

IN THE SUPREME COURT OF THE STATE OF MISSOURI  
Appeal Number SC 92169

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CATHERINE NDEGWA et al.

Respondents-Plaintiffs,

v.

KSSO LLC, et al.,

Appellant-Defendants.

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

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SUBSTITUTE BRIEF OF RESPONDENTS CATHERINE NDEGWA, CATHERINE  
NDEGWA AND ANALE MREMA AS CO-GUARDIANS OF JOHN E.K. MREMA,  
AND CATHERINE NDEGWA AS TRUSTEE OF THE MREMA FAMILY  
REVOCABLE TRUST

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## JURISDICTIONAL STATEMENT

This is a civil appeal from an Order and Judgment, wherein the trial court granted Plaintiffs' Motion for Partial Summary Judgment to quiet the title to Lot 253 of Westhaven Plat Eight and entered Judgment in favor of Respondent-Plaintiff and against Appellant-Defendant KSSO LLC by setting aside a certain Collector's Deed and quieting title in Plaintiff Catherine W. Ndegwa, as Trustee of the Mrema Family Revocable Trust dated February 15, 2008, subject to such secured interests as had been granted in said real estate. LF at 976-982.

The trial court certified the Order and Judgment as being final for the purpose of appeal, in accordance with Missouri Supreme Court Rule 74.01(b), as it found no just reason for delay with respect to the matters raised in the Quiet Title count of the First Amended Petition. LF at 982.

The Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment invalidating the collector's deed to Appellant-Defendant in *Ndegwa v. KSSO, LLC*, Case No. ED96315 (Mo. App., E.D. October 11, 2011). On or about October 26, 2011, Appellant filed its Motion for Rehearing and/or Application for Transfer to the Missouri Supreme Court with the Missouri Court of Appeals, Eastern District. Said motion was denied on November 22, 2011.

On December 5, 2011, Appellant filed its Application for Transfer from the Missouri Court of Appeals, Eastern District pursuant to Missouri Supreme Court Rule 83.04. This Court sustained the Application and ordered transfer on January 31, 2012.

This Court has jurisdiction over the matter under Article V, Section 10 of the Missouri Constitution.

## STATEMENT OF FACTS

Respondents-Plaintiffs Catherine Ndegwa and John E.K. Mrema are husband and wife and reside at 119 Oakside Lane, in St. Louis County, Missouri. LF at 281, 294, 366.

Appellant KSSO, LLC is a Missouri limited liability company with its principal office located in St. Louis County, Missouri. LF at 281, 366.

By General Warranty Deed dated on or about August 7, 1997 and recorded on or about August 19, 1997, in Book 11262 Page 0272 of the St. Louis County Records, Respondent-Plaintiff Catherine Ndegwa and John E.K. Mrema, husband and wife, purchased real estate located in St. Louis County, Missouri, commonly known as 10960 Warwickhall, Bridgeton, Missouri 63044, and more particularly described as:

Lot 253 of Westhaven Plat Eight, according to the plat thereof  
recorded in Plat Book 108 Page 42 of the St. Louis County  
Records.

LF at 282-283, 295, 366.

Lot 253 of Westhaven Plat Eight is improved with a multi-family dwelling containing four rental units. LF at 283, 295, 366.

Respondent-Plaintiff Catherine W. Ndegwa and John E.K. Mrema obtained a loan of \$98,000.00 from IndyMac Bank. LF at 283, 295, which is evidenced by a Promissory Note dated January 22, 2004. LF at 283,295.

The Note is secured by a Deed of Trust dated on or about January 22, 2004 and recorded on or about January 29, 2004 in Book 15610 Page 3495 of the St. Louis County

Records, naming Respondent-Plaintiff Catherine W. Ndegwa and John E.K. Mrema as Borrowers, Integrity Land Title as Trustee, and IndyMac Bank as Lender (hereinafter sometimes referred to as the “IndyMac Deed of Trust”). LF at 283, 295, 301A, 302-321, 367, 563.

The legal description in the IndyMac Deed of Trust does not describe Lot 253 of Westhaven Plat Eight, but in fact describes the real estate affected by that instrument as being Lot 252 of Westhaven Plat Eight. LF at 301A, 302-321, 367, 452, 463. The IndyMac Deed of Trust contains a street address of 10960 Warwickhall Drive, Bridgeton, Missouri 63044. LF at 302-321, 630.

Respondents Catherine Ndegwa and John E.K. Mrema paid all of the real estate taxes due on 10960 Warwickhall Drive, Bridgeton, Missouri 63044, to IndyMac Bank through an escrow account established under the Deed of Trust. LF 33-70.

Respondent One West Bank succeeded to the interests of IndyMac Bank. LF at 283, 366.

On or about August 27, 2007, a tax sale certificate of purchase encumbering Lot 253 of Westhaven Plat Eight was offered for sale by Respondent John Friganza, the Collector of Revenue of St. Louis County, for delinquent real estate taxes owed for the years 2004, 2005 and 2006. LF at 283-284, 459, 466.

The August 27, 2007 offering was a first offering under the Jones-Munger Act. LF at 284, 367.

Appellant KSSO LLC was the successful bidder at the August 27, 2007 sale and received a Tax Sale Certificate of Purchase encumbering Lot 253 of Westhaven Plat Eight. LF at 284, 366, 448, 459, 466, 628, 645.

The Tax Sale Certificate of Purchase contains a legal description of Lot 253 of Westhaven Plat Eight, but contains the correct street address of the Property. LF at 451, 461, 466, 628, 645.

Appellant KSSO, LLC paid the sum of \$26,100.00 for the Tax Sale Certificate of Purchase, representing the sum of \$9,242.00 for delinquent taxes, interest and penalties, and the sum of \$16,858.00 as surplus. LF at 284, 366.

By Quit Claim Deed dated on or about February 20, 2008 and recorded on or about February 20, 2008 in Book 17796 Page 5783 of the St. Louis County Records, both Lots 252 and 253 of West Haven Plat Eight were conveyed by Respondent-Plaintiff Catherine W. Ndegwa and John E.K. Mrema, husband and wife, to John E. K. Mrema and Catherine W. Ndegwa, as Trustees of the Mrema Family Revocable Trust dated February 15, 2008. LF at 285, 296, 301A-301, 322-326, 366, 453, 463, 563, 645.

On November 17, 2008, Respondent-Plaintiff Catherine Ndegwa and Anale Mrema were appointed co-guardians of John E.K. Mrema by the Probate Division of the Circuit Court of St. Louis County, Missouri. LF at 281, 294, 366.

The Probate Division of the St. Louis County Circuit Court found that John E.K. Mrema is an incapacitated and disabled person by reason of dementia-Alzheimer's disease. LF at 370, 372-373.

Appellant KSSO LLC caused a title examination of Lot 253 of Westhaven Plat Eight to be performed by Title Professionals LLC with an effective date of May 1, 2008 (sometimes referred to as the “Original May 1, 2008 Title Examination”). LF at 451, 461-462, 467-469, 630, 644-647.

Said Original May 1, 2008 Title Examination of Lot 253 of Westhaven Plat Eight does not show the IndyMac Deed of Trust as an encumbrance against Lot 253 of Westhaven Plat Eight. LF at 451, 453, 461-462, 463-464, 466-469.

Title Professionals LLC revised the Original May 1, 2008 Title Examination, and said Revised May 1, 2008 Title Examination does not show the IndyMac Deed of Trust as an encumbrance against Lot 253 of Westhaven Plat Eight. LF at 452, 453, 462, 463-464, 470-472, 630, 646-649.

Title Professionals LLC updated its title examination of Lot 253 of Westhaven Plat Eight effective September 4, 2008, and said updated September 4, 2008 Title Examination does not show the IndyMac Deed of Trust as an encumbrance against Lot 253 of Westhaven Plat Eight. LF at 452, 453, 463-464, 473-475, 630, 646-649.

Appellant KSSO LLC notified Respondents-Plaintiffs Catherine Ndeuga and John E.K. Mrema, in their individual capacities, of their right to redeem by letters dated September 15, 2008 (hereinafter sometimes referred to as the “Notice Letters”). LF at 284-285, 287-292, 366.

The Notice Letters dated September 15, 2008 stated in part:

As a person or party that has, or may claim some interest in  
the property, you are advised, that the Missouri ... [statutes]

afford you the opportunity to redeem and / or otherwise protect your interest. Be further advised, that this opportunity will be available for a period of not less than 90 days from the date of this letter.

\*\*\*

The right of redemption continues to be available until that deed is recorded. \*\*\*, it is possible that the period of redemption may exceed the 90 day period described in this notice. This indication is made to you to describe the current handling, and is not brought to your attention as an inducement for you to expect an extended period.

\*\*\*

If you fail to redeem this property within the redemption period, you will be forever barred from redeeming the property.

LF at 287-292, 449, 628-629, 645-646. Enclosed with these letters was a copy of Section 140.405 RSMo with the following wording bracketed:

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.

LF at 287-292, 629, 645-646.

Appellant KSSO LLC did not notify IndyMac Bank of its right to redeem its interest in Lot 253 of Westhaven Plat Eight. LF at 285, 366.

By Collector's Deed dated on or about January 4, 2009 and recorded on or about February 4, 2009 in Book 18202 Page 1341 of the St. Louis County Records, Respondent John Friganza, Collector of Revenue of St. Louis County, Missouri, conveyed Lot 253 of Westhaven Plat Eight to Appellant KSSO LLC. LF at 285, 301, 327-330, 366, 450, 461, 563, 628, 645.

Approximately 116 days elapsed from the date of the Notice Letters dated September 15, 2008 to the date the Collector's Deed was issued on January 9, 2009. LF at 450, 461, 628, 645.

IndyMac Bank paid the 2007 and 2008 taxes due on the Property in a timely manner. LF at 510, 515, 516, 527, 536, 783-784.

### **Procedural Background**

The First Amended Petition filed by Plaintiffs contains eleven counts. LF at 88-176. Count I of the amended Petition is a declaratory judgment action to declare Section 140.170, RSMo, to be facially unconstitutional in violation of the Due Process Clauses of the Missouri and United States Constitutions. LF at 96-97. Count II of the First Amended Petition is a declaratory judgment action to declare Section 140.170, RSMo, to be unconstitutional under the Due Process Clauses of the Missouri and United States Constitutions as applied in this matter. LF at 97-98. Count III of the First Amended Petition is an action to quiet the title to Lot 253 of Westhaven Plat Eight. LF at 98-102. Count IV of the First Amended Petition is an action to quiet the title to Lot 252 of Westhaven Plat Eight. LF at 102-104. Count V of the First Amended Petition is a second quiet title action concerning Lot 253 of Westhaven Plat Eight. LF at 104-105. Count VI of the First Amended Petition is an action for a permanent injunction and preliminary injunction. LF at 105-109. Count VII of the First Amended Petition is an action for ejectment to obtain possession of Lot 253 of Westhaven Plat Eight. LF at 109-110. Count VIII of the First Amended Petition is an action for tortious interference with contracts. LF at 110-111. Count IX of the First Amended Petition is an action for estoppel. LF at 111-114. Count X of the First Amended Petition is an action for negligence directed against IndyMac Bank. LF at 26-27. Count XI of the First Amended Petition is an action for breach of fiduciary duty directed against IndyMac Bank. LF at 29.

Appellant filed its Answer and Defenses to Plaintiff's First Amended Petition and Counterclaims and Cross-claims. LF at 188-208. Of relevance to this appeal are the following: (1) Appellant's Fifth Defense, which alleges that the IndyMac Deed of Trust describes Lot 252 of Westhaven Plat Eight, not Lot 253 of Westhaven Plat Eight, and that Appellant had no obligation to provide any notice to the holder of the IndyMac Deed of Trust. L.F. at 196-197. (2) Appellant's Sixth Defense, wherein it is alleged that relevant case law has interpreted the Jones-Munger Act as providing parties interested in real estate sold at a first offering delinquent tax sale a minimum redemption period of one year under Section 140.340.1, RSMo, and a continuing right to redeem thereafter until a collector's deed is authorized to be issued or the tax sale certificate expires under Section 140.420, RSMo, and that Appellant was under no obligation to inform interested parties that they have a fixed one year right of redemption under Section 140.405, RSMo. LF at 197-198.

Appellant's Counterclaims and Cross-claims include three counts. LF at 200-208. Count I of the Counterclaims and Cross-claims is an action to confirm the Collector's Deed to Appellant under Section 140.330, RSMo, an action to quiet the title to Lot 253 of Westhaven Plat Eight under Sections 527.150-527.250, RSMo, and Missouri Supreme Court Rule 93.01, and an action for a declaratory judgment to declare the rights of the parties in Lot 253 of Westhaven Plat Eight under Sections 527.010 to 527.130, RSMo, and Missouri Supreme Court Rule 87. LF at 200-205. Count II of the Counterclaims and Cross-claims is an action in ejectment under Section 140.580, RSMo, Chapter 524, RSMo, and Missouri Supreme Court Rule 89. LF at 204-205. Count III of the

Counterclaims and Cross-claims is a Conditional Supplemental Counterclaim for Equitable Recoupment to recover certain expenditures if the Collector's Deed is invalidated. LF at 205-208.

Respondent-Plaintiff filed an Answer, Defenses and Reply to Appellant's Counterclaims alleging that Catherine Ndegwa appears before the Court in her individual capacity and in her capacity as Co-Trustee of the Mrema Family Revocable Trust dated February 15, 2008 and in her capacity as the Co-Guardian and Conservator of John E.K. Mrema in Estate No. 08SL-PR0220 in the Probate Division of the Circuit Court of St. Louis County, Missouri. LF at 212-216. Respondent-Plaintiff filed an Amendment by Interlineation to the First Amended Petition to reflect the foregoing. LF at 267.

Respondents-Plaintiffs filed their Motion for Partial Summary Judgment as to Count III of Plaintiff's First Amended Petition. LF at 269-296.

Appellant filed its Motion for Partial Summary Judgment as to Count I of Appellant's Counterclaims and Cross-claims. LF at 297-337.

The Court entered its Order and Judgment granting Respondents-Plaintiffs' Motion for Partial Summary Judgment as to Count III of Plaintiffs' First Amended Petition and denying Appellant's Motion for Partial Summary Judgment as to Count I of Appellant's Counterclaims and Cross-claims. LF at 976-982.

Appellant filed a timely Notice of Appeal. LF at 983-995.

**POINTS RELIED ON**

**I.**

**THE TRIAL COURT CORRECTLY GRANTED RESPONDENT-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF ITS FIRST AMENDED PETITION BECAUSE THE NOTICE LETTERS SENT TO RESPONDENTS FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF SECTION 140.405 RSMO IN THAT THEY WERE SENT AFTER THE REDEMPTION PERIOD ENDED AND THEY MISSTATED THE APPLICABLE REDEMPTION PERIOD. IN SO RULING, THE TRIAL COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT THAT *HOBSON V. ELMER* ALLOWS AN INTERESTED PARTY TO REDEEM THE PROPERTY UNTIL THE TIME THAT THE COLLECTOR'S DEED IS AUTHORIZED.**

*(1) Cedarbridge, LLC v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009); *(2) Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App., E.D. 2009); *(3) Hames v. Bellistri*, 300 S.W.3d 235 (Mo. App., E.D. 2009); *(4) Drake Development & Construction LLC v. Jacob Holdings, Inc.* 306 S.W.3d 171(Mo. App., S.D. 2010)

**II.**

**THE TRIAL COURT CORRECTLY GRANTED RESPONDENT-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THEIR FIRST AMENDED PETITION BECAUSE THE SECTION 140.405 NOTICE SENT BY APPELLANT DID NOT CORRECTLY INFORM THE**

RESPONDENTS THAT THE REDEMPTION PERIOD EXPIRED ON AUGUST 27, 2008, AND DID NOT COMPLY WITH 140.405RSMO. IN SO RULING, THE TRIAL COURT CORRECTLY REJECTED APPELLANT'S ASSERTIONS THAT (1) SECTION 140.405 RSMO CODIFIED RELEVANT CASE LAW, INCLUDING THE SO-CALLED *HOBSON* REDEMPTION PERIOD, WHICH IS LONGER THAN THAT EXPRESSLY STATED IN THE STATUTE; (2) THERE IS NO UNIVERSALLY APPLICABLE REDEMPTION PERIOD IN TAX SALES THAT WOULD ALLOW TAX SALE PURCHASERS TO PROVIDE ADVANCE NOTICE OF THE EXPIRATION OF THE REDEMPTION PERIOD AS VARIOUS OTHER STATUTES MAY CHANGE THE REDEMPTION RIGHTS OF THE INTERESTED PARTIES FROM THE *HOBSON* REDEMPTION PERIOD; (3) TAX SALE PURCHASERS ARE UNABLE TO PROVIDE ADVANCE NOTICE OF THE TIME WHEN THEY MAY BE AUTHORIZED TO ACQUIRE A COLLECTOR'S DEED BECAUSE THE DATE WHEN ALL REQUIREMENTS HAVE BEEN SATISFIED CANNOT BE KNOWN IN ADVANCE; (4) NEITHER SECTION 140.405 RSMO OR OTHER CONSTITUTIONAL PRINCIPLES OF DUE PROCESS REQUIRE A TAX SALE PURCHASER TO PROVIDE ADVANCE NOTICE OF THE REDEMPTION TIMEFRAME, THE SPECIFIC PROCEDURES THAT MUST BE FOLLOWED TO REDEEM, OR ANY OTHER DETAILS RELATING TO THE RIGHT OF REDEMPTION FOR THE TAX SALE; AND (5) THE NOTICE LETTERS SENT BY KSSO INFORMED THE RESPONDENTS OF THEIR RIGHT TO REDEEM

**AND THAT IS ALL THAT IS REQUIRED UNDER 140.405 RSMO.**

(1) *Cedarbridge, LLC v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009); (2) *Keylien Corporation v. Johnson*, 284 S.W.3d 606 (Mo. App., E.D. 2009); (3) *Hames v. Bellistri*, 300 S.W.3d 235 (Mo. App., E.D. 2009); (4) *Drake Development & Construction LLC v. Jacob Holdings, Inc.* 306 S.W.3d 171(Mo. App., S.D. 2010); (4) *M&P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154 (Mo. 1997).

### III.

**THE TRIAL COURT CORRECTLY GRANTED RESPONDENT-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THE FIRST AMENDED PETITION BECAUSE APPELLANT FAILED TO PROVIDE INDYMAC BANK, THE NAMED BENEFICIARY UNDER A PUBLICLY RECORDED DEED OF TRUST AFFECTING LOT 253 OF WESTHAVEN PLAT EIGHT, WITH NOTICE PURSUANT TO SECTION 140.405, RSMO AND APPELLANT'S FAILURE TO PROVIDE SAID NOTICE MANDATES THAT APPELLANT LOSE ALL INTEREST IN THE REAL PROPERTY AS A MATTER OF LAW.**

(1) *Glasgow Enterprises. Inc. v. Brooks*, 234 S.W.3d 407 (Mo. App.2007); (2) *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 2720802, 9 (E.D. Mo.); (3) *Firma, Inc. v. Twillman*, 126 S.W.3d 790, 793 (Mo. App. 2004); (4) *Cedarbridge, LLC v. Eason*, 293 S.W.3d 462 (Mo. App., E.D. 2009).

IV.

**EVEN IF THE TRIAL COURT ERRED IN NOT APPLYING THE SO-CALLED *HOBSON* REDEMPTION PERIOD, RESPONDENTS WOULD STILL HAVE BEEN ENTITLED TO SUMMARY JUDGMENT BECAUSE UNDER THE *HOBSON* REDEMPTION THEORY, THE REDEMPTION PERIOD HAS NOT EXPIRED DUE TO JOHN MREMA'S INCAPACITY.**

(1) Section 140.350 RSMo; (2) *Roberts v. Glasgow*, 860 S.W.2d 26 (Mo. App. E.D. 1993); (3) *Hobson v. Elmer*, 163 S.W.2d 1020 (Mo. 1942).

## ARGUMENT

### Standard of Judicial Review

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

A circuit court's grant of summary judgment is reviewed de novo. Summary judgment is proper if the record, viewed in a light most favorable to the non-moving party, shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. 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. The non-movant is accorded all reasonable inferences from the record. 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. 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. *Id.*

## ARGUMENT

### I.

**THE TRIAL COURT CORRECTLY GRANTED RESPONDENT-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF ITS FIRST AMENDED PETITION BECAUSE THE NOTICE LETTERS SENT TO RESPONDENTS FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF SECTION 140.405 RSMO IN THAT THEY WERE SENT AFTER THE REDEMPTION PERIOD ENDED AND THEY MISSTATED THE APPLICABLE REDEMPTION PERIOD. IN SO RULING, THE TRIAL COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT THAT *HOBSON V. ELMER* ALLOWS AN INTERESTED PARTY TO REDEEM THE PROPERTY UNTIL THE TIME THAT THE COLLECTOR'S DEED IS ISSUED.**

Appellant did not claim in its brief filed with the Eastern District Court of Appeals that mere irregularities in the tax sale proceeding or the collector's deed will not invalidate the tax sale or collector's deed and as such, has abandoned this argument.

Rule 83.08(b) states that a party may file a substitute brief in the Supreme Court which shall include all claims the party desires the Court to review, but shall not alter the basis of any claim that was raised in the brief filed with the Court of Appeals. *Lane v. Lensmeyer*, 158 S.W.3d 218, 229 (Mo. 2005)(holding that taxpayers' challenge to a school district's tax levy was altered when the taxpayers based the amount of tax revenue challenged on different rates of collection in the trial and appellate court than in the Supreme Court). In its brief filed with the Court of Appeals, Eastern District, KSSO did

not assert that the Collector's Deed is prima facie evidence of the regularity of notice in compliance with the Jones-Munger Act, nor did it assert that technical objections and "mere irregularities" of any kind in the proceedings do not invalidate the tax sale proceedings or the Collector's Deed. Appellant merely stated its assertions above and did not make any legal argument; therefore, Respondent assumes Appellant is arguing that failure to comply with 140.405 RSMo notice provisions is a "mere irregularity". However, for the reasons stated above, Appellant has abandoned this argument.

If this Court determines that it can consider the issue of whether the collector's deed is prima facie evidence of the regularity of the tax sale proceedings and that mere irregularities in the process will not invalidate the tax sale, it should find that Respondents have produced evidence relating to the redemption notices that is sufficient to overcome the prima facie evidence of regularity.

Collector's deeds under the Jones-Munger Act vest in the tax sale purchaser an absolute estate in fee simple. 140.120 RSMo. Section 140.460 provides that the collector's deed shall be prima facie evidence ...of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings. The collector's deed is prima facie evidence of the regularity of the tax sale notice in compliance with the law because the notice of the sale and the sale are prior proceedings under 140.460 RSMo. *Mitchell v. Atherton*, 563 S.W.2d 13, 17-18 (Mo., 1978); *Stadium West Properties, L.L.C. v. Johnson*, 133 S.W.3d 128, 136 (Mo. App., W.D. 2007). Section 140.520 RSMo provides that technical objections to, and mere irregularities in, the sale process, do not invalidate the sale or collector's deed. Those who wish to

overcome the prima facie evidence of regularity and validity presented by a collector's deed must offer evidence at variance<sup>1</sup> with the presumptive fee simple absolute title conveyed by the collector's deed to the tax sale purchaser. *Mitchell*, 563 S.W.2d at 18 (invalidating collector's deed where the deed on its face contained the name of the wrong person against whom delinquent taxes were returned); *Stadium West*, 133 S.W.3d at 136 (invalidating collector's deed based on the inadequacy of the legal description in the tax sale notice).

Appellant states that pursuant to *State ex rel. Howard v. Timbrook's Estate*, 144 S.W. 843 (Mo., 1912), 111521 RSMo (the predecessor of §140.520 RSMo), replaced the common law rule of strict construction of tax sale statutes with more liberal rules that technical objections or mere irregularities do not invalidate tax sale proceedings.

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<sup>1</sup> Appellant cites numerous cases challenging conveyances pursuant to quitclaim or beneficiary deeds based on incompetence of the grantor or undue influence on the grantor in support of his contention that clear, cogent and convincing evidence is also required to prove a defect in notice pursuant to Section 140.405. See *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); and *Queathem v. Queathem*, 712 S.W.2d 703, 706 (Mo. App., E.D. 1986). This is a misstatement of the standard as applicable case law requires only "evidence at variance" with the deed or sale process, as noted above.

*Timbrook's Estate*, 144 S.W. at 845-846.

Appellant's reliance on *Timbrook's Estate* for the proposition that tax sale statutes are no longer strictly construed is misplaced because *Timbrook's Estate* did not involve a tax sale, but was rather a suit to collect personal property taxes. The Court noted that where there is a statutory provision for suits to enforce taxes, the proceedings in assessing property and levying and collecting taxes are liberally construed, *Timbrook's Estate*, 144 S.W. at 845, and contrasted the proceedings for collecting personal property taxes with summary proceedings under the prior law where real property was seized and sold at a deep discount with little or notice to the owner. *Timbrook's Estate*, 144 S.W. at 845. In fact, cases involving real property tax sales under the Jones-Munger Act apply a strict construction standard. See *Stadium West*, 133 S.W.3d at 134 ("It has universally been the rule that statutory requirements in proceedings in rem for the sale of land for delinquent taxes must be complied with strictly")(citing *Wates v. Carnes*, 521 S.W.2d 389, 390 (Mo. 1975); *Lohr v. Cobur Corp.*, 654 S.W.2d 883, 887 (if the notice of sale does not strictly follow the statutory requirements concerning the contents of the notice of sale, the subsequent county tax sale is void). Finally, *Timbrook's Estate* was decided 72 years before Section 140.405 RSMo was enacted.

Because failure to comply with Section 140.405 notice requirements results in the purchaser's loss of all interest in the property, a deficient notice could never be a "mere

irregularity” for the purposes of Section 140.520.<sup>2</sup>

At the heart of this case are three issues: (1) What is the redemption period for a first offering tax sale?<sup>3</sup>; (2) When must notice of the right to redeem be provided to parties having an interest in the property? (which is dependent on the determination of the redemption period); and (3) What must be contained in the redemption notice?

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<sup>2</sup> To date, there appears to be only one case that addresses this argument, *Sneil, LLC v. Tybe Learning Center, Inc. et al.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) (Ordered transferred). In *Sneil*, the Eastern District rejected Sneil’s argument that deficiencies in the redemption notices sent to Tybe and Regions Bank were technical objections or mere irregularities citing Section 140.405 RSMo mandates that failure to comply with its provisions dictates that the purchaser lose all interest in the property, *Sneil*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) Slip Op. at 12, and that cases cited by *Sneil* don’t address Section 140.405 in connection with Section 140.520. *Sneil*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) Slip Op. at 12-13.

<sup>3</sup> This case involves a first offering sale under the Jones-Munger Act and therefore is concerned with the redemption period and notice requirements for a first sale. Second offering sales have the same statutory redemption period as first sales and therefore should be subject to the same requirements as first sales. Third offering sales are generally treated differently from first and second sales in that they have a shorter redemption period. Therefore, rules relating to third offering sales will not be discussed unless they are of some particular relevance.

The Courts of Appeal differ as to whether the redemption period for a first offering tax sale is the one year redemption period expressly referred to throughout the Jones-Munger Act, *see* 140.340.1, 140.420, 140.310.1, 140.350, and adopted by the Eastern District in *Keylien Corp. v. Johnson*, 284 S.W.3d, 606, 610 (Mo. App., E.D. 2009), *Cedarbridge LLC v. Eason*, 293 S.W.3d 462, 465 (Mo. App., E.D. 2009), *Hames v. Bellistri*, 300 S.W.3d 235, 239 (Mo. App., E.D. 2009), *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273 (Mo. App., E.D. 2006), *Glasgow Enterprises v. Brooks*, 234 S.W.3d 407, 411 (Mo. App., E.D. 2007), *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App., E.D. October 11, 2011), *Sneil, LLC v. Tybe Learning Center Inc.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012)(ordered transferred), or the *Hobson* Redemption Period adopted by the Western District, which provides for an absolute one year right of redemption in a first offering sale, but allows the property owner to redeem after the absolute period if the tax sale purchaser has not yet obtained a collector's deed. *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942). Courts adopting the one-year right of redemption standard generally adopt the holdings of the Eastern District that the notice must be mailed at least ninety days prior to the expiration of the one year anniversary of the tax sale. *See Cedarbridge*, 293 S.W.3d at 465, *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App., E.D. October 11, 2011) Slip Op. at 12, *Sneil, LLC v. Tybe Learning Center Inc.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) Slip Op. at 6. Courts adopting the *Hobson* Redemption Period, require the redemption notice to be provided at least 90 days before the date that the tax sale purchaser is "authorized" to acquire the collector's deed, which is defined to be the date that the tax

sale purchaser elects to acquire the deed from the expiration of the one-year absolute period of redemption until the tax sale purchaser applies for the collector's deed. *See Hobson v. Elmer*, 163 S.W. 2d 1020, 1023 (Mo., 1942), *Boston v. Williamson*, 807 S.W.2d 216, 217-218 (Mo. App., W.D. 1991), *United Asset Management Trust Company v. Clark*, 332 S.W.3d 159, 164 (Mo. App., W.D. 2010), *Harpagon MO, LLC v. Clay County Collector*, 335 S.W.3d 99, 104-105 (Mo. App., W.D. 2011), *Harpagon MO, LLC v. Bosch*, Appeal No. WD72824 (Mo. App., W.D. August 30, 2011), Slip Op. at 4.

Section 140.340.1 RSMo states that “[t]he 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” by paying to the county collector the purchase money stated in the certificate of purchase and the costs of the sale together with interest at the rate specified in the certificate. Thus, an owner whose property is sold at a first or second tax sale offering<sup>4</sup> has a one year right of redemption *Keylien*, 284 S.W.3d at 610, *Cedarbridge*, 293 S.W.3d at 465, *Hames*, 300 S.W.3d at 239, *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App., E.D. October 11, 2011) Slip Op. at 9, *Sneil, LLC v. Tybe Learning Center Inc.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) Slip Op. at 6. *United Asset Management*, 332 S.W.3d at 164.

The one year redemption period begins on the date of the tax sale and ends, pursuant to the express terms of the statute, one year later. 140.340.1 RSMo., *Keylien*,

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<sup>4</sup> Second tax sales have the same one-year redemption period as first sales. 140.340.1

RSMo. Third sale offerings have a 90-day redemption period. 140.250 RSMo.

284 S.W.3d at 613; *Cedarbridge*, 293 S.W.3d at 465; *Hames v. Bellistri*, 300 S.W.3d 235, 239; *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App., E.D. October 11, 2011) Slip Op. at 10-11, *Sneil, LLC v. Tybe Learning Center Inc.*, Appeal No. ED96828 (Mo. App., E.D. February 28, 2012) Slip Op. at 6, *Kelly v. Nelson*, 226 S.W.3d 882,886 (Mo. App., W.D. 2007)(Section 140.340.1 RSMo. expressly provides a deadline for redemption, since it states that “a redemption payment may be made ‘at any time during the two years next ensuing’ from the tax sale date.”); *M&P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 156 (Mo. banc 1997)(first or second sale is followed by a two-year redemption period during which the owner or occupant of any land or lot sold for taxes, or any other person having an interest therein, may redeem the same by paying the county collector the purchase price plus the cost of sale and interest.)<sup>5</sup>

Appellant relies on *Hobson v. Elmer*, 163 S.W.2d 1020 (Mo. 1942), and Western District cases following its reasoning, wherein this Court discussed the [two] year right of redemption in what is now Section 140.340 in connection with two seemingly conflicting

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<sup>5</sup> The redemption period for a first or second offering sale was two years under a prior version of Section 140.340.1. The redemption period under the version of 140.340.1 RSMo. applicable to this case is one year. Throughout this brief, if the two year redemption period applies rather than the one year period, the word “two” will be bracketed to indicate that the ruling pertained to an older version of the statute. Generally, the number of years to redeem is the only difference in the statute unless otherwise noted.

provisions: 11145 RSMo (now 140.340.4), which states that if the tax sale purchaser fails to take a collector's deed within 6 months after the expiration of the [two] year redemption period, no interest shall be charged or collected from the redemptioner after that time; and 11147 RSMo (now 140.360.2), which requires the redemptioner to pay to the certificateholder the value of any lasting and valuable improvements placed on the land, but providing that no compensation is allowed for improvements made before the expiration of [two] years from the tax sale date. Reading those sections with 11149 RSMo (now Section 140.420), which states that if no person redeems the land sold for taxes within two years from the sale, the collector shall execute a conveyance of the real estate to the purchaser, this Court concluded that the property owner has an absolute right of redemption which cannot be defeated by the tax sale purchaser for [two] years after the tax sale, *Hobson*, 163 S.W.2d at 1023, but that subsequent to the absolute period of redemption, the property owner may still redeem if the purchaser has not complied with conditions necessary to acquire the collector's deed. *Id.* Respondents do not believe that the *Hobson* Redemption Period is the applicable standard for several reasons. First, the discussion relating to the *Hobson* Redemption Period is arguably dicta, because it was not relied upon by the Court in ruling that Elmer, the tax sale purchaser, was entitled to a collector's deed, since he had made several attempts to obtain a collector's deed, but was essentially thwarted by the collector. *Hobson*, 163 S.W.2d at 1024. The issue of whether Hobson's guardian, who redeemed the property just before the then four-year expiration date, could legally redeem, was discussed, but not central to the holding invalidating the redemption. *Hobson*, 163 S.W.2d at 1022-1023. Second, *Hobson* involved a third

offering sale.

For the Court to adopt Appellant's position that in a first offering sale, the applicable redemption period is the *Hobson* Redemption Period, it would have to disregard rules of statutory construction. The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc. 2002). To discern legislative intent, the Court may examine the whole act to discern its evident purpose. *United Pharmacal Co. v. Missouri Board of Pharmacy*, 208 S.W.3d 907, 911 (Mo. 2006). Statutory construction should not be hyper-technical but instead should be reasonable, logical, and should give meaning to the statutes. *United Pharmacal*, 208 S.W.3d at 912. A particular statutory phrase cannot be read in isolation. Instead the provisions of a legislative act are...construed together and a questioned phrase is read in harmony with the entire act. *Gash v. Lafayette County*, 245 Sw3d 229, 232 (Mo. banc 2008). Furthermore, under the principle of construction "inclusio unius est exclusio alterius", the express mention of one thing in a statute implies the exclusion of another. *In re Salcedo*, 34 S.W.3d 862, 868 (Mo. App. 2001). Applying these rules to the Jones-Munger Act clearly results in the conclusion that there is a one-year right of redemption in first and second sale offerings and that if an interested party does not redeem the property within that timeframe, they lose their right and interest to the property. The Jones-Munger Act repeatedly refers to a one year right of redemption in a first or second tax sale offering. See 140.420 RSMo (if no person shall redeem the lands sold for taxes within the applicable redemption period

of one year from the date of the sale, at the expiration thereof, and on production of the certificate of purchase, the collector...shall execute to the tax sale purchaser...a conveyance of the real estate sold.); 140.310.1 RSMo (purchaser of any tract or lot of land at sale for delinquent taxes...shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this law; unless sooner redeemed); 140.340.1 RSMo (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.);140.350 RSMo (infants and incapacitated and disabled persons... may redeem any lands belonging to them sold for taxes, within one year after the expiration of such disability...). When the above sections of the Jones-Munger Act are read together, there can be no question that the legislative intent was for a one-year redemption period in first and second tax sale offerings because that is the deadline that is explicitly stated throughout the statute.

Adopting the Western District, and Appellant's interpretation that there is a one year absolute period of redemption, but thereafter the property owner can redeem until the collector's deed is issued or the tax sale certificate of purchase expires not only does not construe the two subsections at issue, 140.340.4 RSMo and 140.360.2 RSMo, harmoniously with the remainder of the statute, it also directly contradicts the plain language throughout the statute referring to the one year right of redemption.

In *United Asset Management*, the Western District Court of Appeals discussed the right of redemption and stated that pursuant to 140.340.1 RSMo, any interested party may redeem the property at any time during the one year immediately following the tax sale.

*United Asset Management*, 332 S.W.3d at 164. From the sale date until the expiration of the statutory one year period of redemption, the purchaser is vested with an inchoate or inceptive interest in the land subject to the absolute right of redemption in the record owner in whom the title remains vested. *United Asset Management*, 332 S.W.3d at 164. If no one redeems the lands sold within one year from the sale date, at expiration thereof and on production of the certificate of purchase, the collector shall execute the conveyance of real estate which shall vest in the grantee an absolute fee simple interest. *United Asset Management*, 332 S.W.3d at 164. Because 140.410 RSMo states that the purchaser must cause the deed to be executed and placed of record within two years from the sale date., *United Asset Management*, 332 S.W.3d at 164., the Western District, reading 140.410 in conjunction with 140.420, concluded that the purchaser must obtain the collector's deed and record it during the one year period beginning after the sale date. *United Asset Management*, 332 S.W.3d at 164. It is important to note that at this point, the Western District draws the same conclusions as the Eastern District, i.e. that the interested party has one year to redeem and if he does not, the tax sale purchaser may obtain a collector's deed at any time after expiration of the one-year redemption period up to the second anniversary of the tax sale date (assuming legal requirements to obtain the deed are met.) The Western District then contradicts the previous analysis by noting that this Court has construed 140.340.1, 140.360.2 and 140.420 to mean that until the purchaser presents the certificate of purchase to the collector, the original property owner may still redeem the property and destroy the purchaser's power to obtain a collector's deed, *United Asset Management*, 332 S.W.3d at 164 (citing *Hobson v. Elmer*, 163

S.W.2d 1020, 1023) (Mo. 1942), thus extending the redemption period until the time that the purchaser obtains the collector's deed. *United Asset Management*, 332 S.W.3d at 164.

Adopting the *Hobson* Redemption Period not only is contrary to the plain language of the Jones-Munger Act, but has several consequences which Respondents believe are contrary to the legislature's intent. First, use of the *Hobson* Redemption Period converts the statutory redemption period into whatever the tax sale purchaser wants it to be (subject, of course to the one year absolute redemption period and deadline for obtaining the collector's deed), which results in a non-uniform redemption period. Enforcing a uniform one-year redemption period in a first offering sale provides certainty to the property owner, interested parties, and the tax sale purchaser. Allowing the tax sale purchaser to decide the applicable redemption period for each purchased property removes the certainty relating to redemption rights and allows the tax sale purchaser to arbitrarily decide what the redemption period will be. As elaborated in Point II, the tasks which must be completed for a tax sale purchaser to obtain a collector's deed, are all easily accomplished and within the purchaser's control. Thus, there is no valid reason for extending the redemption period beyond that which is expressly stated in the statute.

Second, adopting the *Hobson* redemption period could raise Federal and Missouri Constitutional equal protection issues to the extent that one class of taxpayer is treated differently than another, e.g. providing a longer redemption period for one class of taxpayer and a short redemption period for another.

Since the Jones-Munger Act is specifically structured to provide a one-year right

of redemption in first or second offering sales, 140.340.1 RSMo, 140.420 RSMo, 140.310.1 RSMo, and 140.350 RSMo, on the plain face of the statute, adopting any interpretation of the Act that varies the redemption period is contrary to legislative intent.

At least ninety days prior to the date when a purchaser is authorized to acquire the collector's 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. 140.405 RSMo. 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. 140.405 RSMo. Failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate. 140.405 RSMo.<sup>6</sup>

In *Ndegwa v. KSSO, L.L.C.*, Appeal No. ED 96315 (Mo. App. E.D. October 11, 2011) the Eastern District reiterated its position that a tax sale purchaser must send notice of the right to redeem at least ninety days before the expiration of the one-year redemption period. *Ndegwa v. KSSO, L.L.C.*, Appeal No. ED 96315 (Mo. App. E.D. October 11, 2011), Slip Op. at 12, *Cedarbridge*, 293 S.W.3d at 465; Section 140.405

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<sup>6</sup> 140.405 RSMo was amended in 2010 as a result of the holdings in *Jones v. Flowers*, 547 U.S. 220 (2006) and *Schlereth v Hardy*, 280 S.W.3d 47 (Mo. Banc 2009) to add requirements for unclaimed mail, but also added other requirements that are not at issue in this case.

RSMo. In a first or second offering tax sale, the redemption notice must inform the recipient that he has one year from the date of the tax sale to redeem the property or be forever barred from doing so. *Keylien*, 284 S.W.3d at 612-613; *Cedarbridge*, 293 S.W.3d at 465; *Hames v Bellistri*, 300 S.W. 3d 235, 239-240; *Valli v. Glasgow Enterprises*, 204 S.W. 3d 273, 277 (Mo. App. E.D. 2006); *Glasgow Enterprises, Inc. v. Kusher*, 231 S.W.3d 201, 204 (Mo. App. E.D. 2007), *Ndegwa v. KSSO, L.L.C.*, Appeal No. ED 96315 (Mo. App. E.D. October 11, 2011), Slip Op. at 12, *Sneil, LLC v. Tybe Learning Center Inc*, Appeal No. ED 96828 (Mo. App. E.D. February 28, 2012), Slip Op. at 7. The Southern District adopted the Eastern District holdings requiring notice of the duration of the redemption period in *Drake Development & Construction, LLC v. Jacob Holdings, Inc.* 306 S.W.3d 171, 174 (Mo. App., S.D. 2010) (holding that the redemption notice must inform recipients of the time frame in which they must act to redeem their property or be forever barred from doing so, but not stating that that time frame is. If the tax sale purchaser fails to comply with the above notice requirements, he will lose all of interest in the property as a matter of law. Section 140.405, *Cedarbridge*, 293 S.W. 3d at 466, *Drake Development*, 306 S.W.3d at 174, *Sneil, LLC v. Tybe Learning Center Inc*, Appeal No. ED 96828 (Mo. App. E.D. February 28, 2012), Slip Op. at 12. The Western District reads the notice requirements set forth in Section 140.405 RSMo with *Hobson* and concludes that the redemption notice must be sent at least ninety days before the date that the tax sale purchaser is authorized to obtain the collector's deed. *United Asset Management*, 332 S.W.3d at 175, *Harpagon MO LLC v. Bosch*, Appeal No. WD 72834 (W.D. August 30, 2011), Slip Op. at 4, *Boston v. Williamson*, 807 S.W.2d 216, 218 (Mo.

App., W.D. 1991). The cases then define the date on which the purchaser is “authorized” to acquire the deed as the date between the end of the statutory redemption period and the date on which the purchaser delivers his certificate of purchase to the collector. *Boston*, 807 S.W.2d at 218, *Harpagon MO LLC v. Bosch*, Appeal No. WD 72834 (W.D. August 30, 2011), Slip Op. at 4.

Any reliance on *Boston v. Williamson*, 807 S.W.2d 216 (Mo. App., W.D. 1991) is misplaced, however, because *Boston*, by its own admission, does not involve the question of the time within which land sold for delinquent taxes may be redeemed. *Boston*, 807 S.W.2d at 218.

Under the current version of Section 140.420 RSMo, if the property sold for taxes has not been redeemed within one year from the date of the sale, at the expiration thereof, and upon production of the certificate of purchase, the collector of revenue shall execute to the purchaser a conveyance of the real estate sold. As such, the tax sale purchaser is “authorized” to obtain the deed upon the expiration of the one year redemption period, assuming he meets other statutory requirements such as paying all taxes that accrued after the sale, 140.440 RSMo, tendering the original certificate of purchase to the collector, 140.420 RSMo, paying the recording fees for the collector’s deed, 140.410 RSMo, and providing notice pursuant to 140.405 RSMo. This does not mean that the purchaser *must* obtain the deed immediately upon the expiration of the one year period; however, as long as the above requirements are met, the statute clearly authorizes the purchaser to acquire the deed at this time. The purchaser may choose, for whatever reason, not to immediately exercise this right.

But Section 140.405 RSMo simply cannot be construed to permit the tax sale purchaser to notify interested parties of their right to redeem at least 90 days prior to whatever date that the purchaser chooses to exercise its right to acquire the collector's deed. This construction, depending on when the purchaser decides to send the notice, could extend the period of redemption from one year to some other date arbitrarily selected by the purchaser, which date may or may not be provided in the notice of redemption.

In order to create certainty and consistency, the portion of Section 140.405 RSMo requiring that the purchaser deliver the redemption notice at least ninety days prior to the date when the purchaser is "authorized to acquire the deed" must be construed to mean at least ninety days from the date that the tax sale purchaser is *first* authorized to acquire the deed under Section 140.420 RSMo. To hold otherwise would be misleading to the parties receiving the redemption notices and would render meaningless Section 140.340.1, which specifically gives interested parties one year from the date of the tax sale to redeem the property.

Furthermore, to interpret the phrase "authorized to acquire the deed" and 140.405 RSMo notice requirements in the manner endorsed by the Western District, would mean that the deadline for sending the redemption notice and the expiration date of the redemption period will be different for each property purchased at a particular tax sale offering, the dates being entirely dependent on when the purchaser decides to acquire the deed after giving the notice of redemption. This is an absurd result and cannot be what was intended by the legislature. Section 140.340.1 clearly and unambiguously states that

an owner whose property is sold at a tax sale has one year from the date of the sale to redeem the property. In order to give Section 140.340 its obvious meaning, and construe it with other sections of the Jones-Munger Act relating to the one-year redemption period, the date that the purchaser is “authorized to acquire the deed” must be a fixed date, i.e. the date of expiration of the one-year redemption period. *See Cedarbridge*, 293 S.W.3d at 465.

Interpreting Section 140.405 redemption notice requirements in accordance with the Eastern District holdings in *Keylien*, *Cedarbridge*, *Hames*, *Ndegwa* and *Sneil* creates clarity and harmony between the statutory provisions governing redemption in Chapter 140 RSMo. If the property has not been redeemed within one year from the date of the tax sale, Section 140.420 authorizes the tax sale purchaser to acquire a deed to the land at the end of said one year period. In Section 140.340.1 RSMo, the legislature sets out the redemption period as being one year from the date of the tax sale. Then, under Section 140.405, and as a condition to acquiring the collector’s deed, the tax sale purchaser must notify the interested parties of their right of redemption. Lastly, notice of the right to redeem pursuant to 140.405 RSMo must be sent at least 90 days prior to the date the purchaser is authorized to acquire the deed. For these sections to be construed consistently while giving each section its plain meaning, these provisions must be read to mean that in first and second tax sale offerings, the tax sale purchaser must send notice of the one year right of redemption to the interested parties at least 90 days prior to the first anniversary date of the tax sale.

The Eastern District has held that redemption notices sent pursuant to 140.405 RSMo in a first or second offering sale must inform the recipient that he or she has one year from the date of the tax sale to redeem the property. *See Keylien v. Johnson*, 284 S.W.3d at 613; *Cedarbridge, LLC v. Eason*, 293 S.W.3d at 462; *Hames v. Bellistri*, 300 S.W.3d at 240; *Glasgow Enterprises v. Brooks*, 234 S.W.3d 407, 411 (Mo. App. 2007). In *Drake Development & Construction, LLC v. Jacob Holdings, Inc.*, 306 S.W.3d 171, 174 (Mo. App., S.D. 2010), the Southern District, while not determining the timeframe, held that a redemption notice must inform persons of the timeframe in which they must act to redeem the property or be forever barred from doing so. In *Cedarbridge*, the Eastern District clarified the notice requirement by holding that in a first or second year sale, the notice must inform the recipient that he or she has one year from the date of the tax sale to redeem the property or be forever barred from doing so. *Cedarbridge*, 293 S.W.3d at 465; *Keylien*, 284 S.W. 3d at 612-613; *Hames v. Bellistri*, 300 S.W.3d 235, 239-240 (Mo. App. E.D. 2009); *Valli v. Glasgow Enterprises*, 204 S.W.3d 273, 277 (Mo. App. E.D. 2006); *Glasgow Enterprises v. Kusher*, 231 S.W.3d 201, 204 (Mo. App. E.D. 2007). As noted previously, the Southern District agrees with this premise, but has not made a determination as to the redemption timeframe. *See Drake Development*, 306 S.W.3d 171 (Mo. App. S.D. 2010).

In *United Asset Management*, 332 S.W. 3d at 175, the Western District declined to adopt the Eastern District holdings and held that the redemption notice sent pursuant to 140.405 RSMo only needs to inform the interested party that it has the right to redeem the property, and that informing the property owner of the redemption timeframe and the

fact he could lose his property if it is not redeemed is tantamount to providing legal advice. *United Asset Management*, 332 S.W. 3d at 171, 173.

In concluding that Section 140.405 RSMo and Missouri and federal due process rights require nothing more than a mere statement of the right to redeem, the Western District interprets *Mullane*'s pendency requirement to mean that "the amount of time given to record owners and lienholders to permit them to locate and read the statutes and case laws and generally educate themselves about their redemption rights, is adequate" *United Asset Management*, 332 S.W. 3d at 175, and determines that ninety days mailing is sufficient time under all circumstances to comply with due process. *Id.* In *Harpagon Mo, LLC v. Bosch*, Appeal No. WD 72834 (Mo. App. W.D. August 30, 2011), Slip Op. at 7, the Western District reiterated its belief that only a statement of the right to redeem was required, noting that "[a]rmed with the proper statute, the Bosches could have learned the specifics of their right to redeem." *Id.* This argument ignores the reality that the average property owner reading the Jones-Munger Act would quickly come to the conclusion that he has a one year right of redemption. It also does not address the fact that at the present time, there are no uniform rules regarding the redemption period or the notice requirements due to the differences noted between the Eastern and Southern Districts and the Western District.

Providing basic information about the redemption period and the consequences of failing to redeem the property do not rise to the level of giving legal advice. First, it is impossible to determine the redemption period without knowing whether the property was sold at a first, second, or third offering and the tax sale purchaser is in the best

position to know that information. Second, simply stating that there is a one year right of redemption, which is clearly mentioned numerous times throughout the Jones-Munger Act is no more giving legal advice than informing a property owner that if he does not pay his real property taxes, his property may be sold at a tax sale.

The Western District's holding that all that is required by Section 140.405 RSMo is a statement of the right to redeem, *United Asset Management*, 332 S.W.3d at 175, falls short of U.S. Supreme Court holdings in *Mullane* and prior holdings of this Court that "...the right to meaningful notice extends to actions affecting property interests... and that due process imposes corresponding duties upon those who would affect the rights of holders of such property interests. *Schwartz v Dey*, 665 S.W.2d 933, 934 (Mo., 1984). Thus, due process requires that known parties whose rights would be affected by a tax sale be afforded notice reasonably calculated under all of the circumstances to apprise them of the *pendency* of the action. (emphasis added) *Schwartz*, 665 S.W.2d at 935. See also *State v. Goodbar*, 297 S.W.2d 525, 528 (Mo., 1957) (the essence of due process is notice of the pendency of the action and an opportunity to be heard).

As noted by the Eastern District in *Ndegwa v. KSSO, LLC*, Appeal No. ED96315 (Mo. App. E.D. October 11, 2011), Slip Op. at 15, "[n]otice of the pendency, as opposed to the existence, of an action implies notice of a time component to be reasonable." Respondents believe this is especially true in a tax sale case because not only is a significant property interest at stake, but also the interested party needs to procure funds to redeem the property and generally will need some time to do so. Thus, tax sales are

distinguishable from cases where all that is necessary is the filing of an answer or option to appear and be heard.

The Western District relies heavily on *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999) for the proposition that there is no rationale to justify an individualized notice of state law remedies which are established by published, generally available state statutes and case law, *United Asset Management*, 332 S.W.3d at 174 (citing *West Covina*, 525 U.S. at 241), and that once a property owner is informed that his property has been seized, he can turn to public sources to learn about the remedial procedures available to him and thus the tax sale purchaser need not take other steps to inform him of his options. *West Covina*, 525 U.S. at 242. *West Covina* is easily distinguishable from the *Mullane* line of cases because the holding on its face is limited to property seized for police investigation and criminal prosecution. *Id.* at 236. Moreover, the U.S. Supreme Court indicated that no one contests the state's right to have seized the property pursuant to the search warrant, *or its ultimate obligation to return it* (emphasis added), so that rules restricting the substantive power of the state to take property are not implicated. *Id.* at 240. That is clearly not the case with a tax sale conducted pursuant to the Jones Munger Act because there is no obligation for the tax sale purchaser to return the property unless an interested party redeems. In holding that due process does not require police who have seized property pursuant to a criminal investigation to provide the property owner with notice of state law remedies, the Court noted that existing protections afforded by the Fourth Amendment to the U.S. Constitution and Federal Rule of Criminal Procedure 41(d) are sufficient. *Id.* at 243.

The Western District also states that in *West Covina*, the United States Supreme Court confirmed the correctness of *State v. Goodbar*, 297 S.W.2d 525 (Mo., 1957) and *Bishop v. Board of Education of the Francis Howell School District*, 575 S.W.2d 827 (Mo. App., E.D. 1978) and clarified application of the principle. *United Asset Management*, 332 S.W.3d at 173. While it is true that *West Covina* generally discussed due process concerns, it did not specifically endorse the holdings in either of those cases, nor did it cite them. *Goodbar* and *Bishop* are both civil cases and would therefore not be relevant to the facts or analysis in *West Covina*. Additionally, *Bishop* was decided not on constitutional grounds, but rather by interpretation of the Teacher Tenure Act. *Bishop*, 575 S.W.2d at 828.

For the reasons noted above, Respondent believes that the notice requirements adopted by the Eastern and Southern Districts relating to timing and content provide due process to the property owner and other interested parties by effectively notifying them of their right to redeem the property.

Accordingly, because KSSO did not inform Respondents that they had one year from the date of the tax sale to redeem their property, and because the redemption notice was sent after the expiration of the one year redemption period, KSSO failed to comply with the mandatory notice provisions of Section 140.405 RSMo. Thus, the Trial Court correctly ruled that KSSO lost all of its rights to the Property, and its judgment should be affirmed.

## II.

THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THEIR AMENDED PETITION BECAUSE THE SECTION 140.405 NOTICE SENT BY APPELLANT DID NOT CORRECTLY INFORM THE PROPERTY OWNERS THAT THE REDEMPTION PERIOD EXPIRED ON AUGUST 27, 2008, AND DID NOT COMPLY WITH 140.405 RSMO. IN SO HOLDING, THE TRIAL COURT CORRECTLY REJECTED APPELLANT'S ASSERTIONS THAT (1) SECTION 140.405 RSMO CODIFIED THIS COURT'S OPINION IN *HOBSON V. ELMER* ESTABLISHING THE *HOBSON* REDEMPTION PERIOD AND THAT THERE WAS NO FIXED ONE-YEAR REDEMPTION PERIOD IN THIS CASE; (2) THERE IS NO UNIVERSALLY APPLICABLE REDEMPTION PERIOD IN TAX SALES THAT WOULD ALLOW TAX SALE PURCHASERS TO PROVIDE ADVANCE NOTICE OF THE EXPIRATION OF THE REDEMPTION PERIOD AS OTHER STATUTES MAY ALSO PROVIDE REDEMPTION RIGHTS WHICH MAY VARY FROM *HOBSON* REDEMPTION AND THE TAX SALE PURCHASER WOULD NOT KNOW OR COULD ONLY KNOW WITH GREAT DIFFICULTY HOW THESE RIGHTS AFFECT A PARTICULAR PROPERTY; (3) TAX SALE PURCHASERS CANNOT GIVE ADVANCE NOTICE OF WHEN THEY WILL BE AUTHORIZED TO ACQUIRE A COLLECTOR'S DEED BECAUSE THEY CANNOT KNOW THE DATE THEY WILL BE ABLE TO SATISFY THE

**REQUIREMENTS TO OBTAIN THE COLLECTOR'S DEED IN ADVANCE; (4) NEITHER SECTION 140.405 RSMO NOR CONSTITUTIONAL PRINCIPLES OF DUE PROCESS REQUIRE A TAX SALE PURCHASER TO PROVIDE ADVANCE NOTICE OF THE APPLICABLE TIME LIMITS FOR REDEMPTION, THE SPECIFIC PROCEDURES THAT MUST BE FOLLOWED, OR ANY OTHER DETAILS REGARDING THE RIGHT OF REDEMPTION; AND (5) THAT THE NOTICE LETTERS INFORMED THE RESPONDENT AND OTHER INTERESTED PARTIES OF THEIR RIGHT TO REDEEM AND THAT IS ALL THAT SECTION 140.405 RSMO REQUIRES.**

The Trial Court correctly ruled that the notice provided by Appellant to Respondents did not state the correct redemption period because it did not state that the right to redeem the property expired on August 27, 2008, and the notice did not otherwise comply with Section 140.405 RSMo requirements. Respondent addressed the majority of this argument in Point I and rather than repeat it in Point II, will address remaining issues relating to redemption period calculation and notice requirements raised by Appellant.

The trial court correctly rejected Appellant's assertion that Section 140.405 codified this Court's opinion in *Hobson v. Elmer* establishing the *Hobson* Redemption Period and that there was no fixed one year redemption period in this case. Section 140.405 RSMo was enacted in 1984 as a result of the United States Supreme Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), holding that notice to a mortgagee by publication does not meet due process requirements set forth in the Fourteenth Amendment to the United States Constitution, *Mennonite*, 462 U.S. at

800, and the subsequent Missouri Supreme Court decision in *Lohr v. Cobur*, 654 S.W.2d 883, which held that notice by publication to a beneficiary named in a publicly recorded deed of trust is insufficient. *Lohr*, 654 S.W.2d at 886. Both cases expounded upon the principle first set forth in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), that notice must be reasonably calculated, under all circumstances, to inform interested parties and that notice by publication is insufficient with respect to a person whose name and address are known or are very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. *Mullane*, 339 U.S. at 314.

The enactment of 140.405 RSMo was the culmination of changing standards of due process, which began with the requirement to provide meaningful notice first set forth in *Mullane*, and which has since been broadened to ensure that all interested parties are entitled to notice prior to being deprived of a property interest. *Lohr*, 654 S.W.2d 885-886 (discussing the evolution of notice requirements from *Mullane* to *Mennonite*). Recent cases have held that the following parties are entitled to notice: beneficiaries under a publicly recorded deed of trust, *Lohr*, 654 S.W.2d at 886; a wife signing a publicly recorded deed of trust indicating she has a marital interest in property, *Glasgow Enterprises, Inc. v. Brooks*, 234 S.W.3d 407 (Mo. App. 2007); parties whose names and addresses appear on the front page of the deed of trust, such as beneficiaries and trustees, *Glasgow Enterprises, Inc. v. Kusher*, 231 S.W.3d 201, 204 (Mo. App. 2007); subsequent transferees whose interest in the property is publicly recorded outside of the 90 day period before the purchaser is authorized to acquire the collector's deed, *Glasgow*

*Enterprises, Inc. v. Rossel*, 209 S.W.3d 498, 502 (Mo. App. 2006)<sup>7</sup>; an owner of the property who was not the record owner at the time of the tax sale, but who subsequently purchased the property during the redemption period, *Campbell v. Siegfried*, 823 S.W.2d 156 (Mo. App. E.D., 1992); and an entity that is a nominee or that has only has bare legal title to the property, *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 2720802 (E.D. MO).

Nothing in the text of 140.405 RSMo, which deals solely with notice, indicates that the legislature intended to codify the *Hobson* Redemption Period or any other redemption period. Instead, Section 140.405 was enacted solely to ensure that all parties with a cognizable interest in property sold at a tax sale receive meaningful notice of their right to redeem. *M&P Enterprises, Inc.*, 944 S.W. 2d 154, 157 (Mo. 1997).

The trial court correctly rejected Appellant's assertion that there is no universally applicable redemption period in tax sales that would allow tax sale purchasers to provide advance notice of its expiration, as other statutes may also provide redemption rights which vary from *Hobson* redemption and the tax sale purchaser would not know or could only know with great difficulty how those rights affect a particular property.

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<sup>7</sup> HB 1316 amended Section 140.405 to require that any party wishing to transfer property that has been sold at a tax sale must first redeem it. Thus, *Rossel* and *Campbell* may no longer be good law.

As stated previously in Point I, Respondent does not believe that the *Hobson* Redemption Period is the applicable redemption period, but rather that there is a one-year redemption period in a first or second offering tax sale.

Appellant's statement that there cannot be a universally applicable redemption period that would allow for advance notice of its expiration, directly contradicts the plain language of the Jones-Munger Act.

It is disingenuous for Appellant to argue that it is too difficult to know when the issuance of the collector's deed is authorized because other statutes could impose redemption rights that vary from those provided for by the Jones-Munger Act. Examples cited by Appellant, such as IRS tax lien redemption, civil remedies for satisfaction of an unpaid fine by enforcing a judgment against property under 18 USC § 3613 and redemption under a bankruptcy proceeding, are events that could easily be determined by the tax sale purchaser because there would either be some type of lien filing or the tax sale purchaser would receive actual notice, which would enable the purchaser to determine how the other rights affect his ability to obtain a collector's deed.

IRS liens attach to all property owned by the taxpayer as a matter of law, 26 U.S.C. § 6321, and are filed with the Recorder of Deeds for the county in which the real property is located. *Internal Revenue Manual*, Section 5.12.2.8 (10/30/2009). Procedures for enforcing civil fines pursuant to 18 U.S.C. § 3613 require the United States to file a lien against the property in the same manner as the filing of a federal tax lien.

Thus, the tax sale purchaser can easily learn if there is an IRS lien or judgment lien pursuant to 18 U.S.C. § 3613 against the property by conducting a title search. In a bankruptcy case, the debtor is required to file a list of all creditors, 11 USC §521 (a)(1)(A), which are entities that have a claim against the debtor or that have claims against property of the bankruptcy estate, 11 U.S.C. §101(10). Although 11 U.S.C. § 108(b) extends the timeframe in which a debtor could cure a default under the Bankruptcy Code, the tax sale purchaser would have notice that the property purchased is subject to a bankruptcy proceeding because notice is given to all creditors shortly after the order for relief is entered. 11 U.S.C. § 342. Additionally, a debtor attempting to redeem property in a bankruptcy proceeding would be required to obtain court approval prior to redeeming, generally through confirmation of a Chapter 11 or 13 Plan. *See* 11 U.S.C. § 1123(a)(5)(G); 11 U.S.C. §1128; 11 U.S.C. §1322(b)(3); 11 U.S.C. §1324.

Moreover, if a tax sale purchaser wanted to ensure that other liens or redemption rights would not interfere with his ability to obtain a collector's deed, he could always perform a title search or check other publicly available court records prior to bidding on the property at the tax sale, to determine whether there are other competing interests to the property.

Finally, the Jones-Munger Act specifically addresses incapacity<sup>8</sup> in Section 140.350, which extends the redemption period for one who is incapacitated until one year

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<sup>8</sup> Appellant notes that the Eastern District opinions in *Keylien*, *Cedarbridge*, and *Hames* did not mention, discuss, or consider the affect of 140.350 RSMo in determining the

after the party regains capacity. As this section specifically states that redemption upon capacity will be carried out pursuant to other sections of the Jones-Munger Act, it is clear that the correct interpretation of this section is that the redemption period set forth in Section 140.340.1 remains open until the expiration of one year after the incapacitated party regains capacity. *Roberts v. Glasgow*, 860 S.W.2d 26 (Mo. App. ED 1993) (the existence of a disability tolls the redemption period and the owner may redeem land within [two] years after the expiration of the disability).

Respondent concedes that if an interested party is incapacitated, it may cause difficulty in determining when the tax sale purchaser will be eligible for a collector's deed; however, the redemption period is clearly set forth in the Jones-Munger Act.

Appellant's assertion that 140.350 RSMo is inapplicable to this case is discussed in Point IV.

Because the examples of other redemption statutes cited by Appellant are easily discoverable or would result in the tax sale purchaser receiving notice, the trial court correctly rejected Appellant's argument that there cannot be an easily ascertainable, uniform redemption period.

The trial court correctly rejected Appellant's assertion that tax sale purchasers cannot give advance notice of when they will be authorized to acquire a collector's deed

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content of redemption notices pursuant to 140.405 RSMo. There was no reason to do so because under the facts of those cases, there was no indication that any of the parties were incapacitated.

because they cannot know the date they will be able to satisfy the requirements to obtain the collector's deed in advance.

In order for the tax sale purchaser to be authorized to acquire a collector's deed, the tax sale purchaser must:

- (1) Pay all taxes subsequent to the sale, 140.440 RSMo;
- (2) Tender the original certificate of purchase to the collector, 140.420 RSMo;
- (3) Tender recording fees for the collector's deed under 140.410 RSMo;
- and (4) Comply with the notice provisions of 140.405 RSMo.

All of these requirements are well within the control of the tax sale purchaser and can easily be accomplished within the one year redemption period. The only requirement that could potentially be difficult is providing notice where the tax sale purchaser does not have a valid last known address; however, because there is a one-year redemption period, the tax sale purchaser has sufficient time to locate the address information prior to sending the redemption notice required by 140.405 RSMo. It is important to remember that 140.405 RSMo requires that notice be sent *at least* 90 days prior to the end of the redemption period (emphasis added); therefore, if a tax sale purchaser wanted to ensure that an interested party had adequate notice, he could easily send the notice more than 90 days before the end of the redemption period to ensure that if any notices are returned unclaimed, there will be sufficient time to take appropriate steps to locate address information for the interested party whose notice was returned.

Additionally, 140.290.2 RSMo requires the county collector to state on the certificate of purchase the time when the purchaser will be entitled to a deed for the purchased land, if not redeemed as provided for in the Jones-Munger Act. If there were truly no way to determine the redemption period in advance, it would be impossible for the county collector to comply with this requirement.

As such, the Trial Court correctly concluded that there is a one year redemption period for a first or second tax sale offering, based on the plain language in Section 140.340.1 and controlling case law.

The trial court correctly rejected appellant's assertion that neither section 140.405 nor constitutional principles of due process require a tax sale purchaser to provide advance notice of the applicable time limits for redemption, the specific procedures that must be followed, or any other details regarding the right of redemption.

Respondents addressed this argument in Point I.

The trial court correctly rejected appellant's assertion that the notice letters informed the respondent and other interested parties of their right to redeem and that is all that section 140.405 RSMo requires.

Appellant's assertion that the notice letters sent by KSSO informed the delinquent taxpayers and other interested parties that they had a right to redeem is misleading because (1) IndyMac Bank was an interested party as the holder of a publicly recorded deed of trust and did not receive notice of its right to redeem pursuant to 140.405 RSMo. This argument is addressed in Point III; and (2) it implies that Respondents were only informed of their right to redeem, when in fact Respondents were told not only that they

had the right to redeem the property, but also that “this opportunity will be available for a period of not less than 90 days from the date of this letter.” LF at 161-166. The redemption letter also stated that “[f]or your information and for your further protection, you will find enclosed, a copy of this statute [sic] provision.” LF 161,164. A copy of 140.405 RSMo was enclosed with the following wording bracketed:

“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.” LF at 163, 166.

As argued in Point I, Respondent believes that using ninety day wording in the redemption letter is misleading as the redemption period for a first offering sale is one year and the ninety day wording applicable only to third offering sales implies that the property was sold at a third offering sale. In this case, the error was even more egregious because the highlighted wording clearly applied only to third offering sales.

Several times in its brief, Appellant criticizes the Eastern District for holding that content in redemption notices sent pursuant to 140.405 were inaccurate and misleading, without any evidence that any of the interested parties relied on the inaccurate information to their detriment. Respondent is unaware of any cases applying this standard. In fact, in *Stadium West Properties, LLC v. Johnson*, 133 S.W.3d 128, 133 (Mo. App. W.D. 2004), the tax sale purchaser claimed that because none of Stadium West’s employees ever saw the notice, Stadium West “obviously was not misled by and

did not rely upon any aspect of the published notice. No harm, no foul.” *Stadium West*, 133 S.W.3d at 133. The Western District noted that there was no evidence as to whether any of the employees had seen the tax sale notice, and then stated that “what applicable case authority there is weighs strongly against the actual knowledge and detrimental reliance requirement urged by [the tax sale purchaser]. *Id.*

Finally, even if the content of KSSO’s notice letter had been acceptable, the letter was dated September 15, 2008, LF at 161-166, approximately 19 days after the one-year redemption period ended and as such, failure to send the notice prior to the expiration of the redemption period would have mandated KSSO losing all of its interest in the property as it did not comply with the statutory requirement to notify interested parties no later than 90 days prior to the end of the redemption period. 140.405 RSMo. The late notice would most likely have resulted in Respondents losing their ability to redeem their property. *See Kelly v. Nelson*, 226 S.W.3d 882-883 (Mo. App., W.D. 2007) (noting that collector would not accept payment received more than [two] years after the tax sale date because the redemption period had expired); *Roberts v. Glasgow*, 860 S.W.2d 26, 27 (Mo. App., E.D. 1993)(stating that collector refused to accept payment because it was tendered more than [two] years after the sale).

Because KSSO failed to comply with the mandatory notice provisions of Section 140.405 RSMo by informing Respondents that they had one year from the date of the sale to redeem their property, and because the redemption notice was sent after the expiration of the one year redemption period, the trial court correctly ruled that KSSO lost all of its rights to the Property, and its judgment should be affirmed.

### III.

THE TRIAL COURT CORRECTLY GRANTED RESPONDENT-PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT III OF THE FIRST AMENDED PETITION BECAUSE APPELLANT FAILED TO PROVIDE INDYMAC BANK, THE NAMED BENEFICIARY UNDER A PUBLICLY RECORDED DEED OF TRUST AFFECTING LOT 253 OF WESTHAVEN PLAT EIGHT, WITH NOTICE OF ITS RIGHT TO REDEEM AS REQUIRED BY SECTION 140.405 RSMO AND APPELLANT'S FAILURE TO PROVIDE SUCH NOTICE MANDATES THAT APPELLANT LOSE ALL INTEREST IN THE REAL PROPERTY AS A MATTER OF LAW.

At least 90 days prior to the date when the tax sale purchaser is authorized to acquire the collector's deed, Section 140.405 RSMo requires that the tax sale purchaser notify, by certified mail, any person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate of his or her right to redeem his or her publicly recorded security or claim. *Cedarbridge, LLC v. Eason*, 293 S.W.2d 462, 465 (Mo. App., E.D. 2009). This requirement includes notifying the person who was the publicly-recorded owner of the property prior to the sale and beneficiaries and trustees of deeds of trust. *Id.*

The notice requirements of Section 140.405 and the result for failure to comply with these requirements are mandatory and must be obeyed. *Id.* at 467, *Valli v. Glasgow Enterprises, Inc.*, 204 S.W.3d 273, 277 (Mo. App., E.D. 2006). Under Section 140.405 RSMo, the "failure to send notice of the right to redeem to the holders of a publicly

recorded deed of trust results in the purchaser losing all interest in the real estate as a matter of law.” *Id.*, See also *Glasgow Enterprises, Inc. v. Kusher*, 231 S.W.3d 201, 204 (Mo. App., E.D. 2007)

The right to notice of the right of redemption is required both by principles of due process and the Jones-Munger Act. The Jones-Munger Act has been held by Missouri courts to apply to all persons who have or claim to have or appear of record to have such a claim. *Shaw v. Armstrong*, 235 S. W.2d 851, 855 (Mo. 1951), (*overruled on other grounds by Journey v. Miller*, 250 S.W.2d 164 (Mo. 1952); *Campbell v. Siegfried*, 823 S.W.2d 156 (Mo. App., E.D.1992) and *Glasgow Enterprises, Inc. v. Brooks*, 234 S.W.3d 407 (Mo. App., E.D. 2007). Based on the plain language of the statute and the Missouri cases interpreting it, the notice of redemption rights required by Section 140.405 RSMo. must be given to anyone who claims a publicly recorded interest in the subject real property. *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 2720802, Slip op. at 9 (E.D. Mo.) In *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, the United States District Court for the Eastern District of Missouri provided additional guidance as to the type of property interests that trigger the requirement that the tax sale purchaser provide a redemption notice pursuant to 140.405 RSMo. In holding that Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) was entitled to notice of the right to redeem even though it was only holding title to the property at issue as a nominee, the Court reasoned that the Jones-Munger Act allows the tax sale purchaser to confirm the validity of the collector’s deed through a quiet title action under Section 140.330 RSMo and that Section 140.330 requires the joinder of “all parties who have or

**claim to have or appear of record** in the county where such land or lot is situated, to have any interest in, or lien upon such lands or lots. *Id.* at 9 (emphasis in original). The District Court found that under the plain terms of Section 140.330 RSMo, a party seeking to quiet title must include as defendants not only those who actually possess an interest in or a lien on the property, but all those who "appear of record" with a "claim" to having such an interest or lien. *Id.* After defining the word "claim" to mean "a right or to assert in the face of possible contradiction," or "the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional," *Mortgage Electronic Registration Systems, Inc. v. Bellistri*, 2010 WL 2720802, Slip op. at 11 (E.D. Mo.) the District Court stated:

The plain terms of both Sections 140.330 and 140.405 do not require that the claim ultimately be adjudged legally valid. If a claimant asserts a claim of record, the claimant is entitled to be given notice of redemption rights and joined to the quiet title action. *Id.*

In requiring that notice of the right of redemption be provided to those asserting "claims" against the property, the District Court noted that the Missouri statute is consistent with the principle "that [t]he Fourteenth Amendment's protection of 'property' ... has never been interpreted to safeguard only the rights of undisputed ownership." *Id.* citing *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). "A legitimate claim of a property interest warrants due process protection." *Id.*

The Deed of Trust asserting IndyMac's claim against the Property was publicly recorded. LF at 33-52. In recording the Deed of Trust, IndyMac intended to assert its security interest in the Property located at 10960 Warwickhall, Bridgeton, MO 63044 and therefore had a legitimate claim sufficient to trigger notice of the right of redemption under 140.405 RSMo. Appellant did not send notice of the right to redeem the Property to IndyMac as required by the plain language of Section 140.405 RSMo. and the case law applying same, and as a result, the Collector's Deed is invalid and KSSO has lost all of its interest in the Property.

KSSO's argument that the Deed of Trust was not perfected as to the Property is not convincing because Section 140.405 does not require that notice be sent only to any person holding a publicly recorded "and perfected" lien or claim.

Moreover, the Collector of Revenue's records show that IndyMac, the original holder of the Deed of Trust, paid the 2007 and 2008 taxes due on the Property. LF at 510, 515, 516, 527, 536, 783-784. In order for Appellant to receive a collector's deed, it was required to pay the 2007 and 2008 real estate taxes by the Collector of Revenue. 140.440 RSMo. As the property had not been redeemed, the 2007 and 2008 real estate taxes should still have been outstanding at the time Appellant applied for the collector's deed. Because Appellant is very experienced in tax sale purchases, it would have been put on notice that another party had a claim or interest in the Property, due to the fact that real estate taxes that should have been outstanding and due, had been paid in full. As a result, Appellant should have conducted further investigation to make sure this party received notice.

Appellant argues that because the legal description contained in the Deed of Trust was incorrect, it failed to identify the property with reasonable certainty and thus, Indymac was not entitled to notice of the right of redemption. The fact that as a result of a one digit error in the legal description, the deed of trust could not be located solely by conducting a title search does not justify KSSO's failure to provide notice to IndyMac as required by Section 140.405 RSMo. Section 140.530 RSMo requires only that the land be described "with reasonable certainty" which is no more than what is generally required of deeds. *Leuck v. Russell*, 632 S.W.2d 40, 43 (Mo. App., S.D.1982)(rejecting the assertion that a tax deed must contain a sufficient description of the property without reference to any other document). The legal "description is sufficient if one reasonably skilled in determining land locations can locate it." *Firma, Inc. v. Twillman*, 126 S.W.3d 790, 793 (Mo. App., E.D. 2004). Moreover, a deed may refer to extrinsic evidence to assist in identification of the land conveyed, such as maps, plats, surveys and assessor's plans. *Wayward v. Shafer*, 936 SW2d 843, 846 (Mo. App. S.D., 1984). In *Cedarbridge v. Eason*, 293 S.W.3d 462 (Mo. App. E.D. 2009), a security interest in the property which was sold at a tax sale, had been conveyed to Union Planters Bank (the "Bank") as the beneficiary and Quatre Corporation (the "Trustee") as the trustee by way of a deed of trust (the "Eason Deed of Trust") which was recorded in the St. Louis County Recorder of Deeds office. *Cedarbridge*, 293 S.W.3d at 464. The Trial Court found that the tax sale purchaser did not send the Bank or Trustee notice of the right of redemption and that both held an interest in a publicly recorded deed of trust. *Id.* at 466. The Eason Deed of Trust did not contain a legal description at all, but only an address of

the property in which the Bank held a security interest. LF at 613-623. Yet, the Eastern District Court of Appeals determined that one reason, among others, to uphold the Trial Court's decision that the collector's deed was invalid was that the tax sale purchaser had failed to send notice of the right to redeem to the holders of a publicly recorded deed of trust, *Id.* at 467, despite the absence of a legal description on said deed of trust.

Applying the *Cedarbridge* decision to these facts, it is clear that a review of the extrinsic evidence in the deed would have easily enabled Appellant to identify the correct legal description of the property and notify IndyMac, as the holder of a recorded deed of trust. Appellant's reliance on *Robson v. Diem*, 317 S.W.3d 706 (Mo. App., W.D. 2010), is similarly misplaced because *Robson* clearly supports Respondent's position that notice should be provided to all parties with a beneficial interest in the property so that they have an opportunity to protect that interest. *Robson*, 317 S.W.3d at 715. Although *Robson* concerned a foreclosure sale which occurred without an interested party being notified, the Court stated that the fact that an "interest might not be discovered during a search of the county's grantee-grantor index does not necessarily end the inquiry", *Id.*, because under Missouri law, the "owner" of real property should be broadly construed to include any person beneficially interested in the property. *Id.* The Court held summary judgment was inappropriate in *Robson* because there were factual issues relating to whether Robson was entitled to notice based on the fact that the parcel of land he purchased was mistakenly conveyed to another party prior to its purchase by Robson. *Id.* at 710, 716.

In the instant case, the deed of trust recorded in the St. Louis County Recorder of Deeds Office on January 29, 2004 in Book 15610 Page 2495, contains an incorrect legal description but correctly identifies the property securing the Note as 10960 Warwick Hall, Bridgeton, Missouri 63044. LF at 33-52. The error in the legal description is not enough to invalidate the conveyance of the security interest in the Property or the lienholder's right to notice under Section 140.405. The property conveyed to the trustee as security for the loan from IndyMac, could clearly be identified by the address of the Property which was clearly set forth therein. *Wayward, Inc. v. Shafer*, 936 S.W.2d 843, 845 (Mo. App., E.D. 1996). It is not required that a deed contain a sufficient description so that, based on it alone, the property can be located. *Braun v. Petty*, 31 S.W.3d 521, 524 (Mo. App., E.D. 2000). Oral testimony or extrinsic facts may be used to identify the land conveyed. *Id.* It is clear that the typographical error in the legal description could not be used to prevent the lien holder from enforcing the Deed of Trust against the Property nor would the defect in the legal description result in the invalidation of the lender's security interest in the Property in any other form of proceeding. If the defect in the legal description would be insufficient for invalidating the lien created by this Deed of Trust for any other purpose, it cannot be used as a basis for justifying KSSO's failure to provide notice as required by Section 140.405.

Based on the *Cedarbridge* decision and the reasoning in *MERS v. Bellistri*, the description of the Property contained in the Deed of Trust was sufficient to entitle IndyMac to notice of the right of redemption pursuant to Section 140.405 as a matter of law. Thus, the Trial Court correctly held that IndyMac was entitled to receive notice of

its right to redeem as the holder of a publicly recorded deed of trust and that because KSSO failed to provide such notice to IndyMac, KSSO lost all of its rights to the property. The trial court's judgment should be affirmed.

#### IV.

**EVEN IF THE TRIAL COURT ERRED IN NOT APPLYING THE SO-CALLED *HOBSON* REDEMPTION PERIOD, RESPONDENTS WOULD STILL HAVE BEEN ENTITLED TO SUMMARY JUDGMENT BECAUSE UNDER THE *HOBSON* REDEMPTION THEORY, THE REDEMPTION PERIOD HAS NOT EXPIRED DUE TO JOHN MREMA'S INCAPACITY.**

Section 140.350 RSMo states that “[i]nfants and incapacitated and disabled persons as defined in chapter 475 RSMo, may redeem any lands belonging to them sold for taxes, within one year after the expiration of such disability, in the same manner as provided in section 140.340 for redemption by other persons.” Although the statute does not require a formal adjudication of incompetency to be applicable, *Roberts v. Glasgow*, 860 S.W. 2d 26, 28 (Mo. App. E.D., 1993), for the purposes of these proceedings, Respondents assume that the date of John Mrema's incapacity is November 17, 2008, the date of adjudication of incompetency, LF 372-373, which was 82 days after the expiration of the one-year redemption period on August 27, 2008.<sup>9</sup> KSSO sent a notice

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<sup>9</sup> Respondents did not initially raise this issue in their Motion for Partial Summary Judgment and Memorandum of Law in Support Thereof, LF at 269-280; however, Appellant, in its initial Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, LF at 347-349, opined that §140.350 RSMo is inapplicable to this case because under §456.7-703.4 RSMo, Catherine Ndegwa was authorized to act on behalf of the Mrema Family Revocable Trust once Mrema's role as co-trustee was

letter to John Mrema informing him of his right to redeem dated September 15, 2008. LF at 164-166. KSSO received a collector's deed on January 9, 2009, LF at 168-169, which was recorded on February 9, 2009, LF at 167. Appellant believes that pursuant to *Hobson v. Elmer*, 163 S.W.2d 1020, 1023 (Mo. 1942), the redemption period is comprised of two timeframes: An absolute right of redemption that expires one year after the date of the tax sale, *Hobson*, 163 S.W.2d at 1023, and an ongoing right to redeem which continues until the collector's deed is issued to the tax sale purchaser. *Id.* As stated previously, Respondents do not believe that *Hobson* is applicable to the facts of this case, or that it is the rule of law. However, had the trial court ruled that *Hobson* redemption was applicable, and that Respondents had until the issuance of the collector's deed to redeem the property, the redemption period would have ended on January 9, 2009. LF at 168-169. Because John Mrema's incapacity occurred more than one year after the tax sale but prior to the issuance of the collector's deed, it occurred during the *Hobson* Redemption Period and thus, if *Hobson* were held to apply, Respondents would

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terminated due to his incapacity. Respondents, in Plaintiffs' Reply to Defendant KSSO's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, LF at 385-386, noted that Mrema's incapacity was not initially raised since it is assumed to have occurred after the one-year redemption period expired, but that since Appellant took it upon itself to make Mrema's incapacity an issue, Respondents believe that Mrema would still have the right to redeem if *Hobson* redemption were found to be the applicable standard, because he is still incapacitated.

still have prevailed on their motion for partial summary judgment because the redemption period as it applies to John Mrema does not end until one year after he regains capacity. §140.350 RSMo; *Roberts v. Glasgow*, 860 S.W.2d at 28.

Appellant raises two arguments as to why Section 140.350 RSMo is inapplicable to the facts of this case, neither of which are convincing. First, Appellant states that because the property was conveyed to the Mrema Family Revocable Trust after the tax sale, and because Catherine Ndegwa remained as sole trustee after Mrema's incapacity resulted in his termination as co-trustee, that Catherine Ndegwa had the right to act to preserve Mrema's rights and thus Section 140.350 is inapplicable. Respondents have never disagreed that Mrema's incapacity statutorily terminated his role as co-trustee of the Mrema Family Revocable Trust. While it is true that the property was conveyed to a revocable trust after the tax sale, pursuant to 140.405 RSMo and 140.340.1 RSMo, John Mrema was entitled to notice of the right of redemption as a record owner of the property prior to the tax sale and thus, has a right to redeem the property as record owner.

Appellant's argument overlooks the fact that as trustee of the Mrema Family Revocable Trust, Catherine Ndegwa only had rights to act to preserve the rights of the trust. Although Ndegwa was appointed as co-guardian of John Mrema, the Jones-Munger Act provisions relating to incapacity set forth in 140.350 do not give Catherine Ndegwa the authority to act on Mrema's behalf because the statute does not allow a guardian to redeem the property on behalf of the incapacitated party; rather it simply tolls the redemption period until one year after the incapacity ends.

The fact that John Mrema has co-guardians and a conservator, LF at 372-373, is irrelevant to the analysis because there is no wording in either 140.350 RSMo or 140.405 RSMo that supports Appellant's contention that he can provide notice to a legal guardian or conservator to comply with 140.405 RSMo redemption notice requirements. If providing notice of the right to redeem to a guardian were sufficient to satisfy the requirements in Section 140.405, then the legislature could easily have said that in the statute. Moreover, if the legislature intended for a guardian or conservator to exercise the right to redeem, there would be no need to toll the redemption period because the guardian would have the authority to exercise the rights of the ward.

Appellant also cites the case of *Covey v. Town of Somers*, 351 U.S. 141 (1956), in support of his contention that providing notice to a person without a guardian does not comport with due process principles of law. In *Covey*, the U.S. Supreme Court held that application of New York's tax sale statute to a known, unprotected incompetent would not afford sufficient notice and resulted in a taking in violation of the incompetent's due process rights under the Fourteenth Amendment to the U.S. Constitution. New York's tax sale statute required the delinquent tax sale purchaser to respond to the collector's notice by paying all of the unpaid tax liens, penalties and interest within seven weeks or to file an answer within 20 days after the notice, or be foreclosed of all right, title, interest, and equity of redemption in the delinquent property. *Covey*, 351 U.S. at 142. The provisions of the statute purported to be applicable to and valid and effective with respect to all defendants [in a judicial foreclosure of tax lien action], even though one or more of them be infants, incompetents, absentees, or nonresidents of the State of New

York. *Covey*, 351 U.S. at 143. The Court also noted that it was common knowledge to town officials and townspeople that the property owner was incompetent and had been for at least 15 years, would not understand the meaning of any notice served upon her, and had no one to help her with her affairs, and that no attempt was made to have a guardian or conservator appointed for her until after the foreclosure judgment had been entered. *Covey*, 351 U.S. at 146. Missouri's tax sale statute differs markedly from New York's in that it expressly provides for the situation that arose in the *Covey* case by tolling the redemption period until one year after the incompetent person regains capacity. 140.350 RSMo. By enacting 140.350, the Missouri legislature has ensured that no person who is incapacitated will lose their property without due process of law, because due to the tolling of their redemption period, the incapacitated party will be able to determine whether he or she wishes to exercise his or her redemption right, within the year following the time he/she regains capacity.

Because John Mrema was a record owner prior to the tax sale, who subsequently became incapacitated after the end of the one-year statutory redemption period but prior to the issuance of the collector's deed, under the *Hobson* theory of redemption, John Mrema's right to redeem the property has not expired, due to his continuing incapacity. As a result, Respondents would have prevailed on their Motion for Partial Summary Judgment on Count III of the First Amended Petition if the trial court had held that *Hobson* redemption applied.

**CONCLUSION**

For the foregoing reasons, the Trial Court correctly granted Respondent-Plaintiff's Motion for Partial Summary Judgment on Count III of its First Amended Petition. This Court should affirm the trial court's ruling.

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I, Elizabeth K. Thompson, hereby certify that an electronic email message, together with attachments containing the electronic version of Respondent's Substitute Brief and the Appendix thereto, as PDF files, were sent to the following parties on March 11, 2012:

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## COMPLIANCE CERTIFICATION

In compliance with Missouri Supreme Court Rule 84.06(c), I, Elizabeth K. Thompson, hereby certify as follows:

1. To the best of my 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 my knowledge, information and belief, this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).
3. To the best of my knowledge, information and belief, this brief contains 18, 439 words, as calculated by Microsoft Word.
4. A line count has not been submitted because this brief uses Times New Roman, a proportional font, rather than a monospaced font.

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