IN THE SUPREME COURT OF MISSOURI

JAMES SCHLERETH, Plaintiff, vs. JANE TILLMAN HARDY, and COLLECTOR OF JEFFERSON COUNTY, MISSOURI Defendants.	))))))))))	Supreme Court No. SC89402

From the Circuit Court of Jefferson County, Missouri

Twenty-Third Judicial Circuit

Division 3

Honorable M. Edward Williams

APPELLANT'S REPLY BRIEF

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ARGUMENT

APPELLANT'S POINT RELIED ON

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

The real issue before this Court is whether Missouri acknowledges that statutory due process is sufficient to inform a delinquent taxpayer of their redemption rights when notice is sent via certified mail to the actual physical address of the taxpayer and the certified mail is returned as unclaimed.

The courts in both *Jones* and *Elliot*[1], used the traditional analysis applied in *Mullane*[2] - whether or not, considering all the unique facts and circumstances, the notice is reasonably calculated to apprise the taxpayer of their rights. *Jones v. Flowers,* 547 U.S. 220 (2006); *State v. Elliot,* 225 S.W.3d 423 (Mo. 2007). Considering all those facts, the court in *Jones* determined that notice was not

[1] *Jones v. Flowers*, 547 U.S. 220 (2006), and *State v. Elliot,* 225 S.W.3d 423 (Mo. 2007).
[2] *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950)

reasonably calculated while the court in *Elliot* determined that notice was reasonable calculated. The distinction, then, lies in the facts unique to each case.

Hardy suggests in her responsive brief that this difference revolves around the subject of the notice – tax assessments versus property taking. This suggestion, however, is directly at odds with this Court's express language and interpretation applied in *Elliot*. This Court specifically stated in *Elliot*, "*Jones v Flowers* and *Conseco Finance Servicing Corp v. Missouri Dept. of Revenue*[3], are distinguishable in that those cases involve notice sent to an address where the person affected was not present [emphasis added]." *State v. Elliot*, 225 S.W.3d 423, FN3 (Mo. 2007). This Court cannot ignore its own words and language in *Elliot*. The only plausible reconciliation between *Jones* and *Elliot* is that distinction specifically indicated by this Court – whether the notice was sent to the address where the taxpayer actually resided. To come to the conclusion Hardy suggests this Court must overrule the language it specifically stated in *Elliot*.

Hardy cites to a recent federal district case in Minnesota, *Pagonis v. United States*, 2008 U.S. Dist. LEXIS 57341, to support her suggestion that the distinction between *Jones* and *Elliot* is tax assessments versus property taking. First, Hardy claims that this decision sheds light to the distinction between *Elliot* and *Jones*, however, this case does not even mention *Elliot* and in no way tries to reconcile the

[3] *Conseco Finance Servicing Corp. v. Missouri Dept. of Revenue*, 195 S.W.3d 410 (Mo banc 2006).

two cases. *Id*. Further, *Elliot* is a Missouri case and the District Court of Minnesota is in no way bound by the language in *Elliot*. Next, in *Pagonis*, the plaintiff claimed that *Jones* established a Due Process right to actual notice. *Id*. The *Pagonis* court rejected that proposition that the taxpayer must have actual notice to satisfy the due process requirements. *Id*. Also, the court determined they did not have jurisdiction to hear the case. *Id*. Finally, and perhaps most importantly, the plaintiff in *Pagonis* was seeking injunctive relief that was barred by the Anti-Injunction Act. *Id*. The court was forced to dismiss the lawsuit based on that fact alone. *Id*. In addition, this Court is once again not bound by this decision like they are bound by their own language in *Elliot*.

Hardy has cited to cases from different jurisdictions, particularly Florida, in which the court determined that due process is not met when notice sent via certified mail to the address where the taxpayer actually resides is returned as unclaimed. The Florida courts, however, are not bound by the decision in *Elliot*, like this Court. Also, contrary to the Florida courts, the state of New York, has decided that there is a distinction if the person actually resided at the address, especially if they are attempting to avoid service. *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates, et al.*, 2006 NY Slip Op 6077, 3 (N.Y. App. Div. 2d Dep't 2006). Thus, the state courts are divided on this issue.

Hardy also cites to *Sidun v. Wayne County Treasurer*, 481 Mich. 503 (Mich. 2008), in support of her position. Her reliance on this case is entirely misplaced. The facts of this case are clearly distinguishable because in *Sidun*, notice was not sent to the correct address of one of the property owners. *Id*. at 507. In *Sidun*, the property in question was owned by two separate people with two separate addresses. *Id*. at 505-506. Notice of the foreclosure proceedings was only sent to one of the addresses listed on the deed. *Id*. at 507. The court relied on the principles established in *Mullane* and *Jones* and to determine that notice must be reasonably calculated and desirous to actually notify the owner of their rights. *Id*. at 512. The court also realized that they needed to consider the circumstances unique to the case and that the notice required could vary depending on those unique circumstances. *Id*. at 511. The court concluded that because there were multiple owners, the county treasurer needed to consulted the deed to identify all the property owners who had an interest in the property. *Id*. at 513. The county treasurer did actually consult the deed. *Id*. The county only sent notice to the first address listed on the deed and that notice was returned. *Id*. at 512. The court concluded that it was unreasonable for the treasurer to assume that both property owners resided at the same address when there were two separate addresses listed on the deed. *Id* at 513. Ultimately, the court determined that because the county treasurer did not send notice to the second address listed on the deed that the notice

was not sufficient and that the plaintiff's due process rights were violated. *Id*. at 516. The facts of this case are different in that notice was sent to single correct address of Hardy. Thus, Respondent's reliance on *Sidun* is misplaced.

This Court need not lose sight of the fact that long before her property was sold, Hardy received tax bills by regular mail at that same address to which the certified letters were sent. She received those billing notices but refused to pay her taxes. As a citizen, Hardy has some responsibility to pick up her mail and pay her taxes or suffer the inevitable consequences. This Court should not encourage taxpayers to avoid picking up their certified mail to circumvent the issuance of a Collector's Deed from the sale of their property at a tax auction, where they have failed to pay their taxes.

In conclusion, Schlereth should not be required to take additional steps to notify Hardy when the certified mail was returned unclaimed because Hardy admits she actually resided at the address to which the notice was sent, yet voluntarily chose not to pick it up.

RESPONDENT'S POINT I

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT THE FACSIMILE SIGNATURE ON THE COLLECTOR'S DEED WAS A PROPER WITNESS

SIGNATURE BECAUSE SUCH SIGNATURE WAS NOT THE LEGAL SIGNATURE OF THE PERSON WITNESSING THE DEED IN THAT IT WAS A FASCMILE OF SOMEONE ELSE'S SIGNATURE AND NOT THE SIGNATURE OF THE ACTUAL WITNESS TO THE DEED.

Hardy argues that because the Collector's Deed in this case was witnessed by a Deputy County Clerk, and not the County Clerk herself, the Deed is invalid. Chapter 51 of the Revised Statutes of Missouri set for the duties and responsibilities of the office of the County Clerk and Section 140.640 RSMo states,

> "The clerk of the county commission of all counties of the first class not having a charter form of government shall appoint such assistants, clerks and deputies as he deems necessary for the proper discharge of the duties of his office and may set their compensation within the limits of the allocations made for that purpose by the county commission. …" Section 51.430 RSMo.

Hardy cites two cases to stand for her proposition, *Klorner v. Nunn*, 318 S.W.2d 241 (Mo 1958) and *Callahan v. Davis*, 125 Mo. 27, 28 S.W.162 (1894). *Klorner v. Nunn*, is easily distinguished from the present case in that the deed in *Klorner* was not witnessed by anyone. *Klorner*, 318 S.W.2d at 243. The Collector's Deed issued to Appellant James Schlereth in this case was signed

"Eleanor Koch Rehm, by CLR." (L.F. Vol. I 71-72). It is not disputed that Eleanor Koch Rehm was the duly elected County Clerk at the time the Collector's Deed was issued. Hardy's claim is that the Collector's Deed must be witnessed by the County Clerk herself, not a deputy.

Despite Hardy's contention, this issue is not disposed of by *Callahan v Davis* [citation omitted]. That court found a deed to be invalid because the witnessed signed the deed as "Collector of Nodaway County", not as County Treasurer, as required by the applicable statute. *Callahan*, 125 Mo. 27, 28 at 165. In the present case, the Collector's Deed was signed by a Deputy County Clerk, as required by the statute, specifically Carey Renshaw. (L.F. Vol II. 163). Section 51.430 allows the Clerk to "appoint such assistants, clerks and deputies as he deems necessary for the proper discharge of the duties of his office." Section 51.430 RSMo. The County Clerk therefore has the discretion to delegate certain duties to her deputy clerk. It is only common sense that these duties include the ministerial act of witnessing a deed.

RESPONDENT'S POINT II

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT COULD NOT CHALLENGE THE COLLECTOR'S DEED BECAUSE APPELLANT DID

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

Section 140.440 of the Missouri Revised Statutes requires an applicant pay all of the taxes that have accrued on that property since the issuance of the certificate of purchase. Section 140.440 RSMo. In the present case, Schlereth could not pay any such accrued taxes, as they had been paid by Hardy. (L.F. Vol I. 20). In essence, Hardy asserts that this Court should fault Schlereth for failing to perform an impossible act. Appellant James Schlereth could only pay those taxes that had accrued. To the extent that no taxes had accrued by the time Schlereth applied for the Collector's Deed, there were not taxes to pay. Schlereth was therefore issued a Collector's Deed to the property because there were no outstanding taxes.

Additionally, Hardy has a remedy to recover any taxes she did actually pay. A judgment ordered on November 13, 2006 granted payment from Schlereth to Hardy for those taxes paid by Hardy prior to the issuance of the Collector's Deed. (L.F. Vol. I 43). Thus, Schlereth eventually paid those accrued taxes.

RESPONDENT'S POINT III

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

Finally, Hardy contends that because of statements made by a mysterious clerk in the Collector's office, she was deprived of her right to redeem the property. Hardy, in desperation relies on two conversations that allegedly took place between her and a clerk in the Collector's office. These conversations are referenced in an affidavit attached to Hardy's Statement. The affidavit contains two statements attributed to an unnamed clerk.

Hardy can point to no legal requirement that the County Collector inform a taxpayer that their property has been sold at a delinquent tax land sale. In fact, the

Collector has no such obligations. The obligation to notify a property owner of their right of redemption is outlined in Section 140.405 of the Revised Statutes of Missouri. While Defendant Mahn did not notify Hardy that her property had been sold, a notice of this act was issued in accordance with Section 140.405 RSMo. The notice was sent via certified mail by Plaintiff in accordance with the statute. Defendant Mahn, nor Schlereth for that matter, can be faulted for Hardy's failure to claim the letter that was sent to her in compliance with the statute as it has existed for years. Defendant Mahn had no obligation to notify Hardy of her right to redemption, and Schlereth satisfied all the requirements of Section 140.405 RSMo.

Generally, to make a claim of equal protection, the person making the claim must be a member of a protected class. *Willowbrook* v. *Olech*, 528 U.S. 562, 564 (U.S. 2000). Hardy does not claim to be a member of any protected class in this case. We must not forget the fact that Hardy, as a property owner, failed to fulfill her obligations of paying taxes on the property she owned. While no person likes to pay taxes, if we want to keep our property we must fulfill our obligations and pay the required taxes. Hardy's failure to pay her taxes resulted in her property being sold at a tax auction as provided for in Section 140.150 RSMo. Is Hardy claiming the protected class is those persons who fail to pay their taxes? Section 140.405 RSMo specifically speaks to how these people are to be notified.

Actually, Schlereth complied with all the requirements to send notice in this statute.

In order to show the equal protection clause has been violated, Hardy must show this class "persons who fail to pay their taxes" are treated differently by the County Collector than another group such as those who do pay their taxes. She has made no such allegations because this disparate treatment has not taken place. Thus, there has been no violation of equal protection.

The other type of equal protection claim is the "class of one" claim. *Olech*, at 564. Hardy cites to cases that involve the "class of one" claim, so we can only assume this is the claim Hardy is making, even though it is not explicit. To prove a "class of one" claim, Hardy must prove that she has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id*. Hardy has failed to show that she was intentionally treated differently from any other customer. In fact, the policy by the clerk is that the workers may inform them if they notice it, not that they have to inform them. Some tax payers are told, while others are not told. There is not even an allegation that Hardy was intentionally treated differently. Thus Hardy's rights to equal protection have not been violated.

Additionally, there are some forms of state action, which by their very nature involve discretionary decision making based on a vast array of subjective,

individualized assessments. *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2157-2158 (U.S. 2008). In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. *Id.* In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise. *Id.* For example, consider an officer stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. *Id.* If the officer gives only one of those people a ticket, one could argue the officer has created a class of those who did not get speeding tickets, and a "class of one" that did. *Id.* But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. *Id.*

Allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. *Id.* The same is true in this case. When informing taxpayers who appear in person to pay their delinquent taxes, that their property was recently sold at a tax auction, the

Collector's office tries to provide better customer service. In essence, the Collector's office is repeating to delinquent taxpayers a fact which they should already know. The Collector in her interrogatories states that, "she advises her deputies that at such time as a taxpayer appears in person to pay their taxes, if it is discovered that the property has been sold at a previous tax sale, said deputy may orally notify the taxpayer that the property has been sold." (L.F. Vol. I 129). The Collector does not have a policy that every person shall be told, but that they may notify them [emphasis added]. The deputy has the discretion as to whether or not to notify the taxpayer. Just because Hardy was not notified, does not mean that her equal protection rights were violated. Even the Trial Court acknowledges in their judgment that the burden of imposing a legal requirement on the Collector to inform tax payers if their property was previously sold at a tax sale is too great a burden to place on the Collector's office. (L.F. Vol. II 236).

Even if she could show she is entitled to equal protection, the test laid out by Hardy is the wrong test. Courts use a two-part test to determine the constitutionally of a statute under the equal protection clause. *Weinschenk v State*, 203 S.W.3d 201, 211 (Mo. banc 2006). The first step is to determine whether the statute implicates a suspect class or impinges on a fundamentally protected right. *Id*. The second step is to apply the appropriate level of scrutiny. *Id*.

In this case, however, Hardy is not claiming any statute or policy is unconstitutional. Rather, she is arguing that such policies are being unequally applied. To prove discriminatory administration, Hardy must prove an intentional violation of the essential principle of practical uniformity. *Mackay Tel. & Cable Co. v. Little Rock*, 250 US 94, 100 (U.S. 1919). Unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection without a showing of an intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8 (U.S. 1944). A discriminatory purpose is not presumed, rather Hardy must show a "clear and intentional discrimination" by the Collector. *Id*. The Supreme Court of Indiana has even gone so far as to say that they will not even consider the question of equal protection unless the facts are properly pled and show a fixed and continuous policy of unjust discrimination on the part of the municipality. *Schmidt v Indianapolis*, 168 Ind. 631, 636 (Ind. 1907).

Hardy has made no allegation that the clerk intentionally refused to tell her that her property was previously sold at a tax sale. Nor does Hardy claim that there has been a claim of a continuous policy of unjust discrimination by the Collector. Hardy merely alleges that there was one time when the Collector didn't tell her that her property had been sold at a tax auction; a fact that she already knew or should have known but for her refusal to claim her certified mail. Even if Hardy was not

informed of her right and others were, without the presence of intentional and purposeful discrimination there is no equal protection violation. Finally, mere laxity in the administration of a law is not a violation of equal protection, so even if some people are informed that their property has been sold while others are not, there is no equal protection violation because there is no intentional discrimination. *Sims v. Cunningham,* 203 Va. 347, 352 (Va. 1962) , cert den 371 US 840 (U.S. 1962).

Finally, Hardy points to cases to support her argument, but these cases can all be distinguished from the facts presented in this case. Plaintiff cites to *James v Mullen,* 854 S.W.2d (Mo. App. W.E. 1993), but the issue in that case was whether or not Section 140.405 RSMo required the purchaser of the property at a tax sale to notify the owner of the property of their right of redemption. *Mullen* at 578. The court held that the purchaser was required to notify the owner via certified mail and that his failure to do so constituted a denial of the owner's due process rights. *Id*. At 579. The court does not address, nor is there any claim of an equal protection violation. *Id*.

In *Allegheny Pittsburgh Coal Co. v. County Com*., 488 U.S. 336, (U.S. 1989), the court concluded that the Webster County West Virginia assessor systematically and intentionally discriminated against the petitioners [emphasis added] in that case. The judge concluded that the tax assessments for the

petitioners were, over the years, dramatically in excess for those of comparable properties and that the assessor did not compare the various features of real estate of petitioners to that of others with a much lower assessed rate. *Id* at 339-340. The assessments were not based on the presence of economically minable or removable coal, oil, gas, etc as compared to neighboring properties, nor based upon the present or immediately foreseeable economic development of the real estate. *Id*. The only basis of the assessment, according to the assessor, was the consideration declared in the petitioners deed. *Id*. This approach systematically produced dramatic differences in the valuation of petitioners real estate and otherwise comparable land. *Id*.

In *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484 (N.C. Ct. App. 1995), the court found a distinction between the property of the plaintiff and all other intangible property assessed in Wake County for the tax year of 1990. *Id*. The total assessed value of all other discovered intangible property in Wake County for the tax year 1990, other than the $12,827,900.00 attributable to plaintiff's engineering drawing, was $2,414,926.00. Thus, plaintiff's engineering drawings resulted in payments on an assessed value more than twenty-seven times greater than the total amount paid by all other businesses on intangible property in Wake County combined. *Id*. The court determined this amounted to intentional and arbitrary discrimination. *Id*.

In *Willowbrook v. Olech*, 528 U.S. 562 (U.S. 2000) the Village was demanding a 33 foot easement to furnish water to Olech when they only required a 15 foot easement from others. Olech asserted that the Village's demand was actually motivated by ill will resulting from the Olechs' previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive Olech of her rights or in reckless disregard of her rights. *Id*. at 563, 565. The court recognized "class of one claims" where the plaintiff alleges he/she has intentionally been treated differently from others similarly situated. *Id*. at 654. This case is distinguishable because Hardy does not allege that she was intentionally treated differently from others. In fact, Hardy has no facts as to how others similarly situated were treated by the Collector.

In Summary, the Collector has no duty to inform taxpayers that their property has been sold. It was Schlereth's responsibility to notify Hardy of her redemption rights under Section 140.405 RSMo, which he did. Further, Hardy has not alleged that she was intentionally treated any differently from anyone in the Collector's office. Thus, there has been no violation of the Equal Protection Clause.

CONCLUSION

For the reasons set for above, Appellant, James Schlereth respectfully requests that this Court follow it's language in *Elliot* and reverse the trial court's

judgment because the delivery of the certified letter to Respondent's actual physical address meets all the requirements of due process where Respondent simply failed to claim the letter at her last known available actual physical address [emphasis added].

Appellant, James Schlereth, respectfully requests that this Court affirm the trial court's judgment denying Respondents Second Motion for Summary Judgment based on all other arguments because Schlereth has strictly complied with all of the relevant statutes. The Collector's Deed is valid because the County Clerk has the discretion to delegate certain duties to her deputy clerk, including the witnessing of deeds and because Schlereth paid all of the taxes that had accrued on the property. Those taxes paid by Hardy had not accrued and Schlereth was not required to pay them. Finally, there has been no equal protection violation because there has been no intentional differential treatment between Hardy and any other taxpayer.

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CERTIFICATE OF SERVICE

A copy of this Appellant's Brief, and a CD containing this brief, were mailed first class, U.S. Mail, postage pre-paid on January 15, 2009 to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellant's Reply Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count and line count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,638 and that the total number lines of monospaced type in the brief is 418, exclusive of the cover, signature block, and certificates of service and compliance.

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