IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES E. JOHNSON **APPELLANT,**

vs. **Case No. 2010-CA-00220**

DELORES FERGUSON **APPELLEE.**

APPELLANT'S REPLY BRIEF

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STANDARD OF REVIEW

Appellee Ferguson's argument on the applicable standard of review in this case centers upon the proposition that summary judgment is appropriate when there are no genuine issues of material fact. That is not the issue raised by James E. Johnson in this case. Mr. Johnson's appeal focuses on whether the Chancellor's decision was manifestly wrong or clearly erroneous and whether the Chancellor correctly applied the law to the facts as shown in the record.

This Court employs a *de novo* standard of review in reviewing summary judgments granted by trial courts. *C.F.P. Properties, Inc. v. Roleh, Inc.*, ____ *So. 3d* ____, *2010 WL 2403106, P. 2 (Miss. App. 2010).* A Chancellor's opinion should not be disturbed "when supported by substantial evidence **unless** the Chancellor abused his discretion, was **manifestly wrong,** clearly erroneous, **or** an **erroneous legal standard** was applied." (Emphasis added). *McBride v. Jones, 803, So. 2d 1168 (Miss. 2002); Holloman v. Holloman, 691 So. 2d 897, 898 (Miss. 1996).* In this case the Chancellor's decision was not based on substantial evidence. Furthermore, even if there were substantial evidence to support it the Chancellor's decision was clearly erroneous based upon the existing law.

The issue is not simply whether the trial court utilized the proper statute or case law in its decision. This Court must examine the trial court's use of that law and "**must reverse** for any **erroneous interpretations** or **applications** of law." (Emphasis added). *Mississippi Farm Bureau Mut. Ins. Co. v. Walters, 908 So. 2d 765, 768 (Miss. 2005)* citing *Mississippi Transp. Comm'n. v. Fires, 693 So. 2d 917, 220 (Miss. 1997).* This

Court is required "to examine both case law and any appropriate statutory authority in order to determine whether the relevant law was properly applied in the trial court." *City of Picayunne v. Southern Regional Corp., 916 So. 2d 510, 519 (Miss. 2005).* That determination is made *de novo. Id.* See also *Davidson v. Davidson, 667 So. 2d 616, 620 (Miss. 1995)*; *Seymour v. Brunswick, 655 So. 2d 892, 895 (Miss. 1995)*; *Harrison County v. City of Gulfport, 557 So. 2d 780, 784 (Miss. 1990.* The same standard applies in reviewing summary judgments involving tax sales and deeds. *C.F.P. Properties, Inc., v. Roleh, Inc., Supra.*

The learned Chancellor found that all statutory requirements necessary for a valid tax sale had been met and that *Rush v. Wallace Rentals, LLC, 837 So. 2d 191 (Miss. 2003),* is controlling authority in this case. Johnson respectfully submits that those findings were not supported by substantial evidence and resulted from erroneous interpretations or applications of law. Appellant further respectfully submits that a proper application of the law to the facts in this case requires that the judgment entered be reversed and a judgment rendered for Mr. Johnson on his counter-motion for summary judgment.

STATUTORY REQUIREMENTS WERE NOT MET

I. THE CHANCERY CLERK CONVEYANCE IS VOID BECAUSE NO VALID AFFIDAVIT WAS PREPARED OR RETAINED BY THE CLERK PURSUANT TO MISSISSIPPI CODE § 27-43-3.

Ferguson does not dispute that under *Mississippi Code § 27-43-3* when the redemption notice by mail is returned as undelivered the Clerk must file an affidavit which specifically sets out the acts of search of inquiry made to ascertain the owner's

street and post office address. Nor does she dispute that the statute requires that the affidavit "be retained as a permanent record in the office of the Clerk." Further, she does not deny that the requirement of the affidavit applies in cases of both residents and non-residents. *Roach v. Goebel, 856 So. 2d 711 (Miss. Ct. App. 2003).*

The Tax Search form prepared and retained by the Clerk in this case obviously does not specify the particular acts of search and inquiry which were conducted. (R. 159, RE 13). This alone makes the form insufficient under the statute and voids the sale. *Reed v. Florimonte, 987 So. 2d 967, 973-975 (Miss. 2008).* A second problem is that the form used in this case was not sworn or dated and does not constitute an affidavit.

As the parties have agreed in their Briefs (Appellant's Brief, P. 11; Brief of Appellee, P. 26) an affidavit is a "**sworn** statement in writing made **before** an authorized official." (Emphasis added). *Russell v. State, 849 So. 2d 95, 109 (Miss. 2003).* The parties likewise agree (Brief of Appellee, P. 25) that 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.**" (Emphasis added). *Wilcher v. State, 863 So. 2d 776, 828 (Miss. 2003).*

Ferguson points out in her Brief that the Chancery Clerk is authorized to administer oaths or affirmation. Certainly, the Clerk is an official before whom an affidavit may be made. That does not necessarily mean, however, that every document which the Clerk or his deputy signs thereby constitutes an affidavit. The Tax Search form contained in the record (R. 159, RE 13) is not an affidavit. The word "affidavit" does appear in the body of the document. However, without any sworn oath or

affirmation the insertion of the word "affidavit" no more creates a valid affidavit than the use of the word "deed" or "will" would create a valid deed or will from an otherwise invalid instrument.

Nowhere does the Tax Search form contain the words "sworn to and subscribed before me" or "this day states upon oath" or similar language indicating that its contents were "confirmed by the oath or affirmation of the party making it." The Tax Search form was signed by the Deputy Clerk on behalf of the Clerk. There is no indication that in subscribing the form she was administered an oath by any official authorized to so. *Russell v. State, Supra,* and *Wilcher v. State, Supra.* . The document is not even dated. In *Rebuild America, Inc. v. McGee, _____ So. 3d ____ 2010 WL 322023, P. 2 (Miss. App. 2010),* the Court of Appeals held that an unsworn "affidavit" is not sufficient under the *Mississippi Code § 27-43-3.*

Ferguson also argues that a much later affidavit prepared by her lawyers in support of her motion for summary judgment and signed by the Clerk cures the lack of a valid affidavit in the Clerk's tax sale records. The issue is not the truth of the matters set forth in the Clerk's later affidavit. The issue is the lack of any affidavit made contemporaneously with the mailing of notice as required by statute. The effect of a later affidavit has been decided adversely to Ferguson in the case of *C.F.P. Properties, Inc. v. Roleh, Inc., Supra.* That case involved a complaint to set aside a tax sale. After the complaint was filed the Chancery Clerk executed an affidavit which described his efforts of diligent search and inquiry. The Court of appeals held that the subsequent affidavit could not cure the lack of a contemporaneous affidavit made and retained in the Clerk's

Tax Sale Records. *Id.* Any other ruling would render the statutory requirement meaningless.

II. THE CHANCERY CLERK CONVEYANCE IS VOID FOR LACK OF SUFFICIENT NOTICE AS REQUIRED BY MISSISSIPPI CODE § 27-43-3.

Ferguson states in her Brief that the Clerk properly mailed the notice to redeem to 3671 Horn Lake Road, Nesbit, Mississippi. Johnson has never disputed that this was his mailing address for such purpose. Johnson's point is that no proper return was filed showing that personal service was actually attempted. Personal service is required when the taxpayer is a resident.

There appear to be no cases which interpret the term "resident" in the context of *Mississippi Code § 27-43-3*. Whether the statute requires that the taxpayer be domiciled in the state or merely have a residence in the state has not been addressed. The fact that James Johnson has for many years owned a home in Memphis, Tennessee is certainly an important factor. In the absence of any "avowed intention, and of acts which indicate a contrary intention," it would usually be controlling on the issue of residence. *Hariston v. Hariston, 27 Miss. 704, 1854 WL 2279 P. 10 (Miss. Err. & App. 1854).* In this case Johnson did express an "avowed intention" that DeSoto County, Mississippi, and not Shelby County, Tennessee was his primary place of residence and over the years carried out numerous acts which were in accordance with that position. His family lives on the DeSoto County property. He receives his mail, votes, maintains his driver's license, and performs other acts of citizenship in DeSoto County, Mississippi. (R. 91-93, 112, 113, 117, 118, 121-125, 151). He was certainly amenable to service of process by the Sheriff in DeSoto County, Mississippi. Under these circumstances all parties, including the

Chancery Clerk, Tax Assessor and Tax Collector considered 3671 Horn Lake Road to be Johnson's physical and mailing address for purposes of *Mississippi Code § 27-43-3.* (R. 51, 93, 99).

Ferguson relies on *Bank of Hattiesburg v. Mollere, 79 So. 87 (Miss. 1918), Meyer Bros. Drug Co. v. Fly, 63 So. 2d 227 (Miss. 1913),* and *Young v. Stevens, 968 So. 2d 1260 (Miss. 2007)* as authority that Johnson was not a resident. In the *Bank of Hattiesburg* case the Defendants were not reared in Mississippi and had resided in Mississippi only a short time. In the *Meyer Bros. Drug Co.* case, a non-resident moved to Mississippi solely to obtain the homestead exemption on his property to which a lien had attached. In this case the property is Mr. Johnson's birth place. He has been staying in the Whitehaven area of Memphis, Tennessee, which adjoins DeSoto County. Johnson visits the property almost daily. As set out above he has continued to receive mail and do other acts consistent with the property being his residence. Johnson testified that he plans to return and live there. In *Young v. Stevens, Supra,* was likewise "fact driven." The Court held that residence and domicile are "synonymous for election purposes." *Id. at 1263.* The Court therefore intentionally limited the scope of its holding, declining to extend it to other circumstances.

Furthermore, in this case, the Chancery Clerk delivered a redemption notice to the Sheriff to be served upon Johnson at 3671 Horn Lake Road, thereby in effect treating him as a resident. (R. 50). Under *Mississippi Code § 27-43-3* the notice was to be served "as summons issued from courts are served" and the Sheriff was "to make his return to the Chancery Clerk." Ferguson states that the Sheriff was not able to serve Johnson and so posted a notice. (Brief of Appellee, P. 22). There is absolutely no proof of that. There is

simply a copy of the Clerk's notice in the file which bears the notation "171/32 Posted RB 5/1/08 12:30 a.m." There is no proof whatever that personal service was attempted. In fact, one has to make all sorts of assumptions as to who posted what, and where. However; without any dispute there is no valid return in the file. Without a valid Sheriff's return in the file statutory requirements have not been met. *Rebuild America, Inc. v. Milner, 7 So. 3d 972, 976 (Miss. Ct. App. 2009).* Furthermore, posting is not a valid method of service. *Viking Investments, LLC v. Addison Body Shop, Inc., 931 So. 2nd 679, 681 (Miss. Ct. App. 2006); Rebuild America, Inc. v. Norris, _____ So. 3d ____ 2010 WL 3547982, at P. 3 (Miss. App. 2010).*

Ferguson correctly points out that under *Mississippi Code § 27-43-3* the failure of a landowner to actually receive notice does not render the tax sale void "provided the Clerk and Sheriff have complied with duties [statutorily] prescribed for them." However, in this case there is no proof whatsoever that the Sheriff made any attempt to serve process and there is no return in the file.

III. THE SALE CONDUCTED ON AUGUST 28, 2006 IS VOID BECAUSE IT WAS NOT CONDUCTED IN THE MANNER REQUIRED BY *MISSISSIPPI CODE § 27-41-59.*

Ferguson argues that the statute requires only that a tax parcel be sold in tracts of no more than 160 acres. She bases her argument on *Jones v. Seward, 12 So. 2d 132 (Miss. 1943).* That case does not address the issue before this Court. It dealt with a tax sale of a 400 acre tract. The Sheriff and Tax Collector sold the property in three tracts of 80 acres each and one tract of 160 acres. The Court held that such sale was error because

the parcel had not been first offered in blocks of 40 acres each. [1] Since the parcel in question was larger than 40 acres, the issue of whether a smaller tract must first be offered in separately described subdivisions if the property were less than 40 acres was never considered.

Furthermore, the statute has been modified since the *Jones* decision. *Mississippi Code 1942 § 9923* stated:

> He shall first offer 40 acres **or a smaller separately described subdivision, if there be any**, and if the first parcel so offered does not produce the amount due, then he shall offer another similar subdivision and so on . . .

Mississippi Code § 27-41-59 states:

> He shall first offer 160 acres **or a smaller separately described subdivision, if the land is less than 160 acres.** If the first parcel so offered does not produce the amount due, then he shall offer as an entirety all the land constituting one tract.

Ferguson also says that Johnson's interpretation of the statute would require the tax collector to subdivide even subdivision lots. That is not a concern because there would be no "smaller separately described subdivision" of a platted subdivision lot. However; in this case, where the entire 15 acre parcel was sold for $179.00, a separately described subdivision could easily have been offered.

Finally, Ferguson cites the language in the statute which states that an error in conducting the sale does not invalidate the sale. This language has been contained in the statute and its predecessors for many years. Nevertheless, the failure to offer property in tracts as required by the statute is not a mere error in the conduct of the sale. It is a statutory breach which invalidates the sale. *Jones v. Seward, Supra* (applying *Mississippi*

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[1] Under the statute in effect at the time, *Mississippi Code 1930 § 3249*, 40 acres was the maximum size parcel allowed. The statute was later codified as *Mississippi Code 1942* § 9923, and later as *Mississippi Code § 27-41-59*.

Code 1930 § 3249), *Parker v. Touliatis, 244 So. 2d 7 (Miss. 1971)* (applying *Mississippi Code 1942 § 9923*), and *Pittman v. Currie, 414 So. 2d 423 (Miss. 1982)* (applying *Mississippi Code § 27-41-59*) all hold that failure to offer the tax parcel in the required sized tracts renders the tax sale void. All of those cases were decided despite the language relied upon by Ferguson. Since the statute now requires that the tax parcel first be offered in "a smaller separately described subdivision if the land is less than 160 acres," then the failure to do so also renders the sale void.

RUSH V. WALLACE RENTALS, LLC **IS NOT CONTROLLING AUTHORITY IN THIS CASE**

The case of *Rush v. Wallace Rentals, LLC, Supra,* cited by the Chancellor is distinguishable as set out in Johnson's previous brief. (Brief of Appellant, Pp. 19, 17). Simply because James Johnson believed that he was entitled to homestead exemption and because that exemption may have been subsequently disallowed, is not proof that Johnson intentionally attempted to mislead the Clerk concerning his address. There is nothing indicating that he was hiding the property in the name of another as was the case in *Rush v. Wallace Reynolds, LLC, Supra.* Johnson's actions with regard to his residence have been open. He is an elderly person of limited means and education who truly considers his birth place and family home of four generations to be his permanent residence. His actions and statements over the years have been consistent with that belief. He has consistently maintained that he considered himself a resident of Mississippi.

This Court has been careful to point out the limited application of the *Rush v. Wallace Rentals, LLC, Supra,* holding. See *Reed v. Florimonte, Supra at 974.* Virtually every decision on the subject has emphasized that all statutory requirements relating to tax sales and deeds must be strictly met and that any failure to do so invalidates the underlying tax sale and conveyance. *Rebuild America, Inc. v. Norris, Supra, at P. 2, Rebuild America, Inc. v. McGee, Supra, at P. 2; .C.F.P. Properties, Inc. v. Roleh, Inc., Supra, at P. 3; Rebuild America, Inc. v. Johnson, _____ So. 3d _____, 2010 WL 1445191, P. 3 (Miss. App. 2010).*

CONCLUSION

The statutory requirements necessary to support a valid tax sale and deed were not met. The Tax Search form maintained in the Clerk's records does not specify his acts of search and inquiry which is required under *Mississippi Code § 27-43-3.* Additionally, the Tax Search form is not confirmed by oath or affirmation and does not constitute a sworn affidavit as required by the *Mississippi Code § 27-43-3.* James Johnson was a resident of DeSoto County, and was treated as such, for the limited purposes of *Mississippi Code § 27-43-3.* However, there was no valid return made by the Sheriff showing that personal service of the redemption notice was attempted as required by that statute. The property was not first offered for sale as a smaller subdivision as required by *Mississippi Code § 27-41-59.* Any one of these deviations from the statutory procedure is sufficient to void the tax sale and deed.

Therefore, James E. Johnson respectfully requests this Court to reverse the summary judgment granted in favor of Ferguson, to further reverse the denial of his

counter-motion for summary judgment, and to issue its mandate directing the Chancery Court of DeSoto County to enter final judgment for Johnson, setting aside and canceling Chancery Clerk's Conveyance Land Sold for Taxes upon payment by Johnson of all taxes paid by Ferguson and all statutorily required charges or fees.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Taylor Buntin, attorney of record for the Appellant James E. Johnson in the above styled and numbered cause, do hereby certify that I have this day delivered, via United States mail, postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

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Dated this the 6th day of October, 2010.

Taylor Buntin