the legal significance of the undisputed facts.**" Id. at 765 (emphasis added). See also Waller v. Attorney Gen. Mike Moore, 604 So.2d 265 (Miss. 1992) ("Summary judgment is affirmed because the circuit judge correctly applied the law to uncontradicted material facts.").

Furthermore, "[c]ompeting arguments regarding what legal standard better categorizes certain conduct do not create a dispute of fact". See Kelley v. Grenada County, 859 So.2d 1049, 1052 (Miss. Ct. App. 2003). In Kelley, the Court considered all factual evidence in the record on

appeal and affirmed the trial court's grant of summary judgment finding that the defendant police officer's conduct did not rise to the level of "willful or wanton disregard". See Kelley, 859 So.2d 1054.

Similarly, in Cook v. Stringer, 764 So.2d 481 (Miss. Ct. App. 2000), the Court of Appeals affirmed the trial court's grant of summary judgment where the parties disputed whether the injured plaintiffs were invitees or licensees while on the property of the defendant when injured.

The appellants maintain that, as a matter of law, Jan and Tommy were invitees of the Stringers.

The Stringers maintain that, as a matter of law, Jan and Tommy were licensees on their property at the time of this tragedy and that a lesser duty of care was owed the victims.

The tragic circumstances leading to this litigation aside, we agree with the circuit court that, as a matter of law, Jan and Tommy were social guests of Nancy Stringer at the time of the tragic accident. As Jan and Tommy were social guests, they were licensees. As social guests of Nancy Stringer on the Stringer property, the Stringers enjoyed no benefit from Jan's and Tommy's presence on the property, and Jan and Tommy were there for their own pleasure and benefit. Therefore, absent proof of wanton or willful conduct on the part of the Stringers, there is no liability. The appellants presented no such evidence.

The judgment as a matter of law in favor of the Stringers is affirmed.

Cook, 764 So.2d at 484.

In the present case, the parties' dispute focuses upon whether the undisputed facts justify judgment in favor of Ferguson consistent with the Rush v. Wallace Rentals, LLC decision, and/or whether the undisputed facts evidence satisfaction of the statutory legal requirements for a valid tax sale. As discussed above, the parties' dispute focused on the "legal significance" of undisputed facts and competing arguments regarding which legal standard better categorizes the facts presented to the Chancellor. Significantly, the Chancellor, after considering all of the undisputed facts presented in competing motions for summary judgment addressing these issues,

found that “there is no genuine issue of material fact”, and the Chancellor granted summary judgment to Ferguson finding that the Rush v. Wallace Rentals, LLC case was controlling based on the undisputed facts, and that the undisputed facts established that the statutory requirements for a valid tax sale had been met. (R.210)

There is no genuine issue of material fact, and the Chancellor’s grant of summary judgment to Ferguson should be affirmed.

C. ALL MATERIAL FACTS ARE UNDISPUTED.

The facts of this case are not in dispute. As more fully set out above, Johnson purchased the Property at a tax sale in 1986. (R. 48, 52) Later, in October of 1990, he purchased and moved to his current domicile located at 793 King Road, Memphis, Tennessee. (R. 107-108, 176) In spite of his change in domicile Johnson maintained the address at 3671 Horn Lake Road as his address for notice with the DeSoto County Chancery Clerk, Tax Collector, and Tax Assessor, and even applied for homestead status on the Property. (R. 51, 93, 99, 1-6-108, 111-114, 116-118, 121-124, 127)

Since moving to Memphis, Johnson has consistently failed to pay the property taxes owed on the Property in a timely manner. In fact, in the years from 1993 through 2005, Johnson failed to pay the property taxes before the Property was sold at a tax sale eleven out of thirteen years. (R. 49, 53-63) Finally, in 2005, Johnson’s game of “Russian Roulette” with the DeSoto County Tax Collector caught up to him as the tax sale was confirmed. (R. 49, 64) After redeeming the taxes multiple times in the past just before confirmation of the tax sale, and even redeeming the taxes in 1999 just before the redemption period expired under the exact same circumstances as are present in this case, Johnson failed to redeem the 2005 property taxes and lost the Property to Ferguson in the tax sale. (R. 49, 64) Furthermore, at the time the 2005

tax sale was confirmed, the 2006 and 2007 property taxes were also delinquent and were paid by Ferguson. (R. 49, 66-67)

These undisputed facts paint a very clear picture that Johnson engaged in a very dangerous game of “find me if you can” which put his very ownership of the Property in constant jeopardy. Johnson does not, and cannot, contest any of these facts. Johnson’s only claim rests on the hope that he can find some technical error in the tax sale and confirmation process on which to have this Court award him relief from his own intentional and wrongful conduct designed to deceive the very public officials about whom he now complains.

There are no material facts which are in dispute. Where both parties agree to the material facts and present the issue to the trial court, summary judgment is proper. See APAC-Miss., Inc. v. Goodman, 803 So.2d 1177, 1181 (Miss. 2002).

It is clear from the record before this Court that Johnson failed to pay the property taxes for the 2005 tax year and further failed to redeem those taxes after the tax sale was consummated over two years later in 2008. Further, there are ample undisputed facts in the record presented to the trial court to support the DeSoto County Chancery Court’s award of summary judgment to Ferguson.

D. FERGUSON IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Pursuant to Rule 56 of the *Mississippi Rules of Civil Procedure* a trial court may grant summary judgment to a moving party where there “are no genuine issues of material fact and the moving party is entitle to judgment as a matter of law.” Hardy v. Brock, 826 So.2d at 1182.

Furthermore, “where the trial court failed to make any specific findings of fact, this Court will assume that the issue was decided consistent with the judgment and these findings will not

be disturbed on appeal unless manifestly wrong or clearly erroneous.”³ Mack v. State, 784 So.2d 976, 978 (Miss. Ct. App. 2001).

1. The Statutory Requirements For A Valid Tax Sale Were Satisfied.

The process of selling property to satisfy delinquent *ad valorem* taxes is a creature of statute which is foreign to common law. In the case before the Court all parties properly followed the procedure set out in *Mississippi Code Annotated* and the DeSoto County Chancery Court’s judgment should be affirmed.

(i) Johnson was given proper notice of his redemption rights.

Under *Miss. Code Ann.* § 27-43-1 (1975), it is incumbent upon the Chancery Clerk to provide notice of the tax sale to the reputed property owner within 180 days but not less than 60 days. Further, *Miss. Code Ann.* § 27-43-3 (2007), specifically provides the methods of serving notice 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

³ See Also, § VII, B, Page 11 of this Brief.

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 shall be retained as a permanent record in the office of the clerk and such action shall be 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.

For examining the records to ascertain the record owner of the property, the clerk shall be allowed a fee of Fifty Dollars (\$ 50.00); for issuing the notice the clerk shall be allowed a fee of Two Dollars (\$ 2.00) and, for mailing same and noting such action on the tax sales record, a fee of One Dollar (\$ 1.00); and for serving the notice, the sheriff shall be allowed a fee of Four Dollars (\$ 4.00). For issuing a second notice, the clerk shall be allowed a fee of Five Dollars (\$ 5.00) and, for mailing same and noting such action on the tax sales record, a fee of Two Dollars and Fifty Cents (\$ 2.50), and for serving the second notice, the sheriff shall be allowed a fee of Four Dollars (\$ 4.00). The clerk shall also be allowed the actual cost of publication. Said fees and cost shall be taxed against the owner of said land if the same is redeemed, and if not redeemed, then said fees are to be taxed as part of the cost against the purchaser. The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them.

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.

In sum, the Chancery Clerk must give notice three ways in order for a valid tax sale to have taken place: (1) by certified mail, (2) by personal service, and (3) by publication. Furthermore, "the failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them." See *Miss. Code Ann.* § 27-43-3 (2007). It also should be noted that the statute does not require personal service where the "reputed owner is a nonresident of the State of Mississippi." See *Miss. Code Ann.* § 27-43-3 (2007).

(a) Johnson was given proper notice of his redemption rights by mail.

Johnson complains that he was not given proper notice of his rights to redeem his interest in the Property. This complaint is without merit.

This Court's opinion in DeWeese Nelson Realty, Inc. v. Equity Serv. Co., 502 So.2d 310 (Miss. 1986), is instructive in this case. In DeWeese the reputed landowner (DeWeese) maintained an up to date mailing address for its registered agent with the Mississippi Secretary of State. See DeWeese, 502 So.2d at 312. In spite of this, the municipal clerk mailed he redemption notice letter to the address of Mr. DeWeese's ex-wife. Id. Mr. DeWeese had not lived at that address for over ten (10) years at that time. Id. Furthermore, at that same time the same parcel was sold in Hinds County, and the Hinds County Chancery Clerk mailed the redemption notice to the address listed by the Secretary of State. Id. The Court noted that "landowners have the right to presume information available to one taxing authority may be ascertained by other taxing authorities upon reasonable search and inquiry." Id. (citing Kron v. VanCleave, 339 So.2d 559 (Miss. 1976)). The Court also noted that Mr. DeWeese's ex-wife testified that while she did not know for certain that she did in this case, "it was her practice, whenever her former husband received mail at her address, to send the mail to Mr. DeWeese via one of their two sons." Id. at 313. The Court then stated, "[n]otwithstanding that evidence, the Court looks to *Miss. Code Ann.* § 27-43-3 (1985) which states in part, 'The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and the sheriff have complied with the duties herein prescribed for them.'" Id. The Court then held that in spite of the fact that the municipal clerk had failed to locate the proper address for DeWeese, which was readily available as public record, the clerk was diligent in its search and the sale was valid. Id.

In the present case, the Chancery Clerk clearly met the duties incumbent upon that office. The original notice was mailed to Johnson's address of 3671 Horn Lake Road, Nesbit, Mississippi, on April 11, 2008, and returned to the Clerk "unclaimed" on April 27, 2008, after three (3) attempts to deliver the notice. (R. 50-51, 87-88) Upon receipt of the "unclaimed" notice, the Chancery Clerk also conducted a search of the phone book, car tag records, voter registration records, homestead records, and a general internet search in an attempt to locate another address for Johnson in accordance with *Miss. Code Ann.* § 27-43-3 (2007). (R. 50-51, 81) Nothing in that search revealed any address other than 3671 Horn Lake Road, Nesbit, Mississippi. (R. 50-51, 81)

Furthermore, as is clear in the record from Johnson's own testimony, Johnson intentionally maintained extensive records showing his address to be 3671 Horn Lake Road, Nesbit, Mississippi, the address to which notice was mailed by the Chancery Clerk. By his own admission in both his deposition and his own Memorandum Brief In Response To Deloris Ferguson's Motion For Summary Judgment And In Support Of Counter-Motion For Summary Judgment, Johnson still maintains a driver's license in Mississippi, is registered to vote in DeSoto County, and even claimed the 3567 and 3671 Horn Lake Road properties as his homestead. (R. 91-98, 111-114, 122-124) Johnson did all of this in spite of the fact that he admittedly resides at 793 King Road in Memphis, Tennessee, an address that he openly admits he has lived at continuously for almost twenty (20) years. (R. 107-108, 176)

Further, Johnson established a clear pattern with the Chancery Clerk of failing to pay the taxes on the Property and having notices sent to 3671 Horn Lake Road, Nesbit, Mississippi. As was clearly outlined in Ferguson's Summary Judgment Brief, Johnson repeatedly allowed the taxes on the property in question to be sold at tax sales only to subsequently receive notices at 3671 Horn Lake Road, Nesbit, Mississippi, and then redeem the taxes. (R. 49-63) On one

such occasion in 1999, the notice sent to Johnson by the Chancery Clerk was returned unclaimed, and yet Johnson still managed to redeem the taxes on the property before the redemption period expired. (R. 50, 58, 67-71)

Lastly, Johnson admitted in his own deposition that he wanted all notices from the Chancery Clerk to be mailed to 3671 Horn Lake Road, Nesbit, Mississippi, the address to which the notice was indeed sent. (R. 121-122) It is disingenuous for Johnson to repeatedly hold himself out to be a Mississippi resident located at 3671 Horn Lake Road, Nesbit, Mississippi, (when in fact he is a resident of 793 King Road, in Memphis, Tennessee), but now complain because notice from the Chancery Clerk was sent to the very address which he asked for it to be sent. The judgment of the DeSoto County Chancery Court should be affirmed.

(b) Johnson was not entitled to personal service of the redemption notice because he was not a Mississippi resident.

Pursuant to *Miss. Code Ann. § 27-43-3* (2007), where the reputed owner of a parcel of property on which delinquent taxes are due is not a resident of the State of Mississippi, the clerk is only required to give notice by mail, and “**personal notice served by the sheriff shall not be required.**” (Emphasis added). As previously discussed, Johnson testified on multiple occasions that he currently resides, and at the time of the events in question resided, at 793 King Road in Memphis, Tennessee. (R. 107-108, 176) Johnson purchased this property in 1990 by way of a Warranty Deed from Ervin Harris and has, by his own admission, lived there ever since. (R. 176) Therefore, it was neither factually nor legally possible for Johnson to be a “resident” of the State of Mississippi for purposes of effectuating personal service by the sheriff. Johnson cannot claim to be a resident of the State simply for his own convenience and when it serves his own purposes, but Johnson must show that he is domiciled in the State. Under *Miss. Code Ann. § 27-7-3* (2010), a nonresident is defined as “any natural person whose domicile and place of abode is without the State of Mississippi.” The Mississippi Supreme Court has defined nonresidence as:

“Actual cessation to dwell within a state for an uncertain period without definite intention as to a time for returning, although a general intention to return may exist.” Bank of Hattiesburg v. Mollere 118 Miss. 154, 162, 79 So. 87, 89 (1918) (citing Meyer Bros. Drug Co. v. Fly, 105, Miss. 752, 761, 63 So. 227, 228 (1913)). Furthermore, “[t]he determination of a person’s ‘permanent home and principal establishment’ turns on actual proof of a person’s living arrangements. It is not satisfied with a simple declaration that one intends to be a resident of a particular county when the overwhelming proof shows that he actually resides elsewhere.” Young v. Stevens, 968 So.2d 1260, 1264 (Miss. 2007).

Johnson has resided in Memphis, Tennessee, for almost twenty (20) full years with only a now-claimed, self-serving vague intention of returning to Mississippi someday. (R. 107-108) But see Mollere, 79 So. at 89 (“general intention to return” does not establish residency). Johnson does not live in the house located at 3671 Horn Lake Road and, in fact, that home is occupied by another family. (151-152, 155)

Furthermore, following discovery by DeSoto County that Johnson did not reside at 3671 Horn Lake Road, Nesbit, Mississippi, Johnson’s homestead exemption status on the property was revoked. (R.190) And, while Johnson is technically still registered to vote in DeSoto County, he admittedly does not do so. (R. 122-24) But there is no reason he should, or should even have the right to, since he freely admits that he does not live in Mississippi and has not lived here for the past twenty (20) years.

Johnson’s argument that his situation is unique is unavailing. There is nothing about someone providing false and misleading information to public officials that is worthy of being characterized as “unique”. The fact that Johnson lived on the property for any period of time is irrelevant to this matter. The fact remains that at the time of the tax sale and during the entire redemption period Johnson was a resident of the State of Tennessee thereby relieving the DeSoto

County Sheriff of the duty to personally serve Johnson with notice of the redemption rights.

Since Johnson was not a resident of the State of Mississippi, he cannot claim that the sheriff was required to serve the notice on his children to comply with Rule 4 of the *Mississippi Rules of Civil Procedure*. Therefore, the Chancery Clerk's attempt to have the sheriff personally serve Johnson with the redemption notice was totally unnecessary and was not required by *Miss. Code Ann. § 27-43-3* due to Johnson residing in Memphis, Tennessee. Johnson's willful maintenance of improper contact information with the Clerk and in all other records with the State of Mississippi cannot be used to give him relief from the consequences of the tax sale. Johnson's complaint that he did not receive personal notice from the sheriff is without merit.

Furthermore, even if Johnson could somehow be classed as a resident of the State of Mississippi, he still cannot complain of lack of notice. *Miss. Code Ann. § 27-43-3* clearly states that "the failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them." Here, the Clerk undertook to mail proper notice to Johnson at the address that Johnson had requested notice be sent to. Indeed, as previously discussed, Johnson has used this same manner of notice being mailed by the Clerk to redeem unpaid taxes on the property at numerous times in past years. Further, the Sheriff in fact attempted to personally serve Johnson at the same address but was unable to do so. This, of course, is not surprising considering that Johnson did not live at the property, but, rather, in Memphis, Tennessee. Johnson's argument that the return is not sufficient is without merit as the statute does not require any particular form, but merely states that the sheriff "make his return to the chancery clerk issuing the same." See *Miss. Code Ann. § 27-43-3* (2007). In this case the Sheriff noted that he was not able to serve Johnson personally so he instead posted a copy at the property. (R. 83) There is no claim that this suffices as personal service, but, rather, that actual personal service was not necessary under

Mississippi Code Annotated section 27-43-3 as noted above; only the attempt of personal service is required. Mississippi Code Annotated section 27-43-3 provides that where personal service is not accomplished by the sheriff, and the notice mailed by the clerk is returned “unclaimed”, the clerk shall undertake diligent inquiry into the whereabouts of the reputed landowner, and, further, that “the failure of the landowner to actually receive the notice herein required shall not render the title void.” That was done in this case as evidenced by the Chancery Clerk in his affidavit in the Clerk’s file and in his affidavit submitted with Ferguson’s Motion For Summary Judgment.

Johnson was not entitled to “impossible” personal service under the circumstances and pursuant to the laws of the State of Mississippi.

(c) Publication of the redemption notice was proper.

Lastly, even though Johnson claims that he did not receive notice by either mail or personal service, notice of the tax sale was published in the *DeSoto Times Tribune*, a newspaper of general circulation in DeSoto County, Mississippi, on June 24, 2008, and July 1, 2008. (R. 89-90) While service by publication is not the favored form of service under Mississippi Law, where a person is not a resident of the State of Mississippi or cannot be found after diligent search and inquiry, then service of process solely by publication is valid. See M.R.C.P. 4. While *Miss. Code Ann.* § 27-43-3 intends that publication be done in concert with notice by mail and personal service, it also clearly contemplates the possibility that the publication notice may be the only form of notice which the reputed owner may have an opportunity to see as it clearly states, “the failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them.” See *Miss. Code Ann.* § 27-43-3 (2007).

Therefore, Johnson received the required notice of his redemption rights as contemplated by *Miss. Code Ann.* § 27-43-3.

(ii) **The DeSoto County Chancery Clerk's affidavit is valid.**

Appellant Johnson argues that the affidavit of the Chancery Clerk is invalid because it does not give sufficient information as to the efforts taken by the Clerk in locating Johnson. However, the Desoto County Chancery Clerk confirmed in an affidavit submitted with Ferguson's Motion For Summary Judgment that his office, in its regular and customary manner, undertook a search of the phone book, car tag records, homestead records, voter registration records, and a general internet search that did not reveal any address for Johnson other than the one located at 3671 Horn Lake Road, Nesbit, Mississippi. (R. 49-51) Further, in his own affidavit filed in the Chancery Clerk's records, the Clerk notes that he made diligent inquiry as to the reputed owner's street and post office address, and, after said search and inquiry in compliance with the statute, the Clerk was nevertheless unable to locate any additional information. (R. 81)

In Rush v. Wallace Rentals, 837 So.2d 191, the Mississippi Supreme Court noted that even where the clerk did not perform the full inquiry as stated in her affidavit, the search was nevertheless sufficient and the affidavit was valid, noting that the deputy clerk's failure to strictly comply with the affidavit was not fatal. Rush, 837 So.2d at 198. In fact, in Rush, one of the clerks "admitted the affidavit in this instance was false," but the Court nevertheless found it to be sufficient under the circumstances. Id. (emphasis added). The Court held that "notwithstanding this search and inquiry... landowners are still held accountable for their property taxes. Landowners are presumed to know that all real property is assessed and taxed annually and bear

some obligation to see that taxes on their property are paid each year.”⁴ Id. In this case, the Chancery Clerk made no misrepresentation of fact to this Court, and has, in fact, further explained the actions taken by his office in attempting to locate Johnson with a subsequently filed affidavit. (R. 48-51)

The fact of the matter is that Johnson never notified the Clerk of any other address where either mail or personal notice could be provided. To the contrary, by Johnson’s action in redeeming the unpaid taxes several previous years based on mailed notice to 3671 Horn Lake Road, Nesbit, Mississippi, the Clerk could have understandably assumed that the address provided by Johnson was the proper address for notice (although it is clear from the Clerk’s affidavit that the Clerk made no such assumption and diligent search and inquiry was further conducted).

Also, considering the Mississippi Supreme Court’s decision in Rush, every landowner, including Johnson, is presumed to have knowledge that taxes are due and must be paid every year. Not only did Johnson obtain this property through a tax sale (R. 52), but Johnson has on repeated occasions redeemed the unpaid taxes on the property during his ownership. (R. 49, 53-63) It is frankly incredulous that Johnson now attempts to claim that he did not receive “notice” that taxes were due or of his right of redemption. Johnson is an old hand at this game, and he knew exactly what was going on and what the repercussions were for failing to redeem the taxes.

Johnson also attempts to argue that the Chancery Clerk’s affidavit is invalid because it is not properly sworn or dated. An affidavit is “[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.*” Wilcher v. State, 863

⁴ The Court should be reminded that Johnson in fact testified that he knew that the taxes had to be paid each year (R. 120), and Johnson had in fact previously redeemed taxes due on the property on several occasions. (R. 53-63) Furthermore, Johnson himself obtained titled to the property through a tax sale.

So. 2d 776, 828 (Miss. 2003) (citing Black's Law Dictionary 58 (6th ed. 1990)). There is no requirement stated that the notary or affidavit be dated. Even according to Johnson's own Brief, an affidavit is merely a "sworn statement in writing made before an authorized official." See Appellant's Brief, P. 11 (citing Russell v. State, 849 So.2d 95, 109 (Miss. 2003)). Furthermore, nothing in *Miss. Code Ann.* § 27-43-3 (2007) requires that the affidavit must be dated. Therefore, the fact that the affidavit is not dated is not fatal to its validity.

Johnson also argues that the affidavit is invalid because it is "merely an ... unsworn statement". See Appellant's Brief, P. 11. However, no such seal is necessary. See Wilcher, 863 So.2d at 828; Russell, 849 So.2d at 109. As an affidavit is a "sworn statement in writing made before an authorized official," the only stated requirement is that the person attesting to the signature be authorized to administer oaths. Pursuant to *Miss. Code Ann.* § 25-33-17 (1988) (emphasis added), "clerks of the circuit and chancery courts ... are notaries by virtue of their office, and shall possess all the powers and discharge all the duties belonging to the office of a notary public..." Also, pursuant to *Miss. Code Ann.* § 25-33-9 (2002), "[e]very notary public shall have the power of administering oaths and affirmations in all matters incident to his notarial office..." Thus, it is clear that the deputy clerk had the authority to administer oaths. The adding of the clerk's seal in this case is merely a ministerial act which does not change in any way the Chancery Clerk's substantive compliance with the statute.

The Chancery Clerk's affidavit is valid and provides no basis for reversal of the judgment of the Chancery Court of DeSoto County.

(iii) The tax sale conducted by the DeSoto County Tax Collector was valid.

Johnson complains that the sale conducted by the DeSoto County Tax Collector is invalid purportedly because the sale was not conducted in accordance with *Miss. Code Ann.* § 27-41-59 (1994). Johnson bases his argument on the claim that it was the Tax Collector's duty to first

offer the property in subdivided parcels prior to selling the property as a whole. This argument is misleading at best.

Prior decisions rendered involving application of *Miss. Code Ann.* § 27-41-59, including those cited by Johnson in support of his argument, evidence that the requirement that the property first be offered in subdivided parcels has never been applied where the parcel as a whole is smaller than the size allowed by the statute. See, e.g., Pittman v. Currie, 414 So.2d 423 (Miss. 1982); Jones v. Seward, 194 Miss. 763, 12 So.2d 132, (1943); Herring v. Moses, 71 Miss. 620, 14 So. 437 (1893). Put another way, there is no duty on the Tax Collector to subdivide a parcel where that parcel as a whole is already less than the one hundred sixty (160) acre statutory maximum. In fact, in the Jones case cited above, the Mississippi Supreme Court analyzed the predecessor statute and noted that in sales of land for delinquent state and county taxes it is required “that the land where it constitutes more than forty acres in one body shall first be offered in subdivisions of forty acres.”⁵ See Jones, 12 So.2d at 132. Furthermore, the Jones case was again put before the Mississippi Supreme Court a year later when that Court held that “[it] will be noted the law does not require the lands to be sold in parcels not exceeding forty acres; it only requires they be thus first offered.” Jones v. Seward, 196 Miss. 446, 16 So.2d 619 (1944) (emphasis added).

Thus it is clear that the intent and purpose of the statute is not to require the subdivision of all parcels before offering the parcel as a whole, but rather to require such where the single parcel exceeds a total of one hundred sixty (160) acres. In order to comply with the statute consistent with Johnson’s self-serving interpretation would require the Tax Collector to subdivide even the smallest of parcels, including subdivision lots where there are often covenants

⁵ The statute cited by the Court in Jones, Section 3249, Code of 1930, is the predecessor to the current statute in effect. That statute limited parcels to a maximum size of forty (40) acres rather than the current allowed maximum of one hundred sixty (160) acres.

against further subdivision. This would be an impossible standard for the Tax Collector to meet, and it is clearly not consistent with the statute.

Johnson also fails to address the entire statute. The statute clearly states that “neither a failure to advertise, nor error in the advertisement, nor error in conducting the sale, shall invalidate a sale at the proper time and place for taxes of any land on which the taxes were due and not paid, but a sale made at the wrong time or at the wrong place shall be void.” *Miss. Code Ann.* § 27-41-59 (1994). Johnson has made no argument that the Tax Collector conducted the sale at the wrong time or place, only that the parcel was not offered in subdivided parcels before being sold as a whole. Johnson’s argument fails to state a ground on which the sale can be overturned under the statute. The argument is without merit.

2. Johnson Was Provided Due Process.

While Johnson does not expressly raise the issue in his brief,⁶ Johnson intimates that he was not provided due process under the 4th and 14th Amendments of the U.S. Constitution. This argument is without merit. “The Supreme Court has consistently held that notice by regular mail is sufficient due process to advise the party that their property rights are in jeopardy.” *Smith v. Luther*, 1997 U.S. Dist. LEXIS 9862, *6, 4:96CV69-EMB (S.D. Miss. 1997) (citing *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490, 99 L. Ed. 2d 565, 108 S. Ct. 1340 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L. Ed. 2d 180, 103 S. Ct. 2706 (1983); *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950)). “The well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of [seizure].” *Id*

⁶ While Ferguson believes that this issue should therefore be barred or waived on appeal, *Miss. R. App. Pro.* 28(a)(3); *Reed v. State*, 987 So.2d 1054, 1056-57 (Miss. Ct. App. 2008), Ferguson is nevertheless, in an abundance of caution, addressing the issue because of Johnson’s claim of “lack of notice”.

(citing Weigner v. City of New York, 852 F.2d 646 (2nd Cir. 1988), cert. denied, 488 U.S. 1005, 102 L. Ed. 2d 777, 109 S. Ct. 785 (1989)). Johnson cannot complain that notice sent by mail to the property address which he has admitted he wanted notices sent to, 3671 Horn Lake Road, Nesbit, Mississippi, deprived him of due process.

3. This Court's Opinion In *Rush v. Wallace Rentals, LLC*, Is Controlling.

Johnson argues that the Rush decision relied on by the Chancery Court in its Order Granting Summary Judgment is not applicable to the case at hand. However, an examination of the facts in this case clearly evidences the Chancery Court's proper application of Rush v. Wallace Rentals, 837 So.2d 191 (Miss. 2003). Indeed, the facts of this case could be said to be even more egregious than those in Rush.

In Rush, Eloise Moffite received title to the property by way of a quitclaim deed from O.C. Rush. Id. The 1997 taxes on the property, due on January 1, 1998, were not paid. Id. at 192. Thereafter the property was sold to Oliver Limerick for the outstanding taxes which were never redeemed resulting in a tax deed to Limerick dated October 2, 2000. Id. Limerick then transferred the property to Wallace Rentals on December 5, 2000. Id.

On June 27, 2000, the Lauderdale County Chancery Clerk attempted to notify Moffite by certified mail of her right to redeem the property with notice being sent to 10159 Morgan Road, Meridian, Mississippi, 39307, but was returned, "attempted, not known." Id. In late June or early July of 2000, the chancery clerk attempted to notify Moffite of the tax delinquency via process served by the Sheriff's Department. The sheriff's return on the process (indicating a physical location at 10159 Morgan Road, Meridian, Mississippi 39307) revealed, "attempted, not found." Id. On July 11, 2000, the chancery clerk published in the *Meridian Star* a notice of "maturation to purchaser of the 1998 tax sale for the 1997 taxes unless redeemed prior to maturity date of August 31, 2000." Id. This notice contained the name of Eloise Moffite, 10159

Morgan Road, Meridian, Mississippi, 39307. Id. Thereafter, on October 2, 2000, the chancery clerk executed a form affidavit stating that she had been unable to locate Moffite by reasonable search and inquiry. Id.

The trial court in Rush noted that Moffite owned the property of record, but the property had actually been purchased by her cousin from O.C. Rush and put in Moffite's name. Id. at 194. Further, Moffite had listed her daughter's address (10159 Morgan Road, Meridian, Mississippi, 39307) even though she actually resided at 2112 Martin Luther King Memorial Drive. Id. When Moffite's daughter moved from that address, the Lauderdale County Tax Collector was never notified of the change and continued to send notices to the Morgan Road address. Id. Because the Morgan Road address was never Moffite's actual address, the trial court found the entire matter had resulted from Moffite's own actions and inactions, holding:

This Court finds that the Lauderdale [County] Chancery clerk's office made a diligent search and inquiry to ascertain the (sic) Eloise Moffite's street and post office address. This Court further finds that Eloise Moffite has exerted no effort to correct the incorrect information in the quitclaim deed or to otherwise supply her address so the taxing authorities could notify her of her right of redemption. This Court further finds that Eloise Moffite has exerted no effort to pay the property taxes owed on the Property. Thus, this Court finds that the tax sale is valid and that the tax deed vests title in the tax purchaser. This Court confirms the tax sale and cancels any and all clouds against said title.

Id.

The Mississippi Supreme Court, citing to the trial court's opinion, stated that "landowners are still held accountable for their property taxes. Landowners are presumed to know that all real property is assessed and taxed annually and bear some obligation to see that taxes on their property are paid each year." Id. at 198. The Court further noted:

The address Moffite had placed on the 1997 quitclaim deed listed Moffite's daughter's address of 10159 Morgan Road, Meridian and not Eloise Moffite's own address. The chancellor found that this happened because Moffite's cousin actually purchased the land from Rush in Moffite's name and with her permission. As the chancellor noted in her memorandum opinion, 'Moffite made no attempt to correct the confusion caused by the improper address.' Indeed, the chancellor stated:

‘To grant Eloise Moffite the relief that she seeks would mean that a property owner can provide erroneous information at the time he or she acquires title to land, totally ignore the fact that real property taxes come due every year, make no effort to provide any correct information to the appropriate authorities, and then expect clerks charged with seeking information on seven hundred to a thousand other delinquent taxpayers to go beyond the current information available in their office to find his or her current address. The fact is that the Chancery Clerk did make diligent search and inquiry to find Eloise Moffite in conformance with the requirements of the law.’

Id.

While Johnson did not hide the property in the name of another person as was done in Rush, he did intentionally mislead the Chancery Clerk as to his proper address for receiving notices by having the notices sent to his daughter’s address and not his actual residence at the time of the tax sale, 793 King Road in Memphis, Tennessee. (R. 107-108, 121-122, 125-127, 155) Further, Johnson made no attempt to correct this situation with the DeSoto County Tax Collector, Tax Assessor, or the Chancery Clerk. (R. 121-122, 125-127) Finally, and importantly, it is significant that Johnson did in fact redeem the taxes on this property every preceding year when notices were sent to this same address, 3671 Horn Lake Road, Nesbit, Mississippi, which was supplied by Johnson. (R. 50-51, 53-63) Furthermore, Johnson could hardly claim ignorance of his legal obligation to pay the annual taxes when Johnson in fact obtained title to the Property by virtue of purchase at a tax sale. In effect, allowing Johnson to regain title to the Property after a valid tax sale and conveyance to Ms. Ferguson would be allowing him to benefit from his own willingness to maintain erroneous information in the public record, ignore the property taxes due on the property annually, make no effort to correct the information, and then expect to benefit from the Chancery Clerk’s inability to locate him.

Johnson has admitted that he resides in Memphis, Tennessee (R.107-108), but has maintained an address in the public records of DeSoto County, Mississippi, which purport to portray him to be a resident of this State when, in fact, he is not. Johnson testified that he

understands the taxes were to be paid annually and that the address he maintained with the Chancery Clerk and Tax Collector is 3671 Horn Lake Road, Nesbit, Mississippi, even though he admittedly resides at 793 King Road in Memphis, Tennessee. (R. 107-108, 119-122, 176) The Chancery Clerk has always sent delinquent tax notices to Johnson at 3671 Horn Lake Road, Nesbit, Mississippi, and a search of all records in this State would understandably lead the Clerk to believe that such address was the only valid address for Johnson. (R. 49-51, 53-63)

It is not required that the reputed owner actually receive the notice sent by the chancery clerk, only that the clerk send notice in accordance with the statute. *See Miss. Code Ann. § 27-43-3 (2007)*. It is only where the clerk did not send notice as required by the statute, not where the reputed owner did not receive actual notice, that a sale will be set aside. *See Miss. Code Ann. § 27-43-3 (2007)*.

In this case, the DeSoto County Chancery Clerk sent notice by certified mail and by personal service through the DeSoto County Sheriff's Office (even though personal service was not required by the statute on a Tennessee resident). (R. 49-51, 81-90) When notice was returned unclaimed by way of those two methods, the Clerk performed a diligent search and inquiry of Johnson's whereabouts, but was unable to locate any new or different address for him in any other public record or otherwise. (R. 49-51, 81-90) Further, as previously discussed, discovery revealed that Johnson intentionally maintained public records that precluded the Clerk from locating any other address for him. Lastly, the Clerk published notice of the sale in the *DeSoto Times Tribune* as required by the statute. (R. 89-90) In light of the foregoing, the DeSoto County Chancery Clerk took all reasonable steps to provide notice to Johnson of the tax sale as required by *Miss. Code Ann. § 27-43-3*.

Johnson understandably attempts to distinguish the facts in this case from those in Rush in noting that the owner in the Rush case intentionally furnished false information concerning her

address. However, in the case at hand, Johnson continuously kept up to date his homestead exemption in DeSoto County in spite of the fact that he lived in Memphis, Tennessee, for nearly twenty (20) consecutive years. (R. 51, 91-98) This is directly at odds with *Miss. Code Ann. § 27-33-3* (1984) (part of the Homestead Exemption Act) which clearly states:

... it is hereby declared that homes legally assessed on the land roll, owned and actually occupied as a home by bona fide residents of this state, who are heads of families, shall be exempt from the ad valorem taxes herein enumerated, on not in excess of seven thousand five hundred dollars (\$ 7,500.00) of the assessed value including an area of land not in excess of that specified hereinafter in this article.

Emphasis added.

Johnson clearly did not “actually occupy” the premises located at 3671 Horn Lake Road and thus lied and intentionally furnished false information to the DeSoto County Chancery Clerk concerning his eligibility for homestead exemption. Mississippi Code Annotated section 27-33-57 provides that “any person who shall make oath to a false or fraudulent application for homestead exemption shall be guilty of perjury.”

Johnson continued to file for the homestead exemption after he had moved to Memphis in violation of the statute. (R. 51, 91-98, 190) This clearly mislead the Chancery Clerk as to the location of Johnson, making it substantially more difficult to give actual notice to him of the redemption period. Johnson should not now be allowed to benefit from this game of cat and mouse that he has played with the public offices of DeSoto County allowing him to avoid being provided notice by the Clerk.


Johnson’s acts in continuously misleading the DeSoto County Chancery Clerk and DeSoto County Tax Collector as to his proper address are clearly analogous to the facts in the Rush case and, as in Rush, the Court should not allow Johnson to benefit from his own bad faith acts by reversing the judgment of the DeSoto County Chancery Court.

VIII. CONCLUSION.

There is no genuine issue of material fact pertaining to Johnson's failure to pay the property taxes on the Property, the notices provided by the Chancery Clerk, or the resulting tax sale to Ferguson. The Chancery Clerk conducted a good and valid tax sale and transferred title to the Property to Ferguson. Ferguson was entitled to judgment as a matter of law, and the DeSoto County Chancery Court's grant of summary judgment to Deloris Ferguson should be affirmed.

DELORIS FERGUSON

BY:



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CERTIFICATE OF SERVICE

I, William B. Palmertree, attorneys for Appellee Deloris Ferguson, certify that I have this day provided a copy of the above and foregoing Appellee's Brief, via U. S. Mail, postage prepaid to the following:

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Chancellor Percy L. Lynchard, Jr.
Chancery Court of DeSoto County
P.O. Box 340
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This the 18th day of August, 2010.



WILLIAM B. PALMERTREE, MSB NC 