

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

APPEAL NUMBER: ED 91499

~~FILED~~
SEP 23 2008
LAURA ROY DK
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DAVID M. HAMES,
Plaintiff/Counter-defendant/Appellant,

vs.

ROBERT T. BELLISTRI,
Defendant/Third-party Plaintiff/Respondent,

and

MICHAEL P. MCGIRL,
Defendant/Respondent,

vs.

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SEP 23 2008
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT
90392
FILED

OCT 15 2009

Thomas F. Simon
CLERK, SUPREME COURT

All unknown and unnamed persons or entities who are the heirs, grantees or successors of David M. Hames, also known as David M. Homes, or any persons or entities who have, or claim to have, or appear of record as having, an interest, deed of trust, mortgage, lease, lien, claim, title, or estate in the real property and the improvements thereon, if any, located in the County of Washington, in the State of Missouri, and more particularly described as: All of Parcel 19, Sector II, Lake Forest Farms Subdivision, as shown on a plat thereof recorded in Plat Book 11 at page 1 of the Land Records of Washington County, Missouri,
Third-party Defendants.

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY MISSOURI,
TWENTY-FOURTH JUDICIAL CIRCUIT AT POTOSI MISSOURI
CAUSE NUMBER: 05WA-CC00368
HONORABLE KENNETH W. PRATTE, DIVISION II

APPELLANT'S BRIEF

SCANNED

Prepared by:

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*Acting pro se***

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under Article V, Section 3 of the Missouri Constitution, because this case does not fall within the enumerated categories of cases in which the Missouri Supreme Court has exclusive jurisdiction, and territorial appellate jurisdiction pursuant to § 477.060 RSMo (2002) because this appeal arises from the final judgment entered on May 19, 2008 by the Honorable Kenneth W. Pratte, Circuit Judge of the Circuit Court of Washington County, 24th Judicial Circuit at Potosi Missouri which is a circuit within the appellate territory of this Court.

STATEMENT OF FACTS

On or around September 10, 1998 the Appellant, David M. Hames (hereinafter “Hames”), purchased real property situated in the County of Washington and State of Missouri, to-wit: All of Parcel 19, Sector II, Lake Forest Farms Subdivision, as shown on a plat thereof recorded in Plat Book 11 at page 1 of the land Records of Washington County, Missouri (hereinafter the “Property”), from Chesterfield Cattle Co., a Missouri Limited Liability Company. (CIVIL CASE ON APPEAL – LEGAL FILE CERTIFIED COPIES (hereinafter “L.F.”) 306).

On or around December 8, 2000 attorney Joseph Becker paid the taxes on Hames real Property with a check numbered 6646 in the amount of \$69.82 made payable to the Collector of Revenue, and notified the Respondent, Michael P. McGirl, Collector of Revenue for the County of Washington and State of Missouri (hereinafter “McGirl”), *inter alia*, of the addressee and address of the known owner or reputed owner of the Property as Mr. David Hames at 108 North Main, Taylorville, Illinois 62568. (L.F. 275, 345).

On or around December 12, 2000 said tax payment of \$69.82 was deposited into Washington County, Missouri treasuries and/or to the director of revenue, State of Missouri. (L.F. 154).

On or around July 25, 2002 McGirl caused a list of land and lots upon which delinquent taxes were due situated in the County of Washington and State of Missouri, and a Notice of Tax Certificate Sale attached thereto, to be published in a Supplement to The Independent – Journal (hereinafter “Supplement”). The Property was listed in said

Notice. The Property was assessed to the party or parties, "HOMES DAVID M.", in said Notice. (L.F. 279-282, 187, 210).

On or around September 11, 2002, said list and attached Notice was annexed to an Affidavit of Publication (of Publisher). (L.F. 185). The Affidavit of Publication states, *inter alia*, "I, Neil Richards, being duly sworn according to law, state that I am the Publisher of The Independent – Journal, a weekly newspaper of general circulation in the County of Washington, State of Missouri where located,... The affixed notice appeared in said newspaper in the following consecutive issues: First Insertion July 25, 2002, Second Insertion August 1, 2002, Third Insertion August 8, 2002. (L.F. 185).

The said Affidavit of Publication's affixed notice states to-wit:

NOTICE OF TAX CERTIFICATION SALE

2002

THE FOLLOWING IS A LIST OF LAND AND LOTS IN WASHINGTON COUNTY, STATE OF MISSOURI, UPON WHICH DELINQUENT TAXES ARE DUE. AS MUCH OF SAID LAND AND LOTS AS ARE NECESSARY TO DISCHARGE THE TAXES, INTEREST AND CHARGE WHICH ARE DUE, (BOOK AND PAGES ARE FOUND IN WASHINGTON COUNTY RECORDERS OFFICE), WILL BE SOLD AT PUBLIC AUCTION AT THE COURTHOUSE DOOR OF WASHINGTON COUNTY ON THE 26TH DAY OF AUGUST, 2002, COMMENCING AT 10 O'CLOCK A.M. AND CONTINUING FROM DAY TO DAY THEREAFTER UNTIL ALL ARE

OFFERED FOR SALE. I, MICHAEL P. MCGIRL, COLLECTOR OF WASHINGTON COUNTY STATE OF MISSOURI, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF LAND AND LOTS THAT WILL BE OFFERED FOR SALE ABOVE SET FORTH.

MICHAEL P. MCGIRL
COLLECTOR OF REVENUE
WASHINGTON COUNTY
STATE OF MISSOURI

(L.F. 186).

On the Fourth Monday in August 2002, McGirl offered the Property for sale in a delinquent tax sale. This was the first or second offering of the Property for sale by McGirl. (L.F. 296-297).

At the time of Bellistri's tax sale bid, Hames was the owner or reputed owner of the Property. (L.F. 337).

Bellistri was the high bidder at said sale and purchased the taxes for the Property for the sum of \$2,600.50. (L.F. 296-297).

§ 140.290 RSMo requires, *inter alia*, that after the payment of the bid amount has been made to the county collector, a Tax Sale Certificate of Purchase shall be issued to the purchaser which shall recite the name and address of the owner or reputed owner of the property if known, and if unknown then the party or parties to whom the Property was assessed, together with the address of such party, if known...

A Tax Sale Certificate of Purchase was issued to Bellistri for Hames' real property. (L.F. 297).

The said Tax Sale Certificate of Purchase issued to Bellistri recites, *inter alia*, the numerical number as "524"; the description of the land so purchased as "29.3 Acres of PARCEL 19 SECTOR 2, LAKE FOREST FARMS SUBDIVISION in Lot Sec. 27, Blk. Twp. 40, Rng. 2E"; the total amount of tax, with penalty, interest and costs as "\$225.81"; the year or years of delinquency for which the Property was sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs as "1998 - \$41.93, 1999 - \$38.56, 2000 - \$33.96, 2001 - \$29.36"; the sum bid on the Property as "\$2,600.50"; the sum in excess of the delinquent tax, penalty, interest and costs for which the Property was sold as "\$2,374.69"; the name and address of the purchaser as "BELLISTRIS, ROBERT 5224 COUNTRY CLUB DR HIGH RIDGE, MO 63049"; the true date of the sale as "8-26-2002"; the time when the purchaser will be entitled to a deed for said land, if not redeemed as provided for in Missouri Revised Statutes (hereinafter "RSMo")¹ Chapter 140, as "after the expiration of two years from the date of the above-named purchaser..."; the rate of interest that such certificate of purchase shall bear as "10%"; the party or parties to whom the Property was assessed, together with the address of such party as "HOMES, DAVID M. 4645 ADKINS AVE. ST. LOUIS, MO 63116". (L.F. 309).

On or around August 5, 2003 at approximately 2:23 p.m., Hames, with available witness, visited the Recorder Of Deeds office in Washington County Missouri. At that

¹ All statutory references are to RSMo 2000 unless otherwise specified.

time, in relation to the Property, Hames filed for record and recorded a Recorder Of Deeds Certificate Exempt Document with attached Full Deed Of Release² in Book # 2003 at page # 19179 of the land Records of Washington County, Missouri with Judy Moyers, the Recorder Of Deeds for Washington County, Missouri. (L.F. 283-288).

On or around August 5, 2003, at approximately 2:30 p.m., Hames arrived at the McGirl office, with an available witness, and stated to a tax clerk within said office, in essence, he wanted to pay any taxes due³ upon the Property. After the said tax clerk operated a computerized tax book terminal to look up information, the said tax clerk recited to Hames only that "NO TAXES WERE DUE ON THAT PROPERTY... NO TAXES WERE DUE." (L.F. 261, 277).

² On or around August 5, 2003, David M. Hames also filed for record and recorded a Full Deed Of Release in relation to a property Hames is the known owner or reputed owner of, situated in the same Lake Forest Farms Subdivision of Washington County Missouri, contemporaneously therewith recording the Full Deed Of Release in relation to the Property.

³ On or around August 5, 2003, Hames requested to pay the taxes in relation to a property Hames is the known owner or reputed owner of, situated in the same Lake Forest Farms Subdivision of Washington County Missouri, contemporaneously therewith requesting to pay taxes due upon the Property. The said tax clerk recited an amount due upon that property and Hames paid the amount to said clerk.

Appellant has never taken, received, assumed, claimed or unsealed any United States Postal Service Certified Mail or United States Postal Mail or mail matter of any kind addressed to any name other than Appellant's proper, legal name. (L.F. 108-109).

Bellistri maintains that on or around May 17, 2004, Bellistri sent a letter by certified mail, return receipt requested, addressed to David M. Homes, at 4645 Adkins Avenue, St. Louis, Missouri 63116⁴ (hereinafter "Redemption Notice") to provide adequate notice of such sale and possible redemption rights (L.F. 297,).

The letter and envelope Bellistri maintains he sent is copied at (L.F. 310-311).

There is no visible address on the mailing envelope. (L.F. 311)

The Redemption Notice is addressed to David M. Homes. (L.F. 310-311)

Hames never received the Redemption Notice. (L.F. 311)..

The Redemption Notice caused by Bellistri states "of your right to redeem your security of claim." The Redemption Notice caused by Bellistri states "To redeem your security of claim, contact Michael P. McGirl, Collector of Revenue, Washington County, Missouri with 90 days from the date of receipt of this letter... Failure to redeem said real

⁴ Bellistri sent a certified mail envelope containing a certified mail number of 7002 2030 0007 6441 7474. The addressee recited on said envelope is "David M. Homes". The address of the addressee on said envelope is not visible. The envelope has been stamped "UNCLAIMED" in two locations, and stamped "FINAL NOTICE" in one location. There are hand written dates of 5/13/04, 5-19-04, and 5-27-2004 displayed on said envelope. The date the envelope was mailed on is May 12, 2004.

estate will forfeit your rights to said property and a Collectors Deed will be issued to me.” (L.F. 310).

Bellistri received a Collector’s Deed (To Purchaser of Tax Sale Certificate) concerning the Property from McGirl, dated on or about August 26,2004 and recorded on or about August 27, 2004 in Book 2004 Page 198125 of the Washington County Land Records. (L.F. 303-304, 312-313).

On or around the Month of July, 2005 Hames became aware of the purported tax sale of the Property, and Tax Sale Certificate of Purchase, and purported Redemption Notice sent to David M. Homes at 4645 Adkins Ave., St. Louis, MO 63116 from Bellistri dated May 17, 2004, and the Collector’s Deed issued to Bellistri concerning the Property, when McGirl hand delivered copies of the purported Tax Sale Certificate of Purchase, Certified mailing envelope, purported letter, and Collector’s Deed to Hames while Hames was visiting the McGirl office. (L.F. 176).

Hames initiated the underlying action asking the Court to declare that Hames is the fee simple owner of the Property; to further declare that the sale of Hames real property which occurred on August 26, 2002 is invalid; to further declare the Certificate of Purchase issued to Bellistri is invalid; to further declare that the Collector’s Deed issued to Bellistri is invalid; further for the Court to assess which sum shall be paid to Bellistri for taxes paid and interest thereon; to further assess damages, costs, charges and penalties in McGirl for his errors and omissions; and for such other and further relief as the Court deems just and proper. Count I of Hames’ Petition sought to Set Aside Tax Sale and Collector’s Deed and Count II was for alternative relief should the Court fail to

set aside the tax sale held August 26, 2002 as to Hames' real property and the collector's deed issued thereafter, that the surplus paid by Bellistri and held by the County Treasurer shall be paid to Hames, and for such other and further relief as the Court deems just and proper. (L.F. 343-347). Thereafter, McGirl filed an answer to the Petition and set forth his Affirmative Defenses.(L.F. 336-342). Thereafter, Bellistri filed an answer to the Petition. (L.F. 325-329). Bellistri also filed a Counterclaim/Cross-claims. Count I of Bellistri's Counterclaims/Cross-claims sought Quiet Title and Declaratory Judgment and Count II was for Ejectment. (L.F. 329-334). Bellistri also filed an Application for Order of Publication, which sought an Order of the Court, be entered for service by publication in "*The Independent Journal*, a newspaper of general circulation in Jefferson County, Missouri." (L.F. 322-323). Bellistri also filed a Motion to Add Third-party Defendants. Bellistri named, among other defendants, all unknown and unnamed persons or entities who are the heirs, grantees or successors of David M. Hames, also known as David M. Homes,...(L.F. 317). Thereafter, Notice Upon Order for Service by Publication was filed. (L.F. 319-321). Thereafter, an Affidavit of Publication was filed. (L.F. 315-316). Thereafter, Attorney William B. Beedie filed Withdrawal of Attorney. (L.F. 314). Thereafter, Bellistri filed an Affidavit in Support of Bellistri's Motion for Summary Judgment. (L.F. 2, 301-313). Thereafter, Bellistri filed a Legal Memorandum in Support of Bellistri's Motion for Summary Judgment. (L.F. 2, 290-294). Thereafter, Bellistri filed a Motion for Summary Judgment. (L.F. 2, 295-299). Thereafter, Hames filed a Response to Bellistri's Motion for Summary Judgment. (L.F. 259-289). Thereafter, Bellistri filed a Reply to Hames' Response to Bellistri's Motion For Summary Judgment. (L.F. 257-258).

On December 17, 2007 the Motion Hearing was held. The Court sustained Bellistri's Motion For Summary Judgment. (L.F. 3). On December 21, 2007, Honorable Kenneth W. Pratte signed, filed and approved an Order Granting Motion for Summary Judgment of Bellistri. (L.F. 254-256). Thereafter McGirl filed McGirl's Motion for Summary Judgment. (L.F. 185-248). McGirl also filed McGirl's Legal Memorandum in Support of Motion for Summary Judgment. (L.F. 181-184). Thereafter, Hames filed a Motion to Set Aside the Order Granting Bellistri's Motion for Summary Judgment. (L.F. 158-180). Thereafter, Hames filed Hames' Response to McGirl's Motion for Summary Judgment. (L.F. 129-158). Hames also filed a Legal Memorandum in Support of Hames' Response in Opposition to McGirl's Motion for Summary Judgment. (L.F. 110-129). On February 25, 2008 the Motion Hearing was Held. The Court sustained McGirl's Motion for Summary Judgment. (L.F. 4). Thereafter, Hames filed Hames' Motion for Summary Judgment. (L.F. 63-109). Hames also filed a Memorandum of Law in Support of Hames' Motion for Summary Judgment. (L.F. 34-62). Thereafter, Hames filed a Notice of Hearing set for May 19, 2008, for Hames' Motion for Summary Judgment. (L.F. 4). Thereafter, Bellistri filed a Response to Hames' Motion for Summary Judgment. (L.F. 32-33). Thereafter, Hames filed Hames' Reply to Bellistri's Response to Hames' Motion for Summary Judgment. (L.F. 29-31). On May 19, 2008 Hames brought up Hames' Motion for Summary Judgment and the matter was tried by Court – Civil. (L.F. 5). On May 19, 2008, the Honorable Kenneth W. Pratte signed, filed and approved herein an Order Granting Motion for Summary Judgment for McGirl, quieting title to the Property in Bellistri, ejecting Hames off the Property, and Ordered that Hames be awarded the

surplus of \$2374.69. (L.F. 24-26). Hames did not file a satisfaction of judgment and filed its Notice of Appeal on June 25, 2008. (L.F. 349-351).

POINTS RELIED ON

POINT I

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

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

Midwest Precision Casting Company v. Microdyne, Inc., 965 S.W.2d (Mo. App. E.D,
1998).

Bettis v. Potosi R-III School Dist., 51 S.W.3d 183, 188 (Mo. App. 2001).

Allen v. St. Luke's Hospital of Kansas City, 532 S.W.2d 505, 507 (Mo. App. 1975)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970)

Missouri Supreme Court Rule 74.04(e)(1)

§ 140.290 RSMo

POINT II

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL
COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND
MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO
MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO
HAMES, BECAUSE BELLISTRI FAILED TO SET FORTH THE LEGAL BASIS
FOR BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON THE MOTION**

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

Reese v. Ryan's Family Steakhouses, Inc., 19 S.W.3d 749, 751 (Mo.App. 2000)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970).

Missouri Supreme Court Rule 74.04(c)(1)

POINT III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILED TO CITE TO THE RECORD IN SUPPORT OF ANY FACTUAL ASSERTIONS. ACCORDINGLY, BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION

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

Midwest Precision Casting Co. v. Microdyne, Inc. , 965 S.W.2d 393, 394 (Mo. App. E.D. 1998).

Jackson v. Jackson , 988 S.W.2d 669, 670 (Mo. App. S.D. 1999)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970)

Missouri Supreme Court Rule 74.04(c)(1)

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI FAILED TO ATTACH A COPY OF ALL DISCOVERY, EXHIBITS OR AFFIDAVITS ON WHICH THE MOTION RELIES TO HIS STATEMENT OF UNCONTROVERTED MATERIAL FACTS

ATTACHED TO THE MOTION FOR SUMMARY JUDGMENT.

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

Bank v. Pfeil, 537 S.W.2d 680, 681 (Mo.App. 1976)

Sloss v. Gerstner, 98 S.W.3d 893, 898 (Mo. App. W.D. 2003)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970).

Missouri Supreme Court Rule 74.04(c)(1)

POINT V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE MCGIRL SOLD THE PROPERTY FOR TAXES CLAIMED TO BE DELINQUENT THAT WERE NOT DELINQUENT AT THE TIME OF SALE AS A RESULT OF MCGIRL'S FAILURE TO REFLECT ONTO THE TAX

BOOK, IN RELATION TO THE PROPERTY, THE TAX PAYMENT TO MCGIRL OF \$69.82 MADE ON OR AROUND DECEMBER 8 BY ATTORNEY JOSEPH BECKER, WHICH, ON ITS FACE, INVOKES § 140.530 RSMO AND THE EXSISTENCE OF THAT GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE SALE OF THE PROPERTY BY MCGIRL WAS CONDUCTED ON THE FOURTH MONDAY IN AUGUST 2002, IN COMPLIANCE WITH ALL APPLICABLE ASPECTS OF THE JONES-MUNGER LAW, CHAPTER 140, RSMO SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO THE MCGIRL/BELLISTRI DEAL, NO SALE OR CONVEYANCE OF LAND FOR TAXES SHALL BE VALID IF AT THE TIME OF BEING LISTED SUCH LAND SHALL NOT HAVE BEEN LIABLE TO TAXATION, OR, IF LIABLE, THE TAXES THEREON SHALL HAVE BEEN PAID BEFORE SALE.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

Brock v. Blackwood, 143 S.W.3d 47, 62 (Mo. App. W.D. 2004)

§140.530 RSMo

POINT VI

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO

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

Valli vs. Glasgow Enterprises, Inc., 204 SW3d 273, 277 (Mo. App. E.D. 2006)

Hutchison v. Cannon, 29 S.W.3d 844, 847 (Mo. App. S.D. 2000)

Trailwoods Homeowners' Ass'n v. Scott, 938 S.W.2d 669, 670 (Mo.App. 1997).

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)

§ 140.405 RSMo

§ 140.150.2 RSMo

§ 140.170.2 RSMo

§ 140.290.2 RSMo

140.500 RSMo

Article X, § 13 Missouri Constitution

POINT VII

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF MCGIRL ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE MCGIRL FAILED TO SET FORTH THE LEGAL BASIS FOR MCGIRL'S MOTION FOR SUMMARY JUDGMENT ON THE MOTION ITSELF. ACCORDINGLY, MCGIRL'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING MCGIRL'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO MCGIRL'S MOTION FOR SUMMARY JUDGMENT, A MOTION FOR SUMMARY JUDGMENT SHALL SUMMARILY STATE THE LEGAL BASIS FOR THE MOTION AND DID NOT.

Reese v. Ryan's Family Steakhouses, Inc., 19 S.W.3d 749, 751 (Mo.App. 2000)

Adickes v. S.H. Kress & Co., 398 U.S. 144, 156 (1970).

Missouri Supreme Court Rule 74.04(c)(1)

ARGUMENT

POINT I

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

SHALL...RECITE THE NAME AND ADDRESS OF THE OWNER OR REPUTED OWNER IF KNOWN, AND IF UNKNOWN THEN THE PARTY OR PARTIES TO WHOM EACH TRACT OR LOT OF LAND WAS ASSESSED, TOGETHER WITH THE ADDRESS OF SUCH PARTY, IF KNOWN,...”, SO, BELLISTRI KNEW HAMES WAS UNKNOWN AS “DAVID M. HOMES”.

Summary judgment is designed to permit the trial court to enter judgment, without delay, when the moving party has demonstrated, on the basis of facts on which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371,376 (Mo. 1993). When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. ID. 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, ID. Summary judgment is proper where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. ID; Rule 74.04(c). Summary judgment may be affirmed under any theory that is supported by the record. *ITT Commercial Finance Corp.*, 8544 S.W.2d at 387-388.

Missouri Supreme Court Rule 74.04(e)(1) provides in part: (e) Form of Affidavit. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Following his purchase of the taxes at the tax sale on August 26, 2002, Bellistri was issued a Tax Certificate of Purchase for Hames real property by McGirl. (L.F. 309). Bellistri knew or should have known that the Missouri Statutes governing the contents of a Tax Certificate of Purchase is under § 140.290 RSMo. See *Bettis v. Potosi R-III School Dist.*, 51 S.W.3d 183, 188 (Mo. App. 2001) (it is generally the law that individuals are presumed to know the law). The Tax Certificate of Purchase issued to Bellistri clearly recites “TO WHOM ASSESSED” followed by whatever name and address that happened to be assessed on the tax book with the Property. (L.F. 309). Bellistri knew or should have known that the phrase “TO WHOM ASSESSED” is only invoked on a Tax Certificate of Purchase when the name of the owner or reputed owner is unknown. See *Mo. Highway & Transp. Comm'n v. Myers*, 785 S.W.2d 70, 75 (Mo.banc 1990) (in Missouri, persons are conclusively presumed to know the law.). Bellistri filed a Motion to Add Third-party Defendants in the case below. Bellistri named, among other defendants, “all unknown and unnamed persons or entities who are the heirs, grantees or successors of David M. Hames, also known as David M. Homes,...” (L.F. 317). Bellistri knew Hames is not “also known as David M. Homes” because the name of the owner or reputed owner of the Property in the said Tax Certificate of Purchase is unknown. (L.F. 309). Bellistri’s Motion for Summary Judgment is supported by an affidavit which is not attested to on the basis of personal knowledge. (L.F. 302-313). See *Midwest Precision Casting Company v. Microdyne, Inc.*, 965 S.W.2d (Mo. App. E.D, 1998). Bellistri’s

Affidavit in Support of Summary Judgment states, *inter alia*, that “By letter sent certified mail, return receipt requested, dated May 17, 2004, Defendant Robert Bellistri caused mailed notice of such sale and possible redemption rights to be sent to Plaintiff at the last known address of Plaintiff.” Bellistri referenced a certified mail letter and envelope he purports to demonstrate the legal probative force that he mailed adequate redemption notice. (L.F. 310-311), supported by an affidavit which is not attested to on the basis of personal knowledge. (L.F. 302-313). The Plaintiff’s name in the case below is recited as “David M. Hames”. (L.F. 343-348). Hames name is recited as “David M. Hames” before this persistent and Honorable Court. (L.F. 349-351). However, contrary to his assertion, the name of the addressee on the said certified mail is “David M. Homes”. (L.F. 310-311). In the absence of an allegation of personal knowledge, the contents of the affidavit become inadmissible hearsay. Hearsay statements contained in an affidavit are not facts admissible in evidence and should not be considered by a trial court. *Allen v. St. Luke's Hospital of Kansas City*, 532 S.W.2d 505, 507 (Mo. App. 1975), *Fitzpatrick v. Hoehn*, 746 S.W.2d 652, 654 (Mo. App. 1988); *Conway v. Villa*, 847 S.W.2d 881, 886 (Mo. App. 1993). See also *Midwest Precision Casting Company v. Microdyne, Inc.* 965 S.W.2d 393, 394 (Mo. App. E.D. 1998). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970).

Bellistri’s Motion for Summary Judgment fails to comply with Missouri Supreme Court rule 74.04(e)(1) and that failure implores this Honorable Court to reverse the lower Court Judgment quieting title of the Property to Bellistri and ejecting Hames off the Property.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI FAILED TO SET FORTH THE LEGAL BASIS FOR BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON THE MOTION ITSELF. ACCORDINGLY, BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO BELLISTRI'S MOTION FOR SUMMARY JUDGMENT, A MOTION FOR SUMMARY JUDGMENT SHALL SUMMARILY STATE THE LEGAL BASIS FOR THE MOTION AND DID NOT.

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

Missouri Supreme Court Rule 74.04(c)(1) provides in part: (c) Motion and Proceedings Thereon. (1) Motions for Summary Judgment. A motion for summary judgment shall summarily state the legal basis for the motion.

There is no legal basis for the motion summarily stated on Bellistri's Motion for Summary Judgment prior to the attachment of the statement of uncontroverted material facts. (L.F. 296). The requirements of Rule 74.04 are mandatory. *Reese v. Ryan's Family Steakhouses, Inc.*, 19 S.W.3d 749, 751 (Mo.App. 2000). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970).

Bellistri's Motion for Summary Judgment fails to comply with Missouri Supreme Court rule 74.04(c)(1) and that failure implores this Honorable Court to reverse the lower Court Judgment quieting title of the Property to Bellistri and ejecting Hames off the Property.

POINT III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI'S STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILED TO CITE TO THE RECORD IN SUPPORT OF ANY FACTUAL ASSERTIONS. ACCORDINGLY, BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL

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

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

Missouri Supreme Court Rule 74.04(c)(1) provides in part: A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts.

Bellistri's statement of uncontroverted facts does not cite to the record in support of any factual assertions. (L.F. 296-299). A motion for summary judgment that fails to set forth each material fact in separately numbered paragraphs and that does not specifically reference supporting documents is defective. *Jackson v. Jackson* , 988 S.W.2d 669, 670 (Mo. App. S.D. 1999). The grant of summary judgment on a defective motion provides

ample grounds for reversal. *Id.*; see also *Midwest Precision Casting Co. v. Microdyne, Inc.*, 965 S.W.2d 393, 394 (Mo. App. E.D. 1998). The purpose of this particularity rule is to provide notice to the opposing party and the court as to the specific basis on which the movant claims it is entitled to summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970). No defense to an insufficient showing is required.

Bellistri's Motion for Summary Judgment fails to comply with Missouri Supreme Court rule 74.04(c)(1) and that failure implores this Honorable Court to reverse the lower Court Judgment quieting title of the Property to Bellistri and ejecting Hames off the Property.

POINT IV

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI FAILED TO ATTACH A COPY OF ALL DISCOVERY, EXHIBITS OR AFFIDAVITS ON WHICH THE MOTION RELIES TO HIS STATEMENT OF UNCONTROVERTED MATERIAL FACTS ATTACHED TO THE MOTION FOR SUMMARY JUDGMENT. ACCORDINGLY, BELLISTRI'S MOTION FOR SUMMARY JUDGMENT FAILS TO COMPLY WITH MISSOURI SUPREME COURT RULE 74.04(C)(1) AND THAT FAILURE SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY

JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO BELLISTRIS STATEMENT OF UNCONTROVERTED MATERIAL FACTS, ATTACHED TO THE STATEMENT OF UNCONTROVERTED MATERIAL FACTS SHALL BE A COPY OF ALL DISCOVERY, EXHIBITS OR AFFIDAVITS ON WHICH THE MOTION RELIES.

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

Missouri Supreme Court Rule 74.04(c)(1) provides in part: A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts. Attached to the statement shall be a copy of all discovery, exhibits or affidavits on which the motion relies.

Bellistri did not attach any exhibits or affidavits to his statement of uncontroverted material facts. (L.F. 296-299). When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them. *Bank v. Pfeil*, 537 S.W.2d 680, 681 (Mo.App. 1976). [F]ailure to comply with the applicable rule saddles this Court with the irritating chore of sifting through the record to identify factual disputes. *Sloss v. Gerstner*, 98 S.W.3d 893, 898 (Mo. App. W.D. 2003). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970).

Bellistri's Motion for Summary Judgment fails to comply with Missouri Supreme Court rule 74.04(c)(1) and that failure implores this Honorable Court to reverse the lower Court Judgment quieting title of the Property to Bellistri and ejecting Hames off the Property.

POINT V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE MCGIRL SOLD THE PROPERTY FOR TAXES CLAIMED TO BE DELINQUENT THAT WERE NOT DELINQUENT AT THE TIME OF SALE AS A RESULT OF MCGIRL'S FAILURE TO REFLECT ONTO THE TAX BOOK, IN RELATION TO THE PROPERTY, THE TAX PAYMENT TO MCGIRL OF \$69.82 MADE ON OR AROUND DECEMBER 8 BY ATTORNEY JOSEPH BECKER, WHICH, ON ITS FACE, INVOKES § 140.530 RSMO AND THE EXSISTENCE OF THAT GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE SALE OF THE PROPERTY BY MCGIRL WAS CONDUCTED ON THE FOURTH MONDAY IN AUGUST 2002, IN COMPLIANCE WITH ALL APPLICABLE ASPECTS OF THE JONES-MUNGER LAW, CHAPTER 140, RSMO SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING RESPONDENT BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, CONTRARY TO THE

MCGIRL/BELLISTRI DEAL, NO SALE OR CONVEYANCE OF LAND FOR TAXES SHALL BE VALID IF AT THE TIME OF BEING LISTED SUCH LAND SHALL NOT HAVE BEEN LIABLE TO TAXATION, OR, IF LIABLE, THE TAXES THEREON SHALL HAVE BEEN PAID BEFORE SALE.

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

§140.530 RSMo provides: No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county commission.

In the cause below, by affidavit or other wise, Hames showed probable legal force that on or around December 8, 2000 attorney Joseph Becker had paid the taxes on Hames' real property described as Parcel 19, Sector II, Lake Forest Farms Subdivision and notified the collector of the address of the owner of the real property, David M. Hames, as 108 North Main, Taylorville, Illinois 62568. (L.F. 272, 345). A genuine issue of fact exists "where the record contains competent evidence of two plausible, but contradictory, accounts of the essential facts." *Brock v. Blackwood*, 143 S.W.3d 47, 62 (Mo. App. W.D. 2004). In the cause below, by affidavit or other wise, Hames showed probable legal force that on or around August 5, 2003 Hames visited the McGirl office in

an attempt to pay anything owed on the Property but was told “no taxes are due” on the Property by the tax clerk. (L.F. 260-261, 277-278, 283-288).

The non-movant is accorded the benefit of all reasonable inferences from the record... *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The facts are reviewed in the light most favorable to the party against whom judgment is entered. *Id.*

The Record shows at least one genuine issue of material fact as to whether the sale of the property by McGirl was conducted on the fourth Monday in August 2002, in compliance with all applicable aspects of the Jones-Munger Law, chapter 140, and accordingly requires this Honorable Court reverse the lower Court Judgment quieting title of the Property to Bellistri and ejecting Hames off the Property.

POINT VI

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL COUNTS IN FAVOR OF BELLISTRI ORDERED ON DECEMBER 21, 2007 AND MADE FINAL BY THE ORDER GRANTING SUMMARY JUDGMENT TO MCGIRL ON MAY 19, 2008 AND DENYING SUMMARY JUDGMENT TO HAMES, BECAUSE BELLISTRI, AS A PURCHASER OF TAXES AT A TAX SALE, FAILED TO COMPLY WITH § 140.405 RSMO REQUIREING HIM TO SEND NOTIFICATION OF TAX SALE AND THE RIGHT TO REDEEM TO HAMES PRIOR TO REQUESTING A COLLECTOR’S

DEED AND THE EXSISTENCE OF THAT GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BY LETTER SENT CERTIFIED MAIL, RETURN RECEIPT REQUESTED, DATED MAY 17, 2004, DEFENDANT ROBERT BELLISTRI CAUSED MAILED NOTICE OF SUCH SALE AND POSSIBLE REDEMPTION RIGHTS TO BE SENT TO PLAINTIFF AT THE LAST KNOWN ADDRESS OF PLAINTIFF SHOULD HAVE RESULTED IN THE TRIAL COURT DENYING BELLISTRI'S MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS IN THAT, BELLISTRI DID NOT SEND NOTICE TO THE OWNER OF RECORD DISCLOSED BY THE GENERAL WARRANTY DEED AND FULL DEED OF RELEASE, AND DID NOT SEND NOTICE THAT COMPLIED WITH THE STATUTORY REQUIREMENTS FOR PROPER NOTICE.

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

A. Bellistri did not send notice to the owner of record disclosed by the general warranty deed and full deed of release.

§ 140.405, RSMo, at the time of tax sale provides: "Any person purchasing property at a delinquent land tax auction shall not acquire the deed to the real estate, as provided for in section 140.420, until the person meets with the following requirement or until such person makes affidavit that a title search has revealed no publicly recorded deed of trust, mortgage, lease, lien or claim on the real estate. At least ninety days prior to

the date when a purchaser is authorized to acquire the deed, the purchaser shall notify any person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon that real estate of the latter person's right to redeem such person's publicly recorded security or claim. Notice shall be sent by certified mail to any such person, including one who was the publicly recorded owner of the property sold at the delinquent land tax auction previous to such sale, at such person's last known available address. Failure of the purchaser to comply with this provision shall result in such purchaser's loss of all interest in the real estate. If any real estate is purchased at a third-offering tax auction and has a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate, the purchaser of said property at a third-offering tax auction shall notify anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the real estate pursuant to this section. Once the purchaser has notified the county collector by affidavit that proper notice has been given, anyone with a publicly recorded deed of trust, mortgage, lease, lien or claim upon the property shall have ninety days to redeem said property or be forever barred from redeeming said property. If the county collector chooses to have the title search done then the county collector must comply with all provisions of section 140.405, and may charge the purchaser the cost of the title search before giving the purchaser a deed pursuant to section 140.420.”

In the cause below, Bellistri set forth his prognosis that Missouri Constitution Article X, § 13, and §§ 140.150.2 and 140.170.2 require that notice of tax sale contain the names of all record owner or the names of all owners appearing on the land tax book.

(L.F. 293). This is a dangerous interpretation to be avoided and plainly wrong, because the persistent understanding of the Missouri Constitution Article X, § 13, and §§ 140.150.2 and 140.170.2 requires that No real property, lots, mineral rights, or royalty interests shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale contains the names of all record owners thereof, or the names of all owners appearing on the land tax book and all other information required by law.

(Emphasis added.)

In the case at bar, all owners do not appear on the land tax book. See § 140.290.2 RSMo which provides in part: “Such certificate of purchase shall also recite the name... of the owner or reputed owner if known, and if unknown then the party or parties to whom... assessed...” (Emphasis added.) See *State ex rel. BP Prod. N.Am., Inc. v. Ross*, 163 S.W.3d 922, 927 (Mo. 2005) (en banc). “In addition, in construing a statute, a court may look to related statutes.”

The reason a tax certificate of purchase which states the phrase “To Whom Assessed” is issued to the purchaser, after the collector collects the bid amount from the purchaser, is to make it utterly clear to the purchaser that the owner or reputed owners name and/or address is unknown. In receiving such certificate, the purchaser is making a binding admission of his responsibility to use due diligence in notifying the claim and security holder of the Property about the tax sale and redemption rights. (Emphasis added.)

Following Bellistri’s purchase of the taxes at the tax sale on August 26, 2002, and after he received a tax certificate of purchase, Bellistri sent the obscure and ambiguous

letter to “David M. Homes” which is copied at (L.F. 310-311). In order to satisfy the statutory requirement that notice be given to the owner at the last known “available” address. See *Bullard v. Holt*, 158 S.W.3d 868, 871 (Mo. App. S.D. 2005). An address is “available” when reasonable efforts would result in the address being located and the property interest holder notified. *Id.*, at 872; see also *Estate of Broadhurst*, 737 S.W.2d 504,507 (Mo. App. S.D. 1987). “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.”

Failure to provide the notice required under the statute results in a purchaser’s loss of all interest in the real estate. See § 140.405 RSMo In *Hutchison v. Cannon*, 29 S.W.3d 844, 847 (Mo. App. S.D. 2000) the Court found the requirement of section 140.405 RSMo referred to above: “... is couched in the mandatory term shall. Additionally, that section provides that the “[f]ailure of the purchaser to comply with this provision shall result in his loss of all interest in the real estate.” The use of the word “shall” in a statute is generally interpreted as mandatory. *State v. Muegge*, 842 S.W.2d 192, 195 (Mo.App. E.D. 1992). It is clear that when a statute mandates that something be done by providing that it shall occur, and it also provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. *Id.* The provisions of section 140.405 concerning the giving of notice to the owner and the consequences of the failure to do so are, therefore, mandatory in nature and not merely directory.” In *Valli vs. Glasgow Enterprises, Inc.*, 204 SW3d 273, 277 (Mo. App. E.D. 2006) the Court found: “This

Section, as a prerequisite to an application for a Collector's Deed, imposes on purchasers several distinct notice requirements. First, this Section identifies who must be notified, that is, "any person who holds a publicly recorded deed of trust, mortgage, lease, lien or claim upon th[e] real estate" in question, "including one who was the publicly recorded owner of the property sold at the delinquent land tax auction previous to such sale..."

The information that Hames owned the Property was "available" to Bellistri as evidenced by his own exhibiting of the General Warranty Deed for the Property. (L.F. 306-307). Further, the Full Deed of Release was "available" in the recorders office. Both documents conclusively show the name of the Grantee as David M. Hames. (L.F. 283-284, 306-307,).

Instead of sending Hames notice, Bellistri sent a letter to "David M. Homes". The letter went unclaimed and was returned to Bellistri. (L.F. 311).

Bellistri had personal knowledge that it would be illegal for Hames to assume, claim, take or pry into said letter. See *Bettis v. Potosi R-III School Dist.*, 51 S.W.3d 183, 188 (Mo. App. 2001) (it is generally the law that individuals are presumed to know the law). Title 18 U.S.C.S. §1702 provides: "Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined under this title or imprisoned not more than five years, or both." Section 1702

reaches mail not yet delivered to the addressee or his authorized agent, even though the post office has relinquished possession of the mail matter. *United States v. Murry* 588 F.2d 641, 644 (8th Cir. 1978). The mere removal of the letter from a post office box by one authorized to remove the letter but not authorized to receive the letter for the addressee does not amount to delivery of the mail or remove it from the protection of section 1702. *Id.* at 644-645.

Even in a situation where the mail is misdelivered, left at an address other than the one on the envelope, or misaddressed, bears an address other than the residence of the person to whom it was sent, one can be found to be in violation of the above referenced sections. *United States v. Palmer*, 864 F.2d 524, 525-527 (7th Cir. 1988). The unintended recipient may not keep or open the envelope in either event due to the language in sections 1702 and 1708. *United States v. Brown*, 551 F.2d 236, 239 (8th Cir.1977), the court found:"[u]nder appropriate factual circumstances, a jury might find that a defendant willfully obstructed the mails without design to open, embezzle or secrete the same." *Id.* at 239-40.

Hames has never assumed, claimed or unsealed any mail matter whatsoever that wasn't addressed to his known legal and proper name. (L.F. 108).

There is the existence of a genuine issue of material fact as to whether by letter sent certified mail, return receipt requested, dated may 17, 2004, Bellistri caused mailed notice of such sale and possible redemption rights to be sent to Hames at the last known address of Hames.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. See: *Daugherty v. City of Maryland Heights*, No. SC88012, slip op. at 2 (Mo. banc filed August 7, 2007) “Summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant.” and, *ITT Commercial Finance Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

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

140.500 does not specifically address redemption notices. Bellistri provided no case law showing a Court has looked to §140.500 RSMo in construing the mandatory notice requirements of § 140.405 RSMo 2000.

Bellistri provided three (3) case law to back up the assertion that § 140.500 RSMo shields it from having to use due diligence to notify the owner of the Property: *Evans v. Brussel*, 330 S.W. 2d 788,791 (Mo. 1959); *Mason v. Whyte*, 660 S.W. 2d 383,386 (MO. App., E.D. 1983); *Ruley v. Drey*, 643 S.W. 2d 101,104 (Mo. App., S.D. 1982). Each of these cases were ruled upon prior to, or did not take into account, the United States Supreme Court ruling in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) which found: “Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of

any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.” (emphasis added). See also: *Jones v. Flowers*, 126 S.Ct. 1708, 1713-14 (2006) (quoting *Mullane v. Central Hoover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)): Due process does not require that a property owner receive actual notice before the government may take his property. Rather, we have stated that due process requires the government to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

B. Bellistri did not comply with its statutory obligations because it sent a deficient notice that did not comply with the statutory requirements for proper notice.

Even if the name had been correct and the address correct on the letter Bellistri sent, the information conveyed in the purported letter is deficient and does not apprise Hames of his right to redeem his claim. A similar form of notice was reviewed in the case styled *Valli vs. Glasgow Enterprises, Inc.*, 204 SW3d 273, 277 (Mo. App. E.D. 2006). There, this Court of Appeals held that the notice failed to comply with the mandatory notice requirements of § 140.405 and held that Glasgow forfeited any interest it obtained in the property as a result. In its opinion, this Court reversed the trial court’s decision in favor of Glasgow.

According to Bellistri’s Notice, “David Homes” had a right to redeem an ambiguous right; something Bellistri recited as “your security of claim”. This statement does not adequately convey the right of Hames to redeem his claim to real property – his security or claim. (L.F. 310). Furthermore, the notice incorrectly describes the lawful time period in which Hames could redeem the Property, and the consequence to Hames of not exercising his right to

redeem said Property within the lawful time period. (L.F. 310). According to Bellistri's notice, "David Homes", has a right "To redeem your security of claim, contact Michael P. McGirl, Collector of Revenue, Washington County, Missouri with 90 days from the date of receipt of this letter.

Failure to redeem said real estate will forfeit your rights to said property and a Collectors Deed will be issued to me.". (L.F. 310). As discussed above, Hames never received the Notice. (L.F. 311). However, according to Bellistri, if Hames ever does receive the purported notice Bellistri sent, he will have 90 days from that point to redeem the Property. He doesn't specifically state that Hames will ever be prohibited from redeeming the Property. (L.F. 310). Section 140.405 RSMo requires that once a purchaser provides the proper notice to the necessary parties, he is to notify "the county collector by affidavit that proper notice has been given," thereafter "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.". The failure to provide proper notice is also a failure to comply with Bellistri's obligations. See *Valli vs. Glasgow Enterprises, Inc.*, 204 SW3d 273, 277 (Mo. App. E.D. 2006).

While a "collector's deed is 'prima facie evidence of a good and valid title in fee simple,'" *Ruley v. Drey*, 643 S.W.2d 101, 103 (Mo.App. 1982), "this does not prevent an opponent from offering evidence at variance with the title." *Trailwoods Homeowners' Ass'n v. Scott*, 938 S.W.2d 669, 670 (Mo.App. 1997).

POINT VII

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

Summary judgment is proper where no genuine issues of material fact exist and a movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 376: Rule 74.04(c).

Missouri Supreme Court Rule 74.04(c)(1) provides in part: (c) Motion and Proceedings Thereon. (1) Motions for Summary Judgment. A motion for summary judgment shall summarily state the legal basis for the motion.

There is no legal basis for the motion summarily stated on McGirl's Motion for Summary Judgment prior to the attachment of the statement of uncontroverted material facts. (L.F. 296). The requirements of Rule 74.04 are mandatory. *Reese v. Ryan's Family*

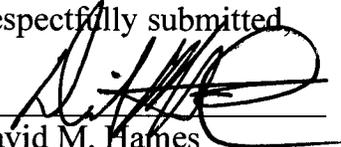
Steakhouses, Inc., 19 S.W.3d 749, 751 (Mo.App. 2000). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970).

McGill's Motion for Summary Judgment fails to comply with Missouri Supreme Court rule 74.04(c)(1) and that failure implores this Honorable Court to reverse the lower Court Judgment granting Summary Judgment in favor of McGill.

REQUEST FOR REVERSAL

Appellant requests that this Court reverse the Judgment of the Honorable Kenneth W. Pratte.

Respectfully submitted



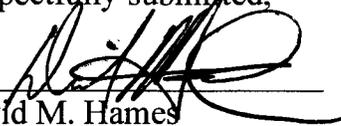
David M. Hames
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Taylorville, Il. 62568
217-287-7335
Acting pro se

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing instrument and one cd rom containing Appellant's Brief, which was scanned for viruses and was virus free, were placed in the United States Mail, postage prepaid, this 23rd day of September, 2008 addressed to Mr. Phillip K. Gephardt, 1720 North Main Street, Desoto, MO 63020; and I hereby certify that two (2) true and correct copies of the foregoing instrument and one cd rom containing Appellant's Brief, which was scanned for viruses and was virus free, were placed in the United States Mail, postage prepaid, this 23rd day

of September, 2008 addressed to Mr. John Rupp, Prosecuting Attorney, 102 North Missouri, Potosi, MO 63664.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE PURSUANT TO

MISSOURI SUPREME COURT RULE 84.06(c)

COMES NOW David M. Hames, pro se, and for his Certificate of Compliance Pursuant to Missouri Supreme Court Rule 84.06(c) states as follows:

1. To the best of my knowledge, information and belief, Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Brief of Appellant, were formed after reasonable inquiry under the circumstances.

Moreover:

(a) Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Brief of Appellant, are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b) Appellant's claims, defenses, requests, demands, objections, contentions and arguments, as set forth in the Brief of Appellant, are warranted by

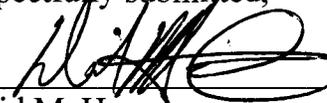
existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(c) the allegations and other factual contentions in the Brief of Appellant have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for the further investigations or discovery; and

(d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. The Brief of Appellant complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).
3. The Brief contains 9,716 words.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE PURSUANT TO

MISSOURI SUPREME COURT RULE 84.06(g)

COMES NOW David M. Hames, pro se, and for his Certificate of Compliance Pursuant to Missouri Supreme Court Rule 84.06(g) and Local Rule 361 states as follows:

1. Appellant contemporaneously herewith files cd rom that contains the Brief of Appellant.

2. The Brief of Appellant was created using Microsoft Word.
3. Appellant has scanned the enclosed cd rom for viruses and was virus free.

Respectfully submitted,



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