IN THE SUPREME COURT OF MISSOURI

JAMES SCHLERETH, Appellant & Cross-Respondent,	)	
vs.	)	Supreme Court No. SC89402
JANE TILLMAN HARDY, Respondent & Cross-Appellant.	)	

From the Circuit Court of Jefferson County, Missouri

Twenty-Third Judicial Circuit

Division 3

Honorable M. Edward Williams

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This action is the result of a tax sale that took place on August 26, 2002. (L.F. Vol. I 11-12).[1] Prior to the tax sale, Jane Tillman Hardy (hereinafter referred to as "Respondent") was the owner of a particular tract of real estate described as follows and hereinafter known as "the Property":

> "The South Half of the Southwest Quarter of the Southeast Quarter of Section Three (3), Township Forty-Two (42), Range Three (3). Parcel No.: 06-2.0-03.0-013." (L.F. Vol. I 11-12.)

Respondent failed to pay the taxes on the Property for the years 1999, 2000, and 2001. (L.F. Vol. I 11-12.) The Property was sold for taxes by Jefferson County on August 26, 2002. (L.F. Vol. I 11-12.)

On that same day, James Schlereth (hereinafter referred to as "Appellant") paid $9,500.75 to the Collector of Revenue and received a Tax Sale Certificate of Purchase. (L.F. Vol. I 73.) The delinquent taxes owed

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[1]Appellant has filed a two volume legal file titled "Legal File Volume 1" and "Legal File Volume 2" (cited "L.F.") and Respondent has filed a volume titled Supplemental Legal File (cited "S.L.F.") and another volume entitled Second Supplemental Legal File (cited "S.L.F. 2d") containing pleadings and documents filed in the trial court.

were $2,139.25, which created a surplus of $7,361.50. (L.F. Vol. I 73).

Following his purchase of the Property, and in conformity with Section 140.405 Missouri Revised Statutes, Appellant sent notice of her redemption rights to Ms. Hardy, Respondent, by certified mail return receipt requested. (L.F. Vol. I 133-134.) Delivery of the notice by the Postal Service was attempted twice: on May 10 and May 21, 2004. (L.F. Vol. I 133.) The notice was returned to Appellant on June 1, 2004, marked "Unclaimed" by the Postal Service. (L.F. Vol. I 133.) The notice was properly addressed to 817 Blossom Lane, St. Louis, MO 63119, the address where Ms. Hardy actually resided. (L.F. Vol. I 133.) Ms. Hardy admits the certified mail was sent to her but she simply did not claim said article of mail. (L.F. Vol. 1. 62.)

On March 8, 2004, Ms. Hardy appeared at the office of the Collector of Revenue and paid the taxes due on the real estate for the years 2002 and 2003.

(L.F. Vol. I 20.) At that time Ms. Hardy was unaware that her property had been sold for taxes. (L.F. Vol. I 122 – 123).

At the time Ms. Hardy appeared at the Collector's office, the Collector had an unwritten policy that if a taxpayer was present at the Collector's office to pay taxes on real property and it was discovered that the

property had been previously sold for taxes the taxpayer may be advised that the property has been sold. (L.F. Vol. I 129). Ms. Hardy did not receive this advice. (L.F. Vol. I 123.) Ms. Hardy first became aware that her Property had been sold for taxes when she was served with Appellant's Petition to Quiet Title on September 28, 2004. (L.F. Vol. I 123). When she appeared in the Collector of Revenue's office on July 29, 2005, to claim the surplus from the tax sale, before knowing the purpose of her visit the Collector of Revenue did advise her that her property had been sold. (L.F. Vol. I 124).

Respondent did not redeem her right to the Property within the two (2) year time period following the tax sale. (L.F. Vol. I 11-12.) Appellant obtained a Collector's Deed to the Property dated August 26, 2004, recorded that day in the Jefferson County Records as Document 040049735. (L.F. Vol. I 13 - 14.)

PROCEDURAL HISTORY

On September 14, 2004, Appellant filed a petition to quiet title against Respondent and the Collector of Revenue of Jefferson County. (L.F. Vol. I 11-12.) The petition requested that the court enter an order that the Property be held in fee simple by Appellant. (L.F. Vol. I 11-12.) Beth Mahn, in her official capacity as Collector of Revenue of Jefferson County consented to the quiet title petition. (L.F. Vol. I 15-16.) Respondent

answered, filed a counterclaim against Appellant requesting the court to set aside the tax sale and deed and award the Property to Respondent, filed an alternative counterclaim requesting the court award $1,251.70 to Respondent (the amount of the 2002 and 2003 property taxes paid by Respondent) if the court awarded the property to Appellant, and filed a cross-claim against the Collector of Revenue of Jefferson County requesting that the court order the surplus held by the Collector of Revenue from the tax sale be paid to Respondent. (L.F. Vol. I 19-25.) Pursuant to Section 140.600 Missouri Revised Statutes, Ms. Hardy tendered repayment to Appellant of the amount paid for the property together with appropriate interest and costs in her Answer and in her Counterclaim. (L.F. Vol. I 21, 23.)

On April 20, 2006, Summary Judgment was entered in favor of Appellant and against Respondent with respect to the petition and Respondent's counterclaim. (L.F. Vol. I 34-35.) The court denied Appellant's motion for summary judgment on the cross-claim and the alternative counterclaim. (L.F. Vol. I 34-35.) The court also denied Respondent's motion for summary judgment. (L.F. Vol. I 34-35.)

On April 24, 2006, Beth Mahn filed a motion to dismiss the cross-claim as moot because she paid the surplus from the tax sale to Respondent. (L.F. Vol. I 36 - 37.) On November 8, 2006, Respondent filed a motion to

voluntarily dismiss her cross-claim. (L.F. Vol. I 41-42.) On November 13, 2006, the Judge signed and ordered the Consent Judgment signed by both parties awarding Respondent $1,251.70 on her alternative counterclaim for payment of the 2002 and 2003 taxes. (L.F. Vol. I 43.)

On December 13, 2006, Respondent filed a motion to amend the judgment and a motion for a new trial. (L.F. Vol. I 49-53.) The Court granted the motion for new trial on March 1, 2007. (L.F. Vol. I 59.)

On February 29, 2008, the court heard arguments for Appellant's and Respondent's Second Motions for Summary Judgment. (L.F. Vol. II 207.) On May 21, 2008, the Court issued Findings of Fact and Conclusions of Law granting Respondent's Motion for Summary Judgment solely on the basis of *Jones v. Flowers*, 547 US 220, 126 S. Ct. 1708, 164 L.Ed.2d 415 (2006). Respondent's other grounds for summary judgment and Appellant's Motion for Summary Judgment were denied. (L.F. Vol. II 224-237.)

On June 16, 2008, Appellant filed notice of appeal. (L.F. Vol. I 240.) Respondent cross-appealed with notice of appeal filed June 25, 2008. (S.L.F. 2d 1 – 22.)

POINTS RELIED ON

(FOR CROSS-APPEAL)

POINT I

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT THE FACSIMILIE SIGNATURE ON THE COLLECTOR'S DEED WAS A PROPER WITNESS SIGNATURE BECAUSE SUCH SIGNATURE WAS NOT THE LEGAL SIGNATURE OF THE PERSON WITNESSING THE DEED, IN THAT IT WAS A FACSIMILIE OF SOMEONE ELSE'S SIGNATURE AND NOT THE SIGNATURE OF THE ACTUAL WITNESS TO THE DEED.

Callahan v. Davis, 125 Mo. 27, 28 S.W. 162 (1894)

Klorner v. Nunn, 318 S.W.2d 241 (Mo. 1958)

Section 140.460 Missouri Revised Statutes

POINT II

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT

RESPONDENT COULD NOT CHALLENGE THE COLLECTOR'S DEED BECAUSE APPELLANT DID NOT PAY THE POST-SALE REAL ESTATE TAXES ACCRUING ON THE PROPERTY BEFORE OBTAINING A COLLECTOR'S DEED, IN THAT THE STATUTE REQUIRING APPELLANT TO PAY SUCH TAXES WAS NOT SATISFIED BY RESPONDENT'S PAYMENT THEREOF.

Section 140.440 RSMo 2000

POINT III

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION WAS NOT VIOLATED BECAUSE THE COLLECTOR OF REVENUE DID NOT ADVISE RESPONDENT THAT HER PROPERTY HAD BEEN SOLD FOR TAXES WHEN SHE APPEARED IN PERSON AT THE COLLECTOR'S OFFICE, IN THAT THE COLLECTOR HAD A POLICY TO ADVISE OTHER TAXPAYERS THAT THEIR PROPERTY HAD BEEN SOLD FOR TAXES WHEN

OTHER TAXPAYERS APPEARED IN PERSON AT THE COLLECTOR'S OFFICE.

Allegheny Pittsburgh Coal Co. v. County Commission, 488 U. S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989)

City of Willowbrook v. Olech, 528 U.S. 562, 120 S. Ct. 1073, 145 L.Ed.2d 1060 (2000)

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771 (Mo. banc 2003)

Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006)

Missouri Constitution, Article 1, Section 2

Missouri Constitution, Article I, Section 10

U.S. Constitution, Amendment XIV, Section 1

ARGUMENT

Standard of Review

Appellate review of a summary judgment motion is *de novo* and is purely an issue of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. Banc 1993). Facts set forth by affidavit or otherwise in support of a party's motion for summary judgment are to be taken as true unless contradicted by the other party in its response to the summary judgment motion. *Cherry v. City of Hayti Heights*, 563 S.W.2d 72 (Mo. Banc 1978); *Dietrich v. Pulitzer Publishing Company*, 422 S.W.2d 330 (Mo. 1986).

APPELLANT'S POINT RELIED ON

THE TRIAL COURT ERRED IN CONCLUDING THAT THE NOTICE TO RESPONDENT WAS INEFFECTIVE BECAUSE APPELLANT COMPLIED WITH THE STATUTORY REQUIREMENTS AND NO ADDITIONAL STEPS WERE NECESSARY TO PROVIDE DUE PROCESS IN THAT RESPONDENT LIVED AT THE ADDRESS TO WHICH NOTICE WAS SENT.

To restate the relevant facts, Appellant sent timely notice of the tax sale and redemption period by certified mail return receipt requested to Respondent at her correct address in compliance with Section 140.405

Missouri Revised Statutes. That notice was returned to Appellant by the post office unclaimed.

Appellant argues that this Court's decision in *State v. Elliott*, 225 S.W.3d 423 (Mo. 2007) renders an unclaimed notice sent to the correct address effective to meet the requirements of due process as outlined by the United States Supreme Court in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). In support of this proposition Respondent also cites *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 32 A.D.3d 391, 820 N.Y.S.2d 104 (N.Y. App. Div. 2d Dept. 2006). For the reasons discussed below, Appellant's reliance on *Elliott* and *Temple Bnai Shalom* is misplaced.

Under the facts of *Elliott*, the Missouri Supreme Court reached the correct result holding notice of tax assessments mailed to the correct address by certified mail return receipt requested to be adequate under the Due Process Clause. But, in the course of so doing the Court distinguished *Jones v. Flowers* in a footnote in a way that misstates the fundamental holding of *Jones v. Flowers*. The footnote said "*Jones v. Flowers* [citation omitted] and *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue*, 195 S.W.3d 410 (2006) are distinguishable in that those cases involve notice sent to an

address where the person affected was not present." *State v. Elliott*, 225 S.W.3d at 425, fn. 3.

In *Jones v. Flowers*, the United States Supreme Court indicated that the actual residence of the taxpayer was not a relevant factor. In fact, the Court specifically contemplated, not once, but *three times*, that the taxpayer might actually reside at the address to which the notice had been sent. First,

> [T]he return of the certified letter marked "unclaimed" meant either that Jones **still lived** at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. [emphasis added] 547 U.S. at 234, 126 S.Ct. 1708, 164 L.Ed.2d 415.

Second, the Court suggested "reasonable followup measures, directed at the possibility than Jones had moved as well as **simply not retrieved the certified letter**...." [emphasis added] 547 U.S. at 235, 126 S.Ct. 1708, 164 L.Ed.2d 415.

Third, in determining that a telephone phone book search was not necessary the Court stated "…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." [emphasis added] 547 U.S. at 236, 126 S.Ct. 1708, 164 L.Ed.2d 415.

No where in the case does the U.S. Supreme Court say anything to the effect that if Jones had lived at 717 North Bryan Street the unclaimed notice would have been effective. The U.S. Supreme Court's sole focus when certified mail notice was returned unclaimed was on the sender's obligation when the sender learned that the notice had not been delivered. Simply stated, the Court held

> . . . when [a certified] mailed notice of a tax sale is returned unclaimed, the State [or sender] must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. - *Jones v. Flowers*, 547 U.S. at 225, 126 S.Ct. 1708, 164 L.Ed.2d 415.

The Florida Court of Appeals has dealt with a case where notice in compliance with the Florida statute sent to the correct address was not received by the taxpayer whose property was then sold. In *Singleton v. Eli B. Investment Corp*, 968 So.2d 702 (Fla. App. 4th Dist. 2007) the Court cited the *Jones* language discussed above, reversed the trial court's summary

judgment in favor of the tax-sale purchaser and remanded for further evidentiary proceedings. *Id*. at 706.

The Michigan Supreme Court followed *Jones v. Flowers* in *Sidun v. Wayne County Treasurer*, 481 Mich. 503, 751 N.W.2d 453 (Mich. 2008) involving unpaid taxes on jointly-owned rental property. The action was brought by the surviving joint tenant to invalidate the tax sale. Notices sent to both co-tenants at the property address were not sufficient as to the plaintiff whose current and different address was on the deed creating the co-tenancy. It is interesting to note that while the County Treasurer took the additional step of posting a notice on the property, the Michigan Supreme Court found this posting was not sufficient to rectify the failed notice to plaintiff because a reasonable person, desirous of actually notifying plaintiff, would have mailed something to her correct address in the first place. *Id*. 481 Mich. at 516.

The reconciliation of *Jones v. Flowers* and *Elliott* cannot be the residence of the taxpayer. Rather, it is the nature of the case. *Elliott* involved a state assessment for income taxes. It did not involve a final taking of property. *Jones v. Flowers*, like the case at bar, does involve a final taking of property.

A recent Federal District Court decision sheds light on the difference between *Elliott* and *Jones* in a post-*Elliott* decision. With facts nearly identical to *Elliott*, *Pagonis v. United States*, 2008 U.S.Dist. LEXIS 57341, 102 A.F.T.R.2d (RIA) 5044, (D. Minn. 2008) (a copy of the decision is attached in the Appendix beginning at page A-18) involved a taxpayer who sought to enjoin the collection of federal income taxes on the basis of *Jones v. Flowers* because the IRS certified mail notice sent to her last known address was return unclaimed. To this the District Court responded

> *Jones v. Flowers* cannot be read as broadly as Pagonis urges. The interest at issue in that case was a property owner's interest in his home, not a taxpayer's interest in assessed taxes. It was the importance of the property interest involved that led the Supreme Court to conclude that more than mere mailing of notice was required….
>
> Pagonis's interest here does not compare with the "important and irreversible prospect" of losing one's home. The Due Process Clause "does not require a showing…that an interested party received actual notice" prior to the deprivation of every property interest. [Citation omitted.] *Jones v. Flowers* does not require more notice than what was given in this matter. -

Pagonis v. United States, 2008 U.S.Dist. LEXIS 57341 at pages 4-5. (Appendix A-20).

It should be pointed out that the *Pagonis* Court erred in one respect. It incorrectly referred to the real estate in *Jones v. Flowers* as Jones' home. It was not his home. As with Respondent's property in this case, it was simply real estate he owned. As *Jones v. Flowers* holds and *Pagonis* indicates, that real estate is entitled to due process protection.

Additionally, the Missouri Supreme Court also observed, in another footnote, that the taxpayer in *Elliott* might have further remedies (Section 143.801 RSMo claim for refund) under state law which would satisfy Due Process requirements. 225 S.W.3d at 425, fn. 5.

The holding in *Jones v. Flowers* is very specific, applying only to sales of real estate for unpaid taxes where a notice sent by certified mail is returned unclaimed. "We granted certiorari to determine whether, when notice of a tax sale is … returned undelivered, the government must take additional steps to provide notice before taking the owner's property." *Jones v. Flowers*, 547 U.S. at 223, 126 S.Ct. 1708, 164 L.Ed.2d 415. "…[W]e have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that the attempt at notice has failed." *Id.* at 227. In at least two places where the

Supreme Court states its holding it limits it to circumstances "when mailed notice of a tax sale is returned unclaimed," *Id*. at 225, and "when the letter addressed to him is returned unclaimed." *Id*. at 239.

Jones v. Flowers did not overrule or invalidate the Arkansas notice statute at issue in that case. Nor would it overrule Missouri's Section 140.405 in this case.

Jones v. Flowers does not overrule *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L.Ed.2d 597 (2002) or any other traditional Due Process case. Indeed the *Jones* analysis begins with the traditional *Mullane* analysis:

> Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery*, supra, at 170, 122 S. Ct. 694, 154 L.Ed.2d 597. Rather, we have stated that due process requires the government 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, 70 S. Ct. 652, 94 L.Ed.

865. – *Jones v. Flowers*, 547 U.S. at 226, 126 S. Ct. 1708, 164 L.Ed.2d 415.

The *Jones v. Flowers* Court simply engaged in the traditional *Mullane* process "that the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment' [citation omitted]." *Id*. at 229, 126 S. Ct. 1708, 164 L.Ed.2d 415. *Jones* reaffirms *Mullane's* requirement that when notice is due, the means employed to give notice must be those that a sender who desires actually to inform the recipient might reasonably adopt to do so. *Id*.

Until *Jones v. Flowers,* traditional Supreme Court notice analysis involved only the state of the sender's information before the notice was sent as one of *Mullane's* "practicalities and peculiarities of the case." In *Jones* the Court added to those practicalities and peculiarities the sender's information, obtained after notice was sent, that the attempted notice failed. "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is return unclaimed." *Id*.

In *Jones* the Court lists court decision and state statutes requiring something more in the way of notice. See *Id*., fn. 1 & 2. Requiring

something more with notice is not unknown in Missouri. For example, in *Bullard v. Holt*, 158 S.W.3d 868 (Mo. App. S.D. 2005) blind reliance on the address in the tax rolls is not permitted when the sender knows the property is rented by a management company and the taxpayer does not reside there. In that case the sender was required to do something more because he knew before he sent the notice the taxpayer would not receive it. It is not unfair or unduly burdensome to require the sender to do something more when he learns after sending the notice that it wasn't received. *Jones v. Flowers* agrees and says it is constitutionally required.

Plaintiff did not take any additional steps when he learned Ms. Hardy had not received his notice. He had other practical means to do so. As discussed in *Jones v. Flowers* this included sending a notice by regular mail or even personal service. Missouri cases also mention personal service (or lack thereof) as a means of providing notice in a tax sale context, thereby indicating familiarity with and acceptance of the concept. See, for example, *M&P Enterprises v. Transamerica Financial Services*, 944 S.W.2d 154 (Mo. Banc 1997); *Anheuser Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868 (Mo. Banc 1995); Lohr *v. Cobur Corporation*, 654 S.W.2d 883 (Mo. Banc 1983.)

Appellant places great reliance on *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates,* 32 A.D.3d 391, 820 N.Y.S.2d 104 (N.Y. App. Div. 2d Dept. 2006) for the proposition (contrary to *Jones v. Flowers*) that because notice was sent to the correct address due process is satisfied. That's not what the case held.

What *Temple Bnai* indicates is two-fold. First, and not material here, the Temple did not have standing to challenge notice sent before the Temple became owner of the property. Second, and material here but what Appellant misreads, is that in applying the *Jones v. Flowers* requirement to find a practical alternative to unclaimed notice, the New York Appellate Division agreed with the trial court that there was no additional practical alternative available because not only had multiple deliveries been attempted for multiple notices to multiple recipients, but also that the Temple was actively avoiding service of the notice. *Id.*, 32 A.D.3d at 393, 820 N.Y.S.2d 104. In other words, the Court looked for a practical alternative and found none because the Temple was doing everything it could to avoid getting the notice.

Appellant attempts to cast Respondent in the same fashion as the Temple, as one trying to avoid service. A review of the *Temple Bnai* case

shows Appellant's attempt to suggest that Respondent was avoiding service is completely unsupportable and without merit.

In *Temple Bnai* the plaintiff temple was organized by Alan Guthartz shortly before it purchased the residence at issue which belonged to his wife, Ona Guthartz, for $965,000.00 on December 29, 2000. The description of the relationship of the parties is contained in detail in materials in the Appendix to this brief at pages A-22 through A-88 and will be more particularly referenced below.

This purchase was more than two years after the lien for delinquent taxes had been sold on April 20, 1998, by the Village to defendant Florence Risman. Plaintiff sued the Village and Risman seeking to challenge (i) the notice provided to the property owner at the time the tax lien was sold and (ii) the notice provided to Plaintiff advising of the running of the redemption period. The sale of the tax lien occurred before the Plaintiff acquired its interest in the property and the redemption period expired after the Plaintiff acquired its interest. Plaintiff admitted that it had failed to check the village records for tax liens before purchasing the property.

As to the notice of the sale of the tax lien, the holding in the case was not based on the adequacy of notice. The New York Court of Appeals affirmed the trial court's determination that the plaintiff temple lacked

standing to challenge the adequacy of the notice sent to the owner, Ona Guthartz, before Plaintiff acquired its interest in the property.

As to notice of the running of the redemption period, Plaintiff contended at oral argument that *Jones v. Flowers* made that notice (which had been returned unclaimed) insufficient. This apparently was the first mention of *Jones v. Flowers* in the *Temple Bnai* case, as *Jones* had been decided after the parties briefed the case but before oral argument. The New York Appellate Division drew many distinctions between *Jones* and the *Temple Bnai* case, but the gravamen of the holding on the redemption notice appears to be based on the *Jones* requirement "of providing notice to the property owner if practicable." *Id*., 32 A.D.3d at 392, 820 N.Y.S.2d 104. The Appellate Division stated "the defendants could reasonably draw the strong inference that the intended recipients simply were 'attempting to evade notice by ignoring the certified mailings' [citations omitted] and that attempts at alternative methods of giving notice were unnecessary and would prove futile." *Id*., 32 A.D.3d at 393, 820 N.Y.S.2d 104.

A further review of the facts indicates how the Appellate Division came to this conclusion. The Temple Bnai Shalom of Great Neck was established by Alan Guthartz, the husband of the property owner Ona Guthartz, who filed a petition for chapter 11 relief on behalf of the Temple

on February 5, 2004. This was during the pendency of the trial court proceedings in *Temple Bnai*. In its order dismissing the Chapter 11 petition (a copy is in the Appendix at pages A-22 through A-29), the Bankruptcy Court revealed some interesting facts about the Temple and the Guthartz's. First, the real estate (the subject of the *Temple Bnai* civil suit) it occupied was a residential structure with, according to the Temple's estimate, a fair market value of $2,000,000. (Bankruptcy Order, Appendix A-22). Ona Guthartz was listed as holding a $1,200,000 mortgage on the structure, but no recorded mortgage was presented to the Bankruptcy Court. (Bankruptcy Order, Appendix A-22). The Temple only owned a "modest number of chairs, prayer shawls, and prayer books, having nominal liquidation value." (Bankruptcy Order, Appendix A-22). It did not claim to own a Torah or a suitable covering for it with the customary silver adornments. There was nothing to suggest that the Temple held on-going religious services. (Brief of Village of Great Neck Estates, Appendix A-61 at A-73).

Debtor's [the Temple's] counsel suggested he wanted to remove the state court foreclosure proceedings to the Bankruptcy Court then on to Federal District Court. The Bankruptcy court referred to this "as an egregious example of blatant forum-shopping, a hallmark of a bad faith filing." (Bankruptcy Order, Appendix A-24). The Bankruptcy Court found

"this case bear the defining characteristics as a single asset real estate case filed under chapter 11 in bad faith to stop a foreclosure sale" (Bankruptcy Order, Appendix A-25) and dismissed the Bankruptcy petition on its own motion.

It also appears that the total taxes owed on the property, both before and after the sale, totaled more than $700,000.00. (Bankruptcy Order, Appendix A-25). Unlike the Respondent in this case, neither Ona Guthartz nor the Temple paid any real estate taxes on the Property after the sale. (Brief of Florence Risman, Appendix A-30 at A-41). The Temple did not respond to a remediation order issued by the Village nor obtain any certificate, permit or approval to use the property for any use other than as a single family residence. (Risman Brief, Appendix A-37)

Taken together, these facts constitute sufficient badges of fraud on the part of the Temple to support the Appellate Division's view that the Temple was actively avoiding service of the notice rather than simply not claiming it at the post office. In such a case there would be no practical or reasonable alternative means to provide notice.

Despite Appellant's protestations to the contrary, there is absolutely nothing in the record to indicate that Respondent was actively avoiding service of the notice. Unlike the *Temple Bnai* case, where there is no

information as to whether there was anyone home at the time delivery of the notice was attempted, the record in this case affirmatively indicates that Respondent was not at home when the postal service attempted delivery. (Trial Court finding of fact 13, L.F. Vol. II 227). Unlike the Temple, which was actively avoiding notice, Respondent simply was not at home.

Moreover, unlike the Temple, Respondent paid the taxes accruing on the property after the sale and in her pleadings has tendered repayment of the taxes and surplus paid by Appellant. The Temple did none of these things.

The facts of *Temple Bnai* are inapposite to this case. In any event, rather than repudiate *Jones v. Flowers*, the New York Court actually applied it when it determined no further notice steps would have been "practical." *Temple Bnai, supra*, 32 A.D.3d at 393, 820 N.Y.S.2d 104.

While not presented as an issue in this case, it bears mentioning that when Appellant sent the notice to Respondent, Appellant was engaging in state action sufficient to make the due process clause applicable to him. This issue was not present in *Jones v. Flowers* because in that case the state itself sent the notice. Nor was it argued in *Temple Bnai* even where the tax sale purchaser, not the state, sent the notice and Appellant does not argue it here. This is because when Appellant provides the notice he is performing a public function under color of state law, Missouri Revised Statutes Chapter

140, the state process for collection of taxes, and is compelled to provide notice by state statute, Section 140.405 Missouri Revised Statutes.

There are three alternative tests to determine whether a private individual is engaging in "state action:" the public function test, the state compulsion test, and the symbiotic relationship (or nexus) test. *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629 (6th cir. 2006). Meeting any one of the tests is sufficient to find that a private individual is engaging in state action. In this case Appellant satisfies both the public function and state compulsion tests.

Tax collection is recognized as one of the traditional areas of government functions where state action is found and due process applies to actions taken by private actors in furtherance of the public, governmental function. *Flagg Bros., Inc. v Brooks*, 436 U.S. 149 at 163, 98 S. Ct. 1729, 56 L.Ed.2d 185 (1978). See also, *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946) (a privately-owned company town was determined to have been engaging in a public function as a city and could not curtail the exercise of free speech and religion); and *Romanski v. Detroit Entertainment, L.L.C., supra* (casino private security personnel who acted under Michigan statutes giving them certain police authority were found to be engaging in state action).

Section 140.405 Missouri Revised Statutes directs the tax sale purchaser to send notice to the property owner at least 90 days before the running of the redemption period. When a private actor is compelled by a state law to act, that action is state action. *Flagg Bros., Inc.*, 436 U.S. 149 at 164, 98 S. Ct. 1729, 56 L.Ed.2d 185 (1978) citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 at 170, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970). Thus, for constitutional purposes, Appellant's action in sending notice to Respondent was state action.

As a result of Plaintiff's failure to take any reasonable steps after learning his notice had not been received, the attempted notice to Ms. Hardy is not effective, the Collector's Deed is void and her right of redemption is not extinguished.

RESPONDENT'S POINT I

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT THE FACSIMILIE SIGNATURE ON THE COLLECTOR'S DEED WAS A PROPER WITNESS SIGNATURE BECAUSE SUCH SIGNATURE WAS NOT THE LEGAL SIGNATURE OF THE PERSON WITNESSING THE DEED IN THAT IT WAS A FACSIMILIE OF SOMEONE ELSE'S

SIGNATURE AND NOT THE SIGNATURE OF THE ACTUAL WITNESS TO THE DEED.

Section 140.460 Missouri Revised Statutes requires that a Collector's Deed be witnessed by the County Clerk. In this case the County Clerk did not witness the deed. The purported signature of Eleanor Koch Rehm, the County Clerk at the time, appears to have been placed on the Collector's Deed by someone with the initials CLR. (L.F. Vol. I 13–14; a copy of the Collector's Deed is in the Appendix to this brief at pages A-10-11).

While this may be a common practice in signing business correspondence, it is not appropriate to meet a statutory requirement that a document be witnessed by a specific person. In Missouri, the witnessing of the Collector's Deed by the county clerk is a strict requirement and deeds fail for the lack of it. *Klorner v. Nunn*, 318 S.W.2d 241 (Mo. 1958). "We have seen that the legislature by an applicable statute had expressly required the collector's deed for such conveyances to be witnessed by the county clerk….The statute was not complied with. The Collector's Deed did not meet the terms of the requirements of the statute and it was therefore void upon its face." *Id.*, 318 S.W.2d at 245.

The precision with which the execution of collector's deeds must occur is illustrated by *Callahan v. Davis*, 125 Mo. 27, 28 S.W. 162 (1894).

In that case P.J. Keeler served as Treasurer of Nodaway County. Under Laws of 1872, article 17, he also served as ex officio county collector. He signed the collector's deed as "P.J. Keeler, Collector of Nodaway County." The Missouri Supreme Court held that this was an improper execution and voided the deed, not because it was signed by the wrong person, but merely because the recital of his office on the deed was incorrect.

> Under the law, it was only by virtue of the authority conferred upon him as treasurer and ex officio collector that he could sell the land. Is, then, the deed void upon its face because of the failure of the collector to execute it as treasurer and ex officio collector, instead of collector?....We cannot presume that Keeler was treasurer at the time of the sale of the land and execution of the tax deed by him…especially in the absence of any recital upon the face of the deed that such was the case….As is said in Spear v. Ditty [sic], 9 Vt. 282, "clearly this is an official act, and it is difficult to see how any one can act officially on paper, and not so state on paper"….
>
> ***
>
> And as there was no such officer in Nodaway county as collector, at the time of the sale of land for taxes, and the

execution of the tax deed, the deed, we think, is void upon its face…. *Id*., 28 S.W. at 165-166.

In her Answers to Defendant Hardy's Second Set of Interrogatories, the Collector of Revenue has indicated that the initials CLR belong to Carey Renshaw, a deputy county clerk. (L.F. Vol. I 155). From the statutory collector's deed form in Section 140.460 it does not appear that the witnessing duty is delegable, as no provision exists in the form for the insertion of the word "deputy." If the clerk's statutory witnessing duty is delegable to a deputy, one wonders why the deputy clerk did not inscribe their own signature, rather than the name of the clerk and initials. The statutory form uses the legend "L.S." which clearly calls for a signature. Respondent submits that as inscribed, there is no witness signature even if the duty is delegable to a deputy. Under the theory of *Callahan v. Davis* the face of the document should clearly state the name of the witness who is acting in his or her official capacity, and clearly and specifically indicate that capacity. The deed from the Collector to Appellant in this case does not. As a result, the deed is essentially unwitnessed and therefore fails to be a valid collector's deed and must be set aside.

RESPONDENT'S POINT II

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT COULD NOT CHALLENGE THE COLLECTOR'S DEED BECAUSE APPELLANT DID NOT PAY THE POST-SALE REAL ESTATE TAXES ACCRUING ON THE PROPERTY BEFORE OBTAINING A COLLECTOR'S DEED, IN THAT THE STATUTE REQUIRING APPELLANT TO PAY SUCH TAXES WAS NOT SATISFIED BY RESPONDENT'S PAYMENT THEREOF.

Section 140.440 Missouri Revised Statutes (2000), as in effect at the time of sale, states in pertinent part as follows:

> Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate….

The direction under this section is to tax-sale purchasers to pay the after-sale property taxes due on the property. If they do not comply, the consequence is that they are not entitled to apply for the deed. As such, this also is a mandatory provision.

In her answers to Defendant Hardy's Requests for Admission, the Collector of Revenue admits that Ms. Hardy paid the taxes for the years 2002 and 2003. (L.F. Vol. I 148). The receipts issued to Ms. Hardy for those tax payments are in the Appendix to this brief at page A-17.

Nowhere is it suggested anyone other that Ms. Hardy has paid the real estate taxes on the property for 2002 and 2003. As holder of the certificate of purchase on the property, Plaintiff was required to pay those taxes, but did not. Thus, Plaintiff was not entitled to apply for the deed. As a consequence the deed issued by the Collector is invalid.

RESPONDENT'S POINT III

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT'S CONSTITUIONAL RIGHT TO EQUAL PROTECTION WAS NOT VIOLATED BECAUSE THE COLLECTOR OF REVENUE DID NOT ADVISE RESPONDENT THAT HER PROPERTY HAD BEEN SOLD FOR TAXES WHEN SHE APPEARED IN PERSON AT THE COLLECTOR'S OFFICE, IN THAT THE COLLECTOR HAD A POLICY TO ADVISE OTHER TAXPAYERS THAT THEIR PROPERTY HAD

BEEN SOLD FOR TAXES WHEN OTHER TAXPAYERS APPEARED IN PERSON AT THE COLLECTOR'S OFFICE.

On March 8, 2004, more than five months before the expiration of her two year right of redemption, Ms. Hardy appeared at the Office of the Collector to pay her back taxes. (L.F. Vol. I 20, 123 and the Affidavit of Jane Tillman Hardy, Appendix pages A-6-9 at A-6-7). At that time she was unaware that her property had been sold for taxes and the Collector did not tell her that it had been. *Id*. As she paid the 2002 and 2003 taxes, in response to her question about taxes due for earlier years she was told "they've been paid." (L.F. Vol. I 123 and the Hardy Affidavit, Appendix A-7). With this response Ms. Hardy stated that she "must have paid them" and was not advised otherwise. (*Id*.) (While not decided on the basis of equal protection, this is exactly what happened in *James v. Mullen*, 854 S.W.2d (Mo. App. W.D. 1993) to lead to the difficulty in that case.) When Ms. Hardy appeared to claim her surplus on July 29, 2005, before knowing the purpose of her visit the Collector advised her that her Property had been sold. (L.F. Vol. I 124 and the Hardy Affidavit, Appendix A-8).

The Collector has stated that as of March 4, 2008, "she advises her deputies that at such time as a taxpayer appears in person to pay their taxes, **if it is discovered** that the property has been sold at a previous tax sale, said

deputy may orally notify the taxpayer that the property has been sold. [emphasis added]" (L.F. Vol. I 129 and the Responses of Defendant Beth Mahn to the First Set of Interrogatories Filed by Defendant Jane Tillman Hardy, Appendix pages A-12-16 at A-14) The Collector further states "she is under no obligation to provide this information to a taxpayer, but does so for the purpose of providing better customer service to the taxpayers of Jefferson County." (*Id.*) On the basis that Ms. Hardy was advised one time (too late to matter), but not the other (when it would have), it certainly appears the Collector's office was following the policy in some cases, but not others.

This amounts to a denial of equal protection to Ms. Hardy. No state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Section 1. "…[A]ll persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when the government does not confer this security, it fails in its chief design." Missouri Constitution, Article 1, Section 2.

It would appear that the Collector of Revenue is attempting to excuse the failure to orally notify Ms. Hardy that her property had been sold on the basis that somehow it wasn't "discovered" or known at the time she was

present paying taxes on the property. In other words, the policy to orally notify taxpayers of previous tax sale of their property makes a classification on the basis of whether the previous tax sale is discovered by the Collector at the time the taxpayer appears to pay taxes on the property.

The standard a classification must meet in order to survive an equal protection challenge varies according to the type of interest affected. So, it must first be determined which standard is to be applied. Both in Missouri and federally, if a fundamental or enumerated right or suspect class is affected, the attempted classification must support a compelling state interest and not go beyond what the state's interest requires, the strict scrutiny test. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006). *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965). On the other end of the spectrum, if a non-fundamental right is affected, it must be conceivable that the classification bears a rational relationship to a legitimate end of government, the rational basis test. *Weinschenk*, *supra*. *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L.Ed. 1234 (1938). At the federal level, but not appearing in Missouri, an intermediate level of scrutiny requires the classification to have a substantial relationship to an important governmental interest when the afffected right is not an enumerated or fundamental right, such as laws affecting gender or

illegitimacy. *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976) (dealing with gender); *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 100 L.Ed.2d 465 (1988) (dealing with illegitimacy).

In Respondent's case the right that is affected is her right to property. Property is a fundamental and enumerated right under *Jones v. Flowers, supra,* and the U.S. and Missouri Constitutions: "…nor shall any State deprive any person of life, liberty or property, without due process of law…." U.S. Constitution, Amendment XIV, Section 1; "... no person shall be deprived of life, liberty or property without due process of law." Missouri Constitution, Article I, Section 10. As a result, strict scrutiny of the Collector's policy is required.

Does the classification serve any compelling state interest? As to the state's interest in tax collection, the answer is no. The taxes have already been collected, paid by the tax-sale purchaser. The state has no interest in collection of taxes with the classification, because the classification is applied only after the taxes have been collected.

The Collector also asserts an interest in providing better service to Jefferson County taxpayers. While the taxpayers of Jefferson County deserve good service, this is not a compelling state interest. The argument cannot be maintained that the Collector's interest in rendering better service

to all taxpayers is a compelling justification for not rendering it to Respondent, particularly in light of the Missouri Constitution's language that securing equal protection, *inter alia*, is the chief design of government. See, Missouri Constitution, Article 1, Section 2.

Having determined that the Collector's policy does not meet a compelling state interest, discussion of whether it is narrowly tailored to meet a compelling state interest would appear unnecessary. On the basis of strict scrutiny, the Collector failed to meet the demands of equal protection.

Turning to the rational basis test, it is difficult to understand how a classification based upon the words "if it is discovered" bears any rational relationship to a legitimate end of government as required by the rational basis test. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771 (Mo. banc 2003). Under this test, a classification is stricken "only if the challenger shows that 'the classification rests on grounds wholly irrelevant to the achievement of the state's objective.'" [citation omitted] *Riche v. Director of Revenue*, 987 S.W.2d 331 at 337 (Mo. banc 1999) (a worker's compensation benefit statute met the test).

The words "if it is discovered" would appear to mean "if the collector knows" the property has been sold. Yet, the Collector most certainly knew on March 8, 2004, that Ms. Hardy's property had been sold in August, 2002.

After all, the Collector published notice of the sale, directed the Sheriff to sell the property, received the money from the sale, issued a receipt (the certificate of purchase) therefor, and, presumably, placed the funds in a bank account. The policy thus appears to make a classification on the basis of the Collector's knowledge of something the Collector already knows. This really isn't a classification at all. It would be nonsense to say to a taxpayer, "I'll tell you if your property has been sold, if I know what I already know." It is the proverbial distinction without a difference and is "wholly irrelevant." This classification based on the discovery of information already known is perfectly irrational and arbitrary.

Does the classification serve any legitimate state interest? Again, no. The taxes have already been collected, so the policy is irrelevant to tax collection. Nor is the Collector's interest in rendering better service advanced by denying it to Respondent. The rational basis test is not satisfied. For the same reasons, the intermediate level of scrutiny cannot be satisfied.

However, even if the Collector's policy is found to be rational, when taxpayers are treated unequally by state or county action for no justifiable reason, the unequal treatment has resulted in a finding of a violation of equal protection. In *Allegheny Pittsburgh Coal Co. v. County Commission*, 488

U. S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989), the Webster County West Virginia assessor established a policy to value real estate at fifty percent of its most recent sale price. *Id*., 488 U.S. at 338. Her practice, apparently established on her own initiative, was contrary to a guide published by the West Virginia Tax Commission. *Id*., 488 U.S. at 345. The petitioning coal companies found assessed values on their property running from eight to thirty-five times more than similarly situated properties. *Id*., 488 U.S. at 341. The West Virginia Supreme Court of Appeals had determined that the actions of the assessor were not discriminatory and that petitioners' remedy to the situation of undervalued other properties was to seek to have the other properties' assessed value increased rather than reduction of their properties' assessed value. *Id*., 488 U.S. at 342. The United States Supreme Court undertook to determine whether the "tax assessments denied petitioners equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others. [citation omitted]" *Id*.

The U.S. Supreme Court agreed that the policy adopted by the assessor was not *per se* unconstitutional. *Id*. Nor does Ms. Hardy mean to suggest here that the Collector's policy is unconstitutional *per se*. Respondent's complaint, like the petitioners' complaint in *Allegheny*

Pittsburgh, is that the policy was unequally applied. The relative undervaluation of petitioners' property as against other similar properties was held to be denial of equal protection. *Id*., 488 U.S. at 346. The petitioners were not limited to the remedy of seeking the increase in assessments of undervalued properties. *Id*. See also, *Rams Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916 (Me. 2003).

In a similar vein, in *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484, 451 S.E.2d 641 (N.C. App. 1995) a clerk in the assessor's office advised a company undergoing an asset sale that $12,000,000 in intangible personal property had to be taxed but did not require other companies to pay tax on similar intangible property. The court found this disparity unconstitutional on the basis of equal protection.

Likewise, a city water company could not treat one customer differently than others in *City of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L.Ed.2d 1060 (2000) (the City had sought a 33 foot easement to furnish water to Olech when it only required a 15 foot easement from others). Nor could the Immigration and Naturalization Service treat aliens differently in exclusionary proceedings versus deportation proceedings for purposes of providing discretionary relief. *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002).

For the Collector to have told Ms. Hardy that her property had been sold is not an onerous requirement. The collector agrees it would be "better customer service to the taxpayers of Jefferson County" to do so. (L.F. Vol. I 129 and Appendix A-14). Indeed, they did so on July 29, 2005, when Ms. Hardy appeared at the Collector's office and identified herself. (Hardy Affidavit, Appendix A-8).

To simply call this advice "better customer service" though, is a misnomer. All citizens are entitled to equal protection of the law. To render "better customer service" to some of the people, some of the time is not equal protection. All of the people, including Ms. Hardy, are entitled to the same level of service, particularly concerning proceedings such as a tax sale where a person's property is being taken away in a summary fashion.

The law is clear that even when a particular state policy or discretion is constitutional, if it is to be applied it must be applied equally. In this case, with respect to the collector's policy of advising taxpayers, like Ms. Hardy, who appeared in person to pay their taxes, it wasn't. Equal protection demands that the Collector, who has undertaken to advise some taxpayers that their property has been sold, must tell everyone. The failure to apply the policy to Ms. Hardy while applying it to others denies her both due

process and equal protection. As a result, the Collector's Deed should be set aside and Ms. Hardy should be allowed to redeem the property.

CONCLUSION

The law has been clear in Missouri for many years that, in a summary proceeding to deny a citizen rights in property, the statutory procedures must be followed *precisely and exactly*. In *Beckwith v. Curd*, 148 S.W.2d 800 (Mo. 1941), the Missouri Supreme Court quoted *Comfort v. Ballingal*, 134 Mo. 281, l.c. 293, 35 S.W. 609, l.c. 612 (Mo. 1896) to the effect:

> When the process of collecting taxes by the sale of lands for their nonpayment is a summary remedy, . . . and the law requires that certain things be done by the officer making such a sale in connection therewith, nothing less than a strict compliance with such requirements will suffice, and **unless it appear that the law has been strictly complied with, the sale will be void.** [emphasis added] 148 S.W.2d at 801.

In *Beckwith v. Curd* the Court also quoted with approval from 26 Ruling Case Law, page 394, paragraph 354:

> One who claims title to the property of another by virtue of a sale for nonpayment of taxes is bound to show the existence of every fact necessary to give jurisdiction and authority to the

officer who made the sale, and a strict compliance by him with all things required by the statute in carrying out the sale. **That the variation from the requirements of law was trivial and did the owner no harm is not sufficient reason for disregarding it.** [emphasis added] *Beckwith v. Curd, supra*, 148 S.W.2d at 801.

The Missouri Supreme Court stated in *Costello v. City of St. Louis*, 262 S.W.2d 591 at 596 (Mo. 1953):

…the proceedings preliminary to and the sale of property by the Collector for delinquent taxes is administrative in character; such preliminary proceedings and sale are non-judicial and ex parte in their nature. No court guides the Collector or his proceedings, and he proceeds upon his own advice. In making his land delinquent list, in his notice and advertisement of sale, in his conduct of the sale, and **in his preparation and execution of his certificate of purchase and his deed the Collector must strictly follow and observe the admonition of the statutes in this summary process of taking away from the citizen the title to the latter's land.** [emphasis added]

While statutory deficiencies may seem trivial or merely technical, Missouri courts continue to hold to strict compliance. Note, for example, the case of *Callahan v. Davis, supra*, 125 Mo. 27, 28 S.W. 162 (Mo. 1894) in which the Missouri Supreme Court held that a collector's deed was void simply because it was executed by one P. J. Keeler as "collector" rather than as "treasurer and ex officio collector." The Court invalidated a collector's deed signed by the right person who indicated the wrong official title.

Ms. Hardy continues to believe that each of the procedural deficiencies described in her first two points relied on is a failure to follow applicable statutes precisely. As a result, the Collector's Deed is invalid under established principles of Missouri law. Add to this the lack of equal protection under the Collector's policy to advise taxpayers of the previous tax sale of the property, and the lack of notice sufficient for due process under *Jones v. Flowers*, and it is clear that the trial court's order granting summary judgment to Respondent should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Respondent's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count and line count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 9719, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Respondent's Brief and served on Appellant were scanned for viruses and found to be virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent's Brief together with the separately-bound Appendix to Respondent's Brief and a CD containing Respondent's Brief were mailed to each of the following by depositing same with the United States Postal Service in St. Louis County, Missouri, with first-class postage pre-paid on the 22nd day of December, 2008:

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