

**IN THE COURT OF APPEALS**

**7/29/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00510 COA**

**THOMAS H. PEARSON, SR., PEGGY H. PEARSON, JACK W. PARKER, AND RUBY T. PARKER**

**APPELLANTS**

**v.**

**JO AAAACE**

**APPELLEE**

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND**

**MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

**TRIAL JUDGE: HON. W. O. DILLARD**

**COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT**

**ATTORNEY FOR APPELLANT:**

**THOMAS H. PEARSON**

ATTORNEY FOR APPELLEE:

ROY J. PERILLOUX

JAMES E. RENFROE

NATURE OF THE CASE: CIVIL -- SUIT TO SET ASIDE TAX SALE AND REMOVE CLOUD FROM TITLE

TRIAL COURT DISPOSITION: SUSTAINED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MANDATE ISSUED: 8/19/97

EN BANC

COLEMAN, J., FOR THE COURT

The appellee, Jo Aaaace, filed a complaint in the Chancery Court of the First Judicial District of Hinds County against the appellants, Thomas H. Pearson, Sr., Peggy H. Pearson, Jack W. Parker, and Ruby T. Parker (the Pearsons and the Parkers), to set aside a tax sale and to remove a cloud from title to two parcels of land in Jackson which he owned. The chancellor granted Aaaace's motion for summary judgment because he found that there was no material issue of fact about whether Aaaace, as the owner of the two parcels of land, had not been properly served with notice of the tax sale as required by Section 27-43-3 of the Mississippi Code of 1972. We affirm.

### **I. Facts**

Jo Aaaace owned two parcels of land located in the City of Jackson as of January 1, 1989. The street address of one parcel was 518 Earl Street (the Earl Street property), and the street address of the other parcel was 1544 Pleasant Avenue (the Pleasant Avenue property). For 1989, Hinds County had assessed ad valorem taxes against the Earl Street property in the total amount of \$164.82. For the same year, Hinds County had assessed ad valorem taxes against the Pleasant Avenue property in the total amount of \$598.87. The ad valorem taxes which Hinds County assessed for the year 1989 could be paid in three installments, the first of which was due by February 1, 1990, the second of which was due by May 1, 1990, and the third of which was due by August 1, 1990. On January 22, 1990, Aaaace paid the first installment for the ad valorem tax due on the Earl Street property in the amount of \$82.41, and on January 31, 1990, Aaaace paid the first installment for the ad valorem tax due on the Pleasant Avenue property in the amount of \$299.44. Aaaace did not pay the remaining two installments of the 1989 ad valorem taxes assessed against either property which became due on May 1 and August 1 of 1990.

On August 27, 1990, the Hinds County Tax Collector sold both of these properties for the unpaid balance of the ad valorem taxes assessed for the year 1989 to the Big C Company as the highest and best bidder for both of them. On May 26, 1992, the Hinds County Chancery Clerk mailed by certified

mail, return receipt requested, two owner's notices to Jo Aaaace at the address of 621 Witsell Road, Jackson, MS 39206, which was the address listed for Aaaace on the Hinds County ad valorem tax receipts for 1989. The two owner's notices stated in part:

Lands assessed to you or supposed to be owned by you were, on the 27th day of August, 1990 sold to The Big C Company for taxes for the year 1989 and . . . the title of said land will become absolute in the Big C Company unless redemption from said tax sale be made on or before [the] 27th day of August, 1992.

On June 10 and 11 respectively, the U. S. Postal Service returned the envelopes which contained both owner's notices to the Hinds County Chancery Clerk. Written in longhand on the fronts of both envelopes were the words "Aaaace, Jo; Rt. 2, Box 7, P. O. Box 11442, Terry, MS 39170." Also stamped on the front of both envelopes was the word "Unclaimed."

The Hinds County Chancery Clerk then delivered to the Hinds County Sheriff copies of these two owner's notices still addressed to Aaaace at 621 Witsell Road, Jackson, MS 39206, so that his deputies might personally serve them on Aaaace at that address. Hinds County Deputy Sheriffs G. A. Ferreri and Ralph Gray each attempted to serve one copy of the owner's notice on Aaaace on August 7 and August 8 respectively. However, neither deputy sheriff found any person in the house located at 621 Witsell Road, so each deputy sheriff posted a copy of the owner's notice "on a door of defendant's usual place of abode in my county, at the premises known as 621 Witsell Rd. in the City of Jackson" according to the return found at the bottom of each owner's notice which each of them completed.

On October 6, 1992, the Hinds County Chancery Clerk filed among the land records of her office her statements that she had made a diligent effort to locate Aaaace "in the following manner:" after which she, or one of her deputies, had checked blanked lines following the words, "phone directory," "city tax directory," and "other." While the word "Affidavit" was printed at the top of these two statements, neither statement contained a formal oath executed by the chancery clerk or by one of her deputies. Instead, the chancery clerk "certified" that she had "made a diligent effort to locate Aaaace."

On December 8, 1992, the Hinds County Chancery Clerk conveyed both the Earl Street and the Pleasant Avenue properties to the Big C Company by tax deeds which were duly recorded among the public land records in her office. On December 29, 1992, the Big C Company conveyed by quitclaim deed both of these properties to Thomas H. Pearson, Sr., and Peggy H. Pearson, husband and wife, and this quitclaim deed was likewise recorded among the public land records of the Hinds County Chancery Clerk. On February 10, 1993, Thomas H. Pearson, Sr., and Peggy H. Pearson conveyed by warranty deed the Earl Street property to Jack W. Parker and Ruby T. Parker, and this warranty deed was recorded among the public land records of the Hinds County Chancery Clerk.

In the meantime, on July 14, 1992, before the chancery clerk had executed and delivered the tax deeds to the Big C Company on December 8, 1992, Jo Aaaace conveyed both the Earl Street and the Pleasant Avenue properties by separate warranty deeds to James Alfred Lewis. These two warranty deeds were duly recorded among the public land records in the Hinds County Chancery Clerk's office. In both warranty deeds, Jo Aaaace listed his mailing address as "1004 Larkspur, Jxn, MS [sic],

" and his telephone number as 366-9411. These two warranty deeds were recorded on July 15, 1992, at least three weeks before the two Hinds County Deputy Sheriffs completed their respective returns on the owner's notices on August 7 and 8, 1992.

## II. Litigation

On June 7, 1993, Jo Aaaace filed a complaint to set aside tax sale and to remove cloud from title against the defendants, the Pearsons and the Parkers, who are the appellants in this Court. The heart of Aaaace's complaint was that he "never received any notice of redemption as required by Sections 27-43-3 and 27-43-5 of the Mississippi Code [of 1972]." He prayed of the chancery court that it "issue its Order setting aside the tax sale and removing the cloud from title." On July 12, 1993, all four of the defendants filed their answer, in which they raised several affirmative defenses and also included a paragraph by paragraph admission or denial of Aaaace's complaint. The four defendants also incorporated into their answer a counterclaim against Aaaace for "costs, damages, and sanctions."

After the parties had engaged in discovery activities, Aaaace filed a motion for summary judgment, the gravamen of which was that he "did not receive proper notice as to redemption from tax sale in accord with Mississippi Code Annotated 27-43-3 (Supp. 1991) and would show that there is no genuine issue as to any material fact and that he is entitled to a judgment on this issue as a matter of law." Aaaace filed three affidavits to support his motion for summary judgment. The first of these was his own affidavit, in which he swore, *inter alia*:

- 1) My name is Jo Aaaace and I am an adult resident citizen of Hinds County, Mississippi.
- 2) I do not now, nor have I ever resided at 621 Witsell Road, Jackson, Mississippi 39206.
- 3) I did not receive any mail on or about May 26, 1992 from Alice James, Hinds County Chancery Clerk.
- 4) I am informed that Hinds County Deputy Sheriff Ralph Gray and former Hinds County Deputy Sheriff G. C. Ferrer [sic] each stated that they served certain papers to me by posting said papers at 621 Witsell Road, Jackson, Mississippi, on August 8, 1992, and August 7, 1992, respectively.
- 5) To this day, I have not received those or any other papers from the Hinds County Sheriff's Office.

The second affidavit was that of Hinds County Deputy Sheriff Ralph Gray in which he swore, *inter alia*, that his return on the owner's notice dated August 8, 1992, was "accurate in all respects," and that "Jo Aaaace could not be found in my county, nor could I find any member of his family over the age of sixteen years willing to receive same." The third affidavit was that of former Hinds County Deputy Sheriff G. A. Ferreri, which was identical in content to the affidavit of Deputy Sheriff Gray except for the date of Ferreri's return on the owner's service, which was August 7, 1992.

The four defendants made no response to Aaaace's motion for summary judgment until May 6, 1994, the very date that the chancellor had set Aaaace's motion for summary judgment for argument. On that date, they filed their unsworn response to motion for summary judgment. In their response, the

defendants alluded to the chancery clerk's "affidavits" recorded on October 7, 1992; asserted that Aaaace had failed to request the proper relief in accordance with *Hammett v. Johnson*, 624 So. 2d 58 (Miss. 1993); referred to the portion of Section 27-43-3 of the Mississippi Code of 1972 (Rev. 1995) which provides that "the failure of the landowner to receive actual notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein;" and complained that Aaaace had "failed to join the Chancery Clerk of Hinds County as an indispensable party." The defendants presented nothing to impeach nor to contradict Aaaace's factual contention that he had not been personally served with owners' notices that his two properties would be conveyed to The Big C Company if he did not pay the balance of the 1989 ad valorem taxes which Hinds County had assessed against them.

After the chancellor heard arguments from both Aaaace in support of his motion for summary judgment and the Pearsons and the Parkers against the motion for summary judgment, he granted Aaaace's motion for summary judgment. In the summary judgment, the chancellor recited:

THIS DAY there came on for a hearing on the Motion for Summary Judgment as filed herein by the Plaintiff, Jo Aaaace, on the issue that he did not receive proper notice as to the redemption of the tax sales herein in accord with Mississippi Code Annotated 27-43-3 (Supp. 1991). The Court finds that the Plaintiff's Motion for Summary Judgment was supported by three affidavits and the Defendant failed to file any affidavits opposing the Plaintiff's Motion for Summary Judgment. Upon hearing argument of counsel, the Court finds that there is no genuine issue as to any material fact and that Summary Judgment should be granted for the Plaintiff. Further, the Court finds that the Sheriff of Hinds County, Mississippi did not serve Jo Aaaace the required Owner's Notice as a Court summons is served and therefore the tax sales are void.

### III. Issues

The appellants present three issues for this Court's review, analysis, and resolution. We recite them as the Pearsons and the Parkers composed them in their brief:

1. Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by not finding that a genuine issue of a material fact existed as to the proper notice.
2. Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by not finding the Plaintiff lacked standing to bring [the] lawsuit.
3. Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by granting improper relief in the Summary Judgment Order.

Although he made no cross-appeal, Aaaace includes the following two issues in his brief:

- I. Appellants failed to comply with the statutory requirements governing the tax sale at issue.

II. The chancellor correctly ruled on Jo Aaaace's motion for summary judgment in that no genuine issue of material fact existed.

Although it is stated differently, Appellants' Issue 1 is identical to Aaaace's Issue II. Aaaace's Issue I is only a restatement of his argument that there is no material issue of fact about whether he was properly notified of the impending sale of his two parcels because he had failed to pay in full the ad valorem taxes which Hinds County had assessed against both of them for the year 1989. Thus, we review the issues in this appeal in the order that the Pearsons and the Parkers have arranged them in their brief.

#### **IV. Analysis and resolution of the issues**

Issue One: Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by not finding that a genuine issue of a material fact existed as to the proper notice.

#### **STANDARD OF REVIEW**

In the recent case of *Richmond v. Benchmark Const. Corp.*, 692 So.2d 60, 61 (Miss. 1997), the Mississippi Supreme Court drew from several earlier cases to propound the following standard of review for the issue of whether a trial court erred when it granted a motion for summary judgment:

Rule 56(c) of the Mississippi Rules of Civil Procedure allows summary judgment where there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. To prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule.

This Court employs a de novo standard of review in reviewing a lower court's grant of summary judgment. Evidentiary matters are viewed in the light most favorable to the non-moving party. If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise, the decision is affirmed.

In *Brown v. Credit Center, Inc.*, 444 So.2d 358, 364 (Miss. 1984), the supreme court emphasized that it was vital for the party who opposed the motion for summary judgment to demonstrate that there were material issues of fact as set forth in Mississippi Rule of Civil Procedure 56(e):

When a motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment if appropriate shall be entered against him.

## THE LAW IN GENERAL

Section 27-43-3 of the Mississippi Code of 1972 (Rev. 1995) is the fulcrum upon which our lever of analysis rests. The portions of Section 27-43-3 which are relevant to our review of this issue read as follows:

The clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the courts are served, and make his return to the chancery clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sales record. 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.

If said reputed owner is a nonresident of the State of Mississippi, then the clerk shall mail a copy of said notice thereto in the same manner as hereinabove set out for notice to a resident of the State of Mississippi, except that personal notice served by the sheriff shall not be required.

Notice by mail shall be by registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as hereinabove required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address. If the reputed owner's street or post office address is ascertained after the additional search and inquiry, the clerk shall again issue notice as hereinabove set out. If personal notice is again issued and it is again returned not found and if notice by mail is again returned undelivered, then the clerk shall file an affidavit to that effect and shall specify therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sales record. If the clerk is still unable to ascertain the reputed owner's street or post office address after making search and inquiry for the second time, then it shall not be necessary to issue any additional notice but the clerk shall file an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the reputed owner's street and post office address and said affidavit shall be retained as a permanent record in the office of the clerk and such action shall be noted on the tax sale record.

....

... The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them.

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 owner upon refund of all purchase money paid.

Miss. Code Ann. 27-43-3 (1972).

The Mississippi Supreme Court has applied this statute in several cases, the first of which we consider is *Hart v. Catoe*, 390 So. 2d 1001 (Miss. 1980). In *Hart*, G. E. Hart sued E. V. Catoe, Jr., to confirm Hart's title to a forty-acre tract of land situated in Forrest County. *Id.* at 1002. Catoe had owned the land since 1939, and he paid the ad valorem taxes assessed against it until 1975, when he failed to pay them. *Id.* Hart bought the forty-acre tract at the tax sale on September 20, 1976. *Id.* Because Catoe did not redeem the taxes within the two-year period, the chancery clerk executed and delivered to Hart a tax deed for the land on October 10, 1978. *Id.* Hart's suit sought to confirm the tax deed and to cancel claims which Catoe had asserted. *Id.*

It was uncontradicted that the chancery clerk had failed to file the supporting affidavits required by Section 27-43-3 of the Mississippi Code of 1972 (Rev. 1995). *Id.* The chancellor dismissed Hart's complaint and canceled his tax deed and all of Hart's claims which he asserted to the land as a cloud on Catoe's title. *Id.* Hart appealed, but the Mississippi Supreme Court affirmed the chancery court's order of dismissal of Hart's complaint. *Id.* at 1003. The supreme court explained that "[t]he public policy of this state favors and protects owners of land from loss by its sale for taxes. *Carmadelle v. Custin*, 208 So.2d 51 (Miss.1968)." *Id.* It then held:

The statute involved here must be given a strict construction, and its requirements fully satisfied. Essential mandates of the statute were not followed and the failure so to do renders the tax deed to appellant void."

*Hart*, 390 So. 2d at 1003.

In *Brown v. Riley*, 580 So. 2d 1234, 1235 (Miss. 1991), Erlene P. Brown filed her complaint in the First Judicial District of Hinds County to confirm a tax deed to a parcel of land located in Clinton. The chancery court dismissed her complaint, and Brown appealed to the Mississippi Supreme Court. *Id.* That court affirmed the chancellor's dismissal "[b]ecause there was a substantial failure to comply with [Section 27-43-3]." *Id.* In *Brown*, Erlene Brown received a tax deed to the Riley's land on September 18, 1983, for unpaid 1982 state and county ad valorem taxes. *Id.* at 1236. On August 5, 1985, the chancery clerk of Hinds County published the statutory notice to owners whose land had been sold for taxes that the sale would mature in the purchasers unless redeemed by September 17, 1985. *Id.* On March 29, 1985, the clerk issued to the sheriff a statutory notice to "James M. and Jo A. Riley" of the sale of their land September 19, 1983, and the redemption date of September 19, 1985. *Id.* A Hinds County Deputy Sheriff served the notice by leaving it with the Riley's son, James A. Riley, at the Rileys' usual place of abode. *Id.* The deputy sheriff testified that she knew James M. Riley personally and that she believed his son, James A. Riley, was over sixteen years of age. *Id.* On March 29, 1985, the clerk mailed a copy of the statutory notice by certified mail to "James M. & Jo A. Riley." *Id.* The service card indicated that the delivery of this statutory notice had been made on April 3, 1985, but there is no signature of any person receiving the card. *Id.* The postal records indicated that this notice was delivered to Jo Ann Riley on April 3, 1985. *Id.*

The Mississippi Supreme Court first noted that "the most important safeguard involving any person who stands to suffer from some official action is prior notice." *Id.* at 1237. It then noted that notice



"is not the entire story" because "[c]ertain statutory formalities attend every process . . . ." *Id.* The supreme court explained that "courts examine whether a summons has 'substantially' complied with process statutes." *Id.* (citations omitted). The supreme court found that there were several deficiencies in the attempt to comply with the requirements of Section 27-43-3, among which were: (1) a noncompliance with Rule 4 of the Mississippi Rules of Civil Procedure, (2) the chancery clerk's giving only forty three days' public notice of the right to redeem rather than the forty five days which Section 27-43-3 required, and (3) the attempt to serve both James and Jo Ann Riley with but a single notice. *Id.* The supreme court then concluded that "[s]tatutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners." *Id.* (citations omitted).

The third case which we consider in this general review of the law is *Hammett v. Johnson*, 624 So. 2d 58 (Miss. 1993), which is yet another case in which a purchaser of realty for unpaid taxes sought to confirm his tax title. After he had heard the evidence, the chancellor concluded that the tax deed should be set aside because it contained an inadequate description and because Johnson, the property owner who had failed to pay the taxes for which the land was sold, was not properly notified prior to its issuance. *Id.* at 59. On appeal, the Mississippi Supreme Court affirmed the chancellor's setting aside the tax deed. *Id.* at 60. The supreme court found that "[t]he dispositive issue is the failure of the chancery clerk to give proper notice." *Id.* The Mississippi Supreme Court found that it was "clear that the chancery clerk did none of these things [which Section 27-43-3 required] with respect to the record owner of the property in question." *Id.* Thus, "[i]t follow[ed] that the tax deed issued pursuant to this defective process is void. *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss.1991)." *Hammett*, 624 So. 2d at 59.

In all three of the foregoing cases, the Mississippi Supreme Court has refused to confirm tax deeds that conveyed title to the purchaser of property at a tax sale because it found that the chancery clerk had failed to comply with the requirements of Section 27-43-3 for giving notice to the landowner that the land would be sold for the nonpayment of the ad valorem taxes assessed against it. In the case *sub judice*, the Pearsons and the Parkers offered no evidence whatsoever that Aaaace had in fact received the owners' notices that the chancery clerk had delivered to the sheriff for personal service on Aaaace; neither did they offer evidence that the chancery clerk had discharged her duties as specified by Section 27-43-3.

This Court notes as a matter of law that while Section 13-3-33 of the Mississippi Code of 1972 provided for service of summons "[i]f the defendant cannot himself be found, and if no person of his family aged sixteen years can be found at his usual place of abode who is willing to receive such copy, then by posting a true copy [of the summons] on a door of the defendant's usual place of abode," this section was repealed as of July 1, 1991. Rule 4 of the Mississippi Rules of Civil Procedure, which provides for the issuance and service of a summons, contains no provision for serving a summons by tacking a copy of it to the door of the defendant's usual place of abode.

The Pearsons and the Parkers argue that because the chancery clerk and the sheriff complied with the duties which Section 27-43-3 imposed on them, their title created by their tax deed is not void. It is true that Section 27-43-3 provides: "The failure of the landowner to actually receive the notice herein required shall not render the title void, provided the clerk and sheriff have complied with the duties herein prescribed for them." Miss. Code Ann. § 27-43-3 (Rev. 1995). However, they presented neither evidence nor argument to support their contention to the chancellor at the hearing on

Aaaace's motion for summary judgment. Thus, they failed to demonstrate that there was a material issue of fact about whether the sheriff and the chancery clerk did comply with those duties which Section 27-43-3 prescribed for them. The Pearsons and the Parkers have not identified such a material issue of fact relevant to this issue in their brief.

We have already noted that the service of the owner's notices by tacking them to the door of the residence at 621 Witsell Road was legally inadequate to serve them personally on Aaaace; thus it cannot be said that the sheriff, acting through his deputies, discharged his duty of personally serving these owner's notices on Aaaace as Section 27-43-3 required. Moreover, in our recitation of the facts, we noted that on the envelopes in which were mailed the unclaimed owner's notices and which were returned to the chancery clerk was printed this address for Jo Aaaace: Rt. 2, Box 7, P. O. Box 11442, Terry, MS 39170. Moreover, Jo Aaaace listed his mailing address as "1004 Larkspur, Jxn, MS [sic]," and his telephone number as 366-9411 in the two warranty deeds to James Alfred Lewis which were recorded in the chancery clerk's office on July 15, 1992, at least three weeks before the two Hinds County Deputy Sheriffs completed their respective returns on the owner's notices on August 7 and 8, 1992. Finally, the two "Affidavits" which the chancery clerk executed to establish her diligence in locating Aaaace were unsworn. The Pearsons and the Parkers have failed to demonstrate that there was a material issue of fact about whether the sheriff and the chancery clerk had discharged the duties which Section 27-43-3 had imposed upon them. Therefore, this Court finds that there was no material issue of fact about whether their tax-sales-titles were valid even though Aaaace received no notice of the impending conveyances of his two properties by the chancery clerk to the Pearsons and the Parkers.

Our standard of review stated that a party who opposed an adversary's motion for summary judgment must respond by affidavits or otherwise and must set forth specific facts showing that there is a genuine issue for trial. If the party who opposes such a motion for summary judgment does not so respond, he risks the entry of summary judgment, if appropriate, against him. The record reflects clearly that Aaaace was never served with the owner's notices which Section 27-43-3 required. The Pearsons and the Parkers have failed to demonstrate any material issue of fact which would relate to whether the sheriff and the chancery clerk discharged their duties which Section 27-43-3 imposed upon them. Because Jo Aaaace was entitled to notice of the impending sale of his two lots for failure to pay two installments on the 1992 ad valorem taxes so that he might redeem them from that sale pursuant to Section 27-43-3, and because the appellants have failed to define any material issue of fact relevant to that legal right of notice which Aaaace enjoyed, the chancellor was correct when he sustained Aaaace's motion for summary judgment. We accordingly affirm the summary judgment for Aaaace.

Issue Two: Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by not finding the Plaintiff lacked standing to bring [the] lawsuit.

The Pearsons and the Parkers argue that because Aaaace had conveyed the two parcels of land which were the subject of the tax sales to James Alfred Lewis on July 14, 1992, Aaaace has no standing to sue them. Instead, by implication, only James Alfred Lewis has such standing. The Pearsons and the Parkers never raised Aaaace's lack of standing to file his complaint as an affirmative defense in their answer. The closest they may have come was their first defense, *i. e.*, "The complaint fails to state a

cause of action against defendants." Yet, they filed no motion to dismiss on this ground; neither did they assert this defense at the chancellor's hearing on Aaaace's motion for summary judgment. The Pearsons and the Parkers never moved the chancery court to join James Alfred Lewis as either a necessary party pursuant to Rule 19 of the Mississippi Rules of Civil Procedure or a permissive party pursuant to Rule 20 of the Mississippi Rules of Civil Procedure.

In the summary judgment, the only specific finding which the chancellor made was "that the Sheriff of Hinds County, Mississippi, did not serve Jo Aaaace the required Owner's Notice as a Court summons is served and therefore the tax sales here are void." The chancellor made neither conclusion of law nor finding of fact relevant to Aaaace's standing to file his complaint to set aside tax sale and to remove cloud from title. This issue remained unadjudicated and unresolved by the chancellor. The Pearsons and the Parkers did nothing to alter or amend this summary judgment in order that the chancellor might yet resolve this issue before they appealed from the summary judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure.

The short answer to the Pearsons' and the Parkers' argument is that because they never raised it as an issue to be adjudicated by the chancellor, we decline to resolve it. *See Ditto v. Hinds County, Miss.*, 665 So. 2d 878, 880 (Miss. 1995) (recognizing that the Mississippi Supreme Court remains bound by the well established rule that it can only review matters on appeal as were considered by the lower court); *Touart v. Johnston*, 656 So.2d 318, 321 (Miss. 1995) (reciting that "[a]s always, an appellant is not entitled to raise new issues on appeal since to do so denies the trial court the opportunity to address the matter). Thus, this Court resolves the Pearsons' and the Parkers' second issue against them.

Issue Three: Whether the trial court erred in granting Plaintiff's Motion for Summary Judgment by granting improper relief in the Summary Judgment Order.

The Pearsons and the Parkers rely on *Hammett v. Johnson*, 624 So. 2d 58, 60 (Miss. 1993) to support their argument that the chancellor granted improper relief by declaring that the tax sales were void. Instead, the appellants assert that the proper relief would have been to grant an additional sixty days to redeem the property, as indeed the Mississippi Supreme Court ordered in *Hammett. Id.* Since it was Aaaace's failure to pay the last two installments on the 1989 ad valorem taxes which created the opportunity for The Big C Company to buy both parcels of land at the tax sale on August 27, 1990, this third issue seems to benefit Aaaace rather than the Pearsons and the Parkers.

However, like the appellants' second issue, this issue was never presented to the chancellor for his determination. Thus, as this Court held when it resolved the Pearsons' and the Parkers' second issue against them, the chancellor's failure to resolve this third issue remains reason enough for this Court to decline to review this third issue. As we did with their second issue, we resolve this third issue against the Pearsons and the Parkers.

## **V. Aaaace's post appeal motion to dismiss**

After this case had been docketed in the Supreme Court of Mississippi, Aaaace filed a motion to dismiss this case "for mootness and failure to petition for interlocutory appeal and for sanctions" in

the supreme court. The basis of his motion was an order canceling tax sales which the Hinds County Board of Supervisors issued on June 27, 1994. This order, which stated that certain tax sales were set aside and held null and void, applied to the two parcels of land which were the subject of Aaaace's complaint to set aside the tax deeds filed in this case. After the Pearsons and the Parkers responded to Aaaace's motion, and after Aaaace filed an amended motion to dismiss, the Mississippi Supreme Court entered an order which denied Aaaace's amended motion to dismiss without prejudice, but which reserved for the litigants the right to address the issues raised in the amended motion to dismiss in their appeal briefs.

Neither Aaaace nor the Appellants have addressed the issues contained in Aaaace's amended motion to dismiss, and neither will we. Of course, our affirmance of the chancellor's grant of summary judgment to Aaaace has the same consequence as our granting his amended motion to dismiss, except for the matter of Aaaace's request for sanctions against the Pearsons and the Parkers which he included in his amended motion to dismiss. In his brief Aaaace did not pursue his request that this Court award sanctions against the Pearsons and the Parkers.

## VI. Summary

Section 27-43-3 of the Mississippi Code (Rev. 1995) has established certain duties which both the chancery clerk and the sheriff must discharge in the course of serving a derelict landowner with notice that his land has been sold for the nonpayment of ad valorem taxes assessed against it but that he has the right to redeem his ownership of the land by paying the taxes, penalty, and interest no later than two years from the date of the tax sale. In the case *sub judice*, the Pearsons and the Parkers failed to create any issue about the material fact that Aaaace had never been served with the owner's notices as Section 27-43-3 required. While it is true that the landowner's failure to receive an owner's notice of nonpayment of taxes and right to redeem will not render the tax title void if the clerk and the sheriff "have complied with the duties . . . prescribed for them," Miss. Code Ann. § 27-43-3 (Rev. 1995), the record in the case *sub judice* establishes that the sheriff failed to serve Aaaace with the requisite owner's notices in accordance with both this section and Rule 4 of the Mississippi Rules of Civil Procedure. The Pearsons and the Parkers have failed to create any issue of material fact about whether the chancery clerk discharged her duty to locate Aaaace. Perhaps their failure stems from what the record indicates were at least two clues about Aaaace's current address which became available to the chancery clerk.

The Pearsons' and the Parkers' other two issues about Aaaace's standing to sue and the nature of the relief which the chancellor granted in his summary judgment were never presented to the chancellor for his resolution; thus, they cannot now present them for the first time to this Court, a court of appellate jurisdiction, for its resolution.

The Pearsons and the Parkers failed to demonstrate that there were any material issues of fact which were relevant to the issues in this case which Section 27-43-3 created, *i. e.*, notice and discharge of official duties by the chancery clerk and the sheriff. As we noted in our standard of review, "[t]o prevent summary judgment, the non-moving party must establish a genuine issue of material fact by means allowable under the Rule." *See Richmond*, 692 So.2d at 61. Because the Pearsons and the Parkers failed to establish that there were genuine issues of material fact in the case *sub judice*, this Court affirms the chancellor's grant of summary judgment to Aaaace.

**THE JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., NOT PARTICIPATING.**