

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JAMES ALEXANDER

APPELLANT

VS.

CAUSE NO. 2010-CA-00890-COA

PATSY PHILLIPS MUSGROVE

APPELLEE

BRIEF OF APPELLEE

**APPEAL FROM THE CHANCERY COURT OF
LAWRENCE COUNTY, MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court of Appeals may evaluate possible disqualification or recusal:

1. James Alexander, Appellant
2. Patsy Joan Vanderford, A/K/A
Patsy Phillips Musgrove, A/K/A
Joan Vanderford, Appellee
3. Jason T. Barrett, Counsel for Appellant on appeal
4. Malcolm T. Rogers, Counsel for Appellee on appeal and at trial.
5. Malcolm T. Rogers, Counsel for Lawrence County Board of Supervisors at trial.
6. J. Cliff Thomas, Jr., former Counsel for Appellee at trial.
7. James F. Noble, Jr., former Counsel for Appellant at trial.
8. Hon. Larry Buffington, Former Chancellor – 13th District

SO CERTIFIED, this the 10th day of March, 2011.

Respectfully Submitted,


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SUMMARY OF ARGUMENT

The tax deed issued by the Chancery Clerk on July 22, 1998, pursuant to a tax sale on August 30, 1993, for delinquent ad valorem taxes for the year 1992 is void for failure of the Chancery Clerk to provide notice of expiration of redemption period as provided for and required in Mississippi Code Ann. Section 27-43-1 (Supp. 1975) and Mississippi Code Ann. Section 27-43-3 (Supp. 1995).

The tax sale in question occurred in August, 1993, however the controlling notice statute relating to the expiration of the redemption period is Section 27-43-3, Mississippi Code of 1972, as Amended. (and effective from and after passage on March 27, 1995.) Since the redemption period expired on August 30, 1995, and notice was published on August 9, 1995, the required forty-five (45) day publication period was not met since the notice was published only twenty-one (21) days before maturity of the tax sale; and, the notice further failed because the landowner's name and the land description were not listed.

The record is void of any attempt of the clerk to send notice as prescribed, therefore, the tax sale is void thereby invalidating any subsequent tax deed.

ARGUMENT

A. THE TRIAL COURT WAS CORRECT IN VOIDING THE 1998 TAX DEED AS THE RESULT OF A VOID TAX SALE FOR THE YEAR 1993, FOR DELINQUENT 1992 TAXES.

The instant case is unique in that James Alexander is attempting a fourth (4TH) bite at the apple, using a somewhat different argument than the ones previously used before the Mississippi Supreme Court. Mr. Alexander has previously appealed three (3) separate, adverse Summary Judgment rulings by the Chancery Court of Lawrence County, Mississippi, one of which addressed the same August, 1993 sale of land for delinquent county Ad Valorem taxes. *See Alexander Vs. Harris, et al 857 So.2d 59, Miss. 2003.*

For reasons unknown to counsel for Ms. Musgrove, this dispute has lingered on the docket of the lower Court for seventeen (17) years, during which time the original attorneys for the original Plaintiff and Defendant have both died, as has the Chancery Clerk serving at the time in question. Present Counsel for this Appellee filed the subject Motion for Summary Judgment herein, and subsequently filed an Amended Motion for Summary Judgment. The first motion, which was sustained, dealt with a 1990 tax sale, and voided a subsequent tax deed. This aspect is not appealed by Alexander.

Counsel for Ms. Musgrove subsequently discovered a second tax deed issued based on the August, 1993 sale of land for delinquent 1992 taxes. Hence the Amended

Motion for Summary Judgment.

Alexander appeals the ruling of the same trial Court setting aside and cancelling a tax deed resulting from a tax sale declared void by that Court and subsequently affirmed by the Mississippi Supreme Court. *See Alexander Vs. Harris, et al 857 So.2d 59, Miss. 2003. 2002-CA-01440-SCT*

The notice of the expiration of the redemption period required for delinquent tax sales conducted in Lawrence County, Mississippi, on August 30, 1993, should have been published on or before July 16, 1995, notifying all landowners by name and land description, that the period in which to redeem the land would expire on August 30, 1995, and the tax sale would mature.

This required notice was published on August 9, 1995, and did not contain the name of the landowner or owners, nor a land description and was therefore totally defective causing the tax sale to become void. The record is totally devoid of any evidence to the contrary and further reveals that the Chancery Clerk and Sheriff failed to carry out their statutorily required duties in 1995 in the following respects:

- a. No notice was issued to the Sheriff of the County of the landowner's residence.
- b. No certified copy of the notice was mailed to the landowner by registered or certified mail.

- c. No diligent search and inquiry was made to ascertain landowner's street and post office address.
- d. No notations of the actions of the Chancery Clerk regarding issuance of notice, the search and inquiry as to landowner's address, or the results thereof were noted on the tax sale records of Lawrence County.
- e. The notice published by the Clerk on August 9, 1995 was defective.
- f. No affidavit has been filed concerning the issuance of the statutory notice, or specifying the acts of search and inquiry made by the Clerk in an effort to ascertain landowner's street and post office address, nor has such action been noted on the tax sale records of Lawrence County.

The notice requirements of the applicable statute, Section 27-43-3 of the Mississippi Code of 1972 (Supp. 1995) were not met by the clerk and/or sheriff, and the publication was inadequate. Notice in delinquent tax sales is part of due process and these statutes should be strictly construed. *Hammett v. Johnson*, 624 So.2d 58 (Miss. 1993). *Brown v. Riley*, 580 So.2d 1234 (Miss. 1981). *James v. Tax Inv. Co.*, 206 Miss. 605, 40 So.2d 539 (1949).

The notice statute, Section 27-43-3, was amended by the Legislature in 1995 and became effective on March 27, 1995. A very significant and succinct part of the statute is the very last paragraph and sentence, which reads as follows:

“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 owners upon refund of all purchase money paid.”

Alexander offered no proof or evidence in his response to the Motion for Summary Judgment, nor is there any documentary evidence in the record that any notice whatsoever was ever given the landowner, mail, summons or otherwise. The failure of the Clerk to give forty-five (45) days notice as required by statute has not been contested by Alexander. It cannot be contested.

Now, Alexander argues that it was he who was entitled to notice (August, 1995) that the August, 1993 tax sale was about to mature, and not the Appellee, Musgrove, arguing that he was the record owner. The original civil action was filed in November, 1993, and was therefore pending before the lower Court in August, 1995, the date notice was required, and was still pending in July, 1998, the date of the tax deed. There has also been a lis pendens notice filed of record during the entire time covered by these proceedings. Therefore, Mr. Alexander bases his argument on record ownership by virtue of a tax deed; a tax deed from the **August, 1990** tax sale; the same tax deed set aside by the lower Court’s first summary judgment ruling; emanating **from a voided August, 1990 tax sale**, for delinquent 1989 taxes, a ruling he does not challenge. This referenced tax sale (August, 1990) was previously voided by the learned Chancellor whose decision

was subsequently affirmed by the Mississippi Supreme Court. *See Alexander V. Davis* 857 So.2d 59 (Miss. 2003) 2002-CA-01437-SCT (Miss. 2003)

Alexander has hitched his wagon to the term *record owner*, as set out in the language of Miss. Code Ann. Section 27-43-3, claiming Appellee Musgrove was not the *record owner* at the time that notice was required (August, 1995) but that he, Alexander, defendant in the lower Court was in fact the *record owner*. Further, Alexander ignores the other language in the statute, specifically the word *shall* and the words *reputed owner*.

In support thereof, he cites an opinion of the Mississippi Attorney General on May 20, 1980, however, Mr. Alexander's reliance thereon is misplaced, for the term *record owner* is only used once in the statute and this is in reference to fees paid to the Clerk. "For examining the records to ascertain the *record owner* (emphasis added) of the property, the Clerk shall be allowed a fee" (Mississippi Code Section 27-43-3)

What Appellant alludes to as *record owner*, and what the Attorney General's excerpt fails to address is that throughout the statute, the legislature used the term *reputed owner* no less than eight (8) times. All notice requirements reference the *reputed owner*.

There is no doubt that the learned Chancellor's ruling was correct, because there is no evidence in the record that the tax sale of 1993 even resembled what the legislature intended. A closer reading of this statute (Section 27-43-3) also reveals the use of the word *shall*, not less than four (4) times, to-wit:

“The Clerk *shall* issue the notice to the sheriff of the county of the *reputed owner’s* residence”

“The Clerk *shall* also be required to publish the name and address of the *reputed owner* and the legal description of such property”

“Such publication *shall* be made at least forty-five (45) days prior to the expiration”

“then the Clerk *shall* make further search and inquiry to ascertain the *reputed owner’s* street and post office address.”

Alexander, by further way of argument, anticipates the reliance of Ms. Musgrove upon the *Lis Pendens* filed of record at the time the original lawsuit was filed. Again, this anticipation is misplaced. *Who* was entitled to notice was never an issue before the lower Court. There *was* no notice.

B. THE CHANCELLOR’S FINAL JUDGMENT IS NOT VOGUE, BUT RETAINS THE MATTER OF TAX REFUNDS FOR FURTHER EXAMINATION AND ADJUDICATION.

The taxes in years subsequent to 1993, have obviously been paid. This aspect of the case was noted by the Chancellor, who, in equity, ordered that Mr. Alexander be refunded sums paid by him subsequent to the filing of this action. One who pays ad valorem taxes, by error or otherwise, does so at his own peril. Here, Mr. Alexander’s

argument is couched more in the form of a pleading allegation in the nature of an affirmative defense. There was pending litigation surrounding the subject lands. The record is not clear and precise as to who paid the current ad valorem taxes as they became due each year while the case remained pending. If Mr. Alexander's contention here was correct, then it would create a foot-race to the tax assessor's office each January 1, and may the fastest person win. The learned Chancellor certainly addressed the matter in his ruling, knowing that he who seeks equity must do equity and Ms. Musgrove is required to refund the taxes, if any, paid by Mr. Alexander. The issue is not before the Court.

C. THE TIMBER SALE PROCEEDS BELONG TO THE RIGHTFUL OWNER OF THE REAL PROPERTY; AND, THE TIMBER WAS A PART OF THE REAL PROPERTY PRIOR TO BEING SEVERED.

Growing, standing timber and trees constitute part of the land, and as such, constitute real property. The original Complaint in the instant case was filed in 1993. After Mr. Alexander was served with process, and with a lis pendens properly filed, he proceeded to sell and harvest the standing timber. The attempted sale of the timber occurred on or about May, 1994. This attempted sale was a made a part of the Amended Complaint and the proceeds were at some point paid into the registry of the Court where they remain. Mr. Alexander's argument for the timber sale proceeds is no more meritorious than his claim for the surface interest in the subject lands.

CONCLUSION

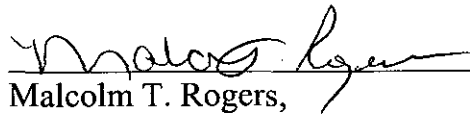
The learned Chancellor's granting of summary judgment in the case at bar was proper. The Mississippi Supreme Court has previously addressed the delinquent tax sales conducted in Lawrence County, Mississippi. *See Alexander v. Womack*, 2002-CA-01431-SCT (Miss. 2003) consolidated with *Alexander v. Davis* 2002-CA-01437-SCT (Miss. 2003) consolidated with *Alexander v. Harris* 2002-CA-01440-SCT (Miss. 2003). *Davis* specifically addressed the August 1992 sale of land for delinquent taxes in the subject county. This Honorable Court is now asked to revisit a matter already ruled upon by the Supreme Court of Mississippi.

The question of who was entitled to notice of tax sale maturity is not before this Honorable Court; nor who paid the ad valorem taxes in 1998, or 2001, 2005 or any other year for that matter, nor is the question of who is the rightful owner of the timber sale proceeds. The Chancellor addressed the equitable refund of monies to Alexander for taxes, if any, that be paid. And, the timber sale proceeds belong to the rightful owner of the land and real property.

The decision of the Chancellor to grant summary judgment was proper, and should be affirmed; and, the case remanded to the Chancery Court of Lawrence County, Mississippi, for further proceedings consistent with the Chancellor's final judgment and the rulings of Court of Appeals, State of Mississippi.

Respectfully Submitted,

PATSY PHILLIPS MUSGROVE

By: 
Malcolm T. Rogers,
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Malcolm T. Rogers, Attorney for Appellee, do hereby certify that I have this day mailed by U.S. Postal Service, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to :

Kathy Gillis, Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

Hon. Larry Buffington
P.O. Box 924
Collins, MS 39428

Honorable Jason T. Barrett
P.O. Drawer 542
Brookhaven, MS 39601

THIS the 10th day of March, 2011.


MALCOLM T. ROGERS