

IN THE MISSOURI SUPREME COURT

SC92074

HARPAGON MO, LLC
Appellant,
v.
EDWARD L. BOSCH & NANCY Z. BOSCH
Respondents.

Original Proceeding:
Harpagon MO, LLC
v.
Edward L. Bosch & Nancy Z. Bosch,
7th Circuit Case No. 08CY-CV12913

Appeal:
WD72834

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is a quiet title action based on Appellant's Collector's Deed for Taxes, pursuant to a tax sale under R.S.Mo. Chapter 140. Appellant appeals the Judgment of the Circuit Court of Clay County, Missouri, 7th Circuit, wherein the trial court denied Plaintiff's Motion for Summary Judgment and granted Defendant's cross-Motion for Summary Judgment. Most facts are undisputed. The issue is whether Plaintiff or Defendant is entitled to judgment as a matter of law.

This action concerns whether Appellant's Notices to Respondents of the right to redeem certain real property after the county collector's tax sale complied with the notice requirements in R.S.Mo. Chapter 140. This action does not involve a challenge to the validity of a treaty or statute of the United States or a provision of the Constitution of the State of Missouri, or otherwise fall within the exclusive jurisdiction of the Missouri Supreme Court. Therefore, jurisdiction of this appeal is vested in the Missouri Court of Appeals. Mo. Const. Art. V, § 3.

Clay County, 7th Circuit, is within the territorial jurisdiction of the Missouri Court of Appeals, Western District, pursuant to R.S.Mo. § 477.050 - 070.

Upon Respondents' post-decision Application, this Court granted Transfer December 20, 2011.

STATEMENT OF FACTS¹

Prior to August, 27, 2007, real property taxes had become delinquent on a parcel fully described as “Sherwood Estates 3rd Plat, Lot 32, Block 10” and commonly known as 3535 N.E. 49th Terrace, Kansas City, Clay County, Missouri (“the Property”). LF 26.

Appellant’s predecessor in interest, Sunrise Atlantic, LLC (“Sunrise”), was the successful bidder at a Clay County tax sale involving the Property, which was a second offering. Tr.

4. Sunrise was awarded a Certificate of Purchase evidencing the transaction. LF 26.

Vesta Holdings, acting as agent for Sunrise, sent to Respondents Edward and Nancy Bosch (collectively “Respondents”) notices of the right to redeem (“Notices”). LF

31-34. Respondent Edward Bosch actually received the Notices sent to himself and Nancy Bosch, and signed the return receipts on July 28, 2008. LF 34; 43, ¶4.² The

Property was not redeemed on or before November 3, 2008, the date on which the Property was conveyed by Collector’s Deed to Appellant. LF 33.

Appellant filed its Petition to Quiet Title on December 31, 2008 in Clay County, Missouri, 7th Circuit. On cross-motions for summary judgment, the trial court ruled in favor of Respondents, stating Appellant or its predecessor in interest did not comply with R.S.Mo. § 140.405. LF 67. Appellant sought reversal of the trial court’s judgment of

¹ References to Legal File page numbers are in the format “LF ____”. References to the Transcript are in the format “Tr. ____”. References to the Appendix are “A__”.

² In reality Appellant sent numerous Notices, but only the Notices to Respondents were challenged.

March 25, 2010. LF 66 – 67. The Western District reversed, and remanded the case to the trial court for further proceedings. This Court granted transfer December 20, 2011.

POINTS RELIED ON

POINT ONE

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE, WHILE THERE IS NO GENUINE ISSUE OF MATERIAL FACT, RESPONDENTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT APPELLANT TIMELY NOTIFIED RESPONDENTS OF A PENDING RIGHT TO REDEEM AND RESPONDENTS FAILED TO REDEEM THE PROPERTY.

A. Standard of Review

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. 1993).

B. Tax Sale Law Overview

R.S.Mo. Chapter 140

C. Appellant's Notices to Respondents were timely.

Boston v. Williamson, 807 S.W.2d 216, 218 (Mo. App. W.D. 1991).

D. Appellant's Notices notified Respondents of a pending right to redeem.

United Asset Mgmt. Trust Co. v. Clark, 332 S.W.3d 159 (Mo. App. W.D. November 30, 2010).

POINT TWO

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT APPELLANT TIMELY NOTIFIED RESPONDENTS OF A PENDING RIGHT TO REDEEM AND RESPONDENTS FAILED TO REDEEM THE PROPERTY.

A. Standard of Review

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. 1993).

B. Organization of Brief

C. Tax Sale Law Overview

R.S.Mo. Chapter 140

D. Appellant's Notices to Respondents were timely.

Boston v. Williamson, 807 S.W.2d 216, 218 (Mo. App. W.D. 1991).

E. Appellant's Notices notified Respondents of a pending right to redeem.

United Asset Mgmt. Trust Co. v. Clark, 332 S.W.3d 159 (Mo. App. W.D.

November 30, 2010).

ARGUMENT

I. The Trial Court erred in granting Respondents’ Motion for Summary Judgment because, while there is no genuine issue of material fact, Respondents are not entitled to judgment as a matter of law, in that Appellant timely notified Respondents of a pending right to redeem and Respondents failed to redeem the Property.

- A. Standard of Review.
- B. Tax Sale Law Overview.
- C. Appellant’s Notice was timely.
- D. Appellant’s Notices notified Respondents of a pending right to redeem.

A. Standard of Review.

“To be entitled to summary judgment under [Mo. R. Civ. P.] Rule 74.04, the movant must show there is no genuine dispute as to the material facts, the movant is entitled to summary judgment as a matter of law.” *Childress Painting and Assoc., Inc. v. John Q. Hammons Hotels Two, L.P.*, 106 S.W.3d 558, 561 (Mo. App. W.D. 2003) *citing* *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993). “When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.” *ITT*, 854 S.W.2d at 376. The propriety of summary judgment is a question of law reviewed *de novo* on appeal. *Id.*

B. Tax Sale Law Overview.

Tax sales are governed by R.S.Mo. Chapter 140. Certificates representing the State of Missouri's lien for real property taxes on delinquent parcels are sold on the fourth Monday in August of each year. *See* R.S.Mo. § 140.150.1. The county collector typically sends notice to known owners, and publishes statutory notice, at least fifteen days prior to the tax sale. *See* R.S.Mo. § 140.170.1. The collection of taxes through this mechanism amounts to a taking of property interests by state action, implicating due process.

Legal title does not vest in the purchaser at the tax sale until the period for redemption has expired *and* he or she consummates the sale by meeting particular requirements and exercising the right to be issued, and have recorded, a Collector's Deed. *Ndegwa v. KSSO, LLC*, --- S.W.3d ---, 2011 WL 4790633 at 4 (Mo. App. E.D. October 11, 2011). For certificates purchased at first and second offerings of a parcel, there is an automatic one-year *statutory* period of redemption. *See* R.S.Mo. § 140.340.1. There is a separate *notice* period of redemption that may exceed the automatic one year depending on how and when the tax sale purchaser consummates the sale. *See* discussion in Section I(C), *infra*.

By statute the State of Missouri has delegated to the purchaser its duty of providing notice prior to final seizure by state action. Therefore, before a tax sale purchaser can be vested with legal title, he must send notice to all holders of publicly recorded interests of their right to redeem. *See* R.S.Mo. § 140.405. The notice of the right to redeem, then, must comply with applicable statutes and meet due process

requirements, as both are implicated. Considerable confusion and litigation has arisen concerning the timing and contents of these notices. *See discussion in United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159 (Mo. App. W.D. November 30, 2010).

Two issues, inextricably intertwined, emerge: (1) *when* a notice must be sent, and (2) *what time component, if any*, the notice must state. The structure of R.S.Mo. Chapter 140, when read and harmonized as a whole, plainly provides a practical flexibility as to *when* a notice must be sent, and accordingly makes no definite provision as to *what time component* the notice must state. Number 1 (*when*) is primarily a matter of statutory compliance. Number 2 (*what time component, if any*) on the other hand, because the statute is silent, is a matter of Constitutional sufficiency. The resolution of *when* provides insight and direction into the resolution of *what time component, if any* must be stated.

Generally, R.S.Mo. § 140.405.2 states that the tax sale purchaser must “notify” the recipient of “such person’s right to redeem the property” and the same must be sent “[a]t least ninety days prior to the date when a purchaser is authorized to acquire the deed.” Case law in the Eastern District has stated R.S.Mo. § 140.405.2 requires very specific notice elements, namely: (1) a notice must be sent ninety days prior to the one-year anniversary of the tax sale (*when*), and (2) there must be a time component to the notice, which must state the recipient has one year from the date of the tax sale to redeem (*what time component, if any*). *Ndegwa*, 2011 WL 4790633, *citing prior Eastern District opinions*. Neither of these requirements appear in the plain language of Chapter 140; both contradict its very structure.

The Western District fully addressed these issues, including the historical evolution of § 140.405 and the case law interpreting it, in a recent 25-page opinion that does not follow that line of cases from the Eastern District. *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159 (Mo. App. W.D. November 30, 2010). The *Clark* Court found Clark’s Notice sufficient to notify its recipient of the opportunity to be heard, and therefore sufficient to extinguish the recipient’s lien upon failure to redeem, even though the Notice was sent after ninety days prior to the one-year anniversary of the tax sale (*when*) and stated a ninety-day time component as to when the recipient must respond, instead of stating they must redeem within one year from the date of the tax sale (*what time component, if any*). *Id.* at 161. The *Clark* Court, stated:

“... § 140.405 is the product of an evolving understanding of the type of notice that due process requires in order for the government to extinguish the interests of landowners, lien holders, and others when seizing private property to enforce tax laws ...” *Id.* at 166.

Clark is the seminal case in the Western District and should be adopted by this Court to be enforced statewide as to *when* the notice must be sent. So long as the Deed is recorded after the automatic one-year statutory redemption period has expired and at least ninety days after the notice, the Notice is timely.³ *Id.*

³ Of course, the Deed must be recorded prior to the two-year time limit on the tax certificate’s viability under § 140.410, so the notice must also be calculated to leave the

As to *what time component, if any*, must be stated in a Notice, neither the Western District nor the Eastern District is entirely correct. A portion of the holding in *Ndegwa* is correct, in that a notice must include a time component to communicate “pendency” of an action, as opposed to mere “existence” of the right to redeem as *Clark* suggests.

However, the time component to be included depends on *when* the notice is sent. If sent ninety days prior to the one-year anniversary of the tax sale, the notice should use one-year language to communicate “pendency.” However, if sent at any point after ninety days prior to the one-year anniversary of the tax sale, the notice should use ninety-day language to communicate “pendency.”

Here, Appellant’s Notice meets these standards and should be validated. The trial court erred in granting Respondents’ Motion for Summary Judgment because Respondents were not entitled to judgment as a matter of law. Appellant’s Collector’s Deed is valid because the Notices sent to Respondents were effective under R.S.Mo. § 140.405 and Constitutional due process. The trial court’s judgment (*see* A1) should be reversed.

C. Appellant’s Notice was timely.

Appellant’s Notices were routine, sent in its regular course of business, and were timely. Careful consideration was paid as to when the Notices were sent.

purchaser time for application to the collector and recording of the deed. *Harpagon v. Bosch*, 2011 WL 3802141 at 4.

R.S.Mo. § 140.405 provides *when* a notice of the right to redeem must be sent: “At least ninety days prior to the date when a purchaser is authorized to acquire the deed ...”

Reasonable minds have differed as to the meaning of this clause in R.S.Mo. § 140.405, and therefore it can be considered ambiguous as to when a notice must be sent. It is appropriate to apply the rules of statutory construction. *Kelly v. Marvin’s Midtown Chiropractic, LLC* 351 S.W.3d 833, 836 (Mo. App. W.D. 2011). A primary tenet of statutory construction is that each word must be interpreted in accordance with its “plain and ordinary meaning.” *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. 2005). “All consistent statutes relating to the same subject are construed together as though constituting one act,” and “[t]he rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions.” *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007) quoting *State Ex Rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991).

Reading § 140.405 in conjunction with R.S.Mo. § 140.340.1, *Ndegwa* states the landowner has one year to redeem the property, and hence the purchaser is authorized to acquire the deed exactly one year after the date of the tax sale. 2011 WL 4790633. *Ndegwa* further states, “[o]ne year from the date of the tax sale, the tax sale purchaser is entitled to redeem his certificate of purchase with the Collector, and take title to the property *if he has completed the list of other required tasks* set forth in the statutory scheme.” *Id.* at 8 (emphasis added). The sentence is inherently illogical – the purchaser

is not authorized to acquire the deed unless and until he has completed those other required tasks.

Despite the apparent logical contradiction, *Ndegwa* concludes that the “*when*” is answered – the purchaser must send the notice ninety days before the expiration of the one-year redemption period. *Id.* at 6, citing *CedarBridge v. Eason*, 293 S.W.3d 462, 465. The analysis is flawed. It is oversimplified, too narrow, and an incomplete understanding of Chapter 140 as a whole.

R.S.Mo. § 140.405 should be read in *pari materia* not only with § 140.340.1, but the other subsections of § 140.340 and the entirety of Chapter 140. When employing this approach, a far different result emerges: there are two separate redemption periods in operation: (1) the automatic *statutory* period of redemption which cannot be altered by any act of the State or the tax sale purchaser; and (2) the *notice* period of redemption which may extend the time for redemption beyond one year, depending on when the tax sale purchaser meets all requirements for issuance of a Collector’s Deed.

Section 140.340.1 states an interest-holder “may redeem [it’s interest] at ***any time during the one year next ensuing***” (emphasis added). The plain language of § 140.340.1 is not indicative of an absolute, fixed deadline, but rather a minimum time frame in which any interest-holder may redeem “at any time,” a right that is absolute. This leaves open the possibility that the time for redemption can extend beyond the automatic one-year period following the tax sale.

The one-year anniversary of the tax sale is not a “fixed date” upon which the purchaser is authorized to acquire a deed. Other requirements must be met before a

purchaser is “authorized to acquire the deed.” These additional requirements demand careful attention at a significant time and cost to the tax sale purchaser, and must not be overlooked. Those include, but may not be limited to:

1. Purchaser must send notice to all holders of publicly recorded interests. § 140.405.
2. Purchaser must notify the Collector by affidavit that all notices have been sent. § 140.405.⁴
3. Purchaser must pay all subsequent city and county taxes that have become due on the property. § 140.440.
4. Purchaser may need to provide paid tax receipts evidencing payment of subsequent taxes, depending on internal policies of each county collector.
5. Now, Purchaser must conduct and produce a valid title search report within 120 days of its application for a deed. § 140.405.1.⁵

⁴ An affidavit to the collector remains a requirement even after the recent amendments. However it is filed after the time for response to the notices has lapsed. Under the old law, the affidavit was filed at the time the notices were sent out. It was this affidavit that began the *notice* period of redemption. Now, the notices themselves begin the *notice* period of redemption. For immediate purposes here, the difference is immaterial.

⁵ This requirement was not part of the law during the time when the facts of this case were occurring. It is cited here only to demonstrate yet another requirement to consummate a tax sale and get a deed.

6. Purchaser must produce the original Certificate of Tax Sale Purchase. § 140.420.
7. Purchaser may be required to pay an additional fee necessary for recording the Collector's Deed. § 140.410.
8. Purchaser must have a deed recorded within two years from the date of the tax sale, else his interest ceases to be a lien. § 140.410.

Additionally, in determining the meaning of § 140.405, this Court must consider in *pari materia* the following sections of Chapter 140 that plainly indicate the redemption period can and does exceed the automatic one-year statutory period of redemption (in relevant parts, emphasis added, and its relevancy stated in brackets below each):

§ 140.310.1 – regarding possession by purchaser

The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time **after one year from the date of sale** be entitled to the immediate possession of the premises so purchased **during the redemption period** provided for in this law ...

[contemplates a purchaser taking possession during the redemption period but after one year has expired]

§ 140.340.4 – regarding interest on purchase price

In case the party purchasing said land, his heirs or assigns fails to take a tax deed for the land so purchased within **six months after the expiration of the one year next following the date of sale, no interest shall be charged or collected from the redemptioner after that time.**

[interest on the purchase price accrues during the automatic one year, and continues for another six months, clearly indicating a right to redeem extending beyond one year]

§ 140.350 – regarding redemption by disabled persons

Infants and incapacitated and disabled persons as defined in chapter 475 may redeem any lands belonging to them sold for taxes, **within one year after the expiration of such disability**, in the same manner as provided in section 140.340 for redemption by other persons.

[a period of redemption can extend well beyond one year if the recipient is disabled or incapacitated]

§ 140.360 – regarding compensation for improvements

1. In the case of any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes ... and the land ... shall be redeemed ... the premises shall not be restored to the person redeeming,

until he shall have paid or tendered to the adverse party the value of such improvements ...

2. No compensation shall be allowed for improvements made before the expiration of one year from the date of sale for taxes.

[improvements can become part of the redemption price, but not if the improvements are made during the automatic one year redemption period; only compensable if done during the extended *notice* redemption period]

§ 140.410 – regarding the viability period of the tax sale certificate

“... it is hereby made the duty of such purchaser ... to cause a deed to be executed and placed on record in the proper county within two years from the date of said sale ...”

[contemplating a purchaser’s lien on the property extending beyond the automatic one-year period, lasting up to two years]

As to *when* a notice must be sent, *Ndegwa* states simply that a landowner has a year to redeem, and therefore to be effective the notice must be sent ninety days prior to that date, citing *obiter dictum* from prior Eastern District cases. *See Harpagon MO, LLC v. Bosch*, --- S.W.3d ---, 2011 WL 3802141 at 2 (Mo. App. W.D. August 30, 2011). *Ndegwa*’s holding on this point would render the above-cited statutes meaningless. The legislature is presumed not to have intended a meaningless act. *Ndegwa*, 2011 WL

4790633 at 11 quoting *Missouri ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123 (Mo. App. E.D. 2002).

In fact there are two separate redemptions periods: an automatic *statutory* period of one year and a separate *notice* period which may overlap but in every case would extend beyond one year. In *Boston v. Williamson*, 807 S.W.2d 216, 218 (Mo. App. W.D. 1991), the Court observed:

... there is no fixed date on which the purchaser at a delinquent tax sale is authorized to receive a deed ... It is the date chosen by the purchaser on which he elects to acquire the deed which triggers the ninety day notice. When he chooses the date the purchaser is obligated to give notice at least ninety days in advance of the date chosen to acquire the deed.⁶

In addition the Missouri Supreme Court has held that the right to redeem continues in the redemptioner until the collector's deed is recorded. *Wetmore v. Berger*, 188 S.W.2d 949 (Mo. 1945)⁷. Therefore, the *Wetmore* Court reasons, the statutory scheme's clear implication is that a tax certificate purchaser will apply for a deed at some point after the

⁶ Similarly, the *Clark* Court notes it is entirely possible that the period of redemption extends beyond the expiration of the one year period following the date of the sale. 2010 WL 4823239 at 4.

⁷ *Wetmore* analyzed a prior version of R.S.Mo. Chapter 140, which had some different time periods involved. The analysis remains relevant despite the intervening amendments to the law.

expiration of the automatic statutory period of redemption. *Accord Clark*, 332 S.W.3d at 164 (“... the period of redemption extends beyond the expiration of the one year period following the date of the sale and continues until the purchaser actually secures the collector’s deed”).

Moreover it would be patently unjust to allow interest to accrue for **six months** after the one-year anniversary of the sale date if the potential redemptioner were barred from redeeming during that period. *Wetmore*, 188 S.W.2d at 953; § 140.340.4.

The proposition that a purchaser must send the Notice at least ninety days prior to the expiration of the automatic one-year statutory period of redemption stems primarily from dicta in *CedarBridge* and now re-emphasized in *Ndegwa*. *CedarBridge v. Eason*, 293 S.W.3d 462 (Mo. App. E.D. 2009); *Ndegwa* 2011 WL 4790633. It is oversimplified to the point of being inaccurate. It fails to acknowledge the overall structure of R.S.Mo. Ch. 140, as well as the *Wetmore*, *Boston* and *Clark* opinions, which recognize and provide for the likelihood that the overall time to redeem will exceed one year in any given case.

During the automatic *statutory* period, no person may alter the landowner’s right to redeem. However, during the extended *notice* period, the purchaser endeavors to consummate the sale⁸. The end of the *notice* period of redemption is uncertain, as it

⁸ The purchaser may begin efforts toward consummation during the automatic one-year period of redemption such that the two separate redemption periods overlap. Often, though not in this case, the purchaser waits the entire year, when there is a greater

depends on when the tax sale purchaser meets the requirements and the Deed is recorded⁹. The State has delegated the duty of sending notice; therefore the purchaser must confirm to the collector it has been accomplished. *See* R.S.Mo. § 140.410.

The structure of Chapter 140 is highly pragmatic, and deliberately so. It is flexible as to *when* a notice may be sent. This best weighs the competing interests of (a) incentivizing tax sale bidding, and thereby promoting the State of Missouri's interest in recapturing real property tax receivables; and (b) the duty of the landowner to preserve his property. In every case the redemptioner's right to redeem will extend beyond the automatic one-year statutory redemption period because the one year period following the tax sale is an absolute right. Extra time to redeem only benefits the landowner and other lienholders.

Here, Appellant's Notices (*see* A3) were timely. The tax sale was August 27, 2007. The Notices were sent July 25, 2008. The automatic one-year statutory period of redemption was set to lapse August 27, 2008. The Notices informed Respondents they had ninety days to redeem the Property, which would have been up to and including

likelihood the property has been abandoned by the owners and lienholders, before undertaking the effort and expense of sending notices and meeting the other numerous requirements.

⁹ The date of recording also depends on how long it takes a Collector's office to process the request and get the deed drafted, signed and recorded. No purchaser can predict the exact date *ex ante* (at the time notices are sent).

October 23, 2008. Respondents received the Notices July 27, 2008. Respondents failed to redeem. Appellant was conveyed the Property by Collector's Deed on November 3, 2008, one hundred and one (101) days after the Notices. LF 33. Appellant's Collector's Deed was recorded well before the viability of their certificate of purchase expired, which would have occurred on August 27, 2009.

The fact that the Notices were not sent prior to ninety days before the expiration of the automatic one-year statutory redemption period is immaterial. Respondents never redeemed the Property prior to recording of the Collector's Deed. Appellant's Notices were timely.

D. Appellant's Notices notified Respondents of a pending right to redeem.

Appellant's Notices were routine, sent in its regular course of business, and were timely. Careful consideration was paid to the contents of the Notices, including *what time component, if any* should be stated. Because Appellant's Notice notified Respondents of a pending right to redeem, the Notices were statutorily and constitutionally sufficient.

Two sources of law control the outcome of this question: Missouri statutes and due process. As to Missouri statutes, § 140.405 requires that a recipient be notified of the **existence of a right to redeem** the property. *Clark*, 332 S.W3d 159, 171. No other specific details are required by the plain language. *See Id.* (“§ 140.405 nowhere provides that the notices required by the statute must say anything other than the recipient has a ‘right to redeem’”).

As to due process, the analysis is more complex. *Clark* and *Ndegwa* provide a sufficient background on due process, applied specifically to the issue of *what time component, if any*, must be stated in a tax sale notice. Both cases are considered in their chronological order.

In *Clark*, Mr. and Mrs. Clark purchased a tax sale certificate and sent a notice to interest holders stating:

YOU NEED TO CONTACT THE CASS COUNTY COLLECTORS
OFFICE WITHIN THE 90 (NINETY) DAYS FROM THE DATE OF
THIS LETTER TO REDEEM THIS PROPERTY OTHERWISE I WILL
FILE FOR THE COLLECTOR’S DEED. *United Asset Management Trust
Company v. Clark*, 332 S.W.3d 159.

Defendant United Asset Management Trust Company (“Trust”), a party entitled to notice, challenged the Clarks’ notice. Trust argued the notice incorrectly stated Trust had ninety days from the date of the notice to redeem, and failed to state that Trust would be “forever barred from redeeming the property.” 332 S.W.3d at 163. After bench trial, the Court ruled in favor of the Clarks, finding the notice sufficient to extinguish underlying liens after expiration of the applicable redemption periods.¹⁰ *Id.*

¹⁰ *Clark* involved a complex issue of whether notices were properly mailed to the correct “last known publicly available address” because the addressee never actually received the notice. There is no similar issue in this case.

Clark turns to the due process analysis at page 173, stating the “right to meaningful notice extends to actions affecting property interests in a variety of circumstances ...” Tax sales to enforce state tax laws undoubtedly implicate due process. The general rule is that “parties whose rights would be affected by a tax sale be afforded notice reasonably calculated under all of the circumstances to apprise them of the pendency of the action.” *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The touchstone is notification that “the matter is pending,” not that “some particular step must be taken or that certain procedure be followed ...” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The recipient of a due process notice is not entitled to precise legal advice about what they might or should do. *See e.g. State v. Goodbar*, 297 S.W.2d 525, 528 (Mo. 1957); *accord Atkins v. Parker*, 472 U.S. 115 (1985) (“The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny.”); *quoted in City of West Covina v. Perkins*, 525 U.S. 234 (1999). A recipient “must be held to a knowledge of the law.” *Bishop v. Bd. of Educ. of Francis Howell Sch. Dist.*, 575 S.W.2d 827, 829 (Mo. App. E.D. 1978).

Therefore *Clark* holds, “... there is no due process requirement to inform those receiving notice of the specific time limits applicable for redemption, the specific procedures that must be followed, or any other specific details, nor is there any such requirement in § 140.405.” *Clark*, 332 S.W.3d at 175.¹¹

¹¹ *Clark* acknowledges the notice sent in that case is “not the model for compliance ...”

Clark stated, “[t]he fact that the notice stated that [Trust] had ninety days in which to redeem the property is of no consequence,” at least in part because the Clarks’ collector’s deed was recorded *exactly* ninety days after the date of the letter and therefore was not misleading. 332 S.W.3d at 175.

Ndegwa disagrees and distinguishes *Clark*’s due process cases. The *Ndegwa* notice stated, in relevant part:

... the Missouri Status [sic] afford you the opportunity to redeem and/or otherwise protect your interest. Be further advised, that this opportunity will be available for a period of not less than 90 days from the date of this letter ... it is possible that the period of redemption may exceed the 90 day period described in this notice. This indication ... is not brought to your attention as an inducement for you to expect an extended period ... If you fail to redeem this property within the redemption period, you will be forever barred from redeeming the property. *Ndegwa*, 2011 WL 4790633 at 2.

This notice was found to be insufficient for failure to use “one year” language regarding the redemption period (discussed Section C, above), and because the *Ndegwa* Court draws a distinction between notifying the recipient of the “pendency” of an action versus the “existence” of an action, holding a tax sale notice must include a time component. 2011 WL 4790633 at 8. Recall *Clark* does not require statement of any time component to comply with the statute or due process.

Ndegwa comes to a conclusion that can be broken down into two separate and distinct Subparts: (1) a notice “must include a time component to comport with due process”; and (2) the time component to be included is provided by Missouri statute – one year.

Subpart Two deals with *when* a notice must be sent. *Ndegwa* misstates Missouri law. *Boston* and *Clark* correctly state the law as discussed in Section C, *supra*.

Subpart One deals with *what time component, if any* must be stated in the notice. This is a critical distinction because the due process cases support the conclusion drawn by *Ndegwa* in Subpart One. The cases cited by *Clark* use a derivative of the word “pendency” as opposed to “existence,” and that distinction is important in a due process analysis. See *Menonite*, 462 U.S. 791 (uses the word “pendency”); *Ndegwa* at 9 (“the seriousness, scope and permanency of the taking” are all greater in tax sale cases). *Ndegwa* holds, in part, that a notice “must include a time component to comport with due process” and the same can be accomplished without being so precise or specific that it constitutes legal advice. 2011 WL 4790633 at 8. *Ndegwa*’s insight is of great value in this regard.

Therefore the rule to be followed in Missouri tax sale notices as to *what time component, if any*, must be stated can be summarized as follows:

1. To comply with Missouri statute, the inclusion of a time component is not required. *Clark*, 332 S.W.3d 159.

2. To comply with due process, a general time component that is not so specific or precise so as to constitute legal advice, must be stated. *Ndegwa*, 2011 WL 4790633.
3. The time component to be stated depends on *when* the notice is sent:
 - a. if sent prior to ninety days before the automatic one-year period of redemption, one year language is sufficient to communicate pendency;
 - b. if sent anytime after ninety days before the automatic one-year period of redemption, ninety-day language is sufficient to communicate pendency.

These Constitutional rules must be applied at the time notices are sent because the “constitutionality of a particular procedure for notice is assessed *ex ante* (“before the event”), rather than *post hoc* (“after this”). *Clark*, 332 S.W.3d at 181 *citing Jones v. Flowers*, 547 U.S. 220, 231 (2006).

In this case, Appellant’s Notice meets the requirements of due process because it states a generally accurate time component that communicates “pendency” of the action, without rising to the level of being legal advice: “This letter is sent to you as Notice that you will have 90 days to redeem said property. If you fail to redeem the property by said date you will be forever foreclosed and barred from redemption.” A3. *Ex ante*, this is the best information a tax sale purchaser can give because the precise date of recording the Collector’s Deed is impossible to project. The date of recording depends on numerous factors, one of which is the expediency of the collector’s office in processing the matter,

which are beyond the tax sale purchaser's knowledge when sending notices three months prior.

This case is closely analogous to *Clark*. 332 S.W.3d 159 (2010). Appellant's Notices here appropriately informed Respondents that they had a pending right to redeem. A3.

To the extent the Notices here are distinguishable from *Clark*, the significant distinctions favor Appellant. For example, whereas the *Clark* Notice said nothing of being forever barred and foreclosed, Appellant's Notices here stated that Respondents would be forever barred from redemption if Respondents did not redeem. A3. Whereas the *Clark* Notice never was received, there is no issue in this case that Respondents actually received the Notices. LF 34. These distinctions from the facts in *Clark* merely simplify the analysis here.

Unlike *Clark*, Appellant's Collector's Deed was not recorded exactly ninety days from the date of the notice. It was 101 days, which is "at least ninety days". R.S.Mo. § 140.405.2. *Ex ante*, the exact date of recording cannot be predicted. The extra days merely afford the recipient more *process* than is *due*: that is, more time to redeem. The ninety day language used is a generally accurate statement that communicates pendency while not rising to the level of legal advice. *Ndegwa*, 2011 WL 4790633 at 8. This is the best a tax sale purchaser can do *ex ante*. It is not misleading. *Harpagon v. Bosch*, 2011 WL 3802141 at 4.

There is no question the Notices were received by Respondents. No redemption of the property was attempted. Because Appellant's Notices notified Respondents of a

pending right to redeem, the Notices were statutorily and constitutionally sufficient. Appellant's Collector's Deed is valid. Respondents are not entitled to judgment as a matter of law, and the Judgment of the trial court (A1) should be reversed.

II. The Trial Court erred in denying Appellant's Motion for Summary Judgment because there is no genuine issue of material fact and Appellant is entitled to judgment as a matter of law, in that Appellant timely notified Respondents of a pending right to redeem and Respondents failed to redeem the Property.

- A. Standard of Review.
- B. Organization of Brief.
- C. Tax Sale Law Overview.
- D. Appellant's Notices were timely.
- E. Appellant's Notices notified Respondents of a pending right to redeem.

A. Standard of Review.

"To be entitled to summary judgment under [Mo. R. Civ. P.] Rule 74.04, the movant must show there is no genuine dispute as to the material facts, the movant is entitled to summary judgment as a matter of law." *Childress Painting and Assoc., Inc. v. John Q. Hammons Hotels Two, L.P.*, 106 S.W.3d 558, 561 (Mo. App. W.D. 2003) citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo.

1993). “When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.” *ITT*, 854 S.W.2d at 376. The propriety of summary judgment is a question of law reviewed *de novo* on appeal. *Id.*

B. Organization of Brief.

Appellant brings two Points on appeal. First, Respondents were not entitled to judgment as a matter of law and Respondents Motion for Summary Judgment should have been denied. Second, for the same reasons, Appellant is entitled to judgment as a matter of law and Appellant’s Motion for Summary Judgment should have been granted. Therefore, the argument in this section is substantially similar to Point One.

C. Tax Sale Law Overview

Tax sales are governed by R.S.Mo. Chapter 140. Certificates representing the State of Missouri’s lien for real property taxes on delinquent parcels are sold on the fourth Monday in August of each year. *See* R.S.Mo. § 140.150.1. The county collector typically sends notice to known owners, and publishes statutory notice, at least fifteen days prior to the tax sale. *See* R.S.Mo. § 140.170.1. The collection of taxes through this mechanism amounts to a taking of property interests by state action, implicating due process.

Legal title does not vest in the purchaser at the tax sale until the period for redemption has expired *and* he or she consummates the sale by meeting particular

requirements and exercising the right to be issued, and have recorded, a Collector's Deed. *Ndegwa*, 2011 WL 4790633 at 4. For certificates purchased at first and second offerings of a parcel, there is an automatic one-year *statutory* period of redemption. *See* R.S.Mo. § 140.340.1. There is a separate *notice* period of redemption that may exceed the automatic one year depending on how and when the tax sale purchaser consummates the sale. *See* discussion in Section I(C), *infra*.

By statute the State of Missouri has delegated to the purchaser its duty of providing notice prior to final seizure by state action. Therefore, before a tax sale purchaser can be vested with legal title, he must send notice to all holders of publicly recorded interests of their right to redeem. The notice of the right to redeem, then, must comply with applicable statutes and meet due process requirements, as both are implicated. Considerable confusion and litigation has arisen concerning the timing and contents of these notices. *See* discussion in *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159 (Mo. App. W.D. November 30, 2010).

Two issues, inextricably intertwined, emerge: (1) *when* a notice must be sent, and (2) *what time component, if any*, the notice must state. The structure of R.S.Mo. Chapter 140, when read and harmonized as a whole, plainly provides a practical flexibility as to *when* a notice must be sent, and accordingly makes no definite provision as to *what time component* the notice must state. Number 1 (*when*) is primarily a matter of statutory compliance. Number 2 (*what time component, if any*) on the other hand, because the statute is silent, is a matter of Constitutional sufficiency. The resolution of *when* provides insight and direction into the resolution of *what time component, if any* must be stated.

Generally, R.S.Mo. § 140.405.2 states that the tax sale purchaser must “notify” the recipient of “such person’s right to redeem the property” and the same must be sent “[a]t least ninety days prior to the date when a purchaser is authorized to acquire the deed.” Case law in the Eastern District has stated R.S.Mo. § 140.405.2 requires very specific notice elements, namely: (1) a notice must be sent ninety days prior to the one-year anniversary of the tax sale (*when*), and (2) there must be a time component to the notice, which must state the recipient has one year from the date of the tax sale to redeem (*what time component, if any*). *Ndegwa*, 2011 WL 4790633 *citing prior Eastern District opinions*. Neither of these requirements appear in the plain language of Chapter 140; both contradict its very structure.

The Western District fully addressed these issues, including the historical evolution of § 140.405 and the case law interpreting it, in a recent 25-page opinion that does not follow that line of cases from the Eastern District. *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159 (Mo. App. W.D. November 30, 2010). The *Clark* Court found Clark’s Notice sufficient to notify its recipient of the opportunity to be heard, and therefore sufficient to extinguish the recipient’s lien upon failure to redeem, even though the Notice was sent after ninety days prior to the one-year anniversary of the tax sale (*when*) and stated the ninety-day time component as to when the recipient must respond, instead of stating they must redeem within one year from the date of the tax sale (*what time component, if any*). *Id.* at 161. The *Clark* Court, stated:

“... § 140.405 is the product of an evolving understanding of the type of notice that due process requires in order for the government to extinguish

the interests of landowners, lien holders, and others when seizing private property to enforce tax laws ...” *Id.* at 166.

Clark is the seminal case in the Western District and should be adopted by this Court to be enforced statewide as to *when* the notice must be sent. So long as the Deed is recorded after the automatic one-year statutory redemption period has expired and at least ninety days after the notice, the Notice is timely.¹² *Id.*

As to *what time component, if any*, must be stated in a Notice, neither the Western District nor the Eastern District is entirely correct. A portion of the holding in *Ndegwa* is correct, in that a notice must include a time component to communicate “pendency” of an action, as opposed to mere “existence” of the right to redeem as *Clark* suggests.

However, the time component to be included depends on *when* the notice is sent. If sent ninety days prior to the one-year anniversary of the tax sale, the notice should use one-year language to communicate “pendency.” However, if sent at any point after ninety days prior to the one-year anniversary of the tax sale, the notice should use ninety-day language to communicate “pendency.”

Here, Appellant’s Notices meet these standards and should be validated. The trial court erred in denying Appellant’s Motion for Summary Judgment because Appellant is

¹² Of course, the Deed must be recorded prior to the two-year time limit on the tax certificate’s viability under § 140.410, so the notice must also be calculated to leave the purchaser time for application to the collector and recording of the deed. *Harpagon v. Bosch*, 2011 WL 3802141 at 4.

entitled to judgment as a matter of law. Appellant's Collector's Deed is valid because the Notices sent to Respondents were effective under R.S.Mo. § 140.405 and Constitutional due process. Judgment for Appellant should be entered.

D. Appellant's Notices were timely.

Appellant's Notices were routine, sent in its regular course of business, and were timely. Careful consideration was paid as to when the Notices were sent.

R.S.Mo. § 140.405 provides *when* a notice of the right to redeem must be sent: "At least ninety days prior to the date when a purchaser is authorized to acquire the deed ..."

Reasonable minds have differed as to the meaning of this clause in R.S.Mo. § 140.405, and therefore it can be considered ambiguous as to when a notice must be sent. It is appropriate to apply the rules of statutory construction. *Kelly v. Marvin's Midtown Chiropractic, LLC* 351 S.W.3d 833, 836 (Mo. App. W.D. 2011). A primary tenet of statutory construction is that each word must be interpreted in accordance with its "plain and ordinary meaning." *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. 2005). "All consistent statutes relating to the same subject are construed together as though constituting one act," and "[t]he rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions." *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007) quoting *State Ex Rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991).

Reading § 140.405 in conjunction with R.S.Mo. § 140.340.1, *Ndegwa* states the landowner has one year to redeem the property, and hence the purchaser is authorized to acquire the deed exactly one year after the date of the tax sale. *Ndegwa*, 2011 WL 4790633 at 11. *Ndegwa* further states, “[o]ne year from the date of the tax sale, the tax sale purchaser is entitled to redeem his certificate of purchase with the Collector, and take title to the property *if he has completed the list of other required tasks* set forth in the statutory scheme.” *Id.* at 8 (emphasis added). The sentence is inherently illogical – the purchaser is not authorized to acquire the deed unless and until he has completed those other required tasks.

Despite the apparent logical contradiction, *Ndegwa* concludes that the “*when*” is answered – the purchaser must send the notice ninety days before the expiration of the one-year redemption period. *Id.* at 6, citing *CedarBridge v. Eason*, 293 S.W.3d at 465. The analysis is flawed. It is oversimplified, too narrow, and an incomplete understanding of Chapter 140 as a whole.

R.S.Mo. § 140.405 should be read in *pari materia* not only with § 140.340.1, but the other subsections of § 140.340 and the entirety of Chapter 140. When employing this approach, a far different result emerges: there are two separate redemption periods in operation: (1) the automatic *statutory* period of redemption which cannot be altered by any act of the State or the tax sale purchaser; and (2) the *notice* period of redemption which may extend the time for redemption beyond one year, depending on when the tax sale purchaser meets all requirements for issuance of a Collector’s Deed.

Section 140.340.1 states an interest-holder “may redeem [it’s interest] at *any time during the one year next ensuing*” (emphasis added). The plain language of § 140.340.1 is not indicative of an absolute, fixed deadline, but rather a minimum time frame in which any interest-holder may redeem “at any time,” a right that is absolute. This leaves open the possibility that the time for redemption can extend beyond the automatic one-year period following the tax sale.

The one-year anniversary of the tax sale is not a “fixed date” upon which the purchaser is authorized to acquire a deed. Other requirements must be met before a purchaser is “authorized to acquire the deed.” These additional requirements demand careful attention at a significant time and cost to the tax sale purchaser, so they should not be overlooked. Those include, but may not be limited to:

1. Purchaser must send notice to all holders of publicly recorded interests. § 140.405.
2. Purchaser must notify the Collector by affidavit that all notices have been sent. § 140.405.¹³

¹³ An affidavit to the collector remains a requirement even after the recent amendments. However it is filed after the time for response to the notices has lapsed. Under the old law, the affidavit was filed at the time the notices were sent out. It was this affidavit that began the *notice* period of redemption. Now, the notices themselves begin the *notice* period of redemption. For immediate purposes here, the difference is immaterial.

3. Purchaser must pay all subsequent city and county taxes that have become due on the property. § 140.440.
4. Purchaser may need to provide paid tax receipts evidencing payment of subsequent taxes, depending on internal policies of each county collector.
5. Now, a purchaser must conduct and produce a valid title search report within 120 days of its application for a deed. § 140.405.1.¹⁴
6. Purchaser must produce the original Certificate of Tax Sale Purchase. § 140.420.
7. Purchaser may be required to pay an additional fee necessary for recording the Collector's Deed. § 140.410.
8. Purchaser must have a deed recorded within two years from the date of the tax sale, else his interest ceases to be a lien. § 140.410.

Additionally, in determining the meaning of § 140.405, this Court must consider in *pari materia* the following sections of Chapter 140 that plainly indicate the redemption period can and does exceed the automatic one-year statutory period of redemption (in relevant parts, emphasis added, and its relevancy stated in brackets below each):

§ 140.310.1 – regarding possession by purchaser

¹⁴ This requirement was not part of the law during the time when the facts of this case were occurring. It is cited here only to demonstrate yet another requirement to consummate a tax sale and get a deed.

The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time **after one year from the date of sale** be entitled to the immediate possession of the premises so purchased **during the redemption period** provided for in this law ...

[contemplates a purchaser taking possession during the redemption period but after one year has expired]

§ 140.340.4 – regarding interest on purchase price

In case the party purchasing said land, his heirs or assigns fails to take a tax deed for the land so purchased within **six months after the expiration of the one year next following the date of sale, no interest shall be charged or collected from the redemptioner after that time.**

[interest on the purchase price accrues during the automatic one year, and continues for another six months, clearly indicating a right to redeem extending beyond one year]

§ 140.350 – regarding redemption by disabled persons

Infants and incapacitated and disabled persons as defined in chapter 475 may redeem any lands belonging to them sold for taxes, **within one year after the expiration of such disability**, in the same manner as provided in section 140.340 for redemption by other persons.

[a period of redemption can extend well beyond one year if the recipient is disabled or incapacitated]

§ 140.360 – regarding compensation for improvements

1. In the case of any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes ... and the land ... shall be redeemed ... the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements ...

2. No compensation shall be allowed for improvements made before the expiration of one year from the date of sale for taxes.

[improvements can become part of the redemption price, but not if the improvements are made during the automatic one year redemption period; only compensable if done during the extended *notice* redemption period]

§ 140.410 – regarding the viability period of the tax sale certificate

“... it is hereby made the duty of such purchaser ... to cause a deed to be executed and placed on record in the proper county within two years from the date of said sale ...”

[contemplating a purchaser’s lien on the property extending beyond the automatic one-year period, lasting up to two years]

As to *when* a notice must be sent, *Ndegwa* states simply that a landowner has a year to redeem, and therefore to be effective the notice must be sent ninety days prior to that date, citing *obiter dictum* from prior Eastern District cases. See *Harpagon MO, LLC v. Bosch*, --- S.W.3d ---, 2011 WL 3802141 at 2 (Mo. App. W.D. August 30, 2011). *Ndegwa's* holding on this point would render the above-cited statutes meaningless. The legislature is presumed not to have intended a meaningless act. *Ndegwa*, 2011 WL 4790633, 11 quoting *Missouri ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123 (Mo. App. E.D. 2002).

In fact there are two separate redemptions periods: an automatic *statutory* period of one year and a separate *notice* period which may overlap but in every case would extend beyond one year. In *Boston v. Williamson*, 807 S.W.2d 216, 218 (Mo. App. W.D. 1991), the Court observed:

... there is no fixed date on which the purchaser at a delinquent tax sale is authorized to receive a deed ... It is the date chosen by the purchaser on which he elects to acquire the deed which triggers the ninety day notice. When he chooses the date the purchaser is obligated to give notice at least ninety days in advance of the date chosen to acquire the deed.¹⁵

¹⁵ Similarly, the *Clark* Court notes it is entirely possible that the period of redemption extends beyond the expiration of the one year period following the date of the sale. 2010 WL 4823239 at 4.

In addition the Missouri Supreme Court has held that the right to redeem continues in the redemptioner until the collector's deed is recorded. *Wetmore v. Berger*, 188 S.W.2d 949 (Mo. 1945)¹⁶. Therefore, the *Wetmore* Court reasons, the statutory scheme's clear implication is that a tax certificate purchaser will apply for a deed at some point after the expiration of the automatic statutory period of redemption. *Accord United Asset Management Trust Co. v. Clark*, 332 S.W.3d at 164 ("... the period of redemption extends beyond the expiration of the one year period following the date of the sale and continues until the purchaser actually secures the collector's deed").

Moreover it would be patently unjust to allow interest to accrue for **six months** after the one-year anniversary of the sale date if the potential redemptioner were barred from redeeming during that period. *Wetmore*, 188 S.W.2d at 953; § 140.340.4.

During the automatic *statutory* period, no person may alter the landowner's right to redeem. However, during the extended *notice* period, the purchaser endeavors to consummate the sale¹⁷. The end of the *notice* period of redemption is uncertain, as it

¹⁶ *Wetmore* analyzed a prior version of R.S.Mo. Chapter 140, which had some different time periods involved. The analysis remains relevant despite the intervening amendments to the law.

¹⁷ The purchaser may begin efforts toward consummation during the automatic one-year period of redemption such that the two separate redemption periods overlap. Often, though not here, the purchaser waits the entire year, when there is a greater likelihood the

depends on when the tax sale purchaser meets the requirements and the Deed is recorded¹⁸. The State has delegated the duty of sending notice; therefore the purchaser must confirm to the collector it has been accomplished. *See* R.S.Mo. § 140.410.

The proposition that a purchaser must send the Notice at least ninety days prior to the expiration of the automatic one-year statutory period of redemption stems primarily from dicta in *CedarBridge* and now re-emphasized in *Ndegwa*. *CedarBridge v. Eason*, 293 S.W.3d 462 (Mo. App. E.D. 2009); *Ndegwa*, 2011 WL 4790633. It is oversimplified to the point of being inaccurate. It fails to acknowledge the overall structure of R.S.Mo. Ch. 140, as well as the *Wetmore*, *Boston* and *Clark* opinions, which recognize and provide for the likelihood that the overall time to redeem will exceed one year in any given case.

The structure of Chapter 140 is highly pragmatic, and deliberately so. It is flexible as to *when* a notice may be sent. This best weighs the competing interests of (a) incentivizing tax sale bidding, and thereby promoting the State of Missouri's interest in recapturing real property tax receivables; and (b) the duty of the landowner to preserve his property. In every case the redemptioner's right to redeem will extend beyond the

property has been abandoned by the owners and lienholders, before undertaking the effort and expense of sending notices and meeting the other numerous requirements.

¹⁸ The date of recording also depends on how long it takes a Collector's office to process the request and get the deed drafted, signed and recorded. No purchaser can predict the exact date *ex ante* (at the time notices are sent).

automatic one-year statutory redemption period because the one year period following the tax sale is an absolute right. Extra time to redeem only benefits the landowner and other lienholders.

Here, Appellant's Notices (*see* A3) were timely. The tax sale was August 27, 2007. The Notices were sent July 25, 2008. The automatic one-year statutory period of redemption was set to lapse August 27, 2008. The Notices informed Respondents they had ninety days to redeem the Property, which would have been up to and including October 23, 2008. Respondents received the Notices July 27, 2008. Respondents failed to redeem. Appellant was conveyed the Property by Collector's Deed on November 3, 2008, one hundred and one (101) days after the Notices. LF 33. Appellant's Collector's Deed was recorded well before the viability of their certificate of purchase expired, which would have occurred on August 27, 2009.

The fact that the Notices were not sent prior to ninety days before the expiration of the automatic one-year statutory redemption period is immaterial. Respondents never redeemed the Property prior to issuance and recording of the Collector's Deed. Appellant's Notices were timely.

E. Appellant's Notice notified Respondents of a pending right to redeem.

Appellant's Notices were routine, sent in its regular course of business, and were timely. Careful consideration was paid to the contents of the Notices, including *what time component, if any* should be stated. Because Appellant's Notice notified

Respondents of a pending right to redeem, the Notices were statutorily and constitutionally sufficient.

Two sources of law control the outcome of this question: Missouri statutes and due process. As to Missouri statutes, § 140.405 requires that a recipient be notified of the **existence of a right to redeem** the property. *Clark*, 332 S.W.3d at 173. No other specific details are required by the plain language. *See Clark* 332 .S.W.3d at 171 (“§ 140.405 nowhere provides that the notices required by the statute must say anything other than the recipient has a ‘right to redeem’”).

As to due process, the analysis is more complex. *Clark* and *Ndegwa* provide a sufficient background on due process, applied specifically to the issue of *what time component, if any*, must be stated in a tax sale notice. Both cases are considered in their chronological order.

In *Clark*, Mr. and Mrs. Clark purchased a tax sale certificate and sent a notice to interest holders stating:

YOU NEED TO CONTACT THE CASS COUNTY COLLECTORS
OFFICE WITHIN THE 90 (NINETY) DAYS FROM THE DATE OF
THIS LETTER TO REDEEM THIS PROPERTY OTHERWISE I WILL
FILE FOR THE COLLECTOR’S DEED. *United Asset Management Trust
Company v. Clark*, 332 S.W.3d 159.

Defendant United Asset Management Trust Company (“Trust”), a party entitled to notice, challenged the Clarks’ notice. Trust argued the notice incorrectly stated Trust had

ninety days from the date of the notice to redeem, and failed to state that Trust would be “forever barred from redeeming the property.” 332 S.W.3d at 163. After bench trial, the Court ruled in favor of the Clarks, finding the notice sufficient to extinguish underlying liens after expiration of the applicable redemption periods.¹⁹ *Id.*

Clark turns to the due process analysis at page 173, stating the “right to meaningful notice extends to actions affecting property interests in a variety of circumstances ...” Tax sales to enforce state tax laws undoubtedly implicate due process. The general rule is that “parties whose rights would be affected by a tax sale be afforded notice reasonably calculated under all of the circumstances to apprise them of the pendency of the action.” *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The touchstone is notification that “the matter is pending,” not that “some particular step must be taken or that certain procedure be followed ...” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The recipient of a due process notice is not entitled to precise legal advice about what they might or should do. *See e.g. State v. Goodbar*, 297 S.W.2d 525, 528 (Mo. 1957); *accord Atkins v. Parker*, 472 U.S. 115 (1985) (“The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny.”); *quoted in City of West Covina v. Perkins*, 525 U.S. 234 (1999). A

¹⁹ *Clark* involved a complex issue of whether notices were properly mailed to the correct “last known publicly available address” because the addressee never actually received the notice. There is no similar issue in this case.

recipient “must be held to a knowledge of the law.” *Bishop v. Bd. of Educ. of Francis Howell Sch. Dist.*, 575 S.w.2d 827, 829 (Mo. App. E.D. 1978).

Therefore *Clark* holds, “... there is no due process requirement to inform those receiving notice of the specific time limits applicable for redemption, the specific procedures that must be followed, or any other specific details, nor is there any such requirement in § 140.405.” 332 S.W.3d at 175.²⁰

Clark stated, “[t]he fact that the notice stated that [Trust] had ninety days in which to redeem the property is of no consequence,” at least in part because the Clarks’ collector’s deed was recorded *exactly* ninety days after the date of the letter and therefore was not misleading. 332 S.W.3d at 175.

Ndegwa disagrees and distinguishes *Clark’s* due process cases. The *Ndegwa* notice stated, in relevant part:

... the Missouri Status [sic] afford you the opportunity to redeem and/or otherwise protect your interest. Be further advised, that this opportunity will be available for a period of not less than 90 days from the date of this letter ... it is possible that the period of redemption may exceed the 90 day period described in this notice. This indication ... is not brought to your attention as an inducement for you to expect an extended period ... If you fail to redeem this property within the redemption period, you will be forever barred from redeeming the property. *Ndegwa*, 2011 WL 4790633 at 2.

²⁰ *Clark* acknowledges the notice sent in that case is “not the model for compliance ...”

This notice was found to be insufficient for failure to use “one year” language regarding the redemption period (discussed Section C, above), and because the *Ndegwa* Court draws a distinction between notifying the recipient of the “pendency” of an action versus the “existence” of an action, holding a tax sale notice must include a time component. 2011 WL 4790633 at 8. Recall *Clark* does not require statement of any time component to comply with the statute or due process.

Ndegwa comes to a conclusion that can be broken down into two separate and distinct Subparts: (1) a notice “must include a time component to comport with due process”; and (2) the time component to be included is provided by Missouri statute – one year.

Subpart Two deals with *when* a notice must be sent. *Ndegwa* misstates Missouri law. *Clark* correctly states the law as discussed in Section C, supra.

Subpart One deals with *what time component, if any* must be stated in the notice. This is a critical distinction because the due process cases support the conclusion drawn by *Ndegwa* in Subpart One. The cases cited by *Clark* use a derivative of the word “pendency” as opposed to “existence,” and that distinction is important in a due process analysis. See *Menonite*, 462 U.S. 791 (uses the word “pendency”); *Ndegwa* at 9 (“the seriousness, scope and permanency of the taking” are all greater in tax sale cases). *Ndegwa* holds, in part, that a notice “must include a time component to comport with due process” and the same can be accomplished without being so precise or specific that it

constitutes legal advice. 2011 WL 4790633 at 8. *Ndegwa's* insight is of great value in this regard.

Therefore the rule to be followed in Missouri tax sale notices as to *what time component, if any*, must be stated can be summarized as follows:

4. To comply with Missouri statute, the inclusion of a time component is not required. *Clark*, 332 S.W.3d 159.
5. To comply with due process, a general time component that is not so specific or precise so as to constitute legal advice, must be stated. *Ndegwa*, 2011 WL 4790633.
6. The time component to be stated depends on *when* the notice is sent:
 - a. if sent prior to ninety days before the automatic one-year period of redemption, one year language is sufficient to communicate pendency;
 - b. if sent anytime after ninety days before the automatic one-year period of redemption, ninety-day language is sufficient to communicate pendency.

These Constitutional rules must be applied at the time notices are sent because the “constitutionality of a particular procedure for notice is assessed *ex ante* (“before the event”), rather than *post hoc* (“after this”). *Clark*, 332 S.W.3d at 181 *citing Jones v. Flowers*, 547 U.S. 220, 231 (2006).

In this case, Appellant’s Notice meets the requirements of due process because it states a generally accurate time component that communicates “pendency” of the action,

without rising to the level of being legal advice: “This letter is sent to you as Notice that you will have 90 days to redeem said property. If you fail to redeem the property by said date you will be forever foreclosed and barred from redemption” (A3). *Ex ante*, this is the best information a tax sale purchaser can give because the precise date of recording the Collector’s Deed is impossible to project. The date of recording depends on numerous factors, one of which is the expediency of the collector’s office in processing the matter, which is beyond the tax sale purchaser’s knowledge when sending notices three months prior.

This case is closely analogous to *Clark*. 332 S.W.3d 159 (2010). Appellant’s Notices here appropriately informed Respondents that they had a pending right to redeem. LF 58 – 59.

To the extent the Notices here are distinguishable from *Clark*, the significant distinctions favor Appellant. For example, whereas the *Clark* Notice said nothing of being forever barred and foreclosed, Appellant’s Notices here stated that Respondents would be forever barred from redemption if Respondents did not redeem. (A3). Whereas the *Clark* Notice never was received, there is no issue in this case that Respondents actually received the Notices. LF 34. These distinctions from the facts in *Clark* merely simplify the analysis here.

Unlike *Clark*, Appellant’s Collector’s Deed was not recorded exactly ninety days from the date of the notice. It was 101 days, which is “at least ninety days”. R.S.Mo. § 140.405.2. *Ex ante*, the exact date of recording cannot be predicted. The extra days merely afford the recipient more *process* than is *due*: that is, more time to redeem. The

ninety day language used is a generally accurate statement that communicates pendency while not rising to the level of legal advice. *Ndegwa*, 2011 WL 4790633 at 8. This is the best a tax sale purchaser can do *ex ante*. It is not misleading. *Harpagon v. Bosch*, 2011 WL 3802141 at 4.

There is no question the Notices were received by Respondents. No redemption of the property was attempted. Because Appellant's Notices notified Respondents of a pending right to redeem, the Notices were statutorily and constitutionally sufficient. Appellant's Collector's Deed is valid. Appellant is entitled to judgment as a matter of law, and judgment should be entered by this Court.

CONCLUSION

WHEREFORE Appellant Harpagon MO, LLC respectfully requests this Court reverse the trial court's judgment and enter judgment for Appellant, together with any such other and further relief the Court deems appropriate and just.

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CERTIFICATE OF COMPLIANCE & SERVICE

I, the undersigned, hereby certify:

1. The attached brief (a) includes the information required by Rule 55.03 and (b) complies with the limitations set forth in Supreme Court Rule 84.06(b) and contains 12,207 words, including footnotes, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certification, as determined by Microsoft Word 2007; and
2. The PDF file of this brief and the PDF files composing the Appendix herein have been scanned for viruses and are virus-free; and
3. That two (2) true and correct copies of the attached brief, and a compact disc containing a copy of this brief, were sent by US Mail, postage prepaid, on this January 9, 2012 to:

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