

IN THE SUPREME COURT OF MISSOURI
Appeal Number SC90392

DAVID H. HAMES,

Appellant-Plaintiff-Counter-defendant,

v.

ROBERT BELLISTRI, and

Respondent-Defendant-Third-party Plaintiff,

MICHAEL P. MCGIRL,

Respondent-Defendant,

v.

All unknown and unnamed persons or entities who are the heirs, grantees or successors of David M. Hames, also known as David M. Homes, or any persons or entities who have, or claim to have, or appear of record as having, an interest, deed of trust, mortgage, lease, lien, claim, title, or estate in the real property and the improvements thereon, if any, located in the County of Washington, in the State of Missouri, and more particularly described as:

All of Parcel 19, Sector II, Lake Forest Farms Subdivision, as shown on a plat thereof recorded in Plat Book 11 at page 1 of the Land Records of Washington County, Missouri,

Third-party Defendants.

On Appeal from the Circuit Court of Washington County, Missouri, Case No. 05WA-CC00368
The Honorable Kenneth W. Pratte, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT BELLISTRI

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JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(E)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO RESPONDENT BELLISTRI'S AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT, SUPPORTING AFFIDAVITS SHALL BE MADE ON PERSONAL KNOWLEDGE, WHEREIN "... A TAX CERTIFICATE OF PURCHASE SHALL ... RECITE THE NAME AND ADDRESS OF THE OWNER OR REPUTED OWNER IF KNOWN, AND IF UNKNOWN THEN THE PARTY OR PARTIES TO WHOM EACH TRACT OR LOT OF LAND WAS ASSESSED, TOGETHER WITH THE ADDRESS OF SUCH PARTY, IF KNOWN, ...", SO, RESPONDENT BELLISTRI KNEW HAMES WAS UNKNOWN AS "DAVID M. HOMES".

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BELLISTRI'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS, THE STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO THE MOTION SHALL STATE WITH PARTICULARITY IN SEPARATELY NUMBERED PARAGRAPHS EACH MATERIAL FACT AS TO WHICH MOVANT CLAIMS THERE IS NO GENUINE ISSUE, WITH SPECIFIC REFERENCES TO THE PLEADINGS, DISCOVERY, EXHIBITS OR AFFIDAVITS THAT DEMONSTRATE THE LACK OF A GENUINE ISSUE AS TO SUCH FACTS.

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JURISDICTIONAL STATEMENT

This case comes to this Court after opinion of the Missouri Court of Appeals, Eastern District, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), on Application for Transfer filed by Respondent Bellistri and sustained by this Court on or about October 6, 2009. This Court has jurisdiction over this appeal under Mo. Const. Art. V, § 10. This Court may finally determine this appeal the same as on original appeal.

STATEMENT OF FACTS

At a time when Plaintiff was represented by counsel, Plaintiff filed a two-count Petition to Set Aside Tax Sale and Collector's Deed. LF at 343-348. Count I of the Petition claimed that Respondent Michael P. McGirl, in his capacity as Collector of Revenue of Washington County, Missouri, misspelled the name of Plaintiff by publishing his name as David M. Homes instead of his correct name of David M. Hames in violation of § 140.170, RSMo. Count I of the Petition also claims that Respondent Robert Bellistri failed to comply with § 140.405, RSMo, because the notice of tax sale redemption rights was addressed to David M. Homes, not David M. Hames. Count II of this Petition is an alternative claim that the surplus funds paid at the tax sale under § 140.230, RSMo, be awarded to Appellant.

The basis of the separate motions for summary judgment filed by Respondents was that the misspelling of Plaintiff's name in the tax book, published advertisements of tax sale and notice sent under § 140.405, RSMo, did not invalidate the Collector's Deed to Respondent Robert Bellistri. LF at 298.

The extensive statement of facts in the Appellant's Brief goes beyond the scope of the allegations made in Appellant's Petition.

ARGUMENT

I.

RESPONDENT BELLISTRI'S RESPONSE TO APPELLANT'S POINT I STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF RESPONDENT BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI KNEW OR SHOULD HAVE KNOWN THAT HE DID NOT CAUSE THE REDEMPTION NOTICE TO BE SENT TO APPELLANT HAMES, WHEREIN, BELLISTRI'S PERSONAL KNOWLEDGE OF § 140.290 RSMO REFLECTS THAT THE TAX CERTIFICATE OF PURCHASE ISSUED DOES NOT RECITE THE NAME OF THE OWNER OR REPUTED OWNER, IT CLEARLY RECITES "TO WHOM ASSESSED" FOLLOWED BY SOME NAME RECITED AS "HOMES, DAVID M." AND SOME ADDRESS AS "4645 ADKINS AVE. ST. LOUIS, MO 63116", EVIDENCING THAT "DAVID M. HOMES" IS NOT APPELLANT HAMES. ACCORDINGLY, RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(E)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO RESPONDENT BELLISTRI'S AFFIDAVIT IN

SUPPORT OF SUMMARY JUDGMENT, SUPPORTING AFFIDAVITS SHALL BE MADE ON PERSONAL KNOWLEDGE, WHEREIN “... A TAX CERTIFICATE OF PURCHASE SHALL ... RECITE THE NAME AND ADDRESS OF THE OWNER OR REPUTED OWNER IF KNOWN, AND IF UNKNOWN THEN THE PARTY OR PARTIES TO WHOM EACH TRACT OR LOT OF LAND WAS ASSESSED, TOGETHER WITH THE ADDRESS OF SUCH PARTY, IF KNOWN, ...”, SO, RESPONDENT BELLISTRI KNEW HAMES WAS UNKNOWN AS “DAVID M. HOMES”.

A.

STANDARD OF JUDICIAL REVIEW

The standard of judicial review of the summary judgment considered in this appeal is stated in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993), as follows:

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. ... [Citations omitted.] Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. ... [Citations omitted.] We accord the non-movant the benefit of all reasonable inferences from the record. ... [Citations omitted.]

Our review is essentially *de novo*. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. ... [Citation omitted.] The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. ... [Citation omitted.]

854 S.W.2d at 376.

Based upon the foregoing, this case is reviewed *de novo*, with the record reviewed in the light most favorable to Appellant. No deference is given to the trial court's summary judgment.

B.

**INSUFFICIENT POINT RELIED ON; FAILURE TO ARGUE POINT BEFORE
THE TRIAL COURT**

Appellant's argument in Point I of his Brief concerns matters that were not brought before the trial court. Appellant did not argue in the trial court prior to or at the time the motion for summary judgment of Respondent Bellistri was submitted to the Court that Respondent Bellistri knew or should have known that Appellant's name was David M. Hames, not David M. Homes, and that Respondent Bellistri knew or should have known that the tax sale certificate of purchase and the notice published pursuant to § 140.170, RSMo, were incorrect, and as a result, Respondent Bellistri's affidavit in support of his motion for

summary judgment was not made upon personal knowledge and belief and was in violation of Missouri Supreme Court Rule 74.04(e)(1).

An insufficient point relied on preserves nothing for appeal. *Skalecki v. Small*, 975 S.W.2d 566 (Mo. App., S.D. 1998). A point relied on must meet three requirements: (1) it must state the trial court's action or ruling about which the appellant complains; (2) it must state why the ruling was erroneous; and (3) it must state what was before the trial court that supports the ruling appellant contends should have been made. *Id.* at 568. This point relied on fails to state what was before the trial court that supports the ruling appellant contends should have been made, because Appellant failed to present any evidence or argument in support of this point to the trial court.

Section 512.160.1, RSMo, provides:

1. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, **no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.**

(Emphasis added.)

Missouri Supreme Court Rule 84.13(a) provides:

- (a) Preservation of Error in Civil Cases. Apart from questions of jurisdiction of the trial court over the subject matter

and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed shall not be considered in any civil appeal and **allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.**

(Emphasis added.)

Missouri Supreme Court Rule 84.13(c) provides:

(c) Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

The argument in this Point I of Appellant’s Brief was not before the trial court at the time the motions for summary judgment of Respondent Bellistri and Respondent McGirl were submitted to the trial court for decision. Appellant failed to preserve the alleged error in Point I of Appellant’s Brief for appellate review under Missouri Supreme Court Rule 84.13(a) and § 512.160, RSMo.

C.

PLAIN ERROR REVIEW IN TAX SALE CASES

Missouri Supreme Court Rule 84.13(c) authorizes “plain error” review under some circumstances when a point has not been preserved for appeal. Other than the Opinion o f

the Missouri Court of Appeals, Eastern District, in this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), counsel for Respondent Bellistri is aware of only one case involving the application of plain error review under former Rule 3.27 (now Rule 84.13(c))¹ to a case involving the validity of a collector's deed, *i.e.* *Shaw v. Armstrong*, 361 Mo. 648, 235 S.W.2d 851, 858-59 (Mo. 1951), *overruled by Journey v. Miler*, 363 Mo. 163, 250 S.W.2d 164 (Mo. banc 1952) *and by Powell v. County of St. Louis*, 556 S.W.2d 189, 194-95 (Mo. banc 1977).

In *Shaw*, a county trustee purchased property at a third offering delinquent tax sale on November 8, 1943, for delinquent taxes for the years 1936, 1937, 1938, 1939, 1940, 1941 and 1942. 235 S.W.2d at 853. The Collector's Deed was issued to the trustee on May 4, 1948. 235 S.W.2d at 857. The *Shaw* Court noted that under a predecessor of what is now codified in § 140.410, RSMo, a collector's deed was required to be issued within four years of the tax sale. The *Shaw* Court found the invalidity of this collector's deed to be plain error for failure to comply with what is now § 140.410, RSMo. 235 S.W.2d at 858-59.

Shaw was overruled in part in the *Journey* case. The *Journey* Court noted that after a 1939 amendment to the Jones-Munger Act, what is now codified at § 140.410, RSMo, applied only to tax sales for which a certificate of purchase was issued, namely first and second offering delinquent tax sales. Because the sale in the *Shaw* case was third offering

¹ Rule 3.27 was the predecessor of Rule 84.13(c). *Barney v. Suggs*, 688 S.W.2d 356, 364 (Mo. banc 1985) (Blackmar, J., dissenting).

delinquent tax sale occurring after the 1939 amendment to the Jones-Munger Act and for which no certificate of purchase was issued, this Court in *Journey* overruled *Shaw* on that ground but indicated that the ground that the sale in *Shaw* should have been set aside on the basis of the inadequacy of consideration still stood. 250 S.W.2d at 165-66. Although *Shaw* may not have been expressly overruled in *Powell v. County of St. Louis*, 556 S.W.2d 189 (Mo. banc 1977), inadequacy of consideration is no longer a ground for setting aside a tax sale. *Shaw* was in part overruled *sub silencio* in *Powell v. County of St. Louis*, 556 S.W.2d 189, 194-95 (Mo. banc 1977). *Shaw* is not good authority.

A practical problem in applying the “plain error” rule to cases involving the validity of collector’s deeds issued under the Jones-Munger Act is § 140.460.2, RSMo, which provides that collector’s deeds:

shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed.

The Collector’s Deed in this case vested Respondent Bellistri with a presumptive fee simple absolute in the property under §§ 140.420 and 140.460.2, RSMo.

Section 140.460, RSMo, does not prevent an opposing party from attempting to overcome the prima facie evidence of the regularity of all prior proceedings and good and valid title being vested by the collector's deed by offering evidence at variance with the title. *Stadium West Properties, LLC v. Johnson*, 133 S.W.3d 128, 136 (Mo. App., W.D. 2004).

An action to set aside a deed is an extraordinary proceeding in equity requiring evidence to support the cancellation of the deed that is clear, cogent and convincing. *See, e.g., Jolly v. Clarkson*, 157 S.W.3d 290, 292 (Mo. App., S.D. 2005); *Robertson v. Robertson*, 15 S.W.3d 407, 411 (Mo. App., S.D. 2000); *Thurmon v. Ludy*, 914 S.W.2d 32, 34 (Mo. App., E.D. 1996); *Estate of Oden v. Oden*, 905 S.W.2d 914, 918-919 (Mo. App., E.D. 1995) (“An action to set aside a deed is a matter of equitable cognizance. Myriad cases hold that relief will be granted only on the basis of “clear and convincing” evidence.”); and *Queathem v. Queathem*, 712 S.W.2d 703, 706 (Mo. App., E.D. 1986).²

Plain error can only arise when a party fails to present the alleged point of error to the trial court for decision. Rule 84.13(a) and (c). If a party has failed to present the alleged defect in the collector's deed to the trial court for determination, that party has almost

² These cases state the common law and do not address the burden of proof needed to set aside a deed protected by a statutory presumption of validity, such as §§ 140.460 or 443.380, RSMo. If “clear, cogent and convincing” evidence is needed to set aside an ordinary deed, then no lesser burden of proof should apply to this Collector's Deed.

assuredly failed to satisfy the burden of overcoming the presumption of validity attaching to the collector's deed under § 140.460.2, RSMo. The presumption of validity under § 140.460.2, RSMo, prevents plain error review in most, if not all, situations.

The type of manifest injustice or miscarriage of justice required for plain error review is also lacking in this case. Under the current state of the law, there may be no detrimental reliance requirement for a delinquent taxpayer or other interested party to invalidate a collector's deed based upon a defect in notice. *See, e.g., Stadium West Properties, LLC v. Johnson*, 133 S.W.3d 128, 133-34 (Mo. App., W.D. 2004). In this case, there is no evidence of any detrimental reliance by Appellant on any notices provided by either of the Respondents or that the misspelling of the name of Appellant actually prejudiced his rights in any way. Although the rule of strict compliance with the Jones-Munger Act allows courts to invalidate collector's deeds on academic or technical grounds without a showing of any actual prejudice to the delinquent taxpayer, *see, e.g., Stadium West Properties, LLC v. Johnson*, 133 S.W.3d 128, 134 (Mo. App., W.D. 2004), actual prejudice to the rights of the delinquent taxpayer should be required for a court to find a miscarriage of justice or a manifest injustice. Such actual prejudice cannot occur with respect to a claim of lack of notice of tax sale proceedings without actual knowledge by the delinquent taxpayer of the alleged defect in the tax sale proceedings prior to the issuance of the collector's deed and detrimental reliance by the delinquent taxpayer upon the alleged defect causing actual

prejudice to the rights of the delinquent taxpayer.³ There is no such evidence in the record before this Court. Merely reciting that the delinquent taxpayer may be denied his rights to property without due process of law should not be sufficient to give rise to plain error review, as was stated in *Hames v. Bellistri*, ED91499, Slip Op. at 4 (Mo. App., E.D. July 21, 2009). Constitutional principles of due process do not require actual receipt of notice. *Dusenbery v. U.S.*, 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). Counsel for Respondent Bellistri is not aware of any precedent creating a constitutional duty of due process to inform a delinquent taxpayer of the duration of their tax sale redemption rights. Without detrimental reliance by the delinquent taxpayer on the alleged defect in the notice provided in tax sale proceedings leading to the issuance of a collector's deed, there can be no manifest injustice or miscarriage of justice.

The plain error rule should be used sparingly and does not justify a review of every trial error that has not been properly preserved for appellate review. *Messina v. Prather*, 42 S.W.3d 753, 763 (Mo. App. 2001). In determining whether to exercise its discretion to provide plain error review, the appellate court looks to determine whether on the face of the appellant's claim substantial grounds exist for believing that the trial court committed a

³ This could occur, for example, if a delinquent tax sale purchaser, who was otherwise ready, willing and able to redeem, waited until after his redemption rights had expired to apply for a certificate of redemption from a tax sale in reliance upon incorrect information contained in a tax sale redemption notice.

"plain" error, which resulted in manifest injustice or a miscarriage of justice. *Bedwell v. Bedwell*, 51 S.W.3d 39, 43 (Mo. App. 2001). "Plain" error for purposes of Rule 84.13(c) is error that is evident, obvious and clear. *Id.* If the court chooses to exercise its discretion to conduct plain error review, the process involves two steps. First, the court must determine whether the trial court committed error, affecting substantial rights, that was evident, obvious and clear. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. 2000). As in the case of regular error, not every evident, obvious and clear error requires reversal. In the case of regular error, to be reversible, the error must have prejudiced the appellant. *Coats v. Hickman*, 11 S.W.3d 798, 807 (Mo. App. 1999). Likewise, in the case of obvious error, the error must have prejudiced the appellant, except that such prejudice must rise to the level of manifest injustice or a miscarriage of justice. *Slankard v. Thomas*, 912 S.W.2d 619, 628 (Mo. App. 1995).

The alleged errors complained of in Point I of Appellant's Brief do not constitute plain error. If such error exists, it is not evident, obvious and clear. It is Respondent Bellistri's belief that Appellant did not present any of the arguments contained in Point I of Appellant's Brief to the trial court prior to the submission of the motions for summary judgment of Respondents to the Court. If *arguendo* such error exists and is found to be evident, obvious and clear, Appellant has not shown how the purported knowledge of Respondent Bellistri that he was misspelling Appellant's name or any other alleged defect in the tax sale proceedings resulted in a manifest injustice or miscarriage of justice. This Court should deny Point I of Appellant's Brief under plain review standards without review of the merits.

D.

THE MISPELLING OF APPELLANT'S NAME IS NOT A GROUND TO SET

ASIDE THE COLLECTOR'S DEED

Historically, absolute accuracy in the spelling of names in tax sale proceedings was not required under tax lien foreclosure statutes in Missouri. The rule of *idem sonans* is that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error. *Davison v. Bankers' Life Ass'n*, 166 Mo. App. 625, 150 S.W.713 (K.C. App., 1912). The rule of *idem sonans* was followed in tax sale proceedings prior to the enactment of the Jones-Munger Act, Chapter 140, RSMo. *Wheelen v. Weaver*, 93 Mo. 430, 6 S.W. 220, 221 (Mo. 1887); *Troyer v. Wood*, 6 S.W. 690, 690 (Mo. 1888); *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S.W.44, 44-45 (Mo. 1888); *Simonson v. Dolan*, 114 Mo. 176, 21 S.W.510, 510-511 (Mo. 1893); *Geer v. Missouri Lumber & Mining Co.*, 134 Mo. 85, 34 S.W. 1099, 1100 (Mo. 1896); *Scarry v. Bunker-Culler Lumber Co.*, 233 Mo. 686, 136 S.W. 294, 295-296 (Mo. 1911); *Miller v. Keaton*, 236 Mo. 694, 139 S.W. 158, 162-163 (Mo. 1911); *Heberling v. Moudy*, 247 Mo. 535, 154 S.W. 65, 66 (Mo. 1912); *Skillman v. Clardy*, 256 Mo. 297, 165 S.W. 1050, 1052-1053 (Mo. 1912); *Williams v. Sands*, 158 S.W. 47, 49 (Mo. 1913); *Myers v. De Lisle*, 259 Mo. 506, 168 S.W.676, 677 (Mo. 1914); *Laclede Land & Improvement Co. v. Creason*, 264 Mo. 452, 175 S.W. 55, 57 (Mo. 1915);

Russ v. Hope, 265 Mo. 637, 178 S.W. 447, 448 (Mo. 1915); *Meramec Spring Park Co. v. Gibson*, 268 Mo. 394, 188 S.W. 179 (Mo. 1916); *Lovell v. Homes*, 219 S.W. 939, 940-941 (Mo. 1920); and *Sligo Furnace Co. v. Coombs*, 292 Mo. 530, 239 S.W. 816, 817 (Mo. 1922).

The Jones-Munger Act, Chapter 140, RSMo, does not follow the rule of *idem sonans*. Article X, § 13 of the Missouri Constitution and §§ 140.150.2 and 140.170.2 require that notice of a tax sale contain the names of all record owners or the names of all owners appearing on the land tax book.

Section 137.170, RSMo, provides:

Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a land list in alphabetical order, as provided in this chapter, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; **and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in any wise impair the validity of the assessment thereof for taxes.**

(Emphasis added.)

Section 140.500, RSMo, provides:

The sale of lands for taxes shall not be invalid on account of such lands having been listed or charged on the tax book in any other name than that of the rightful owner.

Section 140.520, RSMo, provides:

No irregularity in the assessment roll, no omission from the same, **nor mere irregularity of any kind in any of the proceedings**, shall invalidate any such proceeding, or the title conveyed by the tax deed; nor shall any failure of any officer or officers to perform the duties assigned him or them, on the day or within the time specified, work any invalidation of any such proceedings, or of such deed, and no overcharge as to a part of the taxes or costs, nor payment of such taxes or costs, shall invalidate a sale for taxes, except as to part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which such land was sold. Acts of officers de facto shall be as valid as if they were officers de jure, and if a deed would be valid as to the sale for any one tax, it shall not be impaired by any irregularity, error or defect in the proceedings or sale for any other tax or taxes.

(Emphasis added.)

In *Evans v. Brussel*, 330 S.W.2d 788, 791 (Mo. 1959), this Court found that the

advertisement of lands sold for taxes in the name of a prior owner did not invalidate the tax sale under § 140.500, RSMo.

In *Ruley v. Drey*, 643 S.W.2d 101, 104 (Mo. App., S.D. 1982), the Court stated:

A sale and collector's deed are not invalid because the taxes are shown delinquent in the name of someone who is not the owner. § 140.500, RSMo 1978; *Evans v. Brussel*, 330 S.W.2d 788, 791 (Mo.1959). If that does not invalidate a deed, then we do not see why a proper description combined with it would do so. As a practical matter, the differences that occurred here may make it more difficult for an owner to recognize his property. However, as the description of the property is not required to be in the same language as the owner's deed **and as the mistake in the owner's name is not a ground for invalidating the deed**, the collector's deed must be upheld.

643 S.W.3d at 104 (emphasis added).

In *Mason v. Whyte*, 660 S.W.2d 383 (Mo. App., E.D. 1983), the relevant tax book listed the owners as being “Prater, Robert A and wife”. The notice published for the tax sale showed the owners as being “Prater, Robert A. and wf.” It was argued that the notice of sale invalidated the tax sale and collector’s deed because it did not name all of the owners of the property, presumably by omitting the name of Mr. Prater’s wife. This Court stated:

The sale of land for taxes is not invalid because of the land

having been listed or charged on the tax book in any other name than that of the rightful owner. § 140.500; *Ruley v. Drey, supra*, 643 S.W.2d at 104. *Evans v. Brussel*, 330 S.W.2d 788, 791 (Mo.1959). The notice contained the names shown on the land tax book and therefore it was sufficient. This point is denied.

660 S.W.2d at 386.

Respondent concludes that the Jones-Munger Act excuses as mere irregularities all mistakes made in the spelling of the name of an owner of record under §§ 137.170, 140.500, and 140.520, RSMo, whether or not the misspelling of the name would invalidate the tax sale under the rule of *idem sonans*.

If tax sales are not invalid because taxes are shown delinquent in the name of someone who is not the owner, then the mere irregularity of misspelling an owner's name in the published and mailed tax sale notices should not invalidate a collector's deed under §§ 137.170, 140.500 and 140.520, RSMo. Section 140.405, RSMo, did not impliedly repeal §§ 137.170, 140.500, and 140.520, RSMo. This Court should deny Point I of Appellant's Brief.

II.

RESPONDENT BELLISTRI'S RESPONSE TO APPELLANT'S POINT II STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF RESPONDENT BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCGIRL ON MAY 19, 2008 AND DENYING

SUMMARY JUDGMENT TO APPELLANT HAMES, BECAUSE BELLISTRI FAILED TO SET FORTH THE LEGAL BASIS FOR BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON THE MOTION ITSELF. ACCORDINGLY, RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT, A MOTION FOR SUMMARY JUDGMENT SHALL SUMMARILY STATE THE LEGAL BASIS FOR THE MOTION AND DID NOT.

The summary of the legal basis of Respondent Bellistri's Motion for Summary Judgment is stated in the motion under the caption reading, **Summary of Legal Basis for Defendant's Motion for Summary Judgment**. LF at 297-298. Respondent Bellistri has also filed a Legal Memorandum in Support of the Motion for Summary Judgment of Defendant/Third-party Plaintiff's Counterclaims and Cross-claims, parts of which are included in the Legal File. LF at 290-294.

Unless Respondent Bellistri does not understand Point II of Appellant's Brief, said point has no merit.

If, for some reason, the summary of the legal basis for the Motion for Summary Judgment of Respondent Bellistri is somehow deficient, such point was not preserved for review under Missouri Supreme Court Rule 84.13(a) and § 512.160.1, RSMo, and this Court

should not find any such alleged deficiency to be plain error under Missouri Supreme Court Rule 84.13(c).

Respondent Bellistri also notes that Appellant failed to object to his motion for summary judgment on this basis before the trial court. If such objection had been made, any such defect could have been remedied at the trial court level. *See Wayward, Inc. v. Shafer*, 936 S.W.2d 843, 845 (Mo. App., E.D. 1996) (rejecting an argument that a summary judgment affirming a collector's deed should have been reversed on the ground that the motion for summary judgment did not comply with the particularity requirement of Missouri Supreme Court Rule 74.04(c)(1) at the trial court level where the defect could have been remedied).

III.

RESPONDENT BELLISTRIS RESPONSE TO APPELLANT'S POINT III STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRIS ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO APPELLANT HAMES, BECAUSE RESPONDENT BELLISTRIS MOTION FOR SUMMARY JUDGMENT FAILED TO CITE TO THE RECORD IN SUPPORT OF ANY FACTUAL ASSERTIONS. ACCORDINGLY, RESPONDENT BELLISTRIS MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT

BELLITRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO RESPONDENT BELLITRI'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS, THE STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO THE MOTION SHALL STATE WITH PARTICULARITY IN SEPARATELY NUMBERED PARAGRAPHS EACH MATERIAL FACT AS TO WHICH MOVANT CLAIMS THERE IS NO GENUINE ISSUE, WITH SPECIFIC REFERENCES TO THE PLEADINGS, DISCOVERY, EXHIBITS OR AFFIDAVITS THAT DEMONSTRATE THE LACK OF A GENUINE ISSUE AS TO SUCH FACTS.

The argument in Point III of Appellant's Brief was not presented to the trial court prior to submission of the Motion for Summary Judgment of Respondent Bellistri. This point was not preserved for review, as it was not presented to the trial court or pleaded in any claim for relief. Section 512.160.1, RSMo; Missouri Supreme Court Rule 84.13(a). This point is reviewable only under the plain error standard. Missouri Supreme Court Rule 84.13(c).

The Statement of Uncontroverted Material Facts in Support of Defendant/Third-party Plaintiff's Motion for Summary Judgment mirrors the Affidavit in Support of Defendant\Third-party Plaintiff's Motion for Summary Judgment filed simultaneously with the Motion for Summary Judgment of Respondent Bellistri. LF at 295-313. No one reading both documents could miss the fact that they are repetitive and reinforce each other, in that the Affidavit and the Statement of Uncontroverted Material Facts are synchronized to follow each other in lock-step fashion paragraph by paragraph.

In Point III of his Brief, Appellant is seeking to void the Collector's Deed on a purported technical noncompliance with Missouri Supreme Court Rule 74.04(c)(1). If objection to this motion had been made prior to submission to the trial court, counsel for Respondent Bellistri could have easily corrected any such technical defects found to exist in said motion prior to submission of the Motion for Summary Judgment to the trial court for decision. *See Wayward, Inc. v. Shafer*, 936 S.W.2d 843, 845 (Mo. App., E.D. 1996) (rejecting an argument that a summary judgment affirming a collector's deed should have been reversed on the ground that the motion for summary judgment did not comply with the particularity requirement of Missouri Supreme Court Rule 74.04(c)(1) at the trial court level where the defect could have been remedied). This is not plain error that manifests injustice or prejudices Appellant in any way.

IV.

RESPONDENT BELLISTRI'S RESPONSE TO APPELLANT'S POINT IV STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCGIRL ON MAY 9, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE RESPONDENT BELLISTRI FAILED TO ATTACH A COPY OF ALL DISCOVERY, EXHIBITS OR AFFIDAVITS ON WHICH THE MOTION RELIES TO HIS STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO THE MOTION FOR SUMMARY

JUDGMENT. ACCORDINGLY, BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO BELLISTRI'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS, ATTACHED TO THE STATEMENT OF UNCONTROVERTED MATERIAL FACTS SHALL BE A COPY OF ALL DISCOVERY, EXHIBITS OR AFFIDAVITS ON WHICH THE MOTION RELIES.

This point was not preserved for review, as it was not presented to the trial court or pleaded in any claim for relief. Section 512.160.1, RSMo; Missouri Supreme Court Rule 84.13(a). This point is reviewable only under the plain error standard. Missouri Supreme Court Rule 84.13(c).

The Affidavit in Support of Defendant\Third-party Plaintiff's Motion for Summary Judgment was filed simultaneously with the Motion for Summary Judgment. LF at 295-313.

The Affidavit and the attached exhibits accompany that Motion, and when the Circuit Clerk filed same in the Court file by attaching them to the file with two-hole prongs, said Affidavit and Motion were attached.

In essence, Appellant is making a technical argument in Point IV of Appellant's Brief that the Motion for Summary Judgment of Respondent Bellistri failed to comply with Missouri Supreme Court Rule 74.04(c)(1). If objection to this motion had been made prior to

submission to the trial court, counsel for Respondent Bellistri could have easily corrected any such technical defects found to exist in said motion prior to submission of the Motion for Summary Judgment to the trial court for decision. *See Wayward, Inc. v. Shafer*, 936 S.W.2d 843, 845 (Mo. App., E.D. 1996) (rejecting an argument that a summary judgment affirming a collector's deed should have been reversed on the ground that the motion for summary judgment did not comply with the particularity requirement of Missouri Supreme Court Rule 74.04(c)(1) at the trial court level where the defect could have been remedied). This is not plain error that manifests injustice or prejudices Appellant in any way.

V.

RESPONDENT BELLISTRIS RESPONSE TO APPELLANT'S POINT V STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF RESPONDENT BELLISTRIS ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO APPELLANT HAMES, BECAUSE RESPONDENT MCGIRL SOLD THE PROPERTY FOR TAXES CLAIMED TO BE DELINQUENT THAT WERE NOT DELINQUENT AT THE TIME OF SALE AS A RESULT OF RESPONDENT MCGIRL'S FAILURE TO REFLECT ONTO THE TAX BOOK, IN RELATION TO THE PROPERTY, THE TAX PAYMENT TO RESPONDENT MCGIRL OF \$69.82 MADE ON OR AROUND DECEMBER 8 BY ATTORNEY JOSEPH BECKER, WHICH, ON ITS FACE, INVOKES § 140.530 RSMO AND THE

EXISTENCE OF THAT GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE SALE OF THE PROPERTY BY MCGIRL WAS CONDUCTED ON THE FOURTH MONDAY IN AUGUST 2002, IN COMPLIANCE WITH ALL APPLICABLE ASPECTS OF THE JONES-MUNGER LAW, CHAPTER 140, RSMO SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS, IN THAT, CONTRARY TO THE MCGIRL/BELLISTRI DEAL, NO SALE OR CONVEYANCE OF LAND FOR TAXES SHALL BE VALID IF AT THE TIME OF BEING LISTED SUCH LAND SHALL NOT HAVE BEEN LIABLE TO TAXATION, OR, IF LIABLE, THE TAXES THEREON SHALL HAVE BEEN PAID BEFORE SALE.

This point was not preserved for review, as it was not presented to the trial court or pleaded in any claim for relief. Section 512.160.1, RSMo; Missouri Supreme Court Rule 84.13(a). This point is reviewable only under the plain error standard of Missouri Supreme Court Rule 84.13(c).

The Collector's Deed is *prima facie* evidence that the taxes encumbering the property were delinquent at the time of the sale under § 140.460.2, RSMo.

Appellant has the burden of producing evidence to rebut the *prima facie* evidence provided by the Collector's Deed. *Stadium West Properties v. Johnson*, 133 S.W.3d 128, 136 (Mo. App., W.D. 2004). The standard of proof for invalidating a deed is the "clear, cogent and convincing" standard of proof. . *See, e.g., Jolly v. Clarkson*, 157 S.W.3d 290,

292 (Mo. App., S.D. 2005); *Robertson v. Robertson*, 15 S.W.3d 407, 411 (Mo. App., S.D. 2000); *Thurmon v. Ludy*, 914 S.W.2d 32, 34 (Mo. App., E.D. 1996); *Estate of Oden v. Oden*, 905 S.W.2d 914, 918-919 (Mo. App., E.D. 1995) (“An action to set aside a deed is a matter of equitable cognizance. Myriad cases hold that relief will be granted only on the basis of “clear and convincing” evidence.”); and *Queathem v. Queathem*, 712 S.W.2d 703, 706 (Mo. App., E.D. 1986).⁴

In this case, the Collector’s Deed was for the non-payment of taxes due for the years 1998, 1999, 2000 and 2001. LF at 312.

As Respondent Bellistri understands this point, Appellant is arguing in Point V that the alleged payment of the sum of \$69.82 by Joseph Becker on December 8th of an unspecified year (and without evidence that Respondent McGirl received such payment) purportedly invalidates the tax sale and Collector’s Deed under § 140.530, RSMo (which statute is not plead in Appellant’s Petition as a basis for setting aside the Collector’s Deed).

Without intending to limit or waive any claims regarding the legal requirements or elements of Appellant’s purported claim that the tax sale and collector’s deed are invalid

⁴ These cases state the common law and do not address the burden of proof needed to set aside a deed protected by a statutory presumption of validity, such as §§ 140.460 or 443.380, RSMo. If “clear, cogent and convincing” evidence is needed to set aside an ordinary deed, then no lesser burden of proof should apply to this Collector’s Deed.

because no taxes were delinquent at the time of the tax sale, in order to prevail on such a claim, Appellant would need to show at the very least:

1. The amount of taxes, penalties and interest due when the \$69.82 payment was purportedly received by Respondent McGirl.
2. That the check for \$69.82 fully paid all taxes, interest and penalties due for this property when Respondent McGirl purportedly received this check.
3. That Respondent McGirl received the check for the sum of \$69.82 from Joseph Becker, and that said check cleared.

Appellant has not met those burdens or even come close to proving that Respondent McGirl received these funds. Appellant has not presented a genuine issue of material fact as to his payment of the real estate taxes in question. Appellant has not presented a receipt for payment of the taxes for the property for the years 1998, 1999, 2000 and 2001, although he acts as if the allegation that Joseph Becker paid \$69.82 at some unspecified time is tantamount to a receipt for payment of taxes for the years 1998, 1999, 2000 and 2001.

Even the Opinion of the Missouri Court of Appeals, Eastern District, in this case found that delinquent taxes would still be owed if the \$69.82 payment were credited to Appellant. *Hames v. Bellistri*, ED91499, Slip Op. at 2 (Mo. App., E.D. July 21, 2009). This Point should be denied.

VI.

**RESPONDENT BELLISTRIS'S RESPONSE TO APPELLANT'S POINT VI STATING
THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL**

COUNTS IN FAVOR OF RESPONDENT BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENT MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO RESPONDENT HAMES, BECAUSE RESPONDENT BELLISTRI, AS PURCHASER OF TAXES AT A TAX SALE, FAILED TO COMPLY WITH § 140.405 RSMO REQUIRING HIM TO SEND NOTIFICATION OF TAX SALE AND THE RIGHT TO REDEEM TO HAMES PRIOR TO REQUESTING A COLLECTOR'S DEED AND THE EXISTENCE OF THAT GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BY LETTER SENT CERTIFIED MAIL, RETURN RECEIPT REQUESTED, DATED MAY 17, 2004, RESPONDENT ROBERT BELLISTRI CAUSED MAILED NOTICE OF SUCH SALE AND POSSIBLE REDEMPTION RIGHTS TO BE SENT TO PLAINTIFF AT THE LAST KNOWN ADDRESS OF PLAINTIFF SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, RESPONDENT BELLISTRI DID NOT SEND NOTICE TO THE OWNER OF RECORD DISCLOSED BY THE GENERAL WARRANTY DEED AND FULL DEED OF RELEASE, AND DID NOT SEND NOTICE THAT COMPLIED WITH THE STATUTORY REQUIREMENTS FOR PROPER NOTICE.

A.

**ARGUMENTS RELATED TO THE MISSPELLING OF APPELLANT’S NAME
ARE INCORPORATED BY REFERENCE**

To the extent that Point VI of Appellant’s Brief is arguing that Respondent Bellistri failed to comply with § 140.405, RSMo, because the notice of tax sale redemption rights sent by Respondent Bellistri misspelled Appellant’s last name as “Homes” rather than “Hames”, Respondent hereby incorporates his argument relevant to such argument under Point I, as if fully set forth. Sections 140.500 and 140.520, RSMo, excuse the misspelling of Appellant’s name in the tax sale redemption notice sent under § 140.405, RSMo.

B.

POINT NOT PRESERVED FOR REVIEW

Point VI of Appellant’s Brief contains additional legal arguments not presented to the trial court prior to the submission of the motions for summary judgment of Respondents. These arguments appear to be: (1) that the tax sale redemption notice sent by Respondent Bellistri was not mailed to Appellant’s last known available address, and (2) that the content of the notice of tax sale redemption rights sent by Respondent Bellistri violates § 140.405, RSMo, as interpreted in *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006).

Because neither of these arguments was presented to the trial court or pleaded in any claim for relief by Appellant prior to submission of the motions for summary judgment of Respondents, these arguments are not preserved for review under Missouri Supreme Court

84.13(a) and § 512.160.1, RSMo. These arguments are reviewable under the plain error standard of Missouri Supreme Court Rule 84.13(c).

C.

ARGUMENTS ON PLAIN ERROR REVIEW IN TAX SALE CASES

INCORPORATED BY REFERENCE

Respondent Bellistri hereby incorporates by reference, as if fully set forth, his arguments presented in response to Point I of Appellant’s Brief related to the use of plain error review in tax sale cases. Appellant has not overcome the presumptive validity of the Collector’s Deed when the asserted alleged defects were not even presented to the trial court or pleaded in any claim for relief. Further, Appellant has not presented any evidence that he detrimentally relied on any of the asserted alleged defects in the tax sale proceedings. No manifest injustice or miscarriage of justice is shown under this point.

D.

LAST KNOWN AVAILABLE ADDRESS

Appellant argues that his address shown on the General Warranty Deed vesting him with title to the property in question, which was the same address shown on the collector’s and assessor’s records, was not his last known available address, citing *Bullard v. Holt*, 158 S.W.3d 868 (Mo. App., S.D. 2006). *Bullard* interprets the word “available” as requiring reasonable diligence in ascertaining the last known address. The Court in *Bullard* stated:

In order to satisfy the statutory requirement that notice be given to the owner at the "last known available address," we hold that

the purchaser must use due diligence to notify the owner at the last known "available" address. What that means is that the word "available" in section 140.405 encompasses the concept that reasonable efforts should be used to notify the owner that someone else is claiming an interest in the property.

158 S.W.3d at 871-872.

Footnote 2 of the *Bullard* decision states:

Lest there be any misunderstanding, we are not saying that notice to an owner via the address listed in tax records is insufficient notice as a matter of law. Under the facts of a particular case, sending the notice to the address listed in the tax records may comply with the requirements that the purchaser use due diligence to provide notice.

158 S.W.3d at 872 n. 2.

The phrase "last known available address" as it relates to tax sales in Missouri originated in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) and *Lohr v. Cobur Corp.*, 654 S.W.2d 833 (Mo. banc 1983) (*Lohr II*), *subsequent appeal*, 721 S.W.2d 763 (Mo. App., E.D. 1986) in enunciating the constitutional standard required by due process. Although *Bullard* is written in terms of the statutory construction of § 140.405, RSMo, the use of the same words, "last known available address", in both the statute (§ 140.405, RSMo) and case law interpreting the Constitution would

logically make the scope of the phrase, “last known available address”, in the Constitution and the statute coextensive. *See, e.g., Dean Realty Company v. City of Kansas City, Missouri*, 85 S.W.3d 83, 88 (Mo. App., W.D. 2002) (interpreting essentially identical language in two different tax sale statutes pertaining to the same subject in the same manner).

In *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006), the Court stated:

Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked "unclaimed" did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector, see Ark. Code Ann. §26-35-705 (1997)—imposes burdens on the State significantly greater than the several relatively easy options outlined above.

In *Schwartz v. Dey*, 780 S.W.2d 42, 44-45 (Mo. banc 1989), this Court stated:

In this case, plaintiffs do not contend that the collector knew their address of record was incorrect or that their correct address was information in the public domain. Instead, they submit scenarios under which the collector could have found their Maryland address. We have no doubt that under these scenarios it would have been possible to locate plaintiffs' whereabouts. The constitutional analysis requires, however, that we balance the interests of the parties and determine whether the collector's failure to make further attempts to notify plaintiffs was unreasonable. Plaintiffs argue, for instance, that the collector could have found their Maryland address by going to the recorder's office and examining the deed to the property. They concede that their mailing address as shown by the deed is incorrect, but suggest that, from the deed, the collector could have learned the identity of the person who served as notary and should have contacted this person in an attempt to discover plaintiffs' true whereabouts. In this case, the notary was the attorney who represented plaintiffs in the purchase of the property. Plaintiffs also argue that the collector could have effected notice by locating and/or contacting their tenants. These scenarios place upon the collector a substantially greater duty

than that envisioned by *Mullane* and *Mennonite* because they require the collector to ascertain whether the owners' publicly recorded address is correct. The collector is not required to make "impracticable and extended searches ... in the name of due process." *Mullane*, 339 U.S. at 317, 318, 70 S.Ct. at 659. Nor is he "required to undertake extraordinary efforts to discover the ... whereabouts of [the owner]." *Mennonite*, 462 U.S. at 798 n. 4, 103 S.Ct. at 2711 n. 4.

Appellant's Brief appears to state that the General Warranty Deed vesting title of the property in Appellant and a Full Deed of Release were available to Respondent Bellistri to assist him in ascertaining Appellant's last known available address. Respondent does not read Appellant's Brief as stating any other means were available to Respondent Bellistri to ascertain Appellant's last known available address. Appellant's Brief at 38-39. Respondent Bellistri sent the tax sale redemption notice to the address shown on the General Warranty Deed and the tax records. LF at 151, 310 (notice letter mailed to David M. Homes at 4645 Adkins Avenue, St. Louis, Missouri 63116), LF at 102-104 (the Full Deed of Release that does not contain an address for Appellant), and LF at 306-308 (the General Warranty Deed showing the name and address of the Grantee as being, "David M. Hames, 4645 Adkins Avenue, St. Louis, Missouri 63116-2404"). Because Appellant does not explain how Respondent Bellistri was to ascertain Appellant's last known available address other than by examination of the General Warranty Deed and the Full Deed of Release, this argument is

without merit.

E.

NOTIFICATION OF THE RIGHT TO REDEEM UNDER SECTION 140.405,

RSMO

Appellant's Brief also contains an argument that the form of the notice of tax sale redemption sent by Respondent Bellistri does not comply with § 140.405, RSMo, as interpreted by *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273, 277 (Mo. App., E.D. 2006). Relying on *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006), in *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009), and in the Opinion in this case, *Hames v. Bellistri*, Case No. ED91499, Slip Op. at pages 4-6 (Mo. App., E.D. July 21, 2009), the Missouri Court of Appeals, Eastern District, has held that notices under § 140.405, RSMo, must accurately state the duration of the tax sale redemption rights, which the Eastern District has opined is currently a fixed one year period under the current version of § 140.340, RSMo, and was formerly a two-year period in this case under the pre-2003 version of § 140.340, RSMo. The Opinion of the Missouri Court of Appeals, Eastern District, in this case found this unpreserved point to be plain error requiring reversal of the trial court's judgment. The Opinion in this case holds that there is a fixed period of redemption after first and second offering delinquent tax sales, and that § 140.405, RSMo, requires the tax sale purchaser to correctly state the period of redemption in the notices required by that statute. *Hames v. Bellistri*, ED91499, Slip. Op. at 5 (Mo. App., E.D. July 21, 2009).

The current state of Missouri law concerning the content of a notice of the right to redeem under § 140.405, RSMo, is confused and confusing to the point that the efficacy of the tax sale process under the Jones-Munger Act has been or will be seriously eroded by the uncertainty of the required content of notices required by § 140.405, RSMo. The uncertainty of the required content of § 140.405, RSMo, creates a strong disincentive to tax sale purchasers to risk their funds for the purchase of tax liens (thereby depriving local governmental entities of funds needed for governmental operations). The only way to understand this confused state of affairs is to review the history of events that brought us to this point. After quoting the current version of § 140.405, RSMo, in its entirety, the following events are presented in largely chronological order.

Section 140.405, RSMo, currently states:

Any person purchasing property at a delinquent land tax auction shall not acquire the deed to the real estate, as provided for in section 140.420, until the person meets with the following requirement or until such person makes affidavit that a title search has revealed no publicly recorded deed of trust, mortgage, lease, lien or claim on the real estate. At least ninety days prior to the date when a purchaser is authorized to acquire the deed, the purchaser shall notify any person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon that real estate of the latter person's right to redeem such

person's publicly recorded security or claim. Notice shall be sent by certified mail to any such person, including one who was the publicly recorded owner of the property sold at the delinquent land tax auction previous to such sale, at such person's last known available address. Failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate. If any real estate is purchased at a third-offering tax auction and has a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate, the purchaser of said property at a third-offering tax auction shall notify anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate pursuant to this section. Once the purchaser has notified the county collector by affidavit that proper notice has been given, anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the property shall have ninety days to redeem said property or be forever barred from redeeming said property. If the county collector chooses to have the title search done then the county collector must comply with all provisions of this section, and may charge the purchaser the cost of the title search before giving the purchaser a deed pursuant to section 140.420.

F.

IN REM JURISDICTION AND THE “CARETAKER THEORY”

Historically, courts distinguished between *in rem* and *in personam* proceedings in determining the notice required under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.E. 565 (1877). In the early 1900s, the “caretaker theory” arose; the United States Supreme Court presupposed that owners of interests in property would take diligent steps to keep themselves informed of any tax proceedings that could adversely affect their property. *See, e.g., Longyear v. Toolan*, 209 U.S. 414, 28 S.Ct. 506, 52 L.Ed.2d 859 (1908). The “caretaker theory” in tax sale proceedings had continuing constitutional validity until 1983. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 804, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983) (O’Conner, 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. ...[Citations omitted.] *Mullane* expressly acknowledged, and did not reject, the continued vitality of the notion that property owners had some burden to protect their property.”).

G.

**THE 1933 ENACTMENT OF AND 1939 AMENDMENTS TO THE
JONES-MUNGER ACT**

The “caretaker doctrine” was the state of constitutional due process analysis when the Depression-era statutes commonly known as the Jones-Munger Act (currently codified in

Chapter 140, RSMo) were enacted. Senate Bill No. 94, 1933 Mo. Laws 425. The Jones-Munger Act effected a radical change in the method of foreclosing the State's lien for taxes from the prior method of foreclosing such liens by suit in a court of competent jurisdiction. *Schlaflly v. Baumann*, 108 S.W.2d 363, 366 (Mo. 1937).

Under the Jones-Munger Act, as originally enacted in 1933, the collector made out a delinquent land tax list containing the names of the record owners of real property with delinquent land taxes. Notice of the offering of these properties for sale to foreclose the State's lien for taxes was made by publication only. The collector offered property with delinquent taxes for sale a first time at the regular annual tax sale then held in November (which is now held on the fourth Monday each August). If no person bid a sum at the first offering equal to or greater than the delinquent taxes, interest, penalty and costs, then the property was offered for sale a second time at the next regular tax sale the following year. If no person bid a sum at the second offering equal to or greater than the amount of the delinquent taxes, interest, penalty and costs, then the property was offered for sale a third time at the next regular tax sale the following year. At the third offering tax sale, the property was sold to the highest bidder, even if the bid was insufficient to pay the taxes, interest, penalties and costs assessed against the real estate. *See, e.g.*, §§ 9953 and 9953a, 1933 Mo. Laws at 432; *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. banc 1997).

As the Jones-Munger Act was originally enacted in 1933, the owner or occupant of any land or lot sold for taxes—whether in a first, second or third offering delinquent tax

sale—had a two-year period to redeem their interest in the property under §§ 9953b and 9956a, 1933 Mo. Laws at 432. In 1939, the Jones-Munger Act was amended in part by eliminating the two-year right of redemption after property is sold at third offering delinquent tax sales, and the counties were given the authority to appoint a trustee with discretionary authority to bid at third offering delinquent tax sales in order to purchase property at third offering delinquent tax sales and prevent loss to the taxing authorities from inadequate bids. *See, e.g.*, §§ 9953a and 9953b, 1939 Mo. Laws 850, at 851 and 852; *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. banc 1997). This 1939 legislation eliminated any right of redemption after third offering delinquent tax sales. Thus, after the 1939 legislation, the purchaser at a first or second delinquent tax sale offering bought an inchoate interest in the property represented by a certificate of purchase under what is now codified as § 140.340, RSMo, and a purchaser at a third delinquent tax sale offering purchased the property and was issued a deed after the third offering delinquent tax sale without the issuance of a certificate of purchase under what is now codified as § 140.250, RSMo.

H.

AFTER 1939, CERTIFICATES OF PURCHASE ISSUED TO PURCHASERS AT FIRST AND SECOND SALES WERE FOLLOWED BY A RIGHT OF REDEMPTION; COLLECTOR'S DEEDS WERE ISSUED TO PURCHASERS AT THIRD SALES WITHOUT A RIGHT OF REDEMPTION

When a purchaser who is not primarily obligated to pay the real estate taxes for which

a property is being sold at tax sale obtains a tax sale certificate of purchase at a first or second offering under the Jones-Munger Law, the purchaser is considered to have an inchoate or inceptive right to acquire the real estate in accordance with the conditions set forth in the Jones-Munger Law, subject to the absolute right of those with redemption rights to defeat the purchaser's title prior to the expiration of those rights of redemption from the tax sale. The interest of the holder of a tax sale certificate of purchase is analogous in nature to the equitable interest of a vendee under a real estate purchase contract. *State of Missouri ex rel. Baumann v. Marburger*, 182 S.W.2d 163, 165-166 (Mo. 1944); *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942); *State of Missouri ex rel. City of St. Louis v. Baumann*, 153 S.W.2d 31, 34 (Mo. 1941); and *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. banc 1997). No certificate of purchase is issued after a third offering delinquent tax sale, and a collector's deed was issued to the tax sale purchaser. § 140.250.2, RSMo.

I.

SINCE 1942, THIS COURT HAS HELD THAT THE PERIOD OF REDEMPTION FROM FIRST AND SECOND OFFERING DELINQUENT TAX SALES IS AT LEAST THE MINIMUM PERIOD SET FORTH IN WHAT IS NOW CODIFIED AS SECTION 140.340, RSMO (CURRENTLY ONE YEAR, BUT PRIOR TO 2003, TWO YEARS) AND THE RIGHT TO REDEEM CONTINUES THEREAFTER UNTIL THE COLLECTOR'S DEED IS AUTHORIZED TO BE ISSUED; PROVIDED, THAT IF THE COLLECTOR'S DEED IS NOT ISSUED WITHIN

**THE PERIOD SPECIFIED IN WHAT IS NOW CODIFIED AS SECTION 140.410,
RSMO (CURRENTLY TWO YEARS BUT PRIOR TO 2003, FOUR YEARS)
AFTER THE TAX SALE, THE TAX SALE CERTIFICATE EXPIRES AND THE
TAX SALE PURCHASER NO LONGER OWNS AN LIEN ENCUMBERING THE
PROPERTY.**

In *Hobson v. Elmer*, 163 S.W.2d 1020 (Mo. 1942), the Court determined the period of the right of redemption from first and second offering delinquent tax sales. *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942) has been followed by *State ex rel. Baumann v. Marburger*, 182 S.W.2d 163, 165-166 (Mo. 1944), *Wetmore v. Berger*, 188 S.W.2d 949, 953 (Mo. 1945), *Strohm v. Boden*, 222 S.W.2d 772 (Mo. 1949), *Powell v. City of Creve Coeur*, 452 S.W.2d 258, 261-262 (Mo. App., St. L. 1970); and *Boston v. Williamson*, 807 S.W.2d 216, 217 n.3 (Mo. App., W.D. 1991). In *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942), the Court interpreted predecessors of §§ 140.340, 140.360, 140.410, 140.420, RSMo. Those statutes now state as follows:

Section 140.340.1 & .4, RSMo, provide:

1. **The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the one year next ensuing**, in the following manner: by paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his

certificate of purchase and all the cost of the sale together with interest at the rate specified in such certificate, not to exceed ten percent annually, except on a sum paid by a purchaser in excess of the delinquent taxes due plus costs of the sale, no interest shall be owing on the excess amount, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight percent per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.

...

4. **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.

(Emphasis added.) In 2003, the one-year redemption period in the above-referenced statute was substituted for a two-year period redemption period that existed in prior law dating back to 1933. This case is governed by the pre-2003 version of this statute, as the tax sale in this case occurred in 2002.

Section 140.360, RSMo, provides:

1. In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, 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; and, if the parties cannot agree on the value thereof the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment.

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

(Emphasis added.) In 2003 the one-year period in subsection 2 of § 140.360, RSMo, was substituted for a two-year period that existed under prior law dating back to 1933. This case is governed by the pre-2003 version of this statute, as the tax sale in this case occurred in 2002.

Section 140.410, RSMo, provides:

In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs due thereon,

and a certificate of purchase has been or may hereafter be issued, **it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within two years from the date of said sale; provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided.** Certificates of purchase cannot be assigned to nonresidents or delinquent taxpayers. Any person purchasing property at a delinquent land tax sale shall pay to the collector the fee necessary for the recording of such collector deed to be issued. It shall be the responsibility of the collector to record the deed before delivering such deed to the purchaser of the property.

(Emphasis added.) In 2003 the two-year period in the above statute was substituted for a four-year period that existed under prior law dating back to 1933. This case is governed by the pre-2003 version of this statute, as the tax sale in this case occurred in 2002.

Section 140.420, RSMo, provides:

If no person shall redeem the lands sold for taxes **within one year from the sale,** at the expiration thereof, and on production of certificate of purchase, the collector of the county

in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however, to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold.

(Emphasis added.) In 2003 the one-year period in the above-referenced statute was substituted for a two-year period that existed under prior law. This case is governed by the pre-2003 version of this statute, as the tax sale in this case occurred in 2002.

Hobson v. Elmer, 163 S.W.2d 1020, 1023 (Mo. 1942) states:

While the first sentence of Section 11145, supra, [now codified as Section 140.340, RSMo] apparently limits the right of redemption to a period of two years following the sale, such a construction is negated by the last quoted words of the section and by the proviso contained in Section 11147, supra [now codified as Section 140.360, RSMo]. If the right of redemption absolutely ceases at the end of two years there would be no purpose in a provision that the redemptioner could not be charged interest after the end of the two years and it would be

unnecessary to state that the redemptioner was not required to make compensation for improvements placed on the land before the expiration of two years and impliedly that he was required to make such compensation after the end of the two years, if he could not redeem at all after the end of the two years.

We must, however, also take into consideration the language of Section 11149, R.S. Mo. 1939 [now codified as Section 140.420, RSMo]: "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, ... the collector of the county in which the sale of such lands took place shall execute to the purchaser... a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple."

There is one manner and, in our opinion, only one manner in which these seemingly conflicting provisions may be harmonized. We construe them to mean that the owner of the lands has an absolute power of redemption which cannot be defeated by the purchaser during and up to the end of the two-year period. Thereafter the purchaser has a right to obtain a collector's deed at any time within the next two years by complying with the various statutory provisions, to-wit: by

producing to the collector his certificate of purchase, paying the subsequently accrued taxes and legal fees and demanding his deed. If, after the end of the two-year period and before the purchaser has complied with these conditions precedent to obtaining his deed, the owner or transferee applies for a redemption and makes the required payments he thereby destroys the power of the purchaser to obtain a deed.

(Current statutory references added.)

Hobson v. Elmer, 163 S.W.2d 1020, 1022 (Mo. 1942) was extensively discussed in *Powell v. City of Creve Coeur*, 452 S.W.2d 258, 261-262 (Mo. App., St. L. 1970). The Court that decided *Powell v. City of Creve Coeur*, 452 S.W.2d 258 (Mo. App., St. L. 1970) is the predecessor of the Missouri Court of Appeals, Eastern District, that decided *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) and this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009).

Additional cases supporting the proposition that the one-year time period in what is now codified in § 140.340, RSMo, is a minimum absolute redemption period that cannot be defeated by the tax sale purchaser, and that delinquent taxpayers and other interested parties continue to have a right of redemption after the minimum period set forth in what is now codified as § 140.340, RSMo, until such time as the collector's deed is either authorized to be

issued or executed and delivered⁵ are as follows: *Boston v. Williamson*, 807 S.W.2d 216, 217 (Mo. App., W.D. 1991) (holding that the requirement in § 140.405, RSMo, requiring at least ninety days notice prior "to the date when he is authorized to acquire the deed" does not mean the date 90 days prior to the expiration of the time period in § 140.340, RSMo, but means at least 90 days prior to the time the period of redemption expires under *Hobson*); *Campbell v. Siegfried*, 823 S.W.2d 156, 158 (Mo. App., E.D. 1992) (construing the parties entitled to notice under § 140.405, RSMo, to "include anyone who has not received prior notice of the sale, but **who has an interest that could be lost when the collector's deed is issued.**") (emphasis added); and *York v. Authorized Investors Group, Inc.*, 931 S.W.2d 882, 888 (Mo. App., E.D. 1996) ("Until the execution of a tax deed, defendant and all other parties in interest, including plaintiffs, have the right to redeem the property by paying the delinquent taxes.").

J.

MENNONITE NOTICING REQUIREMENTS

Meanwhile, the constitutional method of due process approved in *Pennoyer v. Neff* was modified in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Under *Mullane*, when a property interest is at stake, a state actor who

5 Collector's deeds are recorded prior to delivery. Section 140.410, RSMo. *Hobson* supports the formulation that the right of redemption is foreclosed when the collector's deed is authorized to be issued. Other cases cited are less precise in their formulation.

would affect that interest is under a duty to provide “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.” *Mullane*, 339 U.S. at 314. This requirement has been interpreted as requiring mailed notice to certain parties rather than notice by publication as a pre-condition for proceedings that could affect property rights. *See, e.g., Schwartz v. Dey*, 780 S.W.2d 42, 44 (Mo. banc 1989).

Under the pre-1984 version of the Jones-Munger Act, notice of the sale of property for delinquent taxes was by publication, without mailed notice. *See* §§ 140.030, RSMo, 140.150, and 140.170, RSMo, and Mo. Const. Art. X, § 13. *See Bankers Union Life Insurance Co. v. Floy Hanks & Mistwood*, 654 S.W.2d 888, 889 (Mo. banc 1983) (indicating that only record owners of property have a right to published notice of tax sales under Mo. Const. art. X, § 13); *Mitchell v. Atherton*, 563 S.W.2d 13 (Mo. banc 1978) (indicating that §§ 140.150 and 140.170, RSMo, implement the notice requirements of Mo. Const. art. X, § 13).

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L. Ed. 2d 180 (1983) (a 6-3 decision), the United States Supreme Court applied the *Mullane* standard to Indiana tax sale statutes. The Indiana tax sale statutes at that time provided for a tax sale with a two-year right of redemption similar to the pre-1984 provisions in the Jones-Munger Act applicable to first and second offering delinquent tax sales. The Indiana tax sale statutes in question did not provide for mailed notice to lien holders prior to a tax sale or for mailed notice to lien holder’s of the lien holder’s right of redemption prior to execution and delivery of a collector’s deed.

In *Mennonite*, the Mennonite Board of Missions took back a mortgage on property in Indiana to secure a \$14,000 loan. The mortgagor was responsible for paying the property taxes under the mortgage, but without the knowledge of Mennonite Board of Missions, the owner failed to pay the property taxes. In 1977, the county initiated proceedings to sell the mortgagor's property for non-payment of taxes as provided by Indiana law. This included posting notice in the county courthouse, publishing notice once a week for three consecutive weeks, and sending notice by certified mail to the last-known address of the property owner. Until 1980, Indiana law did not provide for notice by mail or personal service to mortgagees upon request. On August 8, 1977, the property was sold to Richard Adams for \$1,165.75. Following the sale, the mortgagor continued to make monthly payments to Mennonite Board of Missions. It was not until August 16, 1979, that Mennonite Board of Missions learned the property had been sold at tax sale. By then, the two-year redemption period had run, and the mortgagor still owed Mennonite Board of Missions \$8,237.19.

The Court in *Mennonite* stated the following:

This case is controlled by the analysis in *Mullane*. To begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale. Under Indiana law, a mortgagee acquires a lien on the owner's property which may be conveyed together with the mortgagor's personal obligation to repay the debt secured by the mortgage. *Ind.Code* § 32-8-11-7. A mortgagee's security interest generally has priority over

subsequent claims or liens attaching to the property, and a purchase money mortgage takes precedence over virtually all other claims or liens including those which antedate the execution of the mortgage. *Ind.Code* § 32-8-11-4. The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors. Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period.

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. *Wiswall v. Sampson*, 55 U.S. 52, 67, 14 L.Ed. 322 (1852). When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.

462 U.S. at 798, 103 S.Ct. at 2711, 77 L.Ed.2d at 187 (footnote 4 omitted).

Interestingly, the Court in *Mennonite* held that the initial tax sale that carried with it a two-year right of redemption WITHOUT the right to mailed notice caused an immediate and drastic diminution of value that triggered the right to mailed notice or personal service. The Court expressly reserved the following in footnote 6 of *Mennonite*:

This appeal also presents the question whether, before the county auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property. *Griffin v. Griffin*, 327 U.S. 220, 229, 66 S.Ct. 556, 560-561, 90 L.Ed. 635 (1946). Because we conclude that the failure to give adequate notice of the tax sale proceeding deprived appellant of due process of law, we need not reach this question.

Mennonite, 462 U.S. at 800 n.6, 77 L.Ed.2d at 188 n.6, 103 S.Ct. at 2712 n.6.

The *Mennonite* appeal originally involved the constitutionality of a lack of “pre-sale” mailed notice of the tax sale to a lien holder and the constitutionality of a lack of “post-sale” mailed notice of the right of redemption from the tax sale to lien holders prior to the execution and delivery of a collector’s deed. The *Mennonite* case did not decide whether “post-sale” notice in the absence of “pre-sale” notice obviates the immediate and drastic

diminution of value purportedly caused by a sale of the tax lien if such sale is coupled with a post-sale right to notice of the right to redeem from said sale.

Prior to *Mennonite*, this Court as late as 1982 affirmed the constitutionality of the Jones-Munger Act based solely upon notice by publication to lien holders. *McMullin v. Carter*, 639 W.2d 815, 817-818 (Mo. banc 1982).

In *Lohr v. Cobur Corporation*, 654 S.W.2d 883 (Mo. banc 1983) (*Lohr II*), subsequent appeal, 721 S.W.2d 763 (Mo. App., E.D. 1986), this Court addressed the application of the *Mennonite* case to the pre-1984 version of the Jones-Munger Act and found the Act, as it was enacted prior to 1984, failed to provide lien holders with constitutionally mandated, mailed notice. The *Lohr II* Court held as follows:

We conclude that where a deed of trust naming a deed of trust beneficiary is publicly recorded, notice by publication alone is sufficient and must be supplemented by notice mailed to the beneficiary's last known available address or by personal service.

654 S.W.2d at 886.

In *Trapf v. Lohr*, 666 S.W.2d 414 (Mo. banc 1984), appeal dismissed, 469 U.S. 1013, 105 S.Ct. 423, 83 L.Ed.2d 351 (1984), this Court considered the constitutionality of the pre-1984 version of the Jones-Munger Act in a challenge by a delinquent taxpayer that had

received mailed notice of the tax sale from the collector of revenue. The Court upheld the constitutionality of the pre-1984 version of the Jones-Munger Act as applied in that case stating:

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. The Collector did not owe Mrs. Trapf the duty of advising her to open mail plainly addressed to her; nor was he required to initiate the process of re-recording the deed to the property in question so that mail would be addressed to Mrs. Trapf alone. Indeed, the Collector had no notice of the changed status of ownership until Mrs. Trapf informed his office of her divorce in her letter. No case cited or reported requires a tax collector under circumstances such as these to do more than supplement published notices with notice mailed to an interest-holder's last known address. Given that Mrs. Trapf received these mailed notices, received a prompt letter in reply to her inquiry, and knew of her obligation to pay taxes, it cannot be said that she was denied due process of law. Nor can it be said under these facts that the use in published notices of abbreviations more specific than those provided by statute in any way prevented

Mrs. Trapf from taking steps to preserve her interest in the property. § 140.180, RSMo 1987.

It is true that tax sales may by their nature provide windfalls for purchasers seeking bargains in the real estate market, and that tax sales can work hardships upon those whose interests are terminated. Nevertheless, it is the Collector's legal duty to sell property for taxes owed, § § 140.010, 140.190, RSMo 1978; and this case presents no facts or circumstances requiring the tax collector to undertake more extensive efforts than were actually and successfully undertaken to notify the property owner prior to that sale. *But see Covey v. Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956). The procedures actually employed by the Collector pass constitutional muster.

666 S.W.2d at 415-416.

Importantly, the *Trapf* Court did not state that the Collector of Revenue owed Ms. Trapf a constitutional duty to inform her of the duration of her tax sale redemption rights, or that the Collector of Revenue was under a constitutional duty to inform Ms. Trapf that the issuance of a collector's deed would forever foreclose her right to redeem her interest in the property.

K.

SOME LEGISLATIVE HISTORY OF SECTION 140.405, RSMO

In an apparent response to the *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) and *Lohr v. Cobur Corp.*, 654 S.W.2d 833 (Mo. banc 1983) (*Lohr II*), *subsequent appeal*, 721 S.W.2d 763 (Mo. App., E.D. 1986), the General Assembly of Missouri attempted to cure the constitutional defect in the Jones-Munger Act by amending § 140.250 and by enacting a new § 140.405. Senate Bill No. 707, 1984 Mo. Laws 431-32; *M & P Enterprises Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. banc 1997). Counsel for Respondent Bellistri believes that the reservation in footnote 6 of *Mennonite* was the basis for the General Assembly of Missouri to enact § 140.405, RSMo, requiring post-sale *Mennonite*-style noticing of the right of redemption from the tax sale. Footnote 6 clearly shows that *Mennonite* did not decide that pre-sale notice of the tax sale is required if the relevant tax lien foreclosure statutes prohibit a nullification of the delinquent taxpayer or other interested parties' interest in real estate unless there is post-sale mailed notice of the right of redemption of the delinquent taxpayer or other interested parties. Because § 140.405, RSMo, provides that non-compliance with that statute causes a loss of interest by the tax sale purchaser,⁶ there cannot be a nullification of a delinquent taxpayer's

6 Section 140.405, RSMo, should not be read as impliedly repealing §§ 140.550 and 140.570, RSMo, which provide that tax liens sold on property may be judicially foreclosed under § 140.330.2, RSMo, if a tax sale is invalidated.

interest in property and the consequent drastic and immediate diminution of value triggering *Mennonite*-style noticing requirements caused by the issuance of the Collector's Deed foreclosing the right to redeem without complying with the post-sale *Mennonite* noticing requirements enacted in § 140.405, RSMo.

As originally enacted in 1984, § 140.405, RSMo, applied equally to first, second and third offering delinquent tax sales. *Russo v. Kelm*, 835 S.W.2d 568 (Mo. App., E.D. 1992). In 1987, legislation was enacted to exempt third offering delinquent tax purchases from the notice provisions of § 140.405, RSMo. *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154 (Mo. banc 1997); *Russo v. Kelm*, 835 S.W.2d 568, 570 n.1 (Mo. App., E.D. 1992); *Keylien Corporation v. Johnson*, 284 S.W.3d 606, 611 (Mo. App., E.D. 2009).

Without a right of redemption and a right to constitutionally adequate notice of that right of redemption, the third-sale procedures of the Jones-Munger Act were declared unconstitutional. *Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868 (Mo. banc 1995) and *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154 (Mo. banc 1997).

In 1998, the General Assembly created a 90-day right of redemption for third-offering delinquent tax sales and a right of notice thereof by amending § 140.250.1, RSMo, and § 140.405, RSMo. *Keylien Corporation v. Johnson*, 284 S.W.3d 606, 612 (Mo. App., E.D. 2009).

L.

REQUIREMENTS FOR CONTENT OF THE NOTICE UNDER

SECTION 140.405, RSMO

The first case construing the content requirements for notice under § 140.405, RSMo, was *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006). The record on appeal in *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) will confirm that the property in that case was not sold at a third offering tax sale. On motion for rehearing in *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), the Missouri Court of Appeals, Eastern District stated that it could not verify the type of offering (first, second or third) considered in *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) (despite the fact that the record on appeal was presumably filed with that Court), but the rehearing order held that *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) applied third sale procedures. 284 S.W.3d at 614. *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) incorrectly applied the third sale procedures enacted by 1998 amendments to § 140.405, RSMo, to a first or second offering delinquent tax sale for which a certificate of purchase was issued.

Section 140.405, RSMo, does not contain a required form for the notice, such as that required in Illinois in 35 ILCS 200/22-5 and 35 ILCS 200/22-10. The operative language of § 140.405, RSMo, applicable to first and second offering delinquent tax sales is: “At least ninety days prior to the date when a purchaser is authorized to acquire the deed, the purchaser shall notify any person who holds a publicly recorded deed of trust, mortgage,

lease, lien or claim upon that real estate **of the latter person's right to redeem such person's publicly recorded security or claim.**” (Emphasis added.) In *Keylien Corporation v. Johnson*, 284 S.W.3d 606, 612 (Mo. App. E.D. 2009), the Court stated: “The question before us is what constitutes the ‘right to redeem’ that must be contained in that notice.”

In *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006), the Court incorrectly applied the 1998 amendment to § 140.405, RSMo (that created the 90-day right of redemption applicable only to third sales), to a tax sale for which a certificate of purchase was issued. Respondent Bellistri also asserts that *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) imposed a number of requirements for the content of a notice that are not specified in § 140.405, RSMo. Even though the redemption notice in *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) was not received and there was no detrimental reliance on the content of that notice, the Court in *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) found the notice to be misleading as a matter of law.

Valli v. Glasgow Enterprises, Inc., 204 S.W.3d 273 (Mo. App., E.D. 2006) concluded that the notice letter was misleading as a matter of law when there was no evidence presented that there was any detrimental reliance on the content of the notice.⁷ There is precedent holding that there is no detrimental reliance requirement for certain tax sale notices. *Stadium*

⁷ The Court never addressed how a notice could be misleading as a matter of law if it was never received and was never relied upon by the party purportedly misled.

West Properties, LLC v. Johnson, 133 S.W.3d 128, 133 (Mo. App., W.D. 2004). *Stadium West Properties v. Johnson*, 133 S.W.3d 128, 133 (Mo. App., W.D. 2004) states that the issue of a detrimental reliance requirement for published tax sale notices with specific statutory content requirements was an issue of first impression in that case. In *Stadium West Properties v. Johnson*, 133 S.W.3d 128, 133 (Mo. App., W.D. 2004) the Court found that there was no detrimental reliance requirement for a delinquent taxpayer to challenge a published tax sale notice based upon noncompliance with § 140.530, RSMo, requiring that real estate be described with reasonable certainty. Section 140.405, RSMo, is different from § 140.530, RSMo, as that statute contains specific content provisions or requirements. Section 140.405, RSMo, only requires notice “of the latter person's right to redeem such person's publicly recorded security or claim.” Section 140.405, RSMo.

The Eastern District has recognized that *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) does not apply to first or second offering delinquent tax sales in *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) and this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009). However, *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009), and the Opinion of the Eastern District in this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), have created their own problems through the incorrect formulation of the right of redemption in those cases. Both *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009) and *Cedarbridge v. Eason*,

293 S.W.3d 462 (Mo. App., E.D. 2009), require notice of a fixed one-year right of redemption under § 140.340, RSMo. The Opinion of the Eastern District in this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), required notice of a fixed two-year right of redemption under the pre-2003 version of § 140.340, RSMo. However, as explained elsewhere in this Brief, the Jones-Munger Act provides a delinquent taxpayer or other interested party with an absolute right of redemption from first or second delinquent tax sales that cannot be defeated by the tax sale purchaser for a fixed one year period that previously and in this case was a fixed two-year period from the date of the tax sale under § 140.340, RSMo. Thereafter, delinquent taxpayers and other interested parties continue to have a right of redemption until such time as the tax sale purchaser is authorized to acquire a collector's deed. It is the issuance of the collector's deed that forecloses the right of redemption, as the collector's deed vests the tax sale purchasers with a fee simple absolute, subject to certain statutory exceptions, under § 140.420 or § 140.250.2, RSMo. If no collector's deed is authorized to be issued before the date two years (formerly four years) after the tax sale, the tax sale certificate expires under § 140.410, RSMo, and the tax sale purchaser no longer has a lien against the property. Sections 140.340, 140.360, 140.410, and 140.420, RSMo; *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942); *State ex rel. Baumann v. Marburger*, 182 S.W.2d 163, 165-166 (Mo. 1944); *Wetmore v. Berger*, 188 S.W.2d 949, 953 (Mo. 1945); *Strohm v. Boden*, 222 S.W.2d 772 (Mo. 1949); *Powell v. City of Creve Coeur*, 452 S.W.2d 258, 261-262 (Mo. App., St. L. 1970); *Boston v. Williamson*, 807 S.W.2d 216, 217 n.3 (Mo.

App., W.D. 1991); *Campbell v. Siegfried*, 823 S.W.2d 156, 158 (Mo. App., E.D. 1992); and *York v. Authorized Investors Group, Inc.*, 931 S.W.2d 882, 888 (Mo. App., E.D. 1996).

There are a number of legal requirements that the tax sale purchaser must meet in order to be authorized to acquire a collector's deed. For example, the tax sale purchaser must pay subsequent taxes as required under § 140.440, RSMo, the tax sale purchaser must tender the original of the certificate of purchase under § 140.420, RSMo, and the tax sale purchaser must tender recording fees for the collector's deed under 140.410, RSMo, as well as comply with the noticing requirements of § 140.405, RSMo, and any other applicable laws, such as the due process provisions of the United States Constitution, as interpreted in *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).

The actual redemption period from a first or second offering delinquent tax sale in any particular case is dependent upon the interaction of various laws and other factors. Within the current one-year (formerly two-year) window for obtaining a collector's deed established by §§ 140.340 and 140.410, RSMo, the purchaser at a first or second sale has wide latitude in determining when a deed is authorized to be issued. *Boston v. Williamson*, 807 S.W.2d 216, 218 (Mo. App., W.D. 1991) states:

The phrase "authorized to acquire the deed" refers to the date between ... [one] and ... [two] years from the sale on which the purchaser delivers his certificate of purchase to the collector. 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.

(Revisions made due to statutory changes.)⁸

Section 140.350, RSMo, complicates tax sale redemption rights by extending the redemption period for infants or incapacitated or disabled persons until one year after the expiration of the disability. *See Roberts v. Glasgow*, 860 S.W.2d 26 (Mo. App., E.D. 1993) (concluding that no adjudication of disability is required by this statute, and that partially disabled persons are disabled persons for purposes of § 140.350, RSMo) and *Covey v. Town of Somers*, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956) (notice provided to a person without a guardian or conservator who was known to be mentally incompetent did not comport with principles of due process of law). The Eastern District opinions have not considered § 140.350, RSMo, in determining the duration of redemption rights for which notice is purportedly required under § 140.405, RSMo.

Further complicating the duration of tax sale redemption rights are federal laws that may come into play, such as 26 U.S.C. § 7425 (giving the Internal Revenue Service a redemption period of 120 days after the issuance of the collector's deed) or certain

8. Sections 140.340 and 140.410, RSMo, were amended in 2003 to shorten the mandatory redemption period following first and second offering tax sales from two years to one year and the expiration of tax sale certificates from four years to two years.

bankruptcy laws, such as 11 U.S.C. § 108(b) (providing a minimum 60 day period for a trustee in bankruptcy to exercise redemption rights).

M.

CURRENT STATE OF THE LAW REGARDING THE CONTENT OF NOTICES

UNDER SECTION 140.405, RSMO

The current law concerning the content of tax sale redemption notices under § 140.405, RSMo, is uncertain and confusing. Prior to *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006), counsel for Respondent Bellistri thought that § 140.405, RSMo, only required notice “of the latter person's right to redeem such person's publicly recorded security or claim.” Section 140.405, RSMo. *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) erroneously applied the 90-day right of redemption applicable to third sales to first and second sales, and *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006) created a requirements not expressly stated in § 140.405, RSMo, such as, to inform interested parties of the correct duration of their redemption rights. *Hames v. Bellistri*, Case No. ED91499, Slip Op. at page 5 (Mo. App., E.D. July 21, 2009). *Hames v. Bellistri*, No. ED91499 (Mo. App., E.D. July 21, 2009), *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), and *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) require notice of a fixed redemption period from first or second offering tax sales under § 140.340, RSMo, when the correct redemption period is not a fixed period under *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942), *State of Missouri ex rel. Baumann v. Marburger*, 182 S.W.2d 163, 165-166 (Mo. 1944), *Wetmore v. Berger*, 188

S.W.2d 949, 953 (Mo. 1945), *Strohm v. Boden*, 222 S.W.2d 772 (Mo. 1949), *Powell v. City of Creve Coeur*, 452 S.W.2d 258, 261-262 (Mo. App., St. L. 1970), and *Boston v. Williamson*, 807 S.W.2d 216, 217 n.3 (Mo. App., W.D. 1991).

The General Assembly has not legislated any requirement to give delinquent taxpayers and other interested parties notice of the duration of their tax sale redemption rights in § 140.405, RSMo, nor is counsel for Respondent Bellistri aware of any cases construing the Due Process Clause of the Fourteenth Amendment to the United States Constitution to require notice of the duration of the right to redeem from a tax sale. The plain language of § 140.405, RSMo, requires only that the tax sale purchaser inform the addressee of their right to redeem their security or claim. The Eastern District's opinions construing § 140.405, RSMo, otherwise have been disastrously off the mark. *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006), *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), and *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) require the impossible. When notices of tax sale redemption rights are mailed, served or posted, tax sale purchasers cannot know when they will be authorized to acquire a collector's deed, if ever, and tax sale purchasers cannot give advance notice of the duration of the redemption period. Variables affecting the duration of tax sale redemption rights include, without limitation: (1) the time when the tax sale purchaser has given constitutionally adequate notice of tax sale redemption rights to all interested parties in compliance with § 140.405, RSMo, (2) whether updates to title examinations of properties identify new parties that must be given constitutionally

adequate and statutorily compliant notice of their right to redeem (*see, e.g. Glasgow Enterprises, Inc. v. Rossel*, 209 S.W.3d 498 (Mo. App., E.D. 2006) (failure to provide notice to a party who was not identified in the title report required by § 140.405, RSMo, but who acquired an interest more than 90 days prior to the time the tax sale purchaser was authorized to acquire a collector's deed invalidated the collector's deed), (3) whether envelopes containing any of the notice letters mailed will be returned, and how long it takes to find a better "last known available address" to re-mail notices to interested parties (*see 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)); (4) the time when subsequent taxes will be paid, § 140.440, RSMo, (5) the time when recording fees will be tendered, § 140.410, RSMo, (6) the time when the original certificate of purchase will be tendered to the collector, § 140.420, RSMo, (7) whether the delinquent taxpayer files for bankruptcy protection; 11 U.S.C. § 108(b), (8) whether the IRS has a lien on the property; 26 U.S.C. § 7425, and (9) whether any interested parties are infants, incompetent or disabled persons under § 140.350, RSMo.

Ignoring the analysis in *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942), the Eastern District opinions in this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), and *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) make tax sale certificates expire one year (formerly two years) from the date of the tax sale, contrary to § 140.410, RSMo. This result is especially confounding to those attempting to comply with *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), because when mailed notices of tax sale redemption rights are returned, additional reasonable steps consistent with § 140.405, RSMo, *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) include conducting research for a better “last known available address” and re-mailing the notice of tax sale redemption rights via certified mail and regular mail to the better “last known available address”. Such re-mailing re-starts the minimum “at least” 90-day notice period required by § 140.405, RSMo. Under *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), and *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009), if notice letters are returned less than 90 days prior to the expiration of the fixed redemption period, there may be no additional reasonable steps that are practicable for the tax sale purchaser to take and that are compliant with § 140.405, RSMo, to provide constitutionally adequate notice of tax sale redemption rights, because there will not be sufficient time to re-mail the “at least” 90-day notices under § 140.405, RSMo, to the new “last known available address”. *But compare St. Regis of Onslow County v. Johnson*, 663 S.E.2d 908, 914 (N.C. App. 2008) (holding that the requirement of *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) to take additional reasonable steps, if practicable, to attempt to provide notice applies only when the government becomes aware that normal procedures have been ineffective in providing notice at a time when the delinquent tax payer may still redeem his or her interest in the property). Under *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942), *State of Missouri ex rel. Baumann v. Marburger*, 182 S.W.2d 163, 165-166 (Mo. 1944),

Wetmore v. Berger, 188 S.W.2d 949, 953 (Mo. 1945), *Strohm v. Boden*, 222 S.W.2d 772 (Mo. 1949), *Powell v. City of Creve Coeur*, 452 S.W.2d 258, 261-262 (Mo. App., St. L. 1970) and *Boston v. Williamson*, 807 S.W.2d 216, 217 n.3 (Mo. App., W.D. 1991), if notice letters are returned within 90 days of the expiration of the absolute minimum one-year (formerly two-year) redemption period, the tax sale purchaser has an additional year (formerly two years) to take additional reasonable steps that are practicable and consistent with § 140.405, RSMo, to provide constitutionally adequate notice of tax sale redemption rights. Unlike Illinois, 35 ILCS 200/21-385, Missouri does not allow tax sale purchasers to extend the redemption period.

Tax sale redemption funds are paid to the county collectors under § 140.340, RSMo. The redemption amount is determined by the county collector and changes day-to-day due to interest and/or. penalty charges, so the tax sale purchaser cannot give advance notice of the amount needed to redeem the property from the tax sale in the notice of redemption rights. Since *Hobson v. Elmer*, 163 S.W.2d 1020, 1022 (Mo. 1942) was handed down in 1942 until the 2009 Eastern District Opinions in *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009) and this case, *Hames v. Bellistri*, No. ED91499 (Mo. App., E.D. July 21, 2009), delinquent taxpayers and other interested parties had a right of redemption after the expiration of the absolute minimum redemption period under § 140.340, RSMo, until the collector of revenue is authorized to issue a collector's deed. Under the Eastern District Opinions in *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App. E.D. 2009), *Cedarbridge v. Eason*, 293

S.W.3d 462 (Mo. App., E.D. 2009), and this case, *Hames v. Bellistri*, ED91499 (Mo. App., E.D. July 21, 2009), delinquent taxpayers and other interested parties currently lose their right to redeem from a first or second offering delinquent tax sale one year from the date of the sale, regardless of whether the tax sale purchaser is authorized to acquire a collector's deed to the property or whether any collector's deed has been issued to foreclose the right of redemption.

N.

**RESPONDENT BELLISTRI'S NOTICE OF TAX SALE REDEMPTION RIGHTS
GAVE NOTICE OF THE EXISTENCE OF TAX SALE REDEMPTION RIGHTS
IN COMPLIANCE WITH SECTION 140.405, RSMO; THE DEFECT IN SAID
NOTICE LETTER WAS A MERE IRREGULARITY UNDER SECTION 140.520,**

RSMO.

The notice letter in this case states, in part:

Dear Mr. Homes:

On August 26, 2002, I was the highest bidder at the Washington County Tax Land Sale and was issued a Tax Sale Certificate of Purchase on the above referenced property.

According to State law, I am required to notify person(s) who holds a publicly recorded Deed of Trust, Mortgage, Lease, Lien or Claim upon referenced real estate, of your right to redeem your security or claim.

To redeem your security or claim, contact Michael P. McGirl, Collector of Revenue, Washington County, Missouri with 90 days from the date of receipt of this letter.

Failure to redeem said real estate will forfeit your rights to said property and a Collectors Deed will be issued to me.

LF at 310.

The second paragraph of this notice letter gave notice “of the latter person's right to redeem such person's publicly recorded security or claim.” Section 140.405, RSMo. Section 140.405, RSMo, only requires notice of the right of redemption—no other content is mandated for the notice by this statute.

The third paragraph of this notice letter incorrectly states that the right to redeem expires “with 90 days from the date of receipt of this letter.” The third paragraph of this notice letter is mere surplusage not required by § 140.405, RSMo, and unless Appellant can show that he relied upon the incorrect information in this notice, such incorrect information is a mere irregularity under § 140.520, RSMo, that cannot invalidate a collector’s deed.

Scherleth v. Hardy, 280 S.W.3d 47 (Mo. banc 2009) held that tax sale purchasers acting under § 140.405, RSMo, are state actors for purposes of Fourteenth Amendment due process analysis.

Section 140.520, RSMo, provides that no mere irregularity of any kind in any tax sale proceedings shall invalidate any such proceeding or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the duties assigned them work any invalidation of such proceedings or the tax deed. Further, § 140.520, RSMo, provides that the acts of *de facto* officers shall be as valid as officers *de jure*.

The General Assembly of Missouri has assigned the constitutional duty to provide *Mennonite*-style noticing to tax sale purchasers, not to the *de jure* county collectors of revenue. *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 157 (Mo. banc 1997). *Scherleth v. Hardy*, 280 S.W.3d 47 (Mo. banc 2009) has also held that tax

sale purchasers are state actors with the governmental and constitutional obligation to provide the supplemental noticing required by *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

There cannot be one standard of care placed on tax sale purchasers to strictly comply with the law (or suffer the loss of property purchased at tax sale) under cases such as *Stadium West Properties v. Johnson*, 133 S.W.3d 128 (Mo. App., W.D. 2004), when statutes, such as §§ 137.170, 140.500, and 140.520, RSMo, impose a less than strict compliance standard of care for *de jure* officers involved in tax sale proceedings. A strict compliance standard of care is inconsistent with § 140.520, RSMo.

Under § 140.520, RSMo, the acts of *de facto* officers are as valid as the acts of *de jure* officers. *Scherleth v. Hardy*, 280 S.W.3d 47 (Mo. banc 2009) confirms that tax sale purchasers are state actors who are *de facto* governmental officers charged with the statutory duty of providing post-sale *Mennonite*-style noticing of tax sale redemption rights and the further constitutional duty to provide the supplemental noticing of tax sale redemption rights required by *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). Collector's deeds should not be set aside for mere irregularities in a notice of tax sale redemption rights made by a tax sale purchaser under § 140.520, RSMo. Section 140.405, RSMo, has no express requirement to state the duration of the redemption rights, and the notice of tax sale redemption rights cannot be a self-contained notice of all information needed to redeem, as the redemption amount to

be paid under § 140.340, RSMo, changes day-to-day and is calculated by and paid to collectors of revenue, not tax sale purchasers.

Further, the notice letter in this case cannot be the basis for finding manifest injustice or a miscarriage of justice under the plain error review standard, because there is no evidence that Appellant was prejudiced by reliance on the language in the mailed notice. Any challenges to the Collector's Deed based upon the language in the redemption notice are mere irregularities that should not be a basis for invalidating his collector's deed under § 140.520, RSMo.

VII.

RESPONDENT BELLISTRI'S RESPONSE TO APPELLANT'S POINT VII STATING THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF RESPONDENT MCGIRL ORDERED AND MADE FINAL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO RESPONDENT HAMES, BECAUSE RESPONDENT MCGIRL FAILED TO SET FORTH THE LEGAL BASIS FOR RESPONDENT MCGIRLS MOTION FOR SUMMARY JUDGMENT ON THE MOTION ITSELF. ACCORDINGLY, RESPONDENT MCGIRL'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04 (C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT MCGIRL'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO MCGIRL'S MOTION FOR SUMMARY JUDGMENT, A MOTION FOR SUMMARY JUDGMENT SHALL SUMMARILY STATE THE LEGAL BASIS FOR THE MOTION AND DID NOT.

This point was not preserved for review, as it was not presented to the trial court or pleaded in any claim for relief. Section 512.160.1, RSMo; Missouri Supreme Court Rule 84.13(a). This point is reviewable only under the plain error standard. Missouri Supreme Court Rule 84.13(c).

Appellant's Brief makes no reference to that part of the Legal File containing the motion for summary judgment and related documents filed by Respondent McGirl. Respondent Bellistri has not been able to locate those documents in the Legal File. This point does not present any manifest injustice or a miscarriage of justice and should be denied.

VIII.

ADDITIONAL ARGUMENT IN SUPPORT OF THE JUDGMENT NOT RAISED BY THE POINTS RELIED ON IN APPELLANT'S BRIEF: IF THIS CASE IS TO BE REVIEWED UNDER *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), RESPONDENT BELLISTRIO SHOULD BE ALLOWED TO INTRODUCE EVIDENCE THAT HE MAILED TAX SALE REDEMPTION NOTICES BY FIRST CLASS MAIL TO APPELLANT AT THE SAME ADDRESSES AND AT THE SAME TIMES THAT NOTICE OF TAX SALE REDEMPTION WERE SENT BY CERTIFIED MAIL, AND THAT NO SUCH NOTICES SENT BY FIRST CLASS MAIL WERE RETURNED, OR THAT RESPONDENT BELLISTRIO OTHERWISE TOOK STEPS TO COMPLY WITH THE HOLDINGS IN THOSE CASES.

Missouri Supreme Court Rule 84.04(f) provides, in part: “The respondent's brief may also include additional arguments in support of the judgment that are not raised by the points relied on in the appellant's brief.” Respondent Bellistri wishes to address footnote 3 of the Opinion of the Missouri Court of Appeals, Eastern District, *Hames v. Bellistri*, No. 91499, Slip Op. at footnote 3 (Mo. App., E.D. July 21, 2009).

Footnote 3 deals with the *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). The Missouri Court of Appeals, Eastern District, makes the following statement in footnote 3: “The record also reflects that Bellistri failed to take any other actions to provide notice to Hames.” *Hames v. Bellistri*, ED91499, Slip Op. at footnote 3 (Mo. App., E.D. July 21, 2009).

If this Court deems it appropriate to consider the application of *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) to this case, Respondent Bellistri would like the opportunity to present evidence that Respondent Bellistri supplemented the notices sent by certified mail, as required by Section 140.405, RSMo, with identical notices sent to the exact same addressees and addresses by first class mail at the same times as certified mailed notices were sent, and that the notices sent by first class mail in this matter to Appellant were not returned to Respondent Bellistri, or that Respondent Bellistri took other steps to comply with *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). This evidence was not included in the record below, because such evidence is not relevant to any of the legal theories pleaded or argued before the trial

CERTIFICATE OF SERVICE

The undersigned does hereby certify that two (2) true and correct copies of Substitute Respondent Bellistri’s Brief were mailed, postage prepaid, together with an electronic copy of said Brief on disc, to the following persons on the ___ day of _____, 2009, to David M. Hames, 103 Main Cross, Taylorville, Illinois 62568, and Holly D’Andrea, Assistant Prosecuting Attorney, 102 North Missouri, Potosi, Missouri 63664, Attorney for Defendant Michael P. McGirl.

COMPLIANCE CERTIFICATION

In compliance with Missouri Supreme Court 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 21,502 words, more or less, based upon the Word Count function included in the Word program used to produce this Brief.

4. The undersigned further certifies that an electronic copy of this brief was scanned and found to be virus-free, and that such electronic copy of this brief is being filed together with the paper original and copies of this brief.

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