

IN THE SUPREME COURT OF MISSOURI

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Appeal Number SC92169

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CATHERINE NDEGWA et al.,

Respondents,

v.

KSSO LLC, et al.,

Appellant.

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On Appeal from the Circuit Court of St. Louis County, Missouri,  
The Honorable Robert S. Cohen, Circuit Judge

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SUBSTITUTE REPLY BRIEF

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## ARGUMENT

### I.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THEIR FIRST AMENDED PETITION ON THE GROUND THAT THE SECTION 140.405 NOTICE LETTERS DATED SEPTEMBER 15, 2008 SENT BY APPELLANT WERE NOT MAILED AT LEAST 90 DAYS PRIOR TO THE EXPIRATION OF ONE YEAR FROM THE TAX SALE ON AUGUST 27, 2008, AND WERE PURPORTEDLY DEFECTIVE AND PURPORTEDLY FAILED TO COMPLY WITH SECTION 140.405, RSMO, BECAUSE RELEVANT CASE LAW, INCLUDING, WITHOUT LIMITATION, CONSTITUTIONALLY BINDING PRECEDENT DECIDED BY THIS COURT INTERPRETING WHAT IS NOW CODIFIED IN SECTIONS 140.340, 140.360, 140.410, AND 140.420, RSMO, HAS HELD THAT THE TIME PERIOD SPECIFIED IN WHAT IS NOW CODIFIED IN SUBSECTION 1 OF SECTION 140.340, RSMO (CURRENTLY ONE YEAR FROM THE TAX SALE), GRANTS DELINQUENT TAXPAYERS AND OTHER INTERESTED PARTIES A TIME PERIOD WHEN THEY HAVE AN ABSOLUTE RIGHT OF REDEMPTION THAT CANNOT BE DEFEATED BY THE TAX SALE PURCHASER, AND THAT THE DELINQUENT TAXPAYER AND OTHER INTERESTED PARTIES CONTINUE TO HAVE THE RIGHT TO REDEEM THEIR INTEREST FROM THE TAX SALE AFTER THAT

**ABSOLUTE PERIOD CURRENTLY SPECIFIED IN SUBSECTION 1 OF SECTION 140.340, RSMO, UNTIL THE TAX SALE PURCHASER IS AUTHORIZED TO ACQUIRE A COLLECTOR’S DEED TO THE SUBJECT PROPERTY; PROVIDED, HOWEVER, THAT IF NO COLLECTOR’S DEED IS RECORDED WITHIN THE PERIOD SPECIFIED IN WHAT IS NOW CODIFIED IN SECTION 140.410, RSMO (CURRENTLY TWO YEARS FROM THE TAX SALE), THE TAX SALE CERTIFICATE EXPIRES AND THE TAX SALE PURCHASER LOSES ALL INTEREST IN THE SUBJECT PROPERTY (HEREINAFTER SOMETIMES REFERRED TO AS THE “*HOBSON* REDEMPTION PERIOD”).**

“Respondent assumes Appellant is arguing that failure to comply with 140.405 RSMo notice provisions is a ‘mere irregularity’”. Respondents’ Brief, 18.

Appellant KSSO LLC does not argue in this case that failure to comply with § 140.405, RSMo, is a mere irregularity for which a collector’s deed may not be invalidated under §140.520, RSMo. Appellant believes that sufficient evidence has been presented in the trial of the case currently on appeal in *Sneil LLC v. TYBE Learning Center, Inc., et al.*, Appeal No. SC92390, now pending in this Court, that would prevent the invalidation of the collector’s deed in that case under § 140.520, RSMo, on the ground that the purported defects in the noticing in that case are mere irregularities.

Appellant has cited § 140.520, RSMo, in this case, because that statute informs the Court that a strict construction of the provisions of the Jones-Munger Act, Chapter 140, RSMo, is not warranted.

Appellant's citations to § 140.520, RSMo, in its Substitute Brief do not alter the claim that the proper statutory construction of §§ 140.310, 140.340, 140.360, 140.405, 140.410, and 140.420, RSMo, authorizes the timing and content of the Notice Letters in this case.

Respondents argue that *State ex rel. Howard v. Timbrook's Estate*, 240, Mo. 226, 144 S.W. 843, 846 (1912) is not applicable. Respondent's Brief, 19-20. *Timbrook's Estate*, 144 S.W. at 846, cites and quotes § 11521, RSMo 1909. The language quoted from § 11521, RSMo 1909, appears to be the same language used in § 140.520, RSMo, and indicates that provisions of tax sale statutes should not be strictly construed. Although *Timbrook's Estate* may have been decided 72 years before § 140.405, RSMo, was enacted, Respondent's Brief at 20, the language of § 11521, RSMo 1909, construed in *Timbrook's Estate* appears to be the same as that contained in the current version of § 140.520, RSMo. The continuation of the statutory construction of what is now codified in § 140.520, RSMo, in *Timbrook's Estate* would presumably continue. Section 1.120, RSMo.

At pages 21-24 and 30-32 of their Brief, Respondents discuss the substantive issues in this appeal involving the content and timing of the notices required by § 140.405, RSMo. Respondents take an ahistorical view of the law by failing to respond to the contradiction between *Keylien Corporation v. Johnson*, 284 S.W.3d 606, 613 (Mo. App., E.D. 2009),

*Cedarbridge LLC v. Eason*, 293 S.W.3d 462, 465 (Mo. App., E.D. 2009), and *Hames v. Bellistri*, 300 S.W.3d 235, 239 (Mo. App., E.D. 2009)—holding that there is a fixed one-year period of redemption under § 140.340.1, RSMo—and the applicable opinions of this Court in *Hobson v. Elmer*, 349 Mo. 1131, 163 S.W.2d 1020, 1023 (Mo. 1942), *Bullock v. Peoples Bank of Holcomb*, 351 Mo. 587, 173 S.W.2d 753, 758 (Mo. 1943), *State ex rel. Baumann v. Marburger*, 348 Mo. 164, 182 S. W.2d 163, 165-166 (Mo. 1944), *Wetmore v. Berger*, 354 Mo. 166, 188 S.W.2d 949, 953 (Mo. 1945), and *Strohm v. Boden*, 359 Mo. 573, 222 S.W.2d 772, 776 (Mo. 1949)—holding that the time period in what is now codified in § 140.340.1, RSMo, is the minimum redemption period, but the right to redeem continues until the tax sale purchaser is authorized to acquire the deed prior to the time the tax certificate expires under what is now codified in § 140.410, RSMo.1

This is not a situation where there is only a disagreement between the districts of the Missouri Court of Appeals on the timing and content requirements of certain notices of tax sale redemption rights. Precedent of this Court construing relevant statutory provisions has

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1. Respondents also fail to respond to the following cases that support *Hobson*: *Powell v. City of Creve Coeur*, 452 S.W.2d 258 (Mo. App., St. L. 1970); *Boston v. Williamson*, 807 S.W.2d 216 (Mo. App., W.D. 1991); *Campbell v. Siegfried*, 823 S.W.2d 156 (Mo. App., E.D. 1992); *York v. Authorized Investors Group, Inc.*, 931 S.W.2d 882 (Mo. App., E.D. 1996); and *U.S. Bank National Association v. Boykin (In re Carl I. Boykin, III)*, 437 B.R. 346 (Bankr., E.D. Mo. 2010).

already decided how the duration of the right of redemption from first or second offering delinquent tax sales under the Jones-Munger Act is to be determined. *Hobson*, 163 S.W.2d at 1023, *Bullock*, 173 S.W.2d at 758, *Marburger*, 182 S. W.2d at 165-166, *Wetmore*, 188 S.W.2d at 953, and *Strohm*, 222 S.W.2d at 776. Unless there is good reason to overrule this Court's opinions in those cases, the decisions of the Missouri Court of Appeals, Western District, recognizing this Court's prior precedent, *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 164 (Mo. App., W.D. 2010), *Harpagon MO, LLC v. Clay County Collector*, 335 S.W.3d 99, 104-105 (Mo. App., W.D. 2011); *see also U.S. Bank National Association v. Boykin (In re Carl I. Boykin, III)*, 437 B.R. 346 (Bankr., E.D.Mo. 2010) and *Harpagon MO LLC v. Bosch*, Appeal No. WD72834 (Mo. App., W.D. August 30, 2011) (now pending in this Court), Slip Op. at 6, must prevail over the contrary opinions of the Missouri Court of Appeals, Eastern and Southern Districts, *Keylien*, 284 S.W.3d at 613, *Eason*, 293 S.W.3d at 465, *Hames*, 300 S.W.3d at 239, *Drake Development & Construction LLC v. Jacob Holdings, Inc.*, 306 S.W.3d 171, 174 (Mo. App., S. D. 2010), and *Crossland v. Thompson*, 317 S.W.3d 635, 643-644 (Mo. App., S.D. 2010). *See also Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) and *Glasgow Enterprises, Inc. v. Brooks*, 234 S.W. 3d 407 (Mo App E.D. 2007).

At page 24 of their Brief, Respondents cite *Kelly v. Nelson*, 226 S.W.3d 882, 886 (Mo. App., W.D. 2007) for the proposition that § 140.340.1, RSMo, establishes a fixed one-year right of redemption. *Kelly* involved a collector's deed issued on August 26, 2005 (the first

day of eligibility), the redemption payment was received by the collector on September 1, 2005, and the delinquent taxpayers mailed the redemption payment on August 23, 2005. 226 S.W.3d at 883. *Kelly* held that § 140.340, RSMo, provided a two-year deadline for redemption *under the facts in that case*. If the tax sale purchaser is authorized to acquire the collector's deed at the end of the minimum redemption period in § 140.340.1, RSMo, then § 140.340.1, RSMo, states the deadline for redemption *under the facts and circumstances of that case*.

Respondents state that reliance on *Boston v. Williamson*, 807 S.W.2d 216 (Mo. App., W.D. 1991) is misplaced, because *Boston* does not involve the question of the time within which land sold for delinquent taxes may be redeemed. Respondent's Brief, 32. Footnote 3 of *Boston*, 807 S.W.2d at 217 n.3, cites *Hobson* on the issue of the time within which land sold for taxes may be redeemed.

At pages 24-25 of their Brief, Respondents argue that *Hobson* should not be followed because: (1) the *Hobson* Redemption Period is dicta in *Hobson*, and (2) *Hobson* involved a third sale.

**Hobson Dicta?** *Hobson* framed the issue as whether one may redeem an interest from a tax sale more than two years after the sale—the period then set forth in what is now § 140.340.1, RSMo. *Hobson*, 163 S.W.2d at 1022. The answer was “yes.” *Hobson*, 163 S.W.2d at 1023. *Hobson* relied on the *Hobson* Redemption Period, and any opinion of an

intermediate appellate court of this state holding that one may not redeem after the expiration of the period now codified in § 140.340.1, RSMo, may be contrary to *Hobson*.

Based on the opinions of this Court following the *Hobson* Redemption Period that are not discussed or mentioned by Respondents in their Brief, it would appear that the *Hobson* Redemption Period is more than dicta. See *Bullock*, 173 S.W.2d at 758, *Marburger*, 182 S.W.2d at 165-166, *Wetmore*, 188 S.W.2d at 953, and *Strohm*, 222 S.W.2d at 776.

**The original 1933 enactment of the Jones-Munger Act gave rights of redemption to owners of properties sold at third offering delinquent tax sales that were the same as those granted owners of properties sold at first or second offering delinquent tax sales.**

Neither Respondents nor *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App., E.D. October 11, 2011) nor *Sneil, LLC v. TYBE Learning Center, Inc. et al.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) analyze any of the cases following *Hobson* or that are consistent with *Hobson* in determining whether *Hobson* should not be followed because it involved a third offering delinquent tax sale.<sup>2</sup> Prior to the 1939 amendments to the Jones-

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<sup>2</sup> Cases following *Hobson* or that are consistent with that case include: *Bullock*, 173 S.W.2d at 758, *Marburger*, 182 S. W.2d at 165-166, *Wetmore*, 188 S.W.2d at 953, *Strohm*, 222 S.W.2d at 776, *Powell*, 452 S.W.2d at 261-262, *Boston*, 807 S.W.2d at 217 n.3, *Campbell*, 823 S.W.2d at 158, *York*, 931 S.W.2d at 888, *United Asset Mgmt. Trust Co.*, 332 S.W.3d at 164, *Harpagon MO, LLC v. Clay County Collector*, 335 S.W.3d at 104-105, and *Boykin*, 437

Munger Act, a purchaser at a third sale acquired the same interest as purchasers at other sales. *Journey v. Miler*, 363 Mo. 163, 250 S.W.2d 164, 165-166 (Mo. Banc 1952). Thus, for cases involving facts occurring prior to the effective date of the 1939 amendments to the Jones-Munger Act, third offering sales were not treated differently than first or second offerings, and certificates of purchase were issued to purchasers at the pre-1939 third offering sales instead of collector's deeds. See *Hobson*, 163 S.W.2d at 1021 (involving a third offering sale in November 1936 and a certificate of purchase), *Bullock*, 173 S.W.2d at 758 (involving a tax sale on November 12, 1935 and a certificate of purchase), *Marburger*, 182 S. W.2d at 164, 165-166 (involving a third offering sale on November 12, 1938 and a certificate of purchase), *Wetmore*, 188 S.W.2d at 950, 953 (involving a sale on November 16, 1938 and a certificate of purchase), *Strohm*, 222 S.W.2d at 773-774 (involving a sale on December 15, 1937 and a certificate of purchase), *Powell*, 452 S.W.2d at 259, 261-262 (involving a sale other than a third sale), *Boston*, 807 S.W.2d at 217 n.3 (citing *Hobson*), *United Asset Mgmt. Trust Co.*, 332 S.W.3d at 164, *Harpagon MO, LLC v. Clay County Collector*, 335 S.W.3d at 104-105, and *Boykin*, 437 B.R. 346. All of these cases involved certificated sales that occurred prior to August 28, 2010<sup>3</sup>, and all of these cases followed *Hobson*.

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B.R. 346. See also *Harpagon MO LLC v. Bosch*, Appeal No. WD72834 (Mo. App., W.D. August 30, 2011) (now pending in this Court), Slip Op. at 6.

<sup>3</sup> An amendment to § 140.250.2 effective August 28, 2010 provides that certificates of

At pages 26-27 of Respondent's Brief, Respondents argue that the rules of statutory construction support the legal conclusion that § 140.340.1, RSMo, establishes the maximum, not minimum redemption period from first or second offering delinquent tax sales under the Jones-Munger Act, purportedly because "adopting" the *Hobson* Redemption Period does not construe the two subsections at issue, §§ 140.340.4 and 140.360.2, RSMo, harmoniously with the remainder of the statute, and it also contradicts the plain language throughout the statute referring to the one year right of redemption.

The interpretation of the duration of the right of redemption under what is now codified in §§ 140.340 and 140.410, RSMo, has been established by this Court in five appellate opinions adopting the *Hobson* Redemption Period from 1942 to 1949: *Hobson*, 163 S.W.2d at 1023, *Bullock*, 173 S.W.2d at 758, *Marburger*, 182 S. W.2d at 165-166, *Wetmore*, 188 S.W.2d at 953, and *Strohm*, 222 S.W.2d at 776. Until *Valli* and *Keylien* were handed down, there was no dispute that the construction of the relevant statutes by this Court had already determined how the duration of the right of redemption from first or second offering delinquent tax sales under the Jones-Munger Act was to be determined in the most harmonious manner that those statutes can be construed. There is no reason to overrule *Hobson* or the cases following *Hobson*.

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purchase shall be issued to purchasers at third offering delinquent tax sales.

At pages 27-28 of their Brief, Respondents present a novel argument<sup>4</sup> that the right of redemption from first or second offering delinquent tax sales expires at the end of the period specified in § 140.340.1, RSMo, but the tax sale purchaser is authorized to acquire a collector's deed until the tax sale certificate expires under § 140.410, RSMo. This argument may be in conflict with *Sneil*, Slip Op. at 9-10, which states:

[T]he ability of the landowner to redeem after the one-year period from the date of the tax sale due to the failure of the purchaser to acquire a collector's deed is not the same as the absolute right to redeem that exists under § 140.340 during the year following the tax sale.

*Sneil* appears to recognize the right of a delinquent taxpayer to redeem after the period specified in § 140.340.1, RSMo, has expired and before the expiration of the tax sale certificate under § 140.410, RSMo. If the right to redeem exists after the one-year period set forth in § 140.340.1, RSMo, as stated in *Sneil* and explained in *Hobson*, then it would be misleading to give notice that delinquent taxpayers and other interested parties have one year to redeem or they will be “forever barred” from redeeming. If “the date when a purchaser is authorized to acquire the deed” under § 140.405, RSMo, is one year from the tax auction under § 140.340.1, RSMo, then how could the tax sale purchaser be authorized to acquire a deed up until the tax sale certificate expires two years from the tax auction under § 140.410,

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<sup>4</sup> This argument may not be preserved for appellate review under Rule 83.08(b).

RSMo? If the right to redeem expires one year period from the tax sale, as Respondents argue in their Brief at pages 27-28, then there is no need for the tax sale certificates to expire two years after the sale under § 140.410, RSMo.

At page 29 of their Brief, Respondents argue that the *Hobson* Redemption Period converts the statutory redemption period into whatever the tax sale purchaser wants it to be resulting in a non-uniform redemption period.

There is uniformity in the statutes creating the right of redemption recognized in *Hobson*. All delinquent taxpayers whose property has been sold at a first or second offering delinquent tax sale under the Jones-Munger Act have a uniform minimum redemption period specified in § 140.340.1, RSMo. All delinquent taxpayers whose property has been sold at a first or second offering delinquent tax sale under the Jones-Munger Act have a right to be sent mailed notice of their right to redeem to their last known available address at least 90 days prior to the time when the tax sale purchaser is authorized to acquire the collector's deed to the property. Giving delinquent taxpayers additional time to redeem their interest after the expiration of the period specified in § 140.340.1, RSMo, does not prejudice the rights of delinquent taxpayers and other interested parties.

Despite what is said at page 29 of Respondent's Brief, the *Hobson* Redemption Period does not appear to violate Equal Protection principles. *See, e.g. Miner v. Clinton County*, 541 F.3d 464, 474 (2<sup>nd</sup> Cir. 2008) (practice of some New York counties in establishing

different deadlines for redemption or allowing redemption after the deadline enforced by other counties did not violate Equal Protection principles).

At pages 29-33 of Respondent's Brief, Respondents argue that the "adoption" of any interpretation of the Jones-Munger Act that varies the redemption period is contrary to legislative intent. There is no need to "adopt" *Hobson*. *Hobson* was handed down in 1942 and has been followed for approximately 70 years. Further, constitutional principles of Due Process do not require uniform effort on the part of the tax sale purchaser to attempt to provide notice. *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) and *Scherleth v. Hardy*, 280 S.W.3d 47 (Mo. banc 2009) may require the tax sale purchaser to take additional reasonable steps to attempt to provide notice if certain certified mail "bounces back". Because the effort to provide notice to delinquent taxpayers and other interested parties varies with the circumstances, no one should assume that a uniform redemption period that does not accommodate the variation in effort needed to provide notice consistent with Due Process under *Jones* and *Scherleth* is intended by the legislature.

At pages 33-34 of their Brief, Respondents argue that this Court should "rewrite" § 140.405, RSMo, to state that notices must be mailed at least 90 days prior to the date the tax sale purchaser could *first* be authorized to acquire a collector's deed, whether or not the tax sale purchaser has been diligent enough to comply with the legal requirements authorizing the issuance of that deed. Respondents are really arguing that § 140.405, RSMo, requires notice at least 90 days prior to the date when the tax sale purchaser *could first be eligible* to

acquire a collector's deed. The Judiciary may not rewrite statutory language. *Jost v. Big Boys Steel Erection, Inc.*, 946 S.W.2d 777, 779 (Mo. App., E.D. 1997).

At pages 36-38 of their Brief, Respondents argue that the interpretation of § 140.405, RSMo, in *United Asset Mgmt. Co.* is inconsistent with the "pendency requirement" of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). *Ndegwa* states the following:

The rule of proper notice by one who would affect the rights of a property owner is to advise that owner of the "pendency," not the "existence," of an action. *Schwartz*, 665 S.W.2d at 934. The word "existence" is static. The word "pendency" has a time component. A pending action is one that is approaching, imminent, around the corner. Correspondingly, notice of the pendency, as opposed to the existence, of an action implies notice of a time component in order to be reasonable.

*Ndegwa*, Slip Op. at 15-16.

In *Schwartz v. Dey*, 665 S.W.2d 933, 934 (Mo. Banc 1984), *subsequent appeal*, 870 S.W.2d 42 (Mo. Banc 1989), this Court stated:

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Supreme Court stated that where a property interest is at stake, a party must be

afforded that degree of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314, 70 S.Ct. at 657.

In the case of the right to redeem under the Jones-Munger Act, the delinquent taxpayer is not taking an opportunity to present objections to the government in a pending proceeding to determine the right of redemption. The right of redemption either exists or not. Under the *Mullane* standard, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 393 U.S. at 314. "Th[e] right to be heard has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest." *Id.*; see also *City of West Covina v. Perkins*, 525 U.S. 234, 240, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999) (citing *Mullane* for this proposition).

Under the Jones-Munger Act, the right of redemption of the delinquent taxpayer or other interested parties is not contested. Under the Jones-Munger Act, there is no acquiescence to any injury to the right of redemption by the delinquent taxpayer or other interested party. Under the Jones-Munger Act, the delinquent taxpayer has already defaulted on their obligation to pay real estate taxes, and the right to redeem cannot arise without a default in that obligation. Section 140.405, RSMo, requires notice to delinquent taxpayers or other interested parties of their right to redeem, so that they may exercise that right or not.

Just as the obligation on the part of the government to return seized property in *West Covinia* was not contested, *see* Respondent's Brief at 38, no one contests the right of delinquent taxpayers and other interested parties to timely redeem their interests from a delinquent tax sale under the Jones-Munger Act.

At pages 36-37 of their Brief, Respondents argue that providing information on the duration of the right to redeem and the consequences of failing to redeem do not rise to the level of giving legal advice, because: (1) the tax sale purchaser has knowledge of the type of delinquent tax sale under the Jones-Munger Act that has occurred, and (2) the one-year right of redemption is clearly mentioned numerous times throughout the Jones-Munger Act.

In *Bishop v. Bd. of Educ. of Francis Howell Sch. Dist.*, 575 S.W.2d 827, 829 (Mo. App., E.D. 1978), that Court ruled that Due Process does not require giving legal advice in a notice, citing *State v. Goodbar*, 297 S.W.2d 525, 528 (Mo. 1957).

In *United Asset Mgmt. Co.*, 332 S.W.3d at 171, the Missouri Court of Appeals, Western District, found:

*Keylien* held that the notice required by § 140.405 must inform recipients not merely of their right to redeem, as required by express wording of the statute, **but also provide legal advice as to what period of redemption exists depending on what type of tax sale was conducted.** *Id.*

(Emphasis added.)

*Ndegwa* and *Sneil* both conclude that informing delinquent taxpayers and other interested parties that they have one year from the tax auction to redeem or be forever barred does not rise to the level of giving legal advice. *Ndegwa*, Slip Op. at 13, 16; *Sneil*, Slip Op. at 11-12. *Ndegwa* and *Sneil* are based on the assumption that there is a simple, universal fixed one-year right of redemption. That assumption is inconsistent with *Hobson* and the cases following *Hobson* and those statutes granting special rights of redemption to particular classes of persons, such as § 140.350, RSMo, 26 U.S.C. § 7425, 18 U.S.C. § 3613, and 11 U.S.C. § 108(b). The right of redemption from first or second offering delinquent tax sales is not a simple proposition of applying a universal one-year rule to all delinquent taxpayers or other interested parties.

## II.

THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THEIR AMENDED PETITION ON THE GROUND THAT THE SECTION 140.405 NOTICES DATED SEPTEMBER 15, 2008 SENT BY APPELLANT IN THIS CASE PURPORTEDLY FAILED TO CORRECTLY INFORM ADDRESSEES THAT THE REDEMPTION PERIOD ENDED ON OR ABOUT AUGUST 27, 2008 AND PURPORTEDLY FAILED TO COMPLY WITH SECTION 140.405, RSMO, BECAUSE: (1) SECTION 140.405, RSMO, WAS DRAFTED TO INTEGRATE WITH RELEVANT CASE LAW, INCLUDING, WITHOUT LIMITATION, CONSTITUTIONALLY BINDING PRECEDENT DECIDED BY THIS COURT, ESTABLISHING THE *HOBSON* REDEMPTION PERIOD, AS THERE IS NO FIXED ONE-YEAR REDEMPTION PERIOD ENDING ON AUGUST 27, 2008; (2) THERE IS NO UNIVERSALLY APPLICABLE REDEMPTION PERIOD ALLOWING TAX SALE PURCHASERS TO PROVIDE ADVANCE NOTICE OF THE EXPIRATION OF THE REDEMPTION RIGHTS OF DELINQUENT TAXPAYERS AND OTHER INTERESTED PARTIES, AS VARIOUS STATUTES PROVIDE FOR SPECIAL RIGHTS OF REDEMPTION BASED UPON INDIVIDUALIZED FACTS AND CIRCUMSTANCES SPECIFIC TO THE DELINQUENT TAXPAYER OR OTHER INTERESTED PARTY THAT VARY FROM THE *HOBSON* REDEMPTION PERIOD DEPENDING UPON FACTS AND

CIRCUMSTANCES THAT THE TAX SALE PURCHASER CANNOT KNOW OR WOULD KNOW ONLY WITH GREAT DIFFICULTY AT THE TIME THE SECTION 140.405 NOTICE IS SENT, INCLUDING, WITHOUT LIMITATION, SECTION 140.350, RSMO (APPLICABLE TO INFANTS, INCAPACITATED PERSONS AND DISABLED PERSONS AS DEFINED IN CHAPTER 475, RSMO), 11 U.S.C. SECTION 108(B) (APPLICABLE TO DELINQUENT TAXPAYERS AND OTHER INTERESTED PARTIES FILING FOR PROTECTION UNDER THE BANKRUPTCY CODE BEFORE OR AFTER THE SECTION 140.405 NOTICE IS SENT), 11 U.S.C. SECTION 3613 (APPLICABLE TO CERTAIN CLAIMS OF THE FEDERAL GOVERNMENT) AND 26 U.S.C. SECTION 7425 (APPLICABLE TO THE INTERNAL REVENUE SERVICE); (3) TAX SALE PURCHASERS CANNOT GIVE ADVANCE NOTICE OF THE TIME WHEN THEY MAY BE AUTHORIZED TO ACQUIRE A COLLECTOR'S DEED, AS THE DATE WHEN ALL LAWFUL REQUIREMENTS HAVE BEEN SATISFIED AUTHORIZING THE TAX SALE PURCHASER TO ACQUIRE A COLLECTOR'S DEED CANNOT BE KNOWN IN ADVANCE; (4) NEITHER SECTION 140.405, RSMO, NOR CONSTITUTIONAL PRINCIPLES OF DUE PROCESS REQUIRE A TAX SALE PURCHASER TO PROVIDE ADVANCE NOTICE OF THE TIME LIMITS APPLICABLE FOR REDEMPTION, THE SPECIFIC PROCEDURES THAT MUST BE FOLLOWED, OR ANY OTHER DETAILS ATTACHING TO THE RIGHT OF REDEMPTION FROM

**THE TAX SALE; AND (5) THE NOTICE LETTERS DATED SEPTEMBER 15, 2008, INFORMED THE DELINQUENT TAXPAYER AND OTHER INTERESTED PARTIES OF THEIR RIGHT TO REDEEM, WHICH IS ALL THAT IS REQUIRED BY SECTION 140.405, RSMO.**

At pages 41-43 of their Brief, Respondents argue that the enactment of § 140.405, RSMo, was the culmination of changing standards of Due Process that began with *Mullane* and continued with *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983) and *Lohr v. Cobur Corporation*, 654 S.W.2d 883 (Mo. banc 1983), *subsequent appeal*, 721 S.W.2d 763 (Mo. App., E.D. 1986). Respondents imply that the 1984 enactment of § 140.405, RSMo, was intended to broadly codify content requirements for notices mandated by evolving principles of Due Process.

Prior to 1983, the “caretaker doctrine” governed Due Process requirements relative to delinquent tax sales based on the principle that those who own land are charged with knowledge of the real estate taxation laws applicable to them, and it was the responsibility of owners and lien holders to take care to keep themselves informed of proceedings affecting their property. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 803, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983) (O’Connor, J. dissenting) (“The historical justification for constructive notice was that those with an interest in property were under an obligation to act reasonably in keeping themselves informed of proceedings that affected that property.”); *Longyear v. Toolan*, 209 U.S. 414, 418, 28 S.Ct. 506, 52 L.Ed. 859 (1908) (“The owner of

property whose taxes, duly assessed, have remained unpaid for more than one year, must be held to the knowledge that proceedings for sale are liable to be begun as soon as practicable .... The proceedings are inscribed on the public records and otherwise made notorious. If he exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him.”); *Ballard v. Hunter*, 204 U.S. 241, 262, 27 S.Ct. 261, 51 L.Ed. 461 (1908)(“It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises.”).

Even in the post-*Mennonite* era, the sentiments of the caretaker doctrine may not be dead. *See, e.g. Trapf v. Lohr*, 666 S.W.2d 414, 415 (Mo. Banc 1984), *appeal dismissed*, 469 U.S. 1013, 105 S.Ct. 423, 83 L.Ed.2d 351 (1984) (“At some point a property owner’s presumptive duty to preserve his property outweighs the responsibility of a tax collector to provide more extensive forms of notice.”) and *Schwartz v. Dey*, 780 S.W.2d 42, 44-45 (Mo. Banc 1989).

Beginning in 1983 a sea-change in the constitutional law of Due Process with respect to delinquent tax sales occurred with the handing down of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 803, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983), wherein Due Process

principles were interpreted to require mailed notice to certain lienholders prior to a tax sale. Section 140.405, RSMo, was enacted in response to *Mennonite and Lohr. M & P Enterprises Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. Banc 1997).

Respondents find intent in the 1984 legislation to enact a required notice of the duration of redemption rights, because such requirement emanates from evolving principles of Due Process. This is an ahistorical view of the principles of Due Process. In 1984, the General Assembly was implementing *Mennonite and Lohr* by enacting § 140.405, RSMo.

At page 43 of their Brief, Respondents argue that nothing in the text of § 140.405, RSMo, shows legislative intent to codify the *Hobson* Redemption Period. The language, “the date when a purchaser is authorized to acquire the deed”, in § 140.405, RSMo, is a direct reference to *Hobson*.

At pages 44-46 of their Brief, Respondents argue that it is “disingenuous for Appellant to argue that it is too difficult to know when the issuance of the collector’s deed is authorized because other statutes could impose redemption rights that vary from those provided for by the Jones-Munger Act.” Requiring notices of tax sale redemption rights to give notice that delinquent taxpayers have one year from the date of the tax auction or be forever barred is not consistent with statutes providing special redemption rights, such as § 140.350, RSMo, 26 U.S.C. § 7425, 18 U.S.C. § 3613, and 11 U.S.C. § 108(b). Point II of Appellant’s Substitute Brief states, in part: “TAX SALE PURCHASERS CANNOT GIVE ADVANCE NOTICE OF THE TIME WHEN THEY MAY BE AUTHORIZED TO

ACQUIRE A COLLECTOR'S DEED, AS THE DATE WHEN ALL LAWFUL REQUIREMENTS HAVE BEEN SATISFIED AUTHORIZING THE TAX SALE PURCHASER TO ACQUIRE A COLLECTOR'S DEED CANNOT BE KNOWN IN ADVANCE." Delinquent taxpayers and other interested parties have the right to redeem from the tax sale. When a tax sale purchaser sends out a § 140.405 notice, the tax sale purchaser does not know if the tax sale purchaser is ever going to be authorized to obtain a collector's deed, as any redemption from the tax sale will defeat the tax sale purchaser's right to obtain the collector's deed. Even if a collector's deed is authorized to be issued to a tax sale purchaser, the date when the tax sale purchaser will have completed all of the legal requirements for issuance of the collector's deed will not be known to the tax sale purchaser at the time the initial § 140.405 letters are mailed.

Further, Respondents' comments regarding the treatment of the right of redemption in bankruptcy at page 45 of their Brief do not appear to be consistent with *Boykin*, 437 B.R. 346. Bankrupt debtors may not know a tax sale certificate was issued and may list the collector of revenue as a creditor, as occurred in *Boykin*. Using a Chapter 13 Plan to pay off the lump sum needed to redeem before the collector's deed is issued is problematic, as the automatic stay does not prevent the issuance of the collector's deed under *Boykin*.

At page 45 of their Brief, Respondents argue that the tax sale purchaser could perform title examinations of all properties offered for sale at a tax auction prior to bidding. The number of properties offered, the fact that many advertised liens are paid off prior to the tax

sale, the short time period from the date of first publication of the delinquent tax lists to the date of the sale, and the cost of performing these title examinations make such a proposition economically and physically unfeasible.

At pages 46-47 of their Brief, Respondents argue that all of the requirements for issuance of a collector's deed are within the control of the tax sale purchaser. This ignores: (1) That tax sale purchasers have no control over delinquent taxpayers who have the obligation to pay real estate taxes assessed against their property. Any redemption by a delinquent taxpayer or other interested party is not within the control of the tax sale purchaser. (2) *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) and *Scherleth v. Hardy*, 280 S.W.3d 47 (Mo. banc 2009) require tax sale purchasers to perform reasonable additional steps that are practicable to attempt to provide notice of the right to redeem under certain circumstances. Tax sale purchasers do not control when the United States Postal Service delivers "bounce backs" that may trigger a new set of mailings and/or posting of property.

At page 48 of their Brief, Respondents state the Collector cannot comply with § 140.290.2, RSMo, requiring the tax sale certificate to state "the time when the purchaser will be entitled to a deed for said land" if *Hobson* applies. The Tax Sale Certificate of Purchase, LF at 547, states the *Hobson* Redemption Period as follows:

At any time after the expiration of one year from the date of this sale, the above-named purchaser, his heirs or assigns, will upon

application and compliance with the provisions of law pertaining thereto be entitled to a Deed of Conveyance for any real estate herein described, which shall have been redeemed, provided, that on the failure of the holder of this certificate to take our said deed, as entitled by law, and file the same if record within two years from the date of such sale, then and in that event the amount due such purchaser shall cease to be a lien on such lands so purchased as herein provided.

LF at 547.

At pages 49-50 of their Brief, Respondents claim that *Stadium West Properties, LLC v. Johnson*, 133 S.W.3d 128, 133 (Mo. App., W.D. 2004) eliminates any reliance on tax sale notices as a precondition to a finding such notices misleading. *Stadium West* did not cite or discuss § 140.520, RSMo. No modern cases have cited § 140.520, RSMo. Section 140.520, RSMo, changes the result reached in *Stadium West* on this point.

### III.

**THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THE AMENDED PETITION ON THE GROUND THAT APPELLANT FAILED TO PROVIDE INDYMAC BANK WITH NOTICE IN COMPLIANCE WITH SECTION 140.405, RSMO, BECAUSE INDYMAC BANK WAS THE NAMED BENEFICIARY UNDER A PUBLICLY RECORDED DEED OF TRUST AFFECTING LOT 252 OF WESTHAVEN PLAT EIGHT AND THE REAL ESTATE SOLD AT TAX SALE WAS LOT 253 OF WESTHAVEN PLAT EIGHT; THUS, INDYMAC BANK HAD NO PUBLICLY RECORDED INTEREST IN THE REAL ESTATE SOLD AT TAX SALE AND WAS NOT ENTITLED TO NOTICE UNDER SECTION 140.405, RSMO.**

At pages 52-53 of their Brief, Respondents argue that § 140.330, RSMo, as interpreted in *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 2720802 (E.D. Mo. 2010), requires a party seeking to quiet title to include all parties who “appear of record” with a claim against the property to be included as a defendant. That part of *MERS v. Bellistri* concerning § 140.330, RSMo, addresses who is required to be joined as a party to a quiet title action, not who is entitled to notice under § 140.405, RSMo.

At page 54 of their Brief, Respondents argue that the Collector's records purportedly show that Indymac paid 2007 and 2008 taxes, thereby purportedly putting Appellant on notice that Indymac had an interest in Lot 253. Nothing in the record shows title

examinations of Lot 253 showed who paid real estate taxes for 2007 or 2008 or that Appellant had actual knowledge of any of the Collector's records of who paid the real estate taxes for 2007 and 2008.

At pages 55-56 of their Brief, Respondents argue that *Eason* controls Point III of this appeal. *Eason* contains no recitation of facts concerning the existence or adequacy of the legal description in the deed of trust in that case. *Eason* does not contain any discussion or legal analysis of the lack of a legal description in that deed of trust. *Eason* is not controlling.

At pages 56-57 of their Brief, Respondents argue that the Deed of Trust identifies the "Property" with reasonable certainty and that with the aid of oral testimony and extrinsic evidence, the Deed of Trust could be interpreted to affect Lot 253. Oral testimony and extrinsic evidence that might be presented in judicial proceedings to reform the Deed of Trust should not be the standard in determining whether one is a holder of a publicly recorded deed of trust under § 140.405, RSMo. The Deed of Trust describes Lot 252, and the property sold at tax sale was Lot 253. Indymac was not entitled to notice under § 140.405, RSMo.

#### IV.

**REPLY TO ADDITIONAL ARGUMENT IN SUPPORT OF THE JUDGMENT THAT WAS NOT RAISED BY THE POINTS RELIED ON IN THE APPELLANT'S SUBSTITUTE BRIEF: RESPONDENTS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON THE PURPORTED GROUND THAT THE INCAPACITY OF JOHN E.K. MREMA EXTENDED THE REDEMPTION PERIOD UNDER SECTION 140.350, RSMO.**

At pages 59-61 of their Brief, Respondents argue that John E.K. Mrema's right of redemption has not ended, because he has until one year from the date he regains his capacity to redeem under § 140.350, RSMo. This argument was not presented to the trial court and is inconsistent with Respondents' position that the redemption period ended on August 27, 2008.

On February 20, 2008, Lot 253 was conveyed by Quit Claim Deed to John E. K. Mrema and Respondent Ndegwa, as Trustees of a certain Trust. LF at 285, 296, 301A-301, 322-326, 366, 453, 463, 563, 645. The Notice Letters sent by Appellant were dated September 15, 2008. LF at 287-292, 449, 628-629, 645-646. On November 17, 2008, John E.K. Mrema was declared an incapacitated and disabled person, and Respondent Ndegwa was appointed conservator and a co-guardian of the Estate of John E.K. Mrema. LF at 281, 294, 366, 370, 372-373.

On November 17, 2008, John E.K. Mrema's co-trusteeship of the Trust was vacated under § 456.7-704.1(6), RSMo. That vacancy in co-trusteeship need not be filled under § 456.7-704.2, RSMo. Under § 456.7-703.2, RSMo, Respondent Ndegwa was authorized to act for the Trust as the remaining co-trustee of record. Under § 456.7-703.4, RSMo, Respondent Ndegwa, as co-trustee, was authorized to take prompt action in order to avoid injury to the trust property, such as causing the redemption of Lot 253 from the tax lien foreclosure process. Because of the vacancy in the co-trusteeship of the Trust caused by the declaration of John E.K. Mrema's incompetency, John E.K. Mrema no longer had any legal title to Lot 253 after November 17, 2008 and did not have any interest in Lot 253 to redeem.

When John E.K. Mremra was declared incompetent on November 17, 2008, he lost all legal title to the property. No inventory of the Estate of John E.K. Mrema or other evidence has been included in the Record on Appeal showing that his estate claims any interest in Lot 253.

### **CONCLUSION**

For the foregoing reasons, Appellant concludes that the trial court erred in granting Respondents' Motion for Partial Summary Judgment on Count III of their First Amended Petition. This Court should reverse the trial court's Judgment and remand this matter for entry of judgment consistent with such instructions as this Court may deem appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that electronic mail, together with an attachment containing an electronic version of the Appellant's Substitute Reply Brief in pdf format was sent on or before the 22nd day of March, 2012, to Elizabeth K. Thompson at [Thompsonlaw@live.com](mailto:Thompsonlaw@live.com), to Robert E. Fox, Jr., at [rfox@stlouisco.com](mailto:rfox@stlouisco.com), to Elizabeth Kayser at [attykayser@sbcglobal.net](mailto:attykayser@sbcglobal.net), and to Aaron Weishaar at [aweishaar@rwalawfirm.com](mailto:aweishaar@rwalawfirm.com)



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**COMPLIANCE CERTIFICATION**

In compliance with Rule 84.06(c), the undersigned does hereby certify that:

1. To the best of the undersigned's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the claims, defenses, requests, demands, objections, contentions, or arguments stated herein are not presented or maintained for any improper purpose; that said claims, defenses, requests, demands, objections, contentions, or arguments stated herein are warranted by existing law or a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law; that the allegations and other factual contentions stated herein have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and that the denials of factual contentions made herein are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. To the best of the undersigned's knowledge, information and belief, this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. To the best of the undersigned's knowledge, information and belief, this brief contains 7,743 words, more or less.

