

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

CITY OF BRUCE

APPELLANT

VS.

CASE NO.: 2011-TS-276

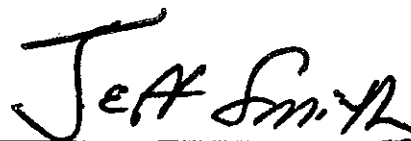
BORREGO SPRINGS BANK, N.A.

APPELLEE

**APPEAL FROM THE ORDER OF CAUSE NO. CV 2009-000026 FROM THE CIRCUIT
COURT OF CALHOUN COUNTY, MISSISSIPPI**

REPLY BRIEF OF THE CITY OF BRUCE, APPELLANT

ORAL ARGUMENTS REQUESTED



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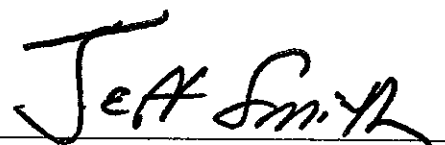
APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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 of Mississippi or the Court of Appeals for the State of Mississippi may evaluate possible disqualification or recusal.

1. Jeffrey C. Smith, attorney for Appellant
2. Stephan L. McDavid, attorney for Appellee
3. Judge Andy Howarth, trial court Judge and Honorable Judge for Calhoun County Circuit Court



Jeffrey C. Smith, Esq., Bar No. [REDACTED]
Attorney of Record for Appellant

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STATEMENT OF THE ISSUES

- I. Did the Calhoun County Circuit Court err by granting a summary judgment motion in favor of Borrego Springs Banks, N.A. by its own, improper statutory interpretation?
After granting summary judgment, did the Calhoun County Circuit Court err in denying Appellant's motion for rehearing against the weight of authority?
- II. Should Appellee be able to willfully and wantonly sit on its rights, after actual notice was given and received, and use the courts as an improper remedy?

STANDARD OF REVIEW

- I. The standard to be used is DE NOVO because it involves review of an erroneous granting of summary judgment, improper legal conclusions based on matters of law, and an incorrect assertion of statutory interpretation.

Appellee inaccurately portrays the issues given before the lower court in its brief. The factual and legal issues presented in the lower court and its rulings were given in a proper and timely manner. While they may not be to Appellee's benefit, this court's rulings have been quite abundant in granting a de novo review for grants or denial of summary judgment. Appellee provides no authority to support its own contention, nor does it provide any authority to contend Appellant's position. De Novo is the standard that should be applied in this appeal as stated in Appellant's original brief.

STATEMENT OF THE CASE

A. Nature of the Case

Appellant would incorporate all its previous statements under this section of Appellant's original brief by reference.

B. Course of Proceeding and Disposition of Lower Court

Appellant would incorporate all its previous statements under this section of Appellant's original brief by reference. In addition to those statements, it is important for Appellant to bring one added piece to this court's attention. Appellee made a motion for an extension of time to file its brief before this court citing scheduling conflicts. It should be made aware to this court that Appellant filed and served a federal lawsuit claiming nearly the same set of facts and issues in the United States District Court for the Northern District of Mississippi during the time it needed for an extension. (CAUSE NO.: 3:11CV00085) Appellee has also had time to answer several dispositive motions made by Appellee during its granted extension of time.

C. Statement of the Facts

Appellant would incorporate all its previous statements under this section of Appellant's original brief by reference. In addition to those statements, the original bankruptcy case cited by Appellee was filed by Skuna River Lumber, LLC on January 26, 2006. It had not paid its taxes up to that point on the property. An order was entered on April 26, 2006 granting Skuna River Lumber, LLC petition for bankruptcy relief by way of a sale, *after* the bankruptcy sale was complete. The tax sale conducted by Appellant occurred on August 28, 2006. It is difficult to

state a violation occurred when relief was granted in the bankruptcy case and Appellant's tax sale did not occur until 4 months after bankruptcy relief.

SUMMARY OF THE ARGUMENT

Appellant would incorporate all its previous statements under this section of Appellant's original brief by reference. In addition to those statements, Appellant shows through its original brief and its record excerpts that it brought up both of the issues of substantial compliance and the Doctrine of Laches at the trial court level. This court should allow those arguments on appeal.

Appellant presented a plethora of evidence by way a growing, national trend towards substantial compliance acceptance which Appellee does not refute. In addition, Appellee lays out the requirements for substantial compliance acceptance as being attempts at the types of notice. Appellant has made the proper argument. Appellant also made attempts at publication. Since there is binding case law presented by Appellant and Appellee's argument is satisfied, this court should apply the substantial compliance doctrine to this case and overrule the erroneous grant of summary judgment and remand for trial.

The Doctrine of Laches applies here under the analysis presented in Appellant's Brief. Appellee makes no argument to refute that other than some cases having little to do with the issue. Appellee makes some unfortunate assertions, but does not give any valid persuasion for this court to not consider the Doctrine. Since the record shows this issue at the trial court level, this court show allow and apply the Doctrine of Laches to this case at hand.

This court should find the Appellant's Brief to be the most persuasive argument and grant Appellant's request to overrule the erroneously granted summary judgment and remand the issue for trial.

ARGUMENT

Appellant is not making new arguments on appeal before this court. The argument of substantial compliance was made before the trial court as Defendant's Motion for Rehearing. Appellant also raised the argument of not sitting on a property owners' rights at the lower court level as referenced by Appellant's record excerpts as well. Since Appellant has raised both of these arguments at the lower level, this court should consider these arguments on appeal as noted by the reasoning of both Appellee and Appellant.

Substantial Compliance is completely applicable and essential to this case for a number or reason, especially for following precedence. Appellee dances around the cases presented by Appellant in the trend towards accepting substantial compliance. Appellee's argument simply states substantial compliance is completely all right, except for when publication notice is involved. That also seems to be the issue in this case and would benefit Appellee's position. Also, by Appellee's position, substantial compliance would proper if there was some attempt at publication notice.

Appellant has shown a number of cases involving the trend towards accepting substantial compliance where the word "shall" was required in a statute. Appellant has shown this very court's acceptance of substantial compliance in tax sales. Appellee tries to dissuade this court from using its own ruling by stating Appellant did not make an attempt at publication notice. This is simply an incorrect statement of fact.

The true fact is that Appellant did publish notice a number of times. Several publications are listed under Miss Code Ann. § 27-43-3. During the course of discovery in this case it was shown that Appellant followed *all* of the statutory requirements of Miss Code Ann. § 27-43-3.

While Appellee's brief does not state it correctly, the question in this case arose over whether notice was sufficient under the redemption period of the tax sale, not the tax sale itself.

Appellant made attempts at giving notice to Appellee on a number of occasions, including publication in the newspaper in the Spring of 2007 and the Spring of 2008, as referenced in the Deposition of Rita Talford in Appellant's brief. Appellee even acknowledged receiving notice when Appellee called Appellant about the issue. The only time publication not made was the last time before the redemption period ended. This is the dispute made in this lawsuit.

Under the reasoning of Appellant and Appellee, substantial compliance should apply in this case. Appellant has already stated the reasons and needs not repeat them in this brief. Appellee's sole contention for not applying substantial compliance is that no attempt was made for publication. Appellee makes no argument why it should not be applied when all forms of notice are attempted. Since Appellant has shown, again, there was more than one attempt at notice by publication. Under the reasoning of *DeWeese Nelson Realty, Inc. v. Equity Services Co.* the guidelines agreed to by Appellee in its brief, this court should apply substantial compliance to this case and overrule the grant of summary judgment and remand for a new trial. 502 So.2d 310 (Miss. 1986).

Appellee tries to use the same improper argument for denying the Doctrine of Laches by stating it was not raised on the trial court level. Appellant's inclusion of both the trial court transcript and the Deposition of Rita Talford both include the issue of sitting on property rights on a number of occasions. While it is true the Appellant did not use the term Doctrine of Laches, Appellant asserted the principles of the doctrine along with the factual and legal requirements to

further the application of the doctrine. Appellee incorrectly uses *Hill v. Nash* to further its assertion that doctrine of laches does not apply in this case. The *Hill* case pertained to when a statute of limitations applied according to deaths of a husband or wife along with a number of old common law issues. 19 So. 707 (Miss. 1896). The *Hill* case took into account feoffments, disseisin, and common law of England under the feudal system in that case, all of the loathed terms by almost every law school property student. All of those issues and the others in the *Hill* case have no place in this discussion. Appellant contends the *Hill* case does not muster the precedence required for consideration in this case, but this court should rather adopt the reasoning of the cases mention in the Appellant's original brief.

Appellee makes no contention arguing the analysis under the doctrine of laches presented by Appellant. Appellee is absolutely and completely wrong in its assertion that Appellant presents no evidence to back up its arguments that Borrego intentionally delayed paying its taxes. Appellant did not deny or refute the fact that it received information on two occasions by phone (as referenced numerous times in Rita Talford's Deposition and the Transcript for the Motion for Summary Judgment), nor did it ever deny the fact it received mailed notice of the taxes owed on the property. Facts are stubborn things that are hard to get around sometimes. When these facts are presented and not denied, this court can only believe the evidence before it and decide Appellee had the knowledge on how much was owed on the property in taxes. It is unfortunate Appellee makes the assertion Appellant is "making up evidence out of thin air." It is disrespectful, an act of lucre, and should not be tolerated by this court. Since more than enough evidence has been presented, this court should find no weight in Appellee's argument.

CONCLUSION

Appellee's arguments completely fail for a number of reasons. Appellee's own argument that substantial compliance can only apply if some attempt is made at publication furthers Appellant's previous arguments. The record shows Appellant made several attempts at publication, so substantial compliance should apply under both sides' legal theories presented to this court. The Doctrine of Laches should apply before this court because it was presented in a number of ways in the lower court. Appellee provides no other way around applying it other than hurling insults at Appellant and completely disregarding facts detrimental to its position. This court should follow the arguments outlined in Appellant's brief, overrule the Grant of Summary Judgment, and remand this case with instructions for a trial.

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APPELLEE

Certificate of Service

I, JEFFREY C. SMITH, attorney for the appellant, CITY OF BRUCE, certify that I have this day served a copy of this APPELLANT'S REPLY BRIEF by United States mail with postage prepaid on the following persons at these addresses:

Honorable Andrew K. Howarth
1 Courthouse Square, Suite 201
Oxford, MS 38655

In addition to the following persons who were previously served with a copy on September 30, 2011:

The Honorable STEPHAN L. McDAVID
McDavid and Associates
1109 Van Buren Avenue
P.O. Box 1113
Oxford, MS 38655
(662) 281-8300

And to:

KATHY GILLIS
Mississippi Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

SO CERTIFIED, on this the 5th day of October 2011.



JEFFREY C. SMITH, MSB [REDACTED]
Attorney for the Appellant

Certificate of Service

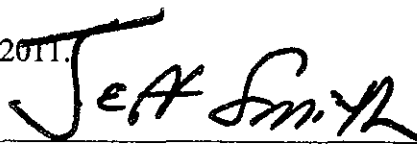
I, JEFFREY C. SMITH, attorney for the appellant, CITY OF BRUCE, certify that I have this day served a copy of this APPELLANT'S RESPONSE BRIEF by United States mail with postage prepaid on the following persons at these addresses:

The Honorable STEPHAN L. McDAVID
McDavid and Associates
1109 Van Buren Avenue
P.O. Box 1113
Oxford, MS 38655
(662) 281-8300

And to:

KATHY GILLIS
Mississippi Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

SO CERTIFIED, on this the 29th day of September 2011.

A handwritten signature in black ink, appearing to read "Jeff Smith", is written over a horizontal line.

JEFFREY C. SMITH, MSB# [REDACTED]
Attorney for the Appellant