

**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**

BRIEF OF THE CITY OF BRUCE, APPELLANT

ORAL ARGUMENTS REQUESTED



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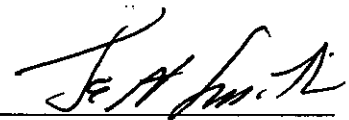
APPELLEE

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



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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.

The Supreme Court of Mississippi should retain and hear this case under the authority it possesses under the Miss. Code Ann. § 11-51-3, § 9-3-9, and specifically in its rules, namely M.R.A.P. 16 (d)(3), 17. Tax sales are an extremely important area of law and this case involves fundamental issues of public importance. In the area of summary judgment, this court has been clear in saying, “[T]his court reviews the grant or denial of summary judgment de novo.” *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002). The trial court ruled on its own version of statutory interpretation by granting summary judgment. This court has been more than clear in decisions involving statutory interpretations by finding, “interpretations of statutes are matters of law.” *Ervin v. State*, 431 So.2d 130, 136 (Miss. 1983). The court furthered this ruling to explain, “Statutory interpretation is a matter of law to be determined de novo.” *Sheppard v. Mississippi Hwy. Patrol*, 693 So.2d 196 (Miss. 1997). This court should clearly find the standard of review as DE NOVO because of the clear and overwhelming weight of authority. After hearing matters, this court should find for Appellant and remand this case with instructions for trial.

STATEMENT OF THE CASE

A. Nature of the Case

This esteemed court must decide the Calhoun County Circuit Court ("trial court") was improper in granting Appellee's motion for summary judgment on November 30, 2010. It must also decide the trial court was improper in denying Appellant's motion for rehearing against the weight of authority on January 21, 2011.

In order to find the trial court was improper in the granting of the summary judgment motion and denial of the motion for rehearing, this court must examine both the facts and the law of the circumstances. On the factual side, this court must examine whether or not the statutory compliance on the part of the Appellant was sufficient. It must also examine whether the Appellee sat on its rights after unarguably receiving actual notice and acknowledging the notice of delinquent taxes and of the tax sale. On the matters of law, this court must examine the authority of Mississippi State Courts, United States Fifth Circuit Cases, and United States Supreme Court Cases. This court should also consider prevailing trends and some secondary sources in determining the trial court was improper in its decisions on the above mentioned motions.

This appeal is designed to set the record straight and apply correct principles of law the facts of this matter. It is trying to seek the correct remedy for an erroneous ruling and protect the right to trial by jury so gloriously guaranteed to everyone by the magnificent founders of this great country and state in the U.S. and Mississippi Constitution. The appeal should clarify there is a genuine issue of material law and fact to be tried in court. This court's ruling rests on reviewing everything de novo and should find for the Appellant. After examining the matters at

hand, this court should clearly find the trial court was incorrect in granting summary judgment, reverse the trial court decision, and remand the issue for trial.

B. Course of Proceeding and Disposition of Lower Court

On February 4th, 2009, Appellee filed suit against Appellant in the Circuit Court of Calhoun County. The suit asked for the court to set aside any interest Appellant had in a piece of property it acquired by and through a tax sale after Appellee failed to pay back taxes for three years. Appellee claims the same interest in the property through a sale in bankruptcy court. Appellant duly and timely answered and an exhaustive discovery process began.

A hearing for a Motion for Summary Judgment, filed by Appellee, was held on November 1, 2010 and that motion was granted under the guise of the interpretation of Miss. Code Ann. § 27-43-3. (Transcript of Summary Judgment Argument, pg. 22, lines 4-9). After this ruling, Appellant filed a Motion for Rehearing on November 24, 2010. In this Motion, Appellant cited a specific case on point that should govern this genuine issue. The court paid no mind to binding case precedence and overruled that motion in an order issued on January 21, 2011. Appellant timely filed this appeal as a result.

C. Statement of the Facts

A piece of property in the City of Bruce (Appellant) was acquired by a company known as Skuna River Lumber, LLC ("Skuna") and financed by Borrego Springs Bank, N.A (Appellee). Skuna fell on hard times and filed for Bankruptcy on January 26, 2006. Appellee claims it bought some "interest" in the property at a bankruptcy sale. (Complaint, pg. 2, #9.). No taxes were paid to the Appellant on this property during the years of 2005, 2006, and 2007, but the property taxes were paid to Calhoun County. (Transcript of Motion for Summary Judgment, pg.

14, lines 9-11). Since there were no taxes paid to Appellant, Appellant exercised its rights to conduct a tax sale and did so. No buyers bought this property, so Appellant exercised its right to purchase the property itself after completing the statutory requirements to do so. Appellee had knowledge of all of this and idly stood by while all this happened.

Throughout the discovery process, it was shown that Appellee wanted to acquire all rights in the piece of property now validly owned and recorded by tax deed by the Appellant. Appellee originally wanted to do this without having to pay any of the taxes that were running until the day of the tax sale and gain interest to this very day. Appellee claimed it had full right in the property and the interest acquired by the Appellant was not valid. (Complaint pg.2, #s 9.-14.). The only quasi-valid reason Appellant gave for this claim was to cite Miss. Code Ann. § 27-41-55. Appellee claims Appellant did not follow a singular notice requirement in that statute to satisfy the large number of notice requirements in the statute before conducting the tax sale. (Transcript of Summary Judgment Argument, pgs. 6-7). Appellee even contends that all clerks operate and give notice in this fashion, even though it may not be proper. (Transcript of Summary Judgment Argument, pg. 7, lines 6-7).

Also during the discovery process, it was found that Borrego Springs knew of the back taxes owed on the property to the City of Bruce for three years and even called twice to confirm the amount with the Clerk's office in Calhoun County. (Transcript of Summary Judgment Argument, pg. 14, lines 15-20, and pg. 15, lines 27-29). Even though Appellant gave the tax amounts to Appellee on two occasions on the phone, Appellee did nothing to try and solidify or pursue its rights. *Id.* Appellee sat on the rights it claimed until it filed suit several months after the tax sale during the redemption period.

SUMMARY OF THE ARGUMENT

The trial court clearly misinterpreted statutory authority and applied incorrect principles of law in granting summary judgment for Appellee. Appellant complied with notice requirements needed to give Appellee sufficient notice of the tax sale. This is evidenced by the fact that Appellee received notice and confirmed the amount owed in taxes to Appellant. Appellant cites clear case law on an almost identical situation decided by this Supreme Court and prays the court applies the reasoning of that decision to the case at hand. In doing so, this court should find the trial court erroneously granted summary judgment and should remand the issue for trial.

Appellee clearly knew of its rights and chose to do nothing about those rights. As referenced in the argument below, case law in this state trends towards accepting the doctrine of substantial compliance for statutory notice requirement and has done that very thing in a previous tax sale situation. The United States Fifth Circuit Court of Appeals as well as the United States Supreme Court have allowed substantial compliance to suffice for statutory notice requirements in a number of instances. This acceptance of substantial compliance is the current trend in state courts across the United States as well. This court should apply the accepted doctrine of substantial compliance to this situation as it has in its previous rulings. This is a case-by-case factual examination and should be allowed to go to the jury at the trial court level and cause no prejudice to the original plaintiff.

Appellee does not argue it tried to exercise its rights, nor does it argue it knew nothing of the events before and during the tax sale process. It even admits to knowing how the notice process worked with other clerks around the state. This gives a clear intent that Appellee knew

what was going on, intentionally did nothing to try and redeem the back taxes, and waited to use the court as an improper remedy for its actions. This court has a long history of favoring those who exercise property rights and disfavoring those who willfully choose not to exercise them and instead use the courts as the only remedy. This court should not allow the summary judgment motion to stand because Appellee intentionally sat on its rights and tried to use the courts as an excuse for its willful inaction. This clear violation of court accepted principles should lead this court to again rule the trial court was incorrect in granting summary judgment in favor of Appellee and remand the issue for trial.

ARGUMENT

The trial court did NOT correctly follow the law or the rules of procedure in erroneously granting Appellee's motion for summary judgment. Sufficient notice was given to defendant according to binding case law. Since Appellant followed notice requirements, Appellee received and confirmed notice, and Appellee simply chose not to do anything, this court should find the trial court was incorrect in granting Appellee's motion for summary judgment under the statutory scheme of Miss. Code Ann. § 27-43-3. To allow the lower court's grant of summary judgment to stand would be a gross miscarriage of justice for the leadership of the city of Bruce, the people of Calhoun County, and the people of Mississippi in general.

The trial court should NOT have granted the motion for summary judgment because there exists a genuine issue of material fact. Rule 56, comment 4 of the Mississippi Rules of Civil Procedure (M.R.C.P.) states, "A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried." There was a disputed fact about whether or not the statutory notice requirement was met by Appellant. Appellant gave case law to support the fact it had complied with the statute under the facts. The trial court denied this fact and therefore improperly applied Rule 56 of the M.R.C.P. The *Holy Bible* states a clear point on this matter in Deuteronomy 19:15 by stating, "at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." These facts have not been established enough by the Appellee during discovery, nor have they been established during the hearing for summary judgment to garner anything close to this simple biblical standard. If a ruling does not rise to the

level of legal standard, procedural standard, or biblical standard, there is no standard a court can cling to in granting summary judgment.

I. Appellant gave sufficient notice to Appellee regarding the tax issue and Appellee sat on its rights

Appellee received actual and sufficient notice of the tax sale and past due taxes and should not be afforded the extra and unjust opportunity to take advantage of the court system of this great state. This fact was brought to the attention of the trial court during the hearing on Appellee's motion for summary judgment and again in the Appellant's motion for rehearing. Since there is binding case law to show, on point, Appellant satisfied the statutory scheme regarding tax sales, the trial court made its ruling erroneously.

In its motion for rehearing, Appellant provided case law for the trial court in determining its decision on granting or denying summary judgment. The case provided was *DeWeese Nelson Realty, Inc. v. Equity Services Co.* and it has a strikingly similar factual scenario. 502 So.2d 310 (Miss. 1986). In the *DeWeese* case, a property owner failed to pay ad valorem taxes due to the City of Jackson. *Id.* As a result of that failure, there was a tax sale of that property to satisfy the back taxes. *Id.* There was no redemption of the sold property during the redemption period, so a tax deed was filed. *Id.* After not doing anything during this time period, the property owner filed suit, claiming Miss. Code Ann. § 27-43-3, specifically not following every single one of the notice requirements. *Id.* The Honorable Justice Prather wrote the opinion of the court and ruled the efforts of the clerk in providing notice were diligent and substantial enough, though not every statutory requirement was met, and the Plaintiff in the suit simply did not claim its rights after admittedly receiving notice. *Id.* Since the Plaintiff sat on its rights and notice was received after

a substantial compliance with the statutory scheme, the court found the tax sale was not void. *Id.* This case is still on the books, has not been overturned, and is good law.

The matter at hand is almost exactly the same as the *DeWeese* case. Appellee unarguably received notice by both letter and phone, knew the back taxes, and willfully did nothing. Just like the Plaintiff in the *DeWeese* case, Appellee intentionally waited until after the tax sale was completed and the tax deed issued. The Clerk for Appellant diligently tried to serve notice upon Appellee, following nearly every notice requirement of the statutory scheme of Miss. Code Ann. § 27-43-3. Appellant's clerk and her deputies even spoke with Appellee over the phone and computed all of its owed taxes and fees. There is no reason to believe Appellee did not have sufficient notice since it has admitted actual notice of the delinquent taxes and tax sale. Accordingly, this court should apply the *DeWeese* reasoning and find that Appellant's clerk substantially complied with the statutory scheme for notice, Appellee received actual notice and should be estopped from denying sufficient notice under the statute, and find the tax sale conducted by Appellant and the subsequent tax deed filed are valid and a question for the jury to decide on trial. Accordingly, this court should reverse the grant of summary judgment and remand it to the lower court with instructions that it proceed to trial.

II. Substantial compliance with the notice provisions should be applied here on a case-by-case and factual basis to avoid persons or entities from sitting on their property rights and using the court system as an improper remedy

This court should find substantial compliance with the notice provisions for municipal tax sales by Appellant was sufficient as evidenced by prior decisions of this court, prior decisions in the federal court systems including the Fifth Circuit and U.S. Supreme Courts, and the trend

towards adopting substantial compliance across the United States. As referenced from the *DeWeese* case above, Mississippi already has some case precedence in allowing substantial compliance with statutory notice requirements to be deemed valid. The reason for allowing substantial compliance is mostly because the plaintiffs in the original lawsuits will not be prejudiced in the decision to allow the tax sale to stand because the plaintiffs did receive actual notice of the sale. Allowing substantial compliance for notice requirements has not only been applied for municipal tax sales, it has been expanded to areas such as the Tort Claims Act in decisions such as *Fairley v. George County*, 871 So.2d 713. (Miss. 2004). The Fairley Court ruled substantial compliance is still good law, but that it must be determined as a fact-sensitive legal issue. *Id.* This is a decision that somewhat extends previous decisions on the matter that established the doctrine of substantial compliance in this state on the Mississippi Tort Claims Act. *Reaves v. Randall*, 729 So.2d 1237 (Miss. 1998). While some parts of these decisions have been overturned by later cases, the premise of the substantial compliance and its application still remain to try and protect diligent efforts and discourage sitting on ones rights. This doctrine of substantial performance has most recently been applied in a case involving statutory notice requirements under the ruling in *Arceo v. Tolliver*, 19 So.3d 67 (Miss. 2009). The court in *Arceo* used the statutory compliance standard for its determination of fulfilling notice requirements just as it did in the *Fairley* and the *Reaves* cases mention above. This court has further expanded the doctrine by ruling, "...notice was evident, which in and of itself is a legal doctrine that implies substantial compliance to any statutory notice requirement." *Lattimore v. City of Laurel*, 735 So.2d 400 (Miss. 1999).

Since this court has already adopted a case-by-case determination of substantial compliance for tax sale notice requirements, it should extend them to the matter at hand as part of a

nationwide acceptance of the doctrine. A recent Fifth Circuit case illustrates the gaining acceptance of the doctrine as applied to notice requirements. In *South Texas Elec. Corp. v. Dresser-Rand Co., Inc.*, a trial court gave jury instructions allowing the consideration of the substantial compliance doctrine in determining whether or not contractual notice provisions were satisfied. 575 F.3d 504, C.A.5 (Tex.). In affirming the decision, the court found the trend in Texas law was one of substantial compliance with statutory notice provisions. *Id.* If the Fifth Circuit can find acceptance of this doctrine in satisfying statutory notice provisions, this court should be able to as well.

This is not a new doctrine for this court, nor is it for this country. This doctrine has a long history of being applied in the United States Supreme Court, dating back to before World War I. In *Grannis v. Ordean*, the Supreme Court upheld a lower court decision allowing for substantial compliance to satisfy statutory notice requirements, citing a number of cases in support of its ruling. 234 U.S. 385. The *Grannis* court was faced with a question over whether notice was sufficient to a non-resident over certain state property in a partition. *Id.* at 388. The court found no problem in accepting the substantial compliance finding, affirming the lower decision and finding it did not violate the due process requirements of the 14th Amendment. *Id.* at 400. This case still has precedence and has been cited as recently as 1999 in decisions. This court should find *Grannis* similar to the case at hand in that an out of state plaintiff is complaining that statutory notice provisions were not followed, just as it was in *Grannis*. While there are some minor differences in the factual scenarios, the court should easily be able to find the similarities. The major similarity is the question in both *Grannis* and the case at hand of whether or not substantial compliance can suffice as satisfactory under the statutory notice schemes. The answer was YES in *Grannis* and this court should adopt the *Grannis* reasoning and find no

violation of due process in allowing the substantial compliance doctrine to be sufficient for Appellant.

The scholarly journal of American Jurisprudence seeks to clarify what substantial compliance is, how it works, and its purposes with the following definition and explanation:

“Substantial compliance means that the notice has been given in a way that, although technically defective, substantially satisfies the purposes for which notices of claim are required. The doctrine of substantial compliance applies to the form and sufficiency of the notice of injury or statement of claim. It is based on the reasoning that substantial compliance fulfills the purpose of the claims statutes.” AMJUR MUNCCORP § 608

This applied doctrine has been applied, discussed, and defined in similar fashions in cases in states such as California¹, Nebraska², Arizona³, New Jersey⁴, Delaware⁵, Wisconsin⁶, and Washington⁷. AMJUR MUCCORP § 608. The reason these cases are mentioned to illustrate the point that the substantial compliance doctrine is a growing recognizable all around the country in courts and should be applied to this situation.

Furthermore, this court should apply the doctrine of substantial compliance to try and avoid an absolute catastrophe from occurring with a strict compliance interpretation. To allow this interpretation would be to unleash the floodgates of litigation because the Clerk for the Appellant followed normal practice of clerks as evidenced by counsel for the Appellee’s statement in the Hearing for Summary Judgment. (Transcript of Hearing for Summary Judgment Motion, page 7, lines 6-7). This court should avoid this unthinkable consequence

¹ *Becerra v. Gonzales*, 32 Cal. App. 4th 584, 38 Cal. Rptr. 2d 248 (6th Dist. 1995)

² *Estate of McElwee v. Omaha Transit Authority*, 266 Neb. 317, 664 N.W.2d 461 (2003)

³ *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 144 P.3d 1254 (2006).

⁴ *Lebron v. Sanchez*, 407 N.J. Super. 204, 970 A.2d 399, 244 Ed. Law Rep. 191 (App. Div. 2009)

⁵ *Hines v. New Castle County*, 640 A.2d 1026 (Del. 1994)

⁶ *State v. Town of Linn*, 205 Wis. 2d 426, 556 N.W.2d 394 (Ct. App. 1996)

⁷ *Renner v. City of Marysville*, 145 Wash. App. 443, 187 P.3d 283 (Div. 1 2008), review granted, 165 Wash. 2d 1027, 203 P.3d 382 (2009) and decision aff’d, 2010 WL 1240992 (Wash. 2010)

and the hundreds and even thousands of lawsuits that would ensue as a result of a strict compliance finding. It would tantamount to a finding of form over substance and deny the rights of redress guaranteed under the 14th Amendment of the U.S. Constitution. Accordingly, this court should reverse the grant of summary judgment and remand it to the lower court with instructions that it proceed to trial.

III. Appellee sat on its property rights and prejudiced Appellant by violating the Doctrine of Laches

This court should find Appellee violated the Doctrine of Laches and sat on its property rights, estopping it from claiming the municipal tax sale was void. The doctrine of laches applies here because the Appellee's delay in trying to remedy the payment of back taxes owed to Appellant paired with the satisfied elements of estoppel are enough to invoke the doctrine. *Morgan v. Morgan*, 431 So.2d 1199 (Miss. 1983). While it is true the doctrine of laches is normally an equitable remedy, equitable remedies may be exercised by courts of law as a matter of this state's court structure. *Woods v. Riley*, 18 So. 384 (Miss. 1894).

This court should be easily be able to find Appellee violated the Doctrine of Laches by adhering to this formula: "Mississippi's courts have said that three factors must be satisfied for a claim to be barred under the doctrine of laches: Delay in asserting a right or claim; The delay was not excusable; and Undue prejudice to the party against whom the claim is asserted." MSPRAC-ENC § 44:1. Furthermore, the court has been adamant in stating, "Moreover, "the question of laches [is] essentially a question of fact for the trial court..." *Lee v. Duncan*, 70 So.2d 615, 619 (Miss. 1954).

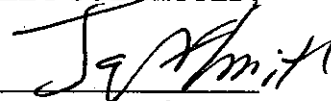
A short analysis of the three above mentioned factors will easily show the court that Appellee violated the Doctrine. There was an intentional delay in asserting the property rights

claimed by Appellee. Appellee knew the exact amount of back taxes and fees it owed Appellant and chose to do nothing about paying those taxes and fees. This delay is not excusable because it was intentional. Any company or individual should know there are property taxes associated with a piece of property, and there was no reason to withhold payment without a hidden purpose. Appellant has a tremendous amount of undue prejudice because of the willful and wanton disregard for paying taxes that is completely inexcusable. This prejudice exists because Appellant received no income from the property in the form of taxes for three years. It could not use that money take care of a small Mississippi town and kind residents who yearn for basic government services. Appellant has now been sucked into over two years of exhaustive litigation and expenses that make it difficult to provide for the good people of a small north Mississippi town. This court should find a clear violation of the doctrine of laches and apply it here to overrule the motion for summary judgment and let the facts of this case be presented to a jury.

CONCLUSION

The trial court erroneously granted the motion for summary judgment in favor of Appellee. This was through a combination of improper interpretation of the law and a failure to apply clear case precedence on the issue. Appellant gave sufficient notice to Appellee regarding the tax sale and Appellee acknowledges receiving notice according to the facts of the case. This is a sufficient basis for this court to make a finding, under its own previous rulings, in favor of Appellant. Substantial compliance with statutory notice provisions is a growing doctrine with acceptance in cases like this and other circumstances involving notice requirements. The doctrine has precedence and acceptance across the country. This court should find substantial compliance applies here and allow a jury to decide if it was sufficiently applied under the facts presented to it. Appellee had clear notice of all the events that happened, did nothing, and now wants to courts to try and impose an improper remedy for its own inaction. To allow this grant of summary judgment would be an injustice and fundamentally wrong as an issue of broad public importance. This court should reverse the trial court grant of summary judgment and remand it to the trial court for trial.

RESPECTFULLY SUBMITTED,



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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 BRIEF by United States mail with postage prepaid on the following persons at these addresses:

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And to:

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

SO CERTIFIED, on this the 15th day of JULY 2011.



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