IN THE
MISSOURI SUPREME COURT

In the Matter of Foreclosure of Liens
for Delinquent Land Taxes by Action in Rem:

COLLECTOR OF REVENUE, CITY OF ST. LOUIS
&
SHERIFF OF CITY OF ST. LOUIS
&
LEWIS MITCHELL COMPANY,
Respondents,
v.
PARCELS OF LAND ENCUMBERED WITH DELINQUENT TAX LIENS, LAND TAX SUIT 144, MOHAMMAD BHATTI,
Appellant.

No. SC90732

Appeal from the Circuit Court of City of St. Louis
22nd Judicial Circuit
The Honorable Michael F. Stelzer, Judge

APPELLANT'S OPENING BRIEF

ANGELA SEE-WAI YEE
Mo. Bar. No. 53978
YEE LAW FIRM, P.C.
7750 Clayton Road, Suite 108
St. Louis, MO 63117
(314) 503-3517 – phone
(314) 644-2516- fax
angelayeelaw@hotmail.com
Counsel for Appellant

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ARGUMENT

As applied to the sale of Mr. Bhatti's home, the notice provisions of Missouri's Municipal Land Reutilization Law violated his federal and state due process rights to notice and an opportunity to be heard.

The City of St. Louis, through its Collector or Revenue and the Sheriff, sold Mr. Bhatti's realty to Lewis Mitchell, for the paltry sum of $7,600, despite knowing that the notice mailed by the Sheriff to the realty's address had been returned as undeliverable and not forwarded to another address, and despite taking no further action, such as mailing a notice to his actual residence in the City or having the Sheriff post a notice of sale on his property, to maximize the probability that Mr. Bhatti would learn about the foreclosure and subsequent sale. This is a stark violation of Mr. Bhatti's federal and state due process rights – a violation this Court should promptly correct by reversing the Circuit Court's judgment denying Mr. Bhatti's motion to set aside.

A. This Court Has Appellate Jurisdiction

Mr. Bhatti is making an as applied challenge to the notice provisions of Missouri's Municipal Land Reutilization Law ("MLRL"), a challenge this Court has jurisdiction to decide. Lewis Mitchell insists that this Court lacks appellate jurisdiction because it is being asked to reexamine the Circuit Court's factual finding – namely, that Mr. Bhatti failed to prove that the Sheriff's notice was

returned as undeliverable. Though it is true that this Court lacks appellate jurisdiction when "[t]he only question . . . is whether the evidence supported the decree [or final judgment]," Engel Sheet Metal Equipment, Inc. v. Shewman, 298 S.W.2d 434 (Mo. 1957), this Court is not faced with a true sufficiency of the evidence argument, but rather a case of inconsistent findings by the same Circuit Court, meaning a misapplication or misinterpretation of the law. (Paragraph B below proves this proposition.) Moreover, Mr. Bhatti is challenging not only the Circuit Court's factual finding, but also the Circuit Court's judgment, which rejected Mr. Bhatti's case as-applied challenge.

To be sure, if the Circuit Court had found that Mr. Bhatti's legal theory was correct, then the only issue here would be the validity of the Circuit Court's factual finding. But though the Circuit Court expressed sympathy for Mr. Bhatti's plight, never did it embrace his legal theory. (On this matter, the opening brief, (AB 8), is mistaken.) At most, the Circuit Court was agnostic about the legal theory. (LF 64) ("Despite what the court *may* believe regarding the unfairness of the present situation . . .") (emphasis added). More significantly, this Court has already rejected the argument advanced by Lewis Mitchell. As this Court stated in State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970):

> As a general rule, in the absence of evidence to the contrary, a general judgment for one party involves a finding in that party's favor on all

> issues properly before the court. The issue of the constitutionality of §§ 226.650--226.720 was before the circuit court, and we necessarily conclude that the trial court held adversely to appellant on that issue. It may be that this appeal can be decided without reaching the constitutional issue, but jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds.

Id. at 901-902 (internal citations omitted). In addition, given that the notice mailed to Mr. Bhatti was returned to the Sheriff as undeliverable, Mr. Bhatti's as-applied challenge cannot be avoided; resolving that challenge is essential to this appeal. (That it might not have been an essential issue to the Circuit Court's decision is immaterial, for the issue here is *this Court*'s jurisdiction, not the Circuit Court's.)

This Court also has jurisdiction because this appeal involves the construction of revenue laws of the State of Missouri – namely, the MLRL. Lewis Mitchell's arguments to the contrary have no merit. First of all, as Lewis Mitchell acknowledges, this Court has already decided that it has jurisdiction over a constitutional challenge to the MLRL because such a challenge involves the construction of a revenue law of the State of Missouri. Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens, 585 S.W.2d 486, 486-87 (Mo. banc 1979). Lewis Mitchell thinks this Court's decision offers shallow analysis of the jurisdictional issue, but missing reasoning has never

been a grounds to deviate from the doctrine of *stare decisis*, and though *stare decisis* is clearly not absolute – for instance, the changing needs of society and the reversal of case law that provides the analytical foundation of precedent can warrant overruling precedent – it does counsel adherence to precedent. Furthermore, there is a good reason why this Court previously concluded that the MLRL is a revenue law of the State of Missouri: As Mr. Bhatti's opening brief noted, Section 92.720.3 (2010) authorizes the collection of, *inter alia*, "state . . . tax bills" by the foreclosure and sale provisions of the MLRL, and the proceeds thereof (after paying the "costs of the publication of the notice of foreclosure and of the sheriff's foreclosure sale" and "all costs including appraiser's fee and attorney's fees") remitted to the State treasury, MO. REV. STAT. §92.840.3(1)-(3) (2010). That the MLRL includes provisions for raising revenue for governmental entities besides the State of Missouri does not detract from the fact that the MLRL is also designed to raise State tax revenue, making both revenue law of this State, as well as a revenue law for the City of St. Louis. Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048, 517 S.W.2d 49 (Mo., 1974) The applicable phrase being interpreted is "the revenue laws of this state," Mo. const. art. V, §3, meaning the revenue laws passed by the General Assembly, not "revenue laws of this state [solely designed to raise money for the state]." A city not within a county occupies

a peculiar status as it performs not only municipal functions, but also county functions. In such a city, the delinquent taxes affected by MLRL are not limited to taxes for municipal purposes, but include state taxes and city taxes levied and collected for carrying out of the county functions of the city. Hull v. Baumann, 131 S.W.2d 721 (Mo., 1939)

B. The Record Establishes that the Sheriff Knew That the Notice Mailed to Mr. Bhatti Was Returned as Undeliverable

Lewis Mitchell seeks to defend the Circuit Court's "failure of proof" finding by noting that the Sheriff's admission made in the "Sheriff's Sale Register" – namely, that the notice it mailed to Mr. Bhatti's realty was returned as undeliverable and not forwarded to another address – was neither admitted into evidence nor judicially noticed by the Circuit Court. The latter allegation is true (but irrelevant), and the former is false. The Sheriff's Sale Register is attached as "Exhibit A" to Circuit Court's foreclosure judgment. Paragraph G thereof recites that "[e]very item shown on each such list [i.e., the attached exhibits] . . . are true and correct and by reference thereto this Court incorporates each of the above mentioned list sheets and *all information, date and figures therein set forth as fully as though set forth here [in] haec verba*." (LF 11, 18-19). The Sheriff's Affidavit, which declares that Exhibit A to the Affidavit "shows which letters were returned to the Sheriff, on what date they were returned, and the reason they were returned

as reported by the United States Postal Service," corroborates the Circuit Court's non-delivery finding. Appellant at all times since the filing of his motion to set aside stated he did not get notice of the sale. The Sheriff's counsel was present for all hearings and never denied that notice was returned to their office. That the Sheriffs' office joins with the Collector of Revenue's brief and does not submit their own separate brief compels the court to join the two agencies into one entity in their actions and statements throughout the record and in these proceedings.

(That the Circuit Court, in denying the motion to set aside the confirmation sale, forgot its prior finding doesn't excuse its irrelevant conclusion that "no such facts [i.e., evidence]" of the return of the Sheriff's notice "were presented to the court." Faulting a party for not producing evidence in support of a finding the court has already made is clearly erroneous. And just as it is unnecessary to ask a court to take judicial notice of state statutes, State v. James, 796 S.W.2d 398 (Mo. Ct. App. E.D. 1990), whose contours a court may not be familiar with, *a fortiori* it is unnecessary to ask a court to take judicial notice of its own prior findings.)

Regarding the deficiency of the City's notice of the foreclosure action/sale and subsequent confirmation hearing, Lewis Mitchell next argues that Mr. Bhatti failed to present this constitutional argument that the *Sherriff*, as opposed to the Collector of Revenue, deprived him of his right to adequate notice. Lewis Mitchell is attacking a straw person. Mr. Bhatti is challenging the failure of the City of St.

Louis, through its Collector of Revenue, to provide adequate notice, under the state and federal due process clauses, of both the foreclosure action and the subsequent tax-delinquency sale and then confirmation hearing. It is the Collector of Revenue that is obligated to ensure that there is newspaper notice, MO. REV. STAT. §92.755 (2010) – which, by definition, cannot be returned to the sender, by the U.S. Post Office (or any other mailing service) – and to ensure that there is a mailing of notice of the right to redemption and the tax-delinquency sale, MO. REV. STAT. §92.760.1 (2010). In this case, the Sherriff acted as the Collector of Revenue's agent in ensuring that the tax-delinquency and redemption notice was mailed to Mr. Bhatti (among other property owners), and that the newspaper notices thereof were made. (LF 24-28). Hence, when Mr. Bhatti complained, in both his amended motion to set aside and his motion for new trial, about the Collector of Revenue's inadequate notice of the tax-delinquency sale (held in May 2009), (LF 49, ¶5), he was necessarily complaining about the adequacy of the notice *however provided* – in this case by the Sherriff, whose knowledge is imputed to the Collector of Revenue. See American Sur. Co. v. Pauly, 170 U.S. 133, 153 (1898) ("It is the rule that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows."); RESTATEMENT (SECOND) OF AGENCY §283(a) (1958). See also MO. REV. STAT.

§92.750.1 (2010) (noting that delinquency sale is held by Sheriff). Furthermore, counsel for the Collector of Revenue admitted at trial that it is the Sheriff who provides notice (TR 21-23). Accordingly, the Collector was not surprised by Mr. Bhatti's argument, the evidence and findings supporting which were in the Circuit Court's file long before the confirmation of the sale. When in fact the Sheriff received returned mail, they make a note and proceed with the sale anyway. At that point, the MLRL is internally flawed. When a governmental body acts to deprive a private individual of their personal property, the taking of his property far outweighs the Collector's burden of providing adequate notice, which is at least on par with a landlord's burden of personal service with proof of service of summons and notice of hearing prior to eviction of a tenant and receiving a default judgment. Nothing close to that is afforded Mr. Bhatti, who has his home taken even after the Sheriff and Lewis Mitchell knew he did not get notice that met even that minimum standard. It is a serious conflict of interest to place the duty of providing notice on the same parties who have no real concern to let the property owner know that they are losing their home.

Even if the Circuit Court did not find that the single mailed notice bounced back to the Sheriff and even if there was no admission as much by the Sheriff, Lewis Mitchell's argument would not undermine the analysis provided by Mr. Bhatti in his opening brief why Lewis Mitchell had a due process obligation to

provide a more timely notice of the confirmation sale – by, for instance, having Mr. Bhatti personally served, as is normally done in almost every civil suit. Instead, Lewis Mitchell sent a single notice by regular mail seven days before the confirmation hearing. Given that the "For Sale" sign was on Mr. Bhatti's front lawn for 150 days before the tax-delinquency sale, and given the substantial unlikelihood that Lewis Mitchell would ever consider buying a home sight-unseen (without an inspection or appraisal), Lewis Mitchell either knew or should have known that Mr. Bhatti had his house up for sale and was ignorant of the both the foreclosure judgment and the tax-delinquency sale, and thus should have attempted to post notice of the confirmation hearing on the realty (or the "For Sale" sign) or had him personally served with the motion (as a motion to modify is done in a dissolution action, being treated as if it were an independent action). In response to this argument Lewis Mitchell says – nothing. The silence speaks volumes. Only when Lewis Mitchell had a real interest to let Mr. Bhatti know did he take the further reasonable step to call his real estate agent who then notified Mr. Bhatti the same day over three months after his confirmation of the sale. This was a known, easy, inexpensive, effective and available way to provide notice before the confirmation. Surely, why would he want to call Mr. Bhatti given that Lewis Mitchell is in the business of buying property at tax sales for financial gain and has presently rented out the property at issue to tenants.

D. Mr. Bhatti's Motion & Amended Motions to Set Aside Were Timely

Repeatedly, Lewis Mitchell implies that Mr. Bhatti's Rule 74.06(b) motion was untimely, because it was filed more than a year after the foreclosure judgment was entered. The Collector of Revenue expressly makes this argument, though resting its case on Rule 75.01. (Collector's Brief 8-9).

There are two problems with Lewis Mitchell's implication. First, though Rule 74.06(b) motions generally must be filed within a year of the judgment (or order) being challenged, that is not true of such motions that allege that a judgment is "void." Lack of proper notice, as required by the federal and state due process clauses – the gravamen of Mr. Bhatti's motion – renders a judgment void. In re Marriage of Hendrix, 183 S.W.3d 582, 589 (Mo. 2006); Platt v. Platt, 815 S.W.2d 82, 83 (Mo. Ct. App. E.D. 1991) (noting that Rule 74.06(b) motion is proper to challenge a court's exercise of jurisdiction "over the parties"). Hence, Mr. Bhatti did not have to file his motion within a year of the foreclosure judgment.

Second, Mr. Bhatti's motions to set aside did not seek to set aside the foreclosure judgment, which, absent a foreclosure sale, purchase thereat, and subsequent confirmation judgment, did not ultimately harm him. (If the tax-delinquency sale and subsequent judgment confirming the sale are set aside, Mr. Bhatti will have the right to redeem his property "by paying to the collector all of

the sums mentioned therein, including principal, interest, penalties, attorney's fees and costs then due" before any later tax-delinquency sale, MO. REV. STAT. §92.750.1 (2010), mooting the foreclosure judgment.) Hence, the one-year time limit did not start running until the judgment confirming the tax delinquency sale, which was entered less than three months before Mr. Bhatti filed his motion to set aside and about four months after the amended motion was filed. (LF 36-37, 38, 48).

The Collector of Revenue's argument is based on the mistaken belief that Mr. Bhatti is appealing the Circuit Court's judgment confirming the tax-delinquency sale. He is not. Rather, Mr. Bhatti is appealing the judgment denying Mr. Bhatti's motion and amended motions to set aside the judgment confirming the sale. Mr. Bhatti is proceeding under Rule 74.06 (and for the reasons just recited, that is the apposite rule under which to seek relief), not Rule 75.01, which concerns the limited (thirty-day) jurisdiction of the circuit courts to sue sponte re-examine their judgments. Insofar as there is a conflict between any provisions of Chapter 511, which the Collector cites, and Rule 74.06 – a conflict Mr. Bhatti cannot see – Rule 74.06 trumps any contrary state statute on any matter of procedure, State ex rel. Union Electric Co. v. Barnes, 893 S.W.2d 804 (Mo. 1995), such as a timing requirement for filing a motion under Rule 74.06.

E. The Collector of Revenue Had Ample Other Reasonable Means More Likely to Provide Actual Notice to Mr. Bhatti

Lewis Mitchell disagrees with Mr. Bhatti's assertion that the Circuit Court found that the City of St. Louis could have easily learned the address of his residence in the City, and thus knew or should have known of alternative, and better means, to send him notice, whether before or after the Sheriff's mailed notices were returned to sender. But the Circuit Court stated clearly on the record, albeit not in the judgment on appeal, "that he [i.e., Mr. Bhatti] does live in the City, so you can find his name easily." (TR 14).

In any event, even if this finding is erroneous, the fact remains that the City of St. Louis, through the Collector of Revenue, knew that the notice of the tax-delinquency sale mailed to Mr. Bhatti was returned as undeliverable and not forwarded. Consequently, under Schlereth v. Hardy, 280 S.W.3d 47 (Mo. 2009), and Jones v. Flowers, 547 U.S. 220 (2006), the Collector of Revenue had a due process obligation to take additional steps that one actually desirous of providing Mr. Bhatti actual notice would take, such as posting a notice on the front door of the realty (located at 3243 Pennsylvania Avenue) or attempting to personally serve Mr. Bhatti at the realty or even just picking up a phone book and trying to call him. None of these additional steps required the "collector . . . to make impracticable and extended searches . . . in the name of due process." In re Foreclosure of Liens

for Delinquent, 190 S.W.3d 416, 421 (Mo. Ct. App. W.D. 2006).[1] This Court should be "confident that additional reasonable steps were available for [the City] to employ before [selling Mr. Bhatti's] property." Flowers, 547 U.S. at 228.

[1]Lewis Mitchell miscites In re Foreclosure as *holding* that "the due process clause does not require a county to search its internal records to see if the landowner's or lienholder's address has changed." That is a correct summary of what the Western District said, but this was dictum, for in that case there had been no address change that the City could have found by a search of its own records. Id. at 421. And the dictum was unreasoned: No authority was cited, and no reasons were given, in support of the dictum, which appeared in the very last sentence of the opinion. Also, In re Foreclosure was decided three years before this Court decided Schlereth v. Hardy, 280 S.W.3d 47 (Mo. 2009), and months before the U.S. Supreme Court decided Jones v. Flowers, 547 U.S. 220 (2006). In any event, requiring the Collector of Revenue, after learning that the single mailed notice of the tax-delinquency sale had bounced back, to have the Sheriff try to personally serve Mr. Bhatti at the realty, or to post notice of sale on the realty itself requires no search of the City's (or a subdivision thereof's) records, simply using the address the Sheriff and Collector of revenue already had in hand. No Herculanean efforts were required, only a simple step (or steps) that a reasonable person desirous of actually notifying Mr. Bhatti of the sale would have taken.

Doing nothing was not a (constitutional) option for the Collector of Revenue and the Sheriff's office of St. Louis City.

Respectfully submitted,

ANGELA SEE-WAI YEE
Mo. Bar. No. 53978
YEE LAW FIRM, P.C.
P. O. Box 440423
St. Louis, MO 63144
(314) 925-8571 – phone
(314) 925-8572 - fax
angelayeelaw@hotmail.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that:

1. Appellant's reply brief contains the information required by Rule 55.03;

2. Pursuant to Mo. Sup. Ct. R. 84.06, the attached brief contains 3,219 words, as determined by Microsoft Word 2007 software;

3. A copy of the Appellant's reply brief (in Word 2007) is contained in the attached CD disk, which was scanned and virus free.

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Angela S. Yee

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Reply Brief together with the separately-bound Appendix to Appellant's Brief and a CD containing Appellant's Reply 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 16th day of October, 2010:

Richard Blanke, Attorney for Respondent, 906 Olive Street, Suite 300 St. Louis, MO 63101 and Gordon Schweitzer, Jr., Attorney for Sheriff of St. Louis City, 10 North Tucker, St. Louis, Missouri 63101 and Anthony Sestric, Attorney for Collector of Revenue, City of St. Louis, 3967 Holly Hills Blvd, St. Louis, Missouri 63116 and Tyrone Taborn, Attorney for Collector, Co-Counsel, 625 North Euclid, Suite 320G, St. Louis, MO 63108 and the Missouri Attorney General Michael Shayne Kisling at P.O. Box 854, Jefferson City, MO 65105.

Respectfully submitted,

_____

ANGELA SEE-WAI YEE
Mo. Bar. No. 53978
YEE LAW FIRM, P.C.
P.O. Box 440423
St. Louis, MO 63144
(314) 925-8571 – phone
(314) 925-8572- fax
angelayeelaw@hotmail.com

Counsel for Appellant