

**IN THE MISSOURI SUPREME COURT**

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**Case No. SC90732**

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**IN THE MATTER OF FORECLOSURE OF LIENS  
FOR DELINQUENT LAND TAXES BY ACTION IN REM,  
PARCELS OF LAND ENCUMBERED WITH  
DELINQUENT TAX LIENS, LAND TAX SUIT 144**

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**MOHAMMAD BHATTI**  
**Appellant**

**v.**

**COLLECTOR OF REVENUE, CITY OF ST. LOUIS  
&  
SHERIFF OF CITY OF ST. LOUIS  
&  
LEWIS MITCHELL COMPANY,  
Respondents**

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Appeal from the Circuit Court of St. Louis of Missouri  
The Honorable Michael F. Stelzer, Presiding

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**RESPONDENT LEWIS MITCHELL COMPANY'S**  
**BRIEF**

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## **JURISDICTIONAL STATEMENT**<sup>1</sup>

This is an appeal of a judgment of the Circuit Court of the City of St. Louis denying Appellant's motion to set aside a tax foreclosure sale and a judgment of the Court confirming that sale; and the Court's Order denying a motion for a new trial. Under Article 5, Section 3 of the Missouri Constitution, this Court has exclusive appellate jurisdiction in all cases involving the validity of a Missouri statute or the construction of the revenue laws of this state. Under section 3, the general jurisdiction for all other appeals is vested with the Missouri Court of Appeals.

The constitutional validity of the Municipal Land Reutilization Law, §§92.700 to 92.920 RSMo., was not the basis upon which the trial court decided the judgment appealed from in this case. Moreover, the Municipal Land Reutilization Law is not a revenue law "of this state." Accordingly, under Article 5, Section 3 of the Missouri Constitution, jurisdiction for this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals for the Eastern District of Missouri.

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<sup>1</sup> Respondent Lewis Mitchell Company has filed with this Honorable Court Respondent's Suggestions in Opposition to Appellant's Jurisdictional Statement and Respondent's Motion to Transfer Appeal. The Court has yet to rule on respondent's motion.

## STATEMENT OF FACTS

It is undisputed that Appellant Mohammad Bhatti (hereinafter “Mr. Bhatti”) was the owner of a parcel of real estate, located at 3243 Pennsylvania Avenue in the City of St. Louis that was foreclosed upon and sold to Respondent Lewis Mitchell Company (hereinafter “Purchaser”) at a tax sale on May 19, 2009, under the Municipal Land Reutilization Law , §§92.700 to 92.920, RSMo.<sup>2</sup> (the “M.L.R.L”).

### I. PROCEDURAL HISTORY:

The Collector of Revenue of the City of St. Louis initiated these proceedings by filing suit in the Circuit Court of the City of St. Louis seeking a judicial foreclosure against Mr. Bhatti’s property located at 3243 Pennsylvania Avenue in the City of St. Louis for his failure to pay real estate taxes for at least three years [LF 8]. On the 6<sup>th</sup> day of June, 2008, the cause was called for trial and Mr. Bhatti, “although having been duly notified by publication and by the mailing of notices in due manner and form provided by law ...came not, but made default” [LF 8]. After the cause was presented to the trial court “on the pleadings, records of proceedings, exhibits admitted in evidence and parcel evidence adduced,” the trial court entered its “Findings of Fact, Conclusions of Law and Order of Judgment and Decree (Of Foreclosure).” [*Id.*] The Judgment declared the tax lien on Mr. Bhatti’s property foreclosed and ordered the property sold by the sheriff of the City of St. Louis. [LF 15]. The judgment also declared that “[a]ny person having the right to answer or redeem having made default,

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<sup>2</sup> All statutory references are to RSMo.2000 unless otherwise indicated.

shall be and is hereby forever barred and foreclosed as to any defense or objection he might have to the foreclosure of such liens for delinquent general and special taxes” [*Id.*]

On May 19, 2009, the property was sold to Purchaser at a sheriff’s tax foreclosure sale for \$7,600.00. The judgment confirming the sale was entered on July 23, 2009, which found, *inter alia*, that the sale price of \$7,600.00 was adequate consideration for the property under forced sale conditions [LF 36].

On October 16, 2009, some eighty-five (85) days after the entry of the confirmation judgment, and *more than one year* after the entry of the judgment of foreclosure, Mr. Bhatti filed his motion to set aside the sale and confirmation judgment [LF 38]. On the day of trial, over Purchaser’s objection, the trial court granted leave for Mr. Bhatti to file his *amended* motion to set aside the sale and confirmation judgment [LF 48; 63]. In Mr. Bhatti’s original and amended motions to set aside the tax sale and confirmation judgment (he made no request to set aside the judgment of foreclosure), he only attacked the constitutionality of the Collector’s notice of the judicial foreclosure proceedings and the Purchaser’s notice of the confirmation hearing [LF 38-43; 48-55]. He did not, in his pleadings, attack the constitutionality of the Sheriff’s notice of the tax sale itself. Now, on appeal, however, for the first time recognizing his error, Mr. Bhatti alleges in his Statement of Facts (and Argument) that the Sheriff’s notice of the tax sale was returned undelivered.

After a full evidentiary hearing, the trial court denied Mr. Bhatti’s motion, based on a failure of proof, on November 16, 2009, [LF 63]. On December 4, 2009, Mr. Bhatti filed his motion for new trial [LF 66]. On the day set for hearing, February 4, 2010, Mr. Bhatti

lodged for filing a “Motion for New Trial – First Amended” [LF 75; 85]. On February 5, 2010, the court entered its order, finding that Mr. Bhatti’s amended motion for new trial was a nullity and denying his initial motion for new trial [LF 85].

Mr. Bhatti filed his Notice of Appeal on February 16, 2010 [LF 88].

## II. SUMMARY OF THE EVIDENCE:

### (A) Hearing on Motion to Set Aside Judgment:

At the evidentiary hearing on Mr. Bhatti’s amended motion to set aside the sale and confirmation judgment, before any evidence was adduced, the trial court expressly asked Mr. Bhatti’s counsel what evidence she had, if any, that would show that the statutory notice sent by the Collector was ever returned to sender as being undeliverable. Mr. Bhatti’s counsel responded:

If the City or the Collector’s Office files an affidavit that says that the mail is sent, I guess that’s what the Court goes by a factual basis to show that mail was sent to the recorded address. The only factual basis that I have to actually show to the court that he didn’t receive the mail is Mr. Bhatti’s testimony. The testimony from the realtor that actually got actual notice. [Tr. 24].

Mr. Bhatti introduced no documents into evidence at the hearing. The Court was not asked to take judicial notice, nor did it take notice, of *any* documents in its file. [Entire Transcript].

Throughout his Brief, in both the Statement of Facts and the Argument, Mr. Bhatti continuously refers to a document titled “Sheriff’s Sale Register,” which contains a notation

opposite Mr. Bhatti's name, to wit: "4-29-09 – RTS, ANK, UTF." The document, however, was not introduced into evidence or judicially noticed by the trial court. The document has been made a part of the Legal File (LF 19 & 20). The trial court's file does contain "minute entries" showing that an "Affidavit of Service of Notice" was filed on June 1, 2009 [LF 2]. The Sheriff's Sale Register was attached to that Affidavit.<sup>3</sup> Yet, it is an uncontradicted fact that *none of these documents* were ever offered into evidence or judicially noticed by the trial court. Accordingly, there is no competent evidence in the trial record to support Mr. Bhatti's "statement of fact" that any notices were returned undeliverable. The trial court found a failure of evidence on this very issue relating to notice.

Additionally, Mr. Bhatti's Statement of Facts is replete with other *allegations* which are not supported by the trial record. For example, Mr. Bhatti cites pages 4, 13, 26 and 32 of the Transcript to support the claim that in his applications for building permits prior to the tax sale, he "provided the City with the address of his City residence, regarding which he was current on his real estate taxes – namely, 3831 Potomac" [Appellant's Brief, p. 5]. Yet, nowhere in Transcript is there *evidence* to support such a claim. Indeed, no applications, or any other evidence establishing the content of the alleged applications, were admitted or received in evidence. Similarly, he cites pages 5-6 of the Transcript to support the contention that a "'For Sale' sign was posted in Mr. Bhatti's yard for 150 days before October 12, 2009" [Appellant's Brief, p. 6]. Although before trial, Mr. Bhatti's counsel argued the point, no

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<sup>3</sup> Mr. Bhatti's counsel erroneously stated that the Sheriff's Sale Register was an attachment to the Collector's Affidavit (filed prior to the judgment of foreclosure).

*evidence* of the time period that the sign was posted was adduced during the hearing. Mr. Bhatti also claims that after making repairs on the property in 2009, he applied for, and after a City inspection, received an occupancy permit [Appellant’s Brief, p. 6; *citing*, TR 5, 14-15, 28; LF 62]. He then asserts that “[n]o prior occupancy permits had been issued” [*citing*, TR 10]. None of these citations to the record, however, point to any *evidence* that “no prior occupancy permits had been issued.”

On page 8 of Appellant’s Brief, Mr. Bhatti asserts the fact that the trial court *agreed* that “the City could ‘easily’ have sent notice to Mr. Bhatti’s City residence, at 3831 Potomac” [*citing*, LF 63-64; TR 14]. Neither the judgment nor the trial court’s comments in the record support the contention. Instead, in a colloquy with Mr. Bhatti’s counsel, the court stated:

Let me ask you this: What if he lived in the County and so they checked with the City Assessor and they find nothing because he doesn’t live in the City, do they have to go to the County Assessor; do they have to go to St. Charles, Jefferson, Addison, St. Clair. I mean, that’s the problem with this case. It is a nice neat analogy because he does live in the City, so you can find his name easily. But I’m not sure that’s how I determine whether or not we should be putting another layer on this due process. [TR 14].

This cannot fairly be characterized as a finding by the trial court that “the City could ‘easily’ have sent notice to Mr. Bhatti’s City residence, **at 3831 Potomac.**”

After the evidentiary hearing, Mr. Bhatti’s motion was taken under submission and

ultimately denied by the trial court on November 16, 2009 [LF 63]. The trial court expressly found no evidence that the City or the Purchaser had any reason to believe that the delinquent taxpayer had not received the statutory notice sent by the Collector under §92.760 [LF 64-65, Order and Judgment of November 16, 2009].

(B) Hearing on Motion for New Trial:

On December 9, 2009, Mr. Bhatti filed his motion for new trial [LF 75]. On page 9 of Appellant's Brief, Mr. Bhatti summarizes the evidence he proffered at the hearing on the new trial motion, which included some evidence of mailings made by Mr. Bhatti's counsel, *after* the trial. These mailings were ostensibly returned as undeliverable by the US Postal Service. Yet, it is an undisputed fact that at the hearing on his motion for new trial, Mr. Bhatti again did not ask the trial court to admit the "Sheriff's Sale Register" into evidence, nor did he request the Court to take judicial notice of *any* documents in its file. On February 4, 2010, the day of the new trial hearing and more than thirty days after the entry of the Order and Judgment of the Court (denying his motion to set aside the tax sale and confirmation judgment), Mr. Bhatti filed an *amended* new trial motion, attempting to put an affidavit of a postal employee before the Court to show that such employee did not deliver any mail to Mr. Bhatti's property on Pennsylvania Ave. [L.F. 75]. The trial court held the amended motion for new trial to be a nullity since it was filed out of time, and denied the original motion for new trial on February 5, 2010 [LF 85].

**POINTS RELIED ON**

**I. THE SUPREME COURT DOES NOT HAVE EXCLUSIVE APPELLATE JURISDICTION BECAUSE THIS APPEAL DOES NOT INVOLVE THE VALIDITY OF A MISSOURI STATUTE OR THE CONSTRUCTION OF THE REVENUE LAWS OF THIS STATE, IN THAT: (A) MR. BHATTI ADMITS IN HIS BRIEF THAT HE IS NOT ATTACKING THE CONSTITUTIONALITY OF THE STATUTES ON THEIR FACE; (B) THE JUDGMENT APPEALED FROM WAS PREDICATED SOLELY UPON A FAILURE OF EVIDENCE AND NOT THE CONSTITUTIONALITY OF THE M.L.R.L.; AND (C) THE M.L.R.L. IS NOT A REVENUE LAW “OF THIS STATE.”**

*Engel Sheet Metal Equipment, Inc. v. Shewman*, 298 S.W.2d 434 (Mo.1957)

*Rollins v. Business Men’s Accident Ass’n of America*, 213 S.W.2d 52 (Mo.1919)

*Chicago, B&Q.R. Co. v. North Kansas City*, 367 S.W. 2d 561 (Mo.1963)

*Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo.banc 1997)

Art. 5, §§ 3 & 11 of the Missouri Constitution

§92.755 RSMo.

§92.760 RSMo.

§92.810 RSMo.

§92.840 RSMo.

**II. IN RESPONSE TO THE APPELLANT’S SOLE POINT RELIED UPON, THE CIRCUIT COURT DID NOT ERR IN DENYING MR. BHATTI’S MOTION TO SET ASIDE THE TAX SALE OR THE JUDGMENT CONFIRMING THE TAX SALE BECAUSE THE CIRCUIT COURT PROPERLY FOUND THAT, WHERE RESPONDENTS DID NOT HAVE ANY REASON TO KNOW THAT THEIR NOTICES HAD NOT BEEN RECEIVED BY MR. BHATTI, HIS CONSTITUTIONAL DUE PROCESS RIGHTS WERE NOT VIOLATED, IN THAT IT WAS UNDISPUTED THAT RESPONDENTS COMPLIED WITH THE STATUTORY NOTICE PROVISIONS AND MR. BHATTI ADDUCED NO COMPETENT AND SUBSTANTIAL EVIDENCE THAT RESPONDENTS HAD REASON TO KNOW THAT MR. BHATTI HAD NOT RECEIVED THE NOTICES OR THAT SUCH NOTICES HAD BEEN RETURNED UNDELIVERED.**

*Rolla 31 School Dist. v. State*, 837 S.W.2d 1, 7 (Mo.banc 1992)

*Weiss v. Rojaanasathit*, 975 S.W.2d 113 (Mo. 1998)

*Collector of Revenue v. Parcels of Land*, 585 S.W.2d 486 (Mo.banc 1979)

*Willis v. Willis*, 50 S.W.3d 378 (Mo.App.2001)

§92.760 RSMo.

§92.810 RSMo.

§92.840 RSMo.

Missouri Supreme Court Rule 44.01

Missouri Supreme Court Rule 74.06

Missouri Supreme Court Rule 84.13

**III. IN FURTHER RESPONSE TO THE APPELLANT’S POINT RELIED UPON, THE CIRCUIT COURT DID NOT ERR IN DENYING MR. BHATTI’S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE BECAUSE: (A) MR. BHATTI ABANDONED THIS ISSUE ON APPEAL IN THAT HE DID NOT INCLUDE SUCH ERROR AS A BASIS OF HIS APPEAL IN HIS POINT RELIED ON; AND (B) MR. BHATTI FAILED TO SHOW THAT HIS ALLEGED “NEWLY DISCOVERED EVIDENCE” WAS NOT AVAILABLE AT TRIAL AND COULD NOT HAVE BEEN OBTAINED IN TIME FOR TRIAL BY THE EXERCISE OF DUE DILIGENCE IN THAT MR. BHATTI DID NOT PLEAD FACTS ILLUSTRATING DUE DILIGENCE AND MR. BHATTI’S COUNSEL GAVE NO EXPLANATION ILLUSTRATING DUE DILIGENCE TO THE TRIAL COURT.**

*Hastings v. Coppage*, 411 S.W.2d 232, 235 (Mo.1967)

*Frager v. Glick*, 347 S.W.2d 385, 390(5) (Mo.1961)

*Davis v. Illinois Terminal RR Co.*, 326 S.W.2d 78 (Mo.1959)

*Greco v. Robinson*, 747 S.W.2d 730 (Mo.App.E.D. 1988)

Missouri Supreme Court Rule 84.04

## STANDARD OF REVIEW

The standard of review in a civil, court-tried case, such as the present case, is set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo.banc 1976). The judgment must be upheld unless it lacks substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or misapplies the law. *Id.* at 32.

Allegations of error that have not been presented to or expressly decided by the trial court shall not be considered on appeal. Supreme Court Rule 84.13(a); *Rolla 31 School Dist. v. State*, 837 S.W.2d 1, 7 (Mo.banc 1992).

Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure. *Smith v. Shaw*, 159 S.W.3d 830, 836 (Mo.banc 2005); *Weiss v. Rojaanasathit*, 975 S.W.2d 113 (Mo. 1998); *Fisher v. State Highway Com'n of Mo.*, 948 S.W.2d 607 (Mo.1997); *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996).

Contentions that are not presented in the points to be argued in Appellant's Brief are abandoned and will not be considered on appeal. Supreme Court Rule 84.04; *Hastings v. Coppage*, 411 S.W.2d 232, 235 (Mo.1967). *See also*, *Boten v. Brecklein*, 452 S.W.2d 86, 96 (Mo.1970), *Marshall v. City of Gladstone*, 380 S.W.2d 312, 314(1) (Mo.1964); *Ayres v. Keith*, 355 S.W.2d 914, 919(6) (Mo.1962). A point is not properly presented for review if it is advanced for the first time in the argument portion of the brief. *Frager v. Glick*, 347 S.W.2d 385, 390(5) (Mo.1961).

A trial court's denial of a motion for new trial is reviewed based solely on the basis

of an abuse of discretion. *Ward v. Goodwin*, 345 S.W.2d 215, 219 (Mo.1961); *Davis v. Illinois Terminal R. Co.*, 326 S.W.2d 78 (Mo.1959).

## **ARGUMENT**

**I. THE SUPREME COURT DOES NOT HAVE EXCLUSIVE APPELLATE JURISDICTION BECAUSE THIS APPEAL DOES NOT INVOLVE THE VALIDITY OF A MISSOURI STATUTE OR THE CONSTRUCTION OF THE REVENUE LAWS OF THIS STATE, IN THAT: (A) MR. BHATTI ADMITS IN HIS BRIEF THAT HE IS NOT ATTACKING THE CONSTITUTIONALITY OF THE STATUTES ON THEIR FACE; (B) THE JUDGMENT APPEALED FROM WAS PREDICATED SOLELY UPON A FAILURE OF EVIDENCE AND NOT THE CONSTITUTIONALITY OF THE M.L.R.L.; AND (C) THE M.L.R.L. IS NOT A REVENUE LAW “OF THIS STATE.”**

Where an appeal from a decree only presents a question of whether evidence supports the decree, this Court does not have original appellate jurisdiction. *Engel Sheet Metal Equipment, Inc. v. Shewman*, 298 S.W.2d 434 (Mo.1957). To give the supreme court jurisdiction it must appear that a constitutional question is essential to a determination of the case. *Rollins v. Business Men’s Accident Ass’n of America*, 213 S.W.2d 52 (Mo.1919). The supreme court abstains from determining constitutional questions that are unnecessary to a disposition of the case. *Chicago, B&Q.R. Co. v. North Kansas City*, 367 S.W. 2d 561 (Mo.1963). Furthermore, the *construction* of statutes and their application to a particular state of facts is within the appellate jurisdiction of the courts of appeal. *Knight. v. Calvert Fire Ins. Co.*, 260 S.W.2d 673 (Mo. 1953). *See also, State ex rel Thompson v. Roberts*, 264

S.W.2d 314 (Mo. 1954) [contention that certain *interpretation* would render statute invalid and unconstitutional did not raise a constitutional question giving supreme court jurisdiction of appeal]; *Cotton v. Iowa Mut. Liability Ins. Co.*, 251 S.W.2d 246 (Mo.1952) [to vest appellate jurisdiction in supreme court on constitutional issue, the attack on the constitutionality of a statute must be that whatever it means and under any construction of which it is susceptible, it is unconstitutional].

In the Jurisdictional Statement of Appellant's Brief, Mr. Bhatti specifically represented he is not attacking the constitutionality of the notice provisions of the M.L.R.L. *on their face* [Appellant's Brief, p. 2]. The trial court's ruling that the notice provisions of the M.L.R.L. did not violate Mr. Bhatti's constitutional rights *as applied* to him was predicated on Mr. Bhatti's failure to prove that the City or Purchaser knew that Mr. Bhatti did not receive notice.

However, [Mr. Bhatti] has provided no evidence that the First Class Mail was ever returned therefore, putting the purchaser and/or Collector of Revenue on notice that additional steps are necessary to satisfy federal and state due process. The court believes that Missouri Revised Statutes, Chapter 92.760 has been satisfied in that the Collector of Revenue sent notices based upon the "records of the Assessor" which listed 3243 Pennsylvania Avenue as the address of [Mr.Bhatti]. . . [Mr. Bhatti's] argument that the purchaser or State should have taken

additional steps because of permits affixed to the windows and/or because of the For Sale sign in the yard may have merit had there been evidence that the purchaser and/or State had some reason to believe that the delinquent taxpayer had not received the Notice. No such facts were presented to the court.

The testimony that the Real Estate Agent and/or [Mr. Bhatti] failed to receive any mail regarding this tax sale at the Pennsylvania address does not support a factual finding that the notice letters mailed First Class were returned thereby triggering additional steps to be taken per the *Schlereth* case.

[LF 64-65, Order and Judgment of November 16, 2009, emphasis supplied].

It is apparent that the trial court's decision was based upon Mr. Bhatti's *failure to adduce evidence* that Purchaser or the State had reason to know that he didn't receive the notice required by the statute, which, if proven, might *then* trigger constitutional requirements that Purchaser or the State take additional steps to provide adequate notice. There was *no evidence* offered to the effect that any of the statutory notices (or the Purchaser's notice of the confirmation hearing) were returned to sender or undelivered. No evidence was adduced showing that the City or Purchaser had any reason to know that Mr. Bhatti did not receive these notices. This was the explicit *basis* of the trial court's ruling. Implicit in the trial court's decision (but unnecessary to it) was that Mr. Bhatti's constitutional due process rights *may* have required the state to take steps *in addition* to what

was required by the statutory scheme *had* Mr. Bhatti made a sufficient showing that the State or Purchaser “had reason to know” that the notice provided was inadequate. Yet, because Mr. Bhatti failed to make such a showing, determining whether the statutory notice requirements *would have been* constitutional as applied to this case was thus not essential to a determination of the case. The *constitutional validity* of the M.L.R.L. was not the basis upon which the trial court decided the case. Accordingly, there is no constitutional question essential to the determination of this appeal.

As to Mr. Bhatti’s contention that supreme court jurisdiction can be predicated upon the “construction of a revenue law of this state,” a law that raises revenue only within a single political subdivision for the benefit of that political subdivision is not a revenue law “of this state” as used in the Missouri Constitution in that the proceeds of such tax are not deposited into the state treasury. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo.banc 1997); cf. *Collector of Revenue v. Parcels of Land*, 585 S.W.2d 486 (Mo.banc 1979) (in an anomalous case, the Court held that the M.L.R.L. *was* a revenue law of this state without any analysis of whether it raised revenues deposited into the state treasury); *see, also, Maryville Properties, L.P. v. Nelson*, 83 S.W.3d 608 (Mo.App.W.D.2002); *Two Pershing Square, L.P. v. Boley*, 981 S.W. 2d 635 (Mo.App.W.D.1998). The M.L.R.L. fails to provide for any “revenues” to be collected by the state, much less deposited into the state treasury. Accordingly, the M.L.R.L. is *not* a revenue law “of this state” under Article 5, section 3 of the Missouri Constitution.

No issue is addressed in Mr. Bhatti’s appeal that falls within the exclusive appellate

jurisdiction of the Missouri Supreme Court. In accordance with Article 5, Section 3, of the Constitution of the State of Missouri, jurisdiction for this appeal lies within the general appellate jurisdiction of the Missouri Court of Appeals for the Eastern District of Missouri.

Under Art. 5, §11 of the Missouri Constitution, this appeal should be transferred to the Missouri Court of Appeals for the Eastern District of Missouri.

**II. IN RESPONSE TO THE APPELLANT’S SOLE POINT RELIED UPON, THE CIRCUIT COURT DID NOT ERR IN DENYING MR. BHATTI’S MOTION TO SET ASIDE THE TAX SALE OR THE JUDGMENT CONFIRMING THE TAX SALE BECAUSE THE CIRCUIT COURT PROPERLY FOUND THAT, WHERE RESPONDENTS DID NOT HAVE ANY REASON TO KNOW THAT THEIR NOTICES HAD NOT BEEN RECEIVED BY MR. BHATTI, HIS CONSTITUTIONAL DUE PROCESS RIGHTS WERE NOT VIOLATED, IN THAT IT WAS UNDISPUTED THAT RESPONDENTS COMPLIED WITH THE STATUTORY NOTICE PROVISIONS AND MR. BHATTI ADDUCED NO COMPETENT AND SUBSTANTIAL EVIDENCE THAT RESPONDENTS HAD REASON TO KNOW THAT MR. BHATTI HAD NOT RECEIVED THE NOTICES OR THAT SUCH NOTICES HAD BEEN RETURNED UNDELIVERED.**

A. The Statutory Scheme:

The M.L.R.L. provides for a step-by-step procedure in the foreclosure of tax liens and the resulting sale and confirmation of that sale in the City of St. Louis. It specifically and expressly assigns to various parties the duty of providing *statutory notice* to the

landowner/taxpayer for each step of the process, including foreclosure, redemption rights, the tax sale, and the confirmation of the tax sale. In a nutshell, the statutory scheme operates as follows.

After multiple years of a landowner not paying his real estate taxes, the Collector of Revenue of the City of St. Louis may file a foreclosure action with the circuit court. Within thirty days after filing such suit, the Collector shall publish notice of foreclosure in a daily newspaper four times, once weekly [§92.755]. The M.L.R.L. further provides that:

1. The collector shall also cause to be prepared and mailed in an envelope with postage prepaid, within thirty days after the filing of such a petition, a brief notice of the filing of the suit, to the persons named in the petition as being the owners, according to the records of the assessor for the respective parcels of real estate described in the petition. The notices shall be sent to the addresses of such persons upon the records of the assessor.

Subsection 1 of §92.760.

This section also provides that the Collector's notice advise the landowner/taxpayer that, unless the taxes are paid and the real estate redeemed "prior to the time of the foreclosure sale of such real estate by the sheriff, the owner . . . shall be forever barred and foreclosed of all right, title and interest and equity of redemption in and to such parcels of real estate."

Subsection 2 of §92.760. As a result of the foreclosure suit, the circuit court may "decree that the lien upon the parcels of real estate described in the tax bill be foreclosed and such real estate sold by the sheriff, and the cause shall be continued for further proceedings, as

herein provided.” Section 92.805.

After a waiting period of six months after the judgment of foreclosure, if the real estate is still not redeemed, the Sheriff is directed to advertise the tax sale and to provide mailed notice (containing, *inter alia*, the date, time and place of sale) directly to the landowner/taxpayer, viz: “No later than twenty days prior to the sheriff’s sale, the sheriff shall send notice of the sale to the owner or owners, as disclosed upon the records of the assessor of real estate for which tax bills thereon are delinquent. The search of the records of the assessor must be made not more than forty days prior to the sending of this notice.... The notice required by this subsection shall be mailed in an envelope with postage prepaid.” Section 92.810.3 [emphasis supplied]. Then, “[a]fter the sheriff sells the real estate at the tax sale, the court shall, upon its own motion or upon motion of any interested party, set the cause down for hearing to confirm the foreclosure sale of the real estate. . . . Notice of the hearing shall be sent by any interested party, or the court, moving to confirm the foreclosure sale, to each person who received notice of sale as specified in subsection 3 of section 92.810.” Section 92.840.1. At the confirmation hearing, the court is to determine whether an adequate consideration has been paid for each such parcel, and, if so, enter its judgment confirming the tax sale. *Id.* Thereafter, the purchaser must apply for an occupancy permit and the sheriff shall then issue its sheriff’s deed transferring title of the property to the purchaser. Section 92.840.6 & .7.

Under the M.L.R.L. then, the Collector provides notice to the landowner/taxpayer of the foreclosure action (suit), the Sheriff provides notice to the landowner/taxpayer of the tax

sale, and any “interested party” — whoever moves for confirmation (almost always the purchaser) — provides notice to the landowner/taxpayer of the confirmation hearing.<sup>4</sup>

Mr. Bhatti admitted to the trial court that the statutory notice provisions of the M.L.R.L. were followed in this case [Tr. 7; 10].

B. Mr. Bhatti had the burden of proving that the statutory notices were returned undelivered or other facts demonstrating that the Collector, Sheriff, or Purchaser had reason to know the notices would not likely have been delivered to Mr. Bhatti.

The M.L.R.L. provides that the Collector must send the landowner/taxpayer notice of the suit of foreclosure, that the Sheriff must send the landowner/taxpayer notice of the tax sale, and that “any interested party” (here, the Purchaser) must send the landowner/taxpayer notice of the confirmation hearing. All of these notices must be by US Mail, in an envelope with postage prepaid. Sections 92.760, 92.810 & 92.840. There is no statutory requirements for personal service or for service by certified or registered mail. *Id.* Publication of the suit for foreclosure and the sheriff’s sale is required and there is no dispute in the case that publication was duly made. *Id.* As stated above, Mr. Bhatti admitted that the statutory notice provisions were followed in this case [Tr. 7;10].

Of course, in addition to the requirements of statutory notice, Mr. Bhatti has procedural rights of due process guaranteed to him by the federal and state constitutions. Mr.

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<sup>4</sup> It is undisputed that the provisions of the M.L.R.L. do not require that any of these notices be sent by certified mail.

Bhatti concedes that “due process does not require that a property owner *receive* actual notice before the government may take his property” [Appellant’s Brief, p. 15, *citing, Jones v. Flowers*, 547 U.S.220, 226, 126 S.Ct. 1708, 1713 (2006)]. It is sufficient that the government provide notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action. *Jones, supra* at 226. The focus then, is not on whether the taxpayer *received* the notice, it is rather on the adequacy of the *means* that were employed by the person or entity providing the notice. Before the *Jones* case, *supra*, and under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.306 (1950), “the adequacy of notice is assessed by what is known *before the notice is sent*. *Jones*, however holds that the government must act on information received *after the notice was sent*, that is, that the notice was returned unclaimed.” *Schlereth v. Hardy*, 280 S.W.2d 47, 50-51 (Mo.banc 2009).

Both *Jones* and *Schlereth, supra*, set forth circumstances under which certified mail notice — sent under *different* statutory schemes (in *Schlereth*, Ch. 140, RSMo.) which are not applicable to the city of St. Louis or this case — may not suffice to meet the constitutional requirements of due process when there is evidence that certified notice is returned *unclaimed*.<sup>5</sup> Accordingly, in order to make his case that the statutory notice

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<sup>5</sup> The U.S. Supreme Court suggested that where certified mail goes unclaimed, one additional step that the state could take to provide additional notice would be to use first-class regular mail, which ordinarily is *more likely* to reach its intended recipient. *Jones*,

provided to him was constitutionally infirm, Mr. Bhatti had to prove that the parties sending notice had reason to know that the notice would not likely reach Mr. Bhatti. Making such a showing required evidence that the notice was returned undelivered or evidence of other facts proving such knowledge. The trial court correctly found that he failed to do either.

1. The Collector's Notice:

In the case at bar, the judgment of foreclosure was entered by the trial court on June 6, 2008 [LF 8], the tax sale occurred on May 19, 2009 [LF 24], and the confirmation judgment was entered on July 23, 2009 [LF 36]. On October 19, 2009, some eighty-five (85) days after the entry of the confirmation judgment, and *more than one year* after the entry of the judgment of foreclosure, Mr. Bhatti filed his motion to set aside the sale and confirmation judgment [LF 38].

The record is clear that Mr. Bhatti never attacked the judgment of foreclosure in the trial court.<sup>6</sup> The prayer for relief under Count I of his (amended) motion to set aside recited that he was proceeding under Supreme Court Rule 74.06, to void and set aside *the tax sale* and *the confirmation judgment* only [LF 52, "WHEREFORE" clause].<sup>7</sup> Moreover, Mr. Bhatti has not attacked the judgment of foreclosure on appeal. Accordingly, the integrity of

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*supra*, 126 S.Ct. at 1719.

<sup>6</sup> For most motions under Rule 74.06, the motion must be brought "not more than one year after the judgment or order was entered." Rule 74.06(c).

<sup>7</sup> Count II is an application for temporary restraining order, having no relevance to the issues in this appeal.

the judgment of foreclosure is not before this Court.

Despite the fact that Mr. Bhatti did not move to set aside the judgment of foreclosure, Mr. Bhatti nevertheless alleged, in Count I of his (amended) motion to set aside the tax sale and confirmation judgment, that he never received the Notice of Sale mailed by the *Collector of Revenue*, and was thus denied his constitutional redemption rights, a right to notice, an opportunity to be heard prior to the tax sale, and a right to bid on the sale of such property [LF 49, ¶ 5]. In its judgment denying the motion to set aside the tax sale and confirmation judgment, the trial court found that \$92,760 “has been satisfied in that the Collector of Revenue sent notices based upon the ‘records of the Assessor’ which listed 3243 Pennsylvania Avenue as the address for [Mr. Bhatti]” [LF 64]. There is nothing in the evidentiary record to establish that the Collector’s notice was returned undelivered.

2. The Sheriff’s Notice:

Although Mr. Bhatti attacks the sheriff’s notice in his brief on appeal, he failed to raise this issue with the circuit court. In his motion and amended motion to set aside the tax sale and confirmation judgment, in his argument to the trial court, and in his new trial motion, he only complained of the Collector’s notice and Purchaser’s notice (not the Sheriff’s notice). “Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure.” *Smith v. Shaw*, 159 S.W.3d 830, 836 (Mo.banc 2005); *Weiss v. Rojaanasathit*, 975 S.W.2d 113 (Mo. 1998); *Fisher v. State Highway Com’n of Mo.*, 948 S.W.2d 607 (Mo.1997); *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996). Allegations of error that have not been presented to or expressly decided

by the trial court shall not be considered on appeal. *Rolla 31 School Dist., supra*. Because Mr. Bhatti did not timely raise this issue in the circuit court, this argument has been waived.

Nevertheless, Mr. Bhatti now argues, for the first time on appeal, that because *the sheriff's notice* was returned undelivered, the statutory notice provision (§92.810.3) is unconstitutional *as applied* to him.<sup>8</sup> The judgment also must be affirmed because this argument is factually incorrect and not supported by the evidentiary record.

In support of his due process argument, Mr. Bhatti points to page 19 & 20 of the Legal File, which sets forth a document entitled “Sheriff’s Sale Register,” which contains some writing opposite Mr. Bhatti’s name, to wit: “4-29-09 – RTS, ANK, UTF.” Throughout his Brief, in both the Statement of Facts and the Argument, Mr. Bhatti free-handedly and continuously refers to this document as if it was either introduced into evidence or judicially noticed by the trial court. To the contrary, Mr. Bhatti did *not* offer the document into evidence, nor did he ask the court to take judicial notice of any portion of its file. There was

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<sup>8</sup> In Appellant’s Brief, Mr. Bhatti does *not* claim that the statutory duty of the Sheriff (or the Collector) to provide notice by first-class mail is unconstitutional *on its face*. To the contrary, he admitted that he was not making any facial attack on the M.L.R.L.. Moreover, in *Collector of Revenue v. Parcels of Land*, 585 S.W.2d 486 (Mo.banc 1979), this Court held that the first-class mail requirements – as it relates to the Collector’s notice under §92.760 – required in the M.L.R.L. – *is facially* constitutional and does not violate due process.

*no evidence* offered that the sheriff's notice was returned to sender or undelivered. This was the explicit *basis* of the trial court's ruling. Accordingly, *Jones* and *Schlereth, supra*, are inapposite.

Mr. Bhatti had the burden of proving the allegations contained in his motion. The motion itself is not evidence and does not prove itself. *Haynes v. Bohon*, 878 S.W.2d 902 (Mo.App.E.D.1994). In order for the so-called "fact" of returned mail contained in the trial court's file to have been considered by the court in arriving at its judgment, it was first necessary for someone either to offer the document into evidence or to read portions of the document into evidence, or ask the court to take judicial notice of its own file. *See Willis v. Willis*, 50 S.W.3d 378, 390 (Mo.App.W.D.2001), *citing, Morrison v. Thomas*, 481 S.W.2d 605 (Mo.App.1972). This was not done.

Mr. Bhatti did not bring to the attention of the trial judge the existence of the document. Further, the motion judge was not apprised of the existence of the document. The court cannot be faulted for not searching its file to find the document. Rather, it was the duty of Mr. Bhatti to bring the document to the attention of the trial court and be given the opportunity to correct the error argued on appeal.<sup>9</sup> *See, Randall v. St. Albans Farms, Inc.*,

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<sup>9</sup> It should also be noted that the Sheriff had no "statutory duty" to file the Sheriff's Sale Register with the Court. Accordingly, there is no applicable "official records" or "public documents" exception to the hearsay rule and if the document *had been* offered as evidence, it would not have been admissible. The court may not take judicial notice of inadmissible hearsay declarations. *See, Cole v. Goodyear Tire & Rubber*

345 S.W.2d 220, 223 (Mo.1961), *citing*, *Timson v. Manufacturers' Coal & Coke Co.*, 119 S.W. 565, 569 (Mo.1909).

3. The Purchaser's Notice:

Despite Mr. Bhatti's admission that he is not attacking the constitutionality of the M.L.R.L. on its face [Jurisdictional Statement, Appellant's Brief, p. 2], Mr. Bhatti nevertheless argues that §92.840.1 is unconstitutional to the extent it permits notice to be sent by first-class mail.<sup>10</sup> He suggests that *personal service* should be required instead of the service required by the statute [*See*, Appellant's Brief, pp. 26-28]. Yet, this Honorable Court has already upheld a facial challenge to the constitutionality of the notice provisions contained in §92.760, as it pertains to the Collector's duty to send first-class mail notifying the landowner of the judicial foreclosure suit. *Collector of Revenue v. Parcels of Land*, 585 S.W.2d 486 (Mo.1979). The Purchaser's notice of the confirmation hearing under §92.840.1 stands on the same constitutional ground as the Collector's notice of the foreclosure hearing

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*Co.*, 967 S.W.2d 176 (Mo. Ct. App. E.D. 1998); *State v. Damask*, 936 S.W.2d 565, 577 (Mo.1996).

<sup>10</sup> Section 92.840.1 provides, *inter alia*: "After the sheriff sells the real estate at the tax sale, the court shall, upon its own motion or upon motion of any interested party, set the cause down for hearing to confirm the foreclosure sale of the real estate. . . . Notice of the hearing shall be sent by any interested party, or the court, moving to confirm the foreclosure sale, to each person who received notice of sale as specified in subsection 3 of section 92.810."

under §92.760. *Both* give notice to the landowner of the right to be heard by the circuit court on an action *in rem*.

Mr. Bhatti also argues for the first time on appeal that the notice provisions of §92.840.1 are unconstitutional as applied to him because the Purchaser only provided seven days notice of the confirmation hearing [Appellant’s Brief, pp. 29-30]. Once again, however, allegations of error that have not been presented to or expressly decided by the trial court shall not be considered on appeal. Rule 84.13(a); *Rolla 31 School Dist., supra*. Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure. *See, Smith; Weiss; Fisher; Hollis; supra*.

Moreover, Supreme Court Rule 44.01(d) provides that “[a] written motion, other than one heard *ex parte*, and notice of the hearing thereof, shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by law or court rule or by order of the court.” No time period for delivery of the notice of the confirmation hearing – on Purchaser’s “Motion to Confirm Land Tax Sale” – is prescribed by §92.840.1. The Rule, therefore, is applicable. There is simply no authority for the contention that providing seven days notice of the confirmation hearing constitutes a constitutional violation of the landowner’s due process rights.

Finally, in arguing that the Purchaser’s notice was unconstitutional *as applied* to the facts of the case, Mr. Bhatti also claims that “a simple review of the Circuit Court record would have informed [Purchaser] that on April 29, 2009 — a month before [Purchaser] bought the property and months before [Purchaser] filed its motion to confirm the sale with

the Circuit Court — the Sheriff’s single notice mailed to the realty’s address had been returned to sender and as unable to forwarded [*sic*]” [Appellant’s Brief, p. 29; emphasis supplied]. Once again, there is nothing in the record to support a finding that “the Sheriff’s single notice mailed to the realty’s address had been returned to sender.” In the absence of admitting the document into evidence or at least declaring that it was taking judicial notice of it, the mere existence of the document titled “Sheriff’s Sale Register” in the court’s file does not provide proof of the matters contained within it [see argument above].

4. Mr. Bhatti failed to adduce *other* competent and substantial evidence that the Collector, Sheriff, or Purchaser had reason to know that he failed to receive any notice.

On pages 16 and 17 of his Brief, Mr. Bhatti argues that the trial court “agreed” that “the City could have ‘easily’ mailed notice to Mr. Bhatti’s actual residence at 3831 Potomac [*citing*, TR 14]. However, at page 14 of the Transcript, the trial judge opined (in an off-the-cuff colloquy with Mr. Bhatti’s counsel) that because Mr. Bhatti did live in the City, “you can find his name easily.” Yet, this cannot fairly be characterized as a finding by the Court that the City could ‘easily’ have sent notice to Mr. Bhatti’s City residence, **at 3831 Potomac**. Nevertheless, Mr. Bhatti insists that “the City knew, or at least should have known, that Mr. Bhatti’s actual residence was 3831 Potomoc, not 3243 Pennsylvania Avenue” [Appellant’s Brief, p. 17]. Once again, there is simply no competent and substantial evidence of record to support this assertion.

Mr. Bhatti contends that it is a fact that his applications for building and construction permits, allegedly filed with the Building Department of the city of St. Louis years before the tax sale notice, listed his address of 3831 Potomac. By extension, he then argues that the city “should have known” his residential address. Mr. Bhatti further argues that the knowledge of the city building department should be imputed to the city sheriff under ordinary agency principles. Yet, even assuming for the sake of argument that the Collector, Sheriff, or Purchaser had known of Mr. Bhatti’s residential address on Potomac, this does not by itself prove that they had reason to know the statutory notices sent to the Pennsylvania address would not be delivered to Mr. Bhatti.

Moreover, the record is devoid of any *evidence* regarding *any* alleged permit applications. On page 5 of Appellant’s Brief, in his Statement of Facts, Mr. Bhatti claims that in his applications for building permits allegedly submitted prior to the tax sale, he “provided the City with the address of his City residence, regarding which he was current on his real estate taxes – namely, 3831 Potomac” [*Citing*, “Tr 4, 13, 26, 32”]. However, Mr. Bhatti’s only citation to the record for the so-called “fact” of what is contained on these alleged building permit applications are to references of oral *argument* made by his counsel to the judge at the hearing. There is no testimony and no documents offered or received in evidence to prove this allegation. The trial court could not legally “take it on faith” that Mr. Bhatti applied for permits and placed his residence address on these applications. Nor can the applications attached to his pleadings as exhibits supply the evidence. *See, Haynes v.*

*Bohon, supra.*

Moreover, it would be unreasonable to require the Sheriff or the Collector of Revenue (both *County* offices) to search the records of the Building Department (a *City* office). *See, Foreclosure of Liens for Delinquent Land Taxes by Action in rem v. Parcels of Land Encumbered with Delinquent Tax Liens*, 190 S.W.3d 416, 422 (Mo.App.W.D. 2006) (holding that due process does not require a county to search its internal records to see if the landowner's or lienholder's address has changed).

On page 17 of his Brief, in his Argument, Mr. Bhatti further argues that because the alleged building permits (not the applications allegedly containing the correct address) were affixed to the window of the property, and because there was a For Sale sign in the yard, “the City knew, or should have known, that the realty was vacant.” The trial court properly found that: “[Mr. Bhatti’s] argument that the purchaser or State should have taken additional steps because of the permits affixed to the windows and/or because of the For Sale in the yard may have merit had there been evidence that the purchaser and/or State had some reason to believe that the delinquent taxpayer had not received the notice. No such facts were presented to the court.” [LF 64]. The existence of a For Sale sign does not prove that the mail was not regularly delivered to the property, occupied or vacant, during the period the notices were mailed; nor does it prove that the property was in fact unoccupied. Moreover, the trial court also properly characterized the alleged affixing of permits to the windows as *argument. Id.* When the applications were made, and how the permits were affixed, were mere allegations. Accordingly, there is simply no competent and substantial evidence to

support any finding on the issue.

On page 6 of Appellant’s Brief, Mr. Bhatti claims that after making repairs on the property in 2009, he applied for, and after a City inspection, received an occupancy permit [citing, TR 5, 14-15, 28; LF 62]. He then asserts that “[n]o prior occupancy permits had been issued” (suggesting that the city should have known the property was vacant and that therefore first-class mail would not be received by the owner) [citing, TR 10]. None of these citations to the record, however, point to any *evidence* that “no prior occupancy permits had been issued.” Then, on page 17 of Appellant Brief, Mr. Bhatti argues that “from October 2005 when Mr. Bhatti bought the realty until January 2009 – while the unpaid taxes leading to the tax sale had been accruing – no occupancy permit regarding the realty had been issued by the City, so the City knew, or should have known, that the realty was vacant.” This argument is also unsupported by any competent substantial evidence.

On page 18 of Appellant’s Brief, Mr. Bhatti argues that “the nature of [his] actions communicate to the public, ‘I own this house to sell it and have spent at least \$7,800.00 to fix it up. [citing LF 60-61]. I am selling this house and you can call my agent to see this house or buy it and she will contact me.’” [citing LF 56-58]. And what is contained on pages 56-58 and 60-61 of the Legal File? – the alleged building permits and a real estate listing summary attached as *exhibits* to Mr. Bhatti’s motion to set aside *that were never offered or received in evidence*.

Mr. Bhatti’s reliance on *Robinson v. Hanrahan*, 409 U.S. 38 (1972) and *Conseco Finance Ser. v. Mo. Department of Revenue*, 195 S.W.3d 410, 416 (Mo.banc 2006) is

misplaced. In both cases, there was a finding supported by the evidence that the state *knew* that it was sending notices to abandoned property or property at which the intended recipient would not receive mail. Such evidence is completely lacking in the case at bar. Likewise, in *Schwartz v. Day*, 780 S.W.2d 42 (Mo.banc1989), this Court acknowledged that when the state knows that notice by mail will be ineffective, more extensive forms of notice may be required. *Id.* at 44. But the Court also went on to hold as follows:

These scenarios place upon the collector a substantially greater duty than that envisioned by *Mullane* and *Mennonite* because they require the collector to ascertain whether the owner’s publicly recorded address is correct. The collector is not required to make “impracticable and extended searches . . . in the name of due process.” [*Citing, Mullane, supra, at 70 S.Ct. at 659*]. Nor is he “required to undertake extraordinary efforts to discover ... the whereabouts of [the owner].

*Schwartz, supra, at 44-45.*<sup>11</sup>

Though Mr. Bhatti’s allegations of fact may make for some interesting constitutional due process analysis, the evidence adduced fails to do so. Mr. Bhatti’s arguments are based upon unsupported claims and purported facts that were not adduced at the hearing on his

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<sup>11</sup> The Court in *Schwartz, supra*, also held that the taxpayer has a presumptive duty to preserve his property by contacting the Collector concerning taxes he knows he has failed to pay. *Id.* at 45.

(amended) motion to set aside the tax sale and confirmation judgment. The trial court held there was insufficient evidence to find that the mailed notices were returned undelivered or any other reason for the city or Purchaser to know that Mr. Bhatti failed to receive the mailed notices. Because the record supports this finding, the judgment should be affirmed.

**III. IN FURTHER RESPONSE TO THE APPELLANT’S POINT RELIED UPON, THE CIRCUIT COURT DID NOT ERR IN DENYING MR. BHATTI’S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE BECAUSE: (A) MR. BHATTI ABANDONED THIS ISSUE ON APPEAL IN THAT HE DID NOT INCLUDE SUCH ERROR AS A BASIS OF HIS APPEAL IN HIS POINT RELIED ON; AND (B) MR. BHATTI FAILED TO SHOW THAT HIS ALLEGED “NEWLY DISCOVERED EVIDENCE” WAS NOT AVAILABLE AT TRIAL AND COULD NOT HAVE BEEN OBTAINED IN TIME FOR TRIAL BY THE EXERCISE OF DUE DILIGENCE IN THAT MR. BHATTI DID NOT PLEAD FACTS ILLUSTRATING DUE DILIGENCE AND MR. BHATTI’S COUNSEL GAVE NO EXPLANATION ILLUSTRATING DUE DILIGENCE TO THE TRIAL COURT.**

On pages 24-26, in the Argument section of Appellant’s Brief, Mr. Bhatti argues that the circuit court erred in denying his motion for new trial. However, his “Point Relied On” assigns no error, on any ground, to this Court Order. Contentions that are not presented in the points to be argued in an appellate brief are abandoned and will not be considered on

appeal. Supreme Court Rule 84.04; *Hastings v. Coppage*, 411 S.W.2d 232, 235 (Mo.1967). See also, *Boten v. Brecklein*, 452 S.W.2d 86, 96 (Mo.1970), *Marshall v. City of Gladstone*, 380 S.W.2d 312, 314(1) (Mo.1964); *Ayres v. Keith*, 355 S.W.2d 914, 919(6) (Mo.1962). A point is not properly presented for review if it is advanced for the first time in the argument portion of the brief. *Fragar v. Glick*, 347 S.W.2d 385, 390(5) (Mo.1961). Accordingly, Mr. Bhatti's argument that the trial court erred by denying his motion for new trial has been abandoned.

The trial court is given broad discretion in ruling on motions for new trial, and the appellate courts will only interfere where there is an abuse of discretion. *Davis v. Illinois Terminal R. Co.*, 326 S.W.2d 78, 86-87 (Mo.1959); *Ward v. Goodwin*, 345 S.W.2d 215, 219 (Mo.1961). In general, the granting of a new trial on the ground of newly discovered evidence is not favored and rests within the sound discretion of the trial court. Before granting such a motion, the trial court must be convinced that the failure to procure the new evidence was not because of lack of diligence, the evidence is not cumulative, is material, and must be of such character to probably produce a different result in a new trial. *Davis, supra*.

Essentially, the "new evidence" proffered by Mr. Bhatti at the hearing on his motion for new trial consisted of envelopes that his trial counsel sent to the Pennsylvania address (the address displayed upon the records of the City Assessor), which were subsequently returned to her as undeliverable. These envelopes were mailed by Mr. Bhatti's counsel after

the judgment denying Mr. Bhatti's motion to set aside was denied.<sup>12</sup>

The trial court properly concluded that he failed to demonstrate that his alleged “newly discovered evidence” was not available at trial and could not have been obtained in time for trial by the exercise of due diligence [LF 85-87].<sup>13</sup> This is because Mr. Bhatti failed to plead or prove any *facts* showing due diligence in discovering or in adducing the “new” evidence set forth in his motion for new trial *before* the entry of the judgment denying his motion to set aside. *Id.* The trial court properly found that:

14. In his Motions, [Mr. Bhatti] makes no reference to any

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<sup>12</sup> Mr. Bhatti also attempted to adduce an affidavit of an employee of the US Postal Service in an *amended* motion for new trial, filed more than thirty (30) days after the entry of the Court's judgment denying the motion to set aside. Citing, *Greco v. Robinson*, 747 S.W.2d 730 (Mo.App.E.D.1988), *Morgan v. Wartenbee*, 569 S.W.2d 391 (Mo.App. W.D.1978), *Lloyd v. Garren*, 366 S.W.2d 314 (Mo.1963), and *Koenke v. Eldenburg*, 803 S.W.2d 68 (Mo.App.W.D. 1990), the trial court properly held that the amended motion was filed out of time and was a nullity in that a motion for a new trial may not be amended to add a new point after the expiration of time provided by the court rule.

<sup>13</sup> The trial court relied upon the following authority in so ruling: *Sims v. Burlington N. & Santa Fe Ry Co.*, 111 S.W.3d 454 (Mo.App. E.D. 2003); *Enos v. Ryder Auto. Operations, Inc.*, 73 S.W.3d 784 (Mo.App. E.D. 2002); *Pijanowski v. Pijanowski*, 272 S.W. 3d 321 (Mo.App. W.D. 2008); *Higgins v. Star Elec.*, 908 S.W.2d 897 (Mo.App. W.D. 1995).

facts illustrating due diligence in this matter. At the hearing, the Court repeatedly questioned [Mr. Bhatti's] counsel as to what steps she had undertaken at trial to discover said evidence. [Mr. Bhatti's] counsel gave no explanation as to why through due diligence she could not have discovered the evidence sooner.

[LF 86].

Albeit Mr. Bhatti *now* argues (in the Argument section of his Brief) myriad reasons why he used due diligence, or in the alternative why no diligence was required, he failed to make any showing of same to the trial court. Accordingly, there is no legal basis to convict the trial court of abusing its discretion in denying the motion for new trial.

### **CONCLUSION**

For all of the foregoing reasons set forth in Point I of its Argument, Purchaser prays that this honorable Court transfer the case to the Eastern District of the Missouri Court of Appeals. In the alternative, for all of the foregoing reasons set forth in Points II & III of its Argument, Purchaser prays that this honorable Court *affirm* any and all Judgments and/or Orders of the trial court appealed from herein.

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## RESPONDENT'S CERTIFICATIONS

1. The undersigned hereby certifies that on the \_\_\_\_ day of September, 2010, one hard-copy of the foregoing Brief and one copy on floppy disk were delivered, pursuant to Rule 84.06(g), by first-class U.S. Mail, postage prepaid, to:

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2. This brief complies with the limitations contained in Rule 84.06(b) in that it is within the word limitations set forth therein.

3. There are 9,910 words in this brief, prepared in proportional space type.

4. This brief was prepared by WordPerfect 11 computer software and has been scanned for viruses and is virus free.

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**APPENDIX**

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