

CERTIFICATE OF INTERESTED PERSONS

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

City of Bruce

Plaintiff and Appellant

Borrego Springs Bank

Defendant and Appellee

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STATEMENT OF THE ISSUE

I. Did the Circuit Court correctly hold that “Defendant failed to present any evidence showing compliance with *Miss. Code. Ann. § 27-43-3*” and, therefore, “as stated within the statute, the tax sale of August 28, 2006...is void”? (R. 566).

STATEMENT OF THE CASE

Borrego Springs Bank (“Borrego”) is a banking institution organized in the State of California. Skuna River Lumber, LLC (“Skuna”) filed for Chapter 11 bankruptcy on January 26, 2006. At that time, Borrego was a secured creditor of Skuna as to certain real property. During the bankruptcy proceedings, the bankruptcy trustee ordered a sale of Skuna’s assets “free and clear of liens, claims and interests.” During the pendency of the bankruptcy matter, the U.S. Bankruptcy Court approved the transfer of the real property to Borrego “free and clear”.

The City was put on notice of Skuna bankruptcy, and the bankruptcy sale to Borrego, but improperly sold the real property at a tax sale on August 28, 2006. Further, the City failed to comply with the statutory requirements of *Miss. Code Ann.* § 27-43-3, which requires publication in a local paper prior to the conclusion of the two year redemption period after a tax sale.

Based on the admission by the City that it did not follow the clear publication requirements of the statute, Borrego moved for and was granted Summary Judgment by the Circuit Court on November 2, 2010 and the tax sale was voided. Borrego had several ground to set aside the tax sale, but the judge only ruled on one; that the City failed to publish notice prior to the running of the redemption period. City’s Motion for Rehearing was not well taken and was denied on January 21, 2011. This appeal was subsequently filed on February 16, 2011.

STATEMENT OF THE FACTS

Borrego was a first position lienholder on the property of Skuna and purchased its assets out of Bankruptcy at a court ordered auction free and clear of liens, claims and interests.

The City of Bruce was a creditor of Skuna, in that ad valorem taxes were due on the property for the year 2005, the City was listed in the bankruptcy schedules, and the City was properly notified of Skuna's bankruptcy. Despite being notified of the bankruptcy, and all proceedings there under, including the sale of the property to Borrego at auction, the City took no action within the bankruptcy, and particularly did not seek relief from the automatic stay in order to move forward with its tax sale of the property. The tax sale occurred on August 28, 2006 while the bankruptcy of Skuna was still pending, after the Bankruptcy Court sale and order transferring the property to Borrego free and clear of all liens.

The City admits that it did not publish notice prior to the running of the redemption period as required by *Miss. Code. Ann.* § 27-43-3.

SUMMARY OF THE ARGUMENT

The trial court correctly granted Summary Judgment to Borrego by finding that City did not comply with the clear and unambiguous statutory requirements of *Miss. Code Ann.* § 27-43-3, which requires publication just prior to the running of the redemption period.

This statute lays out three (3) separate and distinct requirements regarding notice to be given by the City with regard to the running of the redemption period (any notice related to the date of the original tax sale is not in issue). The City admitted to not following the redemption notice requirement of publishing notice in the newspaper 45 days prior to the ending of the redemption period date. (R. 570).

Because Borrego is not a resident of the State of Mississippi, personal service was not required under § 27-43-3. Therefore, only two forms of notice were required, one of which was not performed, publication. The clerk does not have the authority to ignore statutory requirements provided by law. For these reasons, the tax sale is void.

City asserts several allegations never raised in the lower court. The arguments of laches and substantial compliance in Appellant's brief should be stricken and barred from being considered on appeal based on the bedrock principle of this State that, "[t]he failure to raise an issue at the trial level is a

procedural bar to the issue on appeal.” *Birrages v. Ill. Cent. R.R. Co.*, 950 So.2d 188, 194 (Miss. Ct. App. 2006) (citing *Bell v. State*, 769 So.2d 247, 251 (Miss. Ct. App. 2000)). Furthermore, should the Court consider these new arguments, there is no evidence in the record to support the City’s allegations.

STANDARD OF REVIEW

Borrego agrees that the ruling of the trial court in interpreting the language of *Miss. Code. Ann. § 27-43-3* is a de novo review for this Court. However, in its brief the City raises a number of factual issues which were not a part of the evidence before the lower court, nor the basis for the lower court’s ruling on the one issue on appeal, i.e. was there the required publication prior to the expiration of the right of redemption. The only factual issue related to the lower court’s ruling, i.e. lack of publication, was admitted by the City. (R. 570). Therefore, there were no facts in dispute before the lower court related to its ruling, and summary judgment was appropriate

Though the City now wishes to bring in additional arguments (waiver, laches, substantial compliance), and argue that there were factual issues in dispute on these issues, those issues were not a part of the ruling of the lower court and are not, therefore, before this Court on appeal. Summary judgment was completely appropriate on this one legal issue.

ARGUMENT

Under the laws of the State of Mississippi, there are certain statutory procedures which the clerk **must** follow to make a tax sale valid and complete. If the clerk does not follow specifically what the statute requires, then the sale is rendered **void**.

The statute requiring notice of expiration of the tax sale redemption period contains three **separate and independent** forms of notice (by mail, by personal service if in-state owner, **and** by publication). The statute does not allow the clerk to select one form of notice and ignore the others, but must complete all forms that are required. *Rebuild America, Inc. v. Norris*, 2011 WL 2418977 (Miss. 2011).

The **ONLY** form of notice in issue in this case is notice by publication. Miss. Code Ann. § 27-43-3, states:

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**.

Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be **void**...

Miss. Code Ann. § 27-43-3 (emphasis added). In the present case, the trial court found that the clear requirements of Miss. Code Ann. § 27-43-3 were not followed,

based on the admission of the City, and based on the language of the statute the tax sale was void.

A. THE CITY OF BRUCE FAILED TO COMPLY WITH CLEAR STATUTORY REQUIREMENTS

Miss. Code Ann § 27-43-3 requires that notice be given to the “reputed owner” by certified mail, personal service delivered by the sheriff, **and** publication in the appropriate newspaper. *Id.*¹

This Court has held on several occasions that all three notice requirements **must be** satisfied for the redemption notice to be in compliance with the statute. *Rebuild Am., Inc. v. Estate of Wright*, 27 So.3d 1202, 1204 (Miss. Ct. App. 2010)(“Therefore, in order for a redemption notice to be complete and in accordance with the statute, **all three requirements must be met.**”), *Viking Invs., LLC v. Addison Body Shop, Inc.*, 931 So.2d 679, 681 (Miss. Ct. App. 2006) (emphasis added)(“Any deviation from the statutorily mandated procedure renders the sale void.”)(quoting *Hart v. Catoe*, 390 So. 2d 1001, 1003 (Miss. 1980). The City, admittedly, did not publish any notice prior to the running of the redemption period, as required by Miss. Code Ann. § 27-43-3. (R. Volume 5, pgs. 13-15). Therefore, the sale is void. *Roach v. Goebel*, 856 So.2d 711 (Miss. Ct. App. 2003).

¹ The Mississippi Supreme Court stated, “the most important safeguard involving any person who stands to suffer from some official action is prior notice. This gives the recipient an opportunity to prepare himself and be heard. Notice, therefore, by far is the paramount factor and purpose of all process.” *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss.1991).

“Public policy favors and protects the owner of land from loss by its sale for taxes.” *Alexander v. Gross*, 996 So.2d 822, 825 (Miss. Ct. App. 2008) (quoting *Carmadelle v. Custin*, 208 So.2d 51, 55 (Miss. 1968)). Therefore, “[s]tatutes dealing with land forfeitures for delinquent taxes should be **strictly construed in favor of the landowners.**” *Rebuild Am., Inc. v. Milner*, 7 So.3d 972, 974 (Miss. Ct. App. 2009) (quoting *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991)(emphasis added)). “*Any* deviation from the statutorily mandated procedure renders the tax sale void.” *Roach*, 856 So.2d at 716 (emphasis added).

B. THE CITY OF BRUCE MADE IMPROPER ARGUMENTS ON APPEAL

“One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level.” *Estate of Myers v. Myers*, 498 So.2d 376, 378 (Miss. 1986); accord *R & S Development, Inc. v. Wilson*, 534 So.2d 1008, 1012 (Miss. 1988); *Strait v. Pat Harrison Waterway Dist.*, 523 So.2d 36, 41 (Miss. 1988); *Methodist Hospitals of Memphis v. Marsh*, 518 So.2d 1227, 1228 (Miss. 1988); *Estate of Johnson v. Adkins*, 513 So.2d 922 (Miss. 1987); *Bailey v. Collins*, 215 Miss. 78, 60 So.2d 587, 589 (Miss. 1952).

For the first time on appeal the City attempts to assert new legal theories that were not asserted to the lower court, and were not a part of the lower court’s ruling. These include the argument that notice by mail is considered legal

“substantial compliance” with the other, **separately** required, notice by publication. Also, the City argues that by some action the Bank committed laches and should not be entitled to void the sale. Both arguments were not before the lower court at the time of the summary judgment and were not brought before the lower court on the motion to reconsider filed by the City. (R. 172, 572). Therefore, the law of Mississippi is clear that such issues cannot be considered on appeal. *Myers*, 498 So.2d 376, 378.

Should this Court consider the new issues raised for the first time on appeal, the Bank would assert the following.

**C. “SUBSTANTIAL COMPLIANCE ” IS NOT ALLOWED WITH THE
STATUTORY REQUIREMENTS OF § 27-43-3**

The City argues that the clerk “substantially complied” with the publication requirement by mailing notice, and therefore the tax sale should be allowed to stand. (*Brief of Appellant*, 11). Based on the law cited above, the argument of substantial compliance made by the City is inapplicable, in that all types of notice are independent and required.

If the City had made **some or any** form of publication, then it could make an argument that such attempted publication was “substantial compliance” with the publication requirement. However, because “all three [notice] requirements must be met”, notice by mail cannot be substantial compliance for the publication notice also required. *Viking Invs., LLC v. Addison Body Shop, Inc.* 931 So.2d 679,

681 (Miss. Ct. App. 2006). However, if the Court is to consider these arguments, the Cities “authority” are no authority at all.

The cases cited by the City deal specifically with substantial compliance as it relates to personal notice in civil actions (such as the Mississippi Tort Claims Act), and not to **publication** notice. In each of these cases, there was **some** attempt at complying with the statutory requirement of notice, but each case addresses if the attempt was sufficient, and in no case was there two required forms of notice such as before the Court now. Again, in our case there was **NO** publication notice by the City, and notice by mail is not substantial compliance with the obligation to publish notice. They have no authority for this frivolous argument, and as such, the cases are not relevant to any issue in this case.

Fairley v. George County involves mailed notice requirements for initiation of a medical malpractice suit and is in no way related to tax sales. *Fairley v. George*, 871 So. 2d 713 (Miss. 2004). *Reaves v. Randall* involves mailed notice sent to a superintendent notifying the school board of the filing of a lawsuit. 729 So. 2d 1237 (Miss. 1998); *See also, Acreo v. Tolliver*, 19 So. 3d 67 (Miss. 2009). (Court found that there was **no** substantial compliance because the letter provided did not follow the clear requirements of the Medical Malpractice Tort Reform Act. *Id.* at 72.); *South Texas Elec. Coop. v. Dresser-Rand Co., Inc.*, 575 F.3d 504 (5th

Cir. 2009)(Involving a turbine manufacturer’s repair obligations under notice provisions in the express warranty of a contract).

Miss. Code. Ann. § 27-43-3 states that the clerk “shall” provide such notice. The Legislature's statutory use of the term “shall” connotes a mandatory requirement. See *Weiner v. Meredith*, 943 So.2d 692, 694 (Miss. 2006). This Court has a “constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation.” *University of Mississippi Medical Center v. Easterling*, 928 So.2d 815, 820 (Miss. 2006). Further, in regard to notice provisions in general, the Mississippi Supreme Court has held that, “it would set a dangerous precedent if this Court were to ignore specific statutory requirements for notice.” *Carpenter v. Dawson*, 701 So.2d 806, 808 (Miss. 1997).

Finally, the City cites to the case of *DeWeese Nelson Realty, Inc. v. Equity Services Co.*, which actually does involve a tax sale due to the nonpayment of city and county ad valorem taxes. 502 So. 2d 310 (Miss. 1986). However, this too is distinguishable from the present case in that the issue was substantial compliance with personal notice by mail and the court determined that the effort at notice by mail was sufficient to comply with the “**notice by mail**” obligation. It does NOT deal with substantial compliance with the publication requirement because the clerk DID publish notice. The Supreme Court held that “notice must be given by personal service, mail, **and** publication before a landowner's rights are finally

extinguished by the maturing of a tax deed.” *DeWeese*, 502 So.2d at 314 (emphasis added).

If the City had published any sort of notice in the local newspaper, there may have been an argument that it has substantially complied with the publication notice requirements. However, since it published nothing, it is trying to argue notice by mail is substantial compliance with the required notice by publication. There is no law to support the City’s argument and no reasonable extension of the existing law can cover this frivolous argument.

The City has continuously failed to provide any legal authority supporting the position that it did not have to follow the clear requirements of publication under §27-43-3. It is well settled, as found by the Supreme Court of Mississippi, that “the failure to cite authority in support of an argument eliminates our obligation to review the issue.” *Glasper v. State*, 914 So. 2d 708, 726. (Miss. 2005).

D. LACHES DOES NOT APPLY

Because this appeal is the first time the City has raised the issue of Borrego being barred by the doctrine of laches for “sitting on its rights,” it is procedurally barred from presenting this on appeal. *Birrages v. Ill. Cent. R.R. Co.*, 950 So.2d 188, 194 (Miss. Ct. App. 2006)(“The failure to raise an issue at the trial level is a procedural bar to the issue on appeal.”).

But if considered, this Court has held that “no claim is barred by laches until the limitation has attached, and that laches is no defense if the proceedings are brought within the prescribed period of limitation.” *Hill v. Nash*, 73 Miss. 849, 19 So. 707 (Miss. 1896). The statute of limitation has not run to void the tax sale, and the City has not raised the running of the statute as a defense. Therefore, laches cannot apply. The City knows this and ignores this clear law.

City’s only claim supporting the idea that the doctrine of laches should be invoked is that Borrego “intentionally” did not pay taxes, and the City tries to bring in facts that were **not** presented to the lower court to support this argument. Borrego did not address this issue at the hearing below and did not present its facts on this issue below because the issue was NOT before the lower court. . (*Brief of Appellant*, pg. 14). The City is just attempting to create a factual dispute when none exists within the Order on appeal.

Further, City alleges that nonpayment of the taxes by Borrego was “willful and wanton,” yet again provides **no** evidence in support thereof. The entire argument on the doctrine of laches is made up of entirely unsubstantiated claims, which is improper.²

² Again, all of these factual issues were not before the lower court based on any sort of proof and were not a part of the lower court’s ruling now on appeal.

Furthermore, this Court has held,

“[L]aches, in a legal sense, is not merely delay, but delay that results in injustice or disadvantage to another. Time is only one element. There must be some other element than mere passage of time, some element of estoppel or change in conditions or relations of the parties, or intervention of rights of third persons, so that it would be inequitable to permit the party to then assert his rights.”

Sample v. Romine, 193 Miss. 706, 732-33 (1942). There is no evidence (either before this Court or the lower court) that Borrego intentionally delayed paying taxes to harm or disadvantage City or that the City has been harmed in some way. To make up such “evidence” out of thin air is unwarranted and frivolous. The City presents no evidence (here or below) on any change of conditions “that would be inequitable” to prevent voiding the sale. The fact that the taxes went unpaid was an unintentional mistake, and once Borrego realized where and what taxes were due, it immediately attempted to pay. However, this counter fact is not (and was not) before the Court.

CONCLUSION

There is no question that the City clerk did not follow the clear statutory provision requiring it to publish notice of the ending of the redemption period. Based on the language of the statute, failure to do so renders the sale **void**. *Miss. Code Ann.* § 27-43-3. City has alleged numerous unsubstantiated arguments regarding Borrego’s so-called “intentional” actions to avoid payment of taxes. This

is simply not the case. City is attempting to dance around the real issue- that it did NOT follow the statute. Throughout the entire litigation process, and now on appeal, City has not provided a single piece of authority stating that it had the right to ignore the statute and not publish notice of the running of the redemption period. Based on the **fact** that City did not follow the requirements, this Court should uphold the ruling of the lower court in finding the tax sale **void**.

CERTIFICATE OF SERVICE

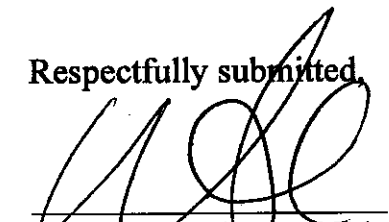
I, Steve McDavid, attorney for Appellees, hereby certify that I have this day served, via United States Mail, First Class, postage prepaid, a true and correct copy of the foregoing Brief of Appellees to the following:

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This the 12th day of September, 2011

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