SUPREME COURT OF MISSOURI

No. SC94969

SONYA M. LONG,

Respondent,

vs.

NEENA HARDIN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
THE HONORABLE COLLEEN DOLAN, JUDGE,
ON TRANSFER FROM MISSOURI COURT OF APPEALS EASTERN DISTRICT

SUBSTITUTE BRIEF OF RESPONDENT SONYA M. LONG

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of Appeals transferred on its order after an opinion of the Court of Appeals however the record does not demonstrate that this case involves issues of general interest or importance, warrants reexamination of existing law or that the opinion of the Court of Appeals is contrary to a previous opinion of another Court of Appeals decision as required by Rules 83.02 and 83.04, Mo. R. Civ. P.

STATEMENT OF FACTS

This appeal arises from the trial court's denial of Appellant Neena Hardin's Motion to set aside a post-judgment sheriff's sale of residential real estate. The sale was conducted pursuant to a final judgment in partition of 2034 Sun Valley Drive, St. Louis, Missouri, 63136. No hearing was requested by Appellant on her Motion to set aside the sale, and therefore the only facts before this Court are those set out in the Judgment of the trial court. (L.F. 12-15).

The facts found by the trial Court were that in1973 the Sun Valley residence was purchased by Respondent, Sonya Long, her then husband, Richard Moore, and her mother, Glorious Hardin. Sonya, Richard and Glorious purchased the property with a thirty year loan and Sonya made all of the payments on the deed of trust, insurance and taxes for the first twenty two of the thirty year loan, the first twenty directly to the lender and then for two years more through a Chapter 13 bankruptcy. (L.F. 13, 14). Sonya was eligible to liquidate her debts in a Chapter 7

case but in order to save the home; she paid payments to the trustee in her Chapter 13 case for the home loan payment on Sun Valley. (L.F. 13, 14).Improvements to the home through 1992 were made by Sonya and her mother.

Neena Hardin did not pay for any improvements. (L.F. 13). During twenty two years of the thirty year loan Hardin made no payments to the note, principal, interest, utilities or improvements. No improvements were paid for by the parties after 1992 and Hardin failed to produce any documents evidencing that she ever made any payments for the deed of trust, taxes or insurance. (L.F. 13).

There was no evidence of when Hardin moved into the property but only that Glorious deeded her one half interest in the property to her daughters, Sonya and Neena in 1991 (L.F. 13).

Sonya paid the note, taxes and insurance for twenty two years of the thirty year loan. In 2010, Hardin founded Diamondz in the Ruff, an adult "entertainment" business she operated out of the home without paying rent. (L.F. 13).

In 2011, Neena refused an offer to buy out Sonya's interest or sell the property. When Neena refused, Sonia filed a petition in July, 2011, asking the court to partition the propety. Neena filed an answer and delayed hiring an attorney for eight months. Two discovery sanction motions were required befor she provided requested documents and the case was not tried until January 7, 2013. The partition judgment entered March 13, 2013 contained the order that the

property be sold.

On April 13, 2013 Neena filed her Notice of appeal. An appeal bond ordered by the court was never filed. (All times above are set out in L.F. 2-5).

Docket entries in the first appeal ED99323 show that the legal file was ordered and filed late, no transcript was ordered within the required time and the Notice of Appeal was deemed filed out of time. (Resp. Appendix 2). After two dismissal notices and an order to show cause, the Court of Appeals dismissed the Appeal and on December 3, 2013 issued its mandate finalizing the partition judgment and sale order. (Resp. Appendix 2).

The Trial Court's judgment in the partition action included the order of sale in accordance with Rule 96.19 (Mo. R. Civ. P.). It divided the proceeds of any sale 2/3 to Respondent, Sonya Long and 1/3 to Appellant, Neena Hardin.

Appellant knew about the order of sale because she filed the appeal that was later dismissed. The parties were given notice of the mandate and the judgment became final (Resp. Appendix 2). In January 2014 the trial judge then sent the sheriff an execution titled "Order of Sale" which reiterated the order of sale included in her final judgment, and authorized the Sheriff to proceed with the sale. The St. Louis County Sheriff complied with all publication and other requirements of Rule 96.19 and conducted a public sale of the property at the Courthouse in accordance with the final judgment and statutory requirements to the highest

bidder (Resp. Appendix 11).

Thereafter, appellant filed a motion with the trial court to set aside the sheriff's sale and order a new sale. (L.F. 29-31) Appellant did not present any evidence, request an evidentiary hearing or request findings of fact or conclusions of law. The trial Court denied appellant's motion. (L.F. 35) The assertion by Appellant that there were undisputed facts is at best inaccurate. Appellant's Motion to set aside the Sheriff's sale states that the trial Court allowed an ex parte hearing on a proposed order of sale in January, 2014. That is not the case. The appeal was dismissed and in December, 2013 the Eastern District issued its mandate affirming the Partition Judgment and Order of Sale. Thereafter the attorneys discussed that the sheriff would go forward with the sale.

The "order" to the sheriff to which Appellant objects was an execution, a ministerial, administrative action by the Judge after final appeal directing the sheriff to proceed with the sale ordered in her Judgment.

The order of sale was set out in the Court's March13, 2013 Partition Judgment which appellant appealed in 2013, *Long V. Hardin*, ED99923. (Respondent's Appendix 2).

POINTS RELIED ON

I

APPELLANT'S APPEAL SHOULD BE RETRANSFERRED TO THE COURT OF APPEALS TO REINSTATE ITS OPINION BECAUSE TRANSFER OF THE CASE WAS IMPROVIDENTLY GRANTED IN THAT APPELLANT HAS FAILED TO DEMONSTRATE THAT THE CASE INVOLVES ANY QUESTION OF GENERAL INTEREST OR IMPORTANCE, THAT THERE IS EXISTING LAW THAT NEEDS TO BE REEXAMINED OR THAT THE OPINION BELOW IS CONTRARY TO A PREVIOUS APPELLATE OPINION AND THERE IS NO RECORD PRESERVED FOR APPEAL.

Mo. R. Civ. P. 83.02;

Mo. R. Civ. P. 83.04;

Mo. R. Civ. P. 83.09;

Pope v. Pope, 179 S.W. 3d 442, 450 (Mo. App. WD, 2005);

MAI 2.01 (2), (3).

II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SET ASIDE THE SHERIFF'S SALE OF THE PARTIES' PROPERTY AND ORDER A NEW SALE IN THAT THE ORDER OF SALE WAS MADE IN THE ORIGINAL JUDGMENT WHICH BECAME FINAL

WHEN APPELLANT'S FIRST APPEAL WAS DISMISSED AND THE INSTRUCTIONS TO THE SHERIFF TO PROCEED WITH THE SALE OF THE PARTITIONED PROPERTY AFTER THE FINAL JUDGMENT DID NOT CONSTITUTE A NEW MATTER REQUIRING A MOTION AND HEARING AS IT MADE NO CHANGE IN THE COURT'S FINAL JUDGMENT AND WAS INSTRUCTION TO THE SHERIFF TO EXECUTE ON THE JUDGMENT.

DiLeo v. Hunter, 505 S.W.2d 112 (Mo.App. 1974);

Long v. Hardin, ED101612, March 10, 2015 (Resp. Appendix 5);

Plant v. Plant, 825 S.W.2d 674 (Mo.App. 1992);

Sangamon Assoc. v. Carpenter 1985 Family, 165 S.W.3d 141 (Mo. 2005);

MO. R. CIV. P. 96.19

MO. R. CIV. P. 55.26(a)

III

THE TRIAL COURT PROPERLY EXERCIZED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO SET ASIDE THE SHERIFF'S SALE BASED ON THE PURCHASE PRICE IN THAT THE SALE WAS PROPERLY CONDUCTED BY THE SHERIFF, APPELLANT WAS AWARE THAT THE JUDGMENT CONTAINED AN ORDER OF SALE, AND APPELLANT PRODUCED NO EVIDENCE OF FRAUD IN THE CONDUCT OF THE SALE AND NO

EVIDENCE OF THE PRICE THE PROPERTY SHOULD HAVE BROUGHT IN A JUDICIAL SALE.

Boatmen's Bank of Jefferson County v. County Interiors, Inc., 721 S.W. 2d 72, 78(Mo. App. ED 1986;

Borchers v. Borchers, 352 Mo. 601, 179 S.W.2d 8, 12 (1944));

City of St. Louis v. Peck, 319 S. W. 2d 678, 684 (Mo. App. 1959);

Swift v. Federal Home Loan Mortgage Corporation, 417, S.W. 3d 342, (Mo. App. 2013.

MO. R. CIV. P. 96.19;

ARGUMENT

I

APPELLANT'S APPEAL SHOULD BE RETRANSFERRED TO THE COURT OF APPEALS TO REINSTATE ITS OPINION BECAUSE TRANSFER OF THE CASE WAS IMPROVIDENTLY GRANTED IN THAT APPELLANT HAS FAILED TO DEMONSTRATE THAT THE CASE INVOLVES ANY QUESTION OF GENERAL INTEREST OR IMPORTANCE, THAT THERE IS EXISTING LAW THAT NEEDS TO BE REEXAMINED OR THAT THE OPINION BELOW IS CONTRARY TO A PREVIOUS APPELLATE OPINION AND THERE IS NO RECORD PRESERVED FOR APPEAL.

Transfer to this Court generally is an extraordinary remedy. In cases in which the Supreme Court does not have original jurisdiction Transfer should only be granted in specific cases. Under Rules 83.02 those are cases involving questions of general interest or importance or for reexamining existing law.

While this case is of importance to the parties, their situation is unique to the facts of this case. Appellant does not argue and the record does not demonstrate an issue of general interest or importance. Nor does Appellant's brief or the record mention any law which Appellant claims should be reexamined. As in most appeals her argument is that the trial Court abused its discretion not that any applicable law should be reexamined or changed. Appellant just wants a different outcome.

The other ground for this Court to transfer a case is if the opinion below conflicts with a previous decision of an appellate court of this state. Rule 83.04. There is no argument raised by Appellant demonstrating that the opinion below states law that is contrary to another appellate holding. Appellate agrees on the law but wants another chance to have this Court second guess the trial Court that has lived with this case for four years and the Court of Appeals that has considered the law and equities in two separate appeals. Appellant disagrees with the Court of Appeals application of case law to the facts of this case and not that the opinion stated law which conflicts with another appellate decision.

In considering the propriety of transfer, the Court should also consider whether any issue is preserved for its review. *Pope v. Pope*, 179 S.W. 3d 442, 450 (Mo. App. WD, 2005). In this case there were no facts preserved and most "facts" cited by Appellant were mere allegations in her unverified Motion.

The record, consisting only of a legal file, contains no testimony or evidentiary support for Appellant's motion to set aside the sheriff's sale. No hearing was requested to present any evidence to back up the factual allegations of her motion. It is well established law that the statements of counsel are not evidence. Appellant's record and statement of facts contain little else.

There is no testimony in the record to support Appellant's "facts" concerning the ages of parties, who resides in the home or the circumstances under which the order of sale went to the sheriff. They are merely allegation made in the Motion to set aside the sale. Pages 29-31 of the Legal file contain only Appellant's Motion. Appellant never requested an evidentiary hearing and did not seek to present any evidence to the trial court during the hearing on her Motion to Set Aside the sale. The allegations in the Appellant's motion are not evidence. Just as jurors are instructed that the oral statements of counsel are not evidence, statements of counsel in a Motion are not evidence. MAI 2.01 (2), (3). No evidence was presented to the trial Court in support of Appellant's motion. No proper record on

appeal has been preserved for this Court's consideration and, therefore Appellant's appeal should be dismissed or denied.

For the foregoing reasons it is most respectfully submitted that the transfer of this case was improvidently granted and that the case should, under Rule 83.09, be returned to the Court of Appeals to reinstate its opinion.

II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SET ASIDE THE SHERIFF'S SALE OF THE PARTIES' PROPERTY AND ORDER A NEW SALE IN THAT THE ORDER OF SALE WAS MADE IN THE ORIGINAL JUDGMENT WHICH BECAME FINAL WHEN APPELLANT'S FIRST APPEAL WAS DISMISSED AND THE INSTRUCTIONS TO THE SHERIFF TO PROCEED WITH THE SALE OF THE PARTITIONED PROPERTY AFTER THE FINAL JUDGMENT DID NOT CONSTITUTE A NEW MATTER REQUIRING A MOTION AND HEARING AS IT MADE NO CHANGE IN THE COURT'S FINAL JUDGMENT AND WAS INSTRUCTION TO THE SHERIFF TO EXECUTE ON THE JUDGMENT.

Standard of Review.

In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. *banc* 1976). To set aside a judgment as "against

the weight of the evidence," an appellate court must have a firm belief that the judgment is wrong. *Id*.

Argument

In *White v. Director of Revenue*, 321 S.W.3d 298, 307–08 (Mo. *banc* 2010) the Court further stated that it is only when the evidence is uncontested that no deference is given to the trial court's findings.

In this case there was no evidence presented, let alone uncontested evidence. Evidence is uncontested in a court-tried case when the issue before the trial court involves only stipulated facts.

There was no stipulation of facts concerning the order of sale and deference should be given to the trial court that heard all of the testimony during the trial, handled post trial motions, assessed the credibility of witnesses and weighed the equities in declining to set aside the sheriff's sale. The confirmation or rejection of a public sale in a partition action is within the sound discretion of the trial court. *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141, 144 (Mo. banc 2005). This decision is not disturbed on appeal unless there is a manifest abuse of discretion. *DiLeo v. Hunter*, 505 S.W.2d 112, 114 (Mo.App.1974). The Court of Appeals decision now transferred correctly held that Hardin did not present to the trial court her claim that a separate motion under

Rule 55.26 was required before authorizing the sheriff to execute on her partition judgment. *Long v. Hardin,* Ed10162, March 10, 2015 (Resp. Appendix 5).

The only issue for Appellate review was Hardin's conclusory assertion that she should have been notified when the Sheriff's order was sent by the trial court.

Appellant claims that she was not notified that the Court would enter an order of sale. That is not the case. This case is analogous to the case of *Plant v. Plant*, 825 S. W. 2d 674, (Mo. App. S.D. 1992). In *Plant*, as in this case, the Court in a partition judgment entered an order of sale as part of its judgment. (L.F. 12-15). In this case like *Plant* the Court's judgment found that the property could not be divided in kind and entered its order for the sale of the real estate pursuant to Rule 96. (L.F. 13, 14). *Plant*, Id at 676.

Appellant certainly knew about that judgment as she filed an appeal of the judgment in *Long V. Hardin*, ED99923 (Resp. Appendix 2).The Court of Appeals advised the parties of the dismissal of that appeal and upon issuance of its mandate Hardin's attorney knew the Court was then free to proceed with the sale it had previously ordered.

The Order authorizing the Sheriff to proceed with the sale merely reiterated Court's judgment in accordance with Rule 96.19. It did not change anything about the final judgment and did not grant any party new relief. Contrary to appellant's claims it was not a new matter and did not require notice or a hearing. It was an

execution on the Court's partition judgment. It did not change the terms of that judgment and made no new orders affecting the rights of the parties. Interestingly, although Appellant's attorney claims he should have had the right to be heard before the Court sent the order to the sheriff, nowhere does he state that the order of sale violated any statute, court rules, or the Court's final judgment.

Appellant does not claim that there was any way in which the language of the order that went to the sheriff should have been changed. The Court of Appeals noted that, "Hardin does not allege that the order of sale document sent to the Sheriff was in any way defective or that a particular modification or condition was necessary to protect her interest at the sale." *Long v. Hardin*, ED101612 (Resp. Appendix 5).

Appellant's real complaint is that because she did not bother to exercise any diligence she was unaware of the sheriff's sale of the property. The St. Louis County Sheriff published notice of the sale in The Countian for four consecutive weeks, starting January 24, 2014 and ending on February 14, 2014. The sale was March 13 2014. (Resp. Appendix 11).

Hardin's complaint is directly addressed in *Plant* where the appellant requested that a sheriff's sale be set aside, complaining that he did not have notice of the sale other than the required publication.

In *Plant* as in this case there was no allegation that the published notice did not comply with the requirements of Rule 96. The *Plant* Court stated that the partition sale conducted by the Sheriff is not a proceeding separate from the partition case to which *Plant* was a party. As a party, the appellant was served with process at the inception of the suit and, after being properly summoned, "…was charged with notice of all subsequent proceedings" even if no actual notice was received. *Plant,* Id at 679.

That being the case, Appellant, like Robert Plant, "had notice that the real estate was to be sold', and that the sale would be conducted by the county sheriff.

The *Plant* court went on to say, "Robert was a party to the partition action. He had actual knowledge that the real estate would be sold and that the sheriff of Barry County would sell it." A telephone call to the sheriff could have provided the sale date. It was appellant's responsibility to monitor the appropriate newspapers in his county which would have given the particulars concerning the sale. *Plant* , Id 680.

The court pointed out that the flow of information that was available after Plant became a party to the partition action amounted to "actual Notice" and, like Plant, Hardin in this case cannot complain when her lack of knowledge was the result of failing to keep herself apprised of the status after the sale was ordered in

the partition judgment. *Plant*, supra at 680, *Missouri Highway & Transportation Commission v. Myers*, 785 S. W. 2d 70, 75 (Mo. Banc 1990).

Even had Hardin properly raised the issue in the trial court, action of the trial judge in sending her order to the Sheriff was not a new issue to be raised by a motion which required a notice or hearing under the Missouri Rules of Court. It was a ministerial action, authorizing the sheriff to proceed to execute on the order of sale already included in the partition judgment.

In this case, the trial Court correctly overruled Hardin's motion that the Sheriff's sale be set aside.

There was no abuse of discretion or error in the trial court's judgment or the Court of Appeals opinion affirming it. There is no existing law that should be reexamined. Appellant's position would create confusion and change to existing Court Rules creating a requirement that every execution on a judgement require a new motion and hearing before execution orders are delivered to a Sheriff to enforce the terms of a final judgment.

III

THE TRIAL COURT PROPERLY EXERCIZED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO SET ASIDE THE SHERIFF'S SALE BASED ON THE PURCHASE PRICE IN THAT THE SALE WAS PROPERLY CONDUCTED BY THE SHERIFF, APPELLANT WAS AWARE THAT THE JUDGMENT CONTAINED AN ORDER OF SALE, AND APPELLANT PRODUCED

NO EVIDENCE OF FRAUD IN THE CONDUCT OF THE SALE AND NO NEW EVIDENCEOF THE PRICE THE PROPERTY SHOULD HAVE BROUGHT IN A JUDICIAL SALE.

The confirmation or rejection of a public sale in a partition action is within the sound discretion of the trial court. *Borchers v. Borchers*, 352 Mo. 601, 179 S.W.2d 8, 12 (1944). Inadequacy of price alone is not a sufficient ground for refusing to confirm a public sale. Should the price be inadequate and should there be circumstances attending the sale tending to cause such inadequacy, or where the rights of infants are jeopardized, the general rule does not apply" *Borchers*, 179 S.W.2d at 12.

In this case there was no evidence that either Sonya or anyone else did anything to influence or taint the sale process. The sheriff conducted the sale in accordance with his published notice and the requirements of law. Sonya Long was the high bidder and thus purchased back her home after many years of having been denied the use of the property or her equity.

In claiming that a sale can be set aside if the price amounts to a "sacrifice," appellant cites *Koester v. Koester*, 543 S.W.2d 51, 55 (Mo.App.1976). *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141, 144-145 (Mo. 2005). Neither of those cases was one in which an arguably low sale price resulted in the Court setting aside a sale. The only case in which the appellate court reversed the trial

judge was *Sangamon*, supra. In that case the trial judge set aside the Sheriff's sale and negotiated his own price, leading to a reversal.

The *Sangamon* Court reversed, holding that it was inappropriate for the trial judge to change the public partition sale price. *Sangamon*, Id 145.

The courts have long held that the price that one can expect at a forced sale may differ markedly from a market price. The test of adequacy of a judicial sale is the price received in comparison with what the property would bring in fair sheriff's sale. *City of St. Louis v. Peck*, 319 S. W. 2d 678, 684 (Mo. App. 1959).

In this case appellant did not offer any evidence that the property was not sold in a fair manner or that another sheriff's sale would have resulted in a different price. The sale here was conducted fairly and lawfully.

The judge below had tried the case, judged the credibility of the parties and their circumstances. As there were no requested findings, we do not know how those factors were evaluated in denying Appellant's motion to set aside the sale. What we can tell from the record is that this case was filed July 7, 2011. Appellant delayed getting an attorney and only hired one eight months after service when a motion for sanctions was filed due to her refusal to respond to discovery. A second motion was required for discovery when the attorney did not respond, the result being that the case was not tried until January, 2013. (L.F. 2-4).

After the Judgment was entered, March 13, 2013 Appellant appealed filing her Notice of Appeal on April 23, 2013. (L. F. 2, 3). After she continuously missed filing dates and ignored orders to show cause the Court of Appeals dismissed that appeal in October, 2013 and sent its mandate to the trial court December 5, 2013 (L.F. 5), (Resp. Appendix 5).

Appellant continues to live in the home to the exclusion of her sister, Sonya. She pays no rent or mortgage. She had refused the opportunity to buy out Sonya's interest or place the property for sale. She refused the opportunity she was given in the judgment to work for an orderly market sale of the home. (L.F. 13, 14). Living in the home rent free for the 40 months from the filing of the lawsuit to date, not to mention living rent free for years before certainly demonstrates that she has not been denied fair compensation for her interest which she had received as a gift. At the sheriff's sale in this case, Sonya purchased her home from which she had been denied the use and benefit for many years. The sale was conducted fairly. Both the published notice and conduct of the sale were strictly in accordance with law. Appellant relies on a party's opinion testimony at trial that the house was worth $65,000. There was no appraisal or expert testimony and the value was not in issue in the trial Court.

Appellant ignores well established law that a sale below market value is not sufficient grounds to set aside a judicial sale. To set aside a sale, evidence of an

low sale price generally must be accompanied by substial evidence that, for example, the sale was held at an unusual hour, the trustee abused his discretion in exercising his power of sale, or there was unfairness or partiality in the conduct of the sale, and that the complaining party suffered harm as a result. If a sale is "fairly and lawfully conducted, without fraud and partiality and with full opportunity for competitive bidding," a low sale price alone will not justify setting aside a foreclosure sale. *Boatmen's Bank of Jefferson County v. County Interiors, Inc.*, 721 S.W. 2d 72, 78(Mo. App. ED 1986. The measure of adequacy is the price the property would have brought in a fair judicial sale. Appellant offered no evidence in the trial court that another judicial sale would bring a different price or any additional interested buyers.

In this case the Appellate Court recognized that Hardin presented absolutely no evidence that there was any fraud or irregularity in the conduct of the sale and has in fact admitted just the opposite. There was no evidence that there was any collusion or deceit in the sale. *Long v. Hardin*, ED101612. (Resp. Appendix 5).

This case is analogous to *Swift v. Fed. Home Loan Mortgage Corp*., 417 S. W. 3d 342 (Mo. App. 2013). In *Swift* the home had been partitioned following a divorce. The evidence of value was that after the divorce wife had obtained a mortgage of $97,000.00. That mortgage was wiped out by the purchase of the home by Federal Home Loan for $1.00. Husband filed an action for Partition and

the *Swift* trial court ruled that Fed only purchased half and ordered the partition sale. We do not know if there was any other bidder in the *Swift* Sheriff sale but the facts were that husband bought the property at the sale for $1,000. In a properly conducted sale in that case no bidder thought a $97,000 plus home in that sale was worth more than $1,000.

Swift held, "…the measure of adequacy in a judicial sale is the price received in comparison with what the property would bring in a fair sheriff's sale." *Swift*, Id. 345. The court found in that case as in this, the sale was fair.

Swift further explained, ""Property sold at a sheriff's sale will not normally sell for a price approaching its fair market value. Factors to be considered in determining what price a property will bring at a fair sheriff's sale include the fact that the buyer is taking the property subject to any encumbrances, as-is structurally, and with the risk of legal processes needed to secure title." Id. at 345. In the *Swift* case as in this there was no known encumbrance at the time of the sale. There was no evidence offered to the court of what price could be expected at a judicial sale.

Hardin like *Swift* relies on a claim that the market price made the bid received in the Sheriff's sale inadequate. In both sales no one was willing to bid more than the person who purchased the property. As both sales were admittedly

fair and properly conducted the price bid is really the only evidence of what a fair sheriff's sale would bring.

In this case the property was properly advertised over four weeks, a fact admitted to by Appellant. (Resp. Appendix 11). In St. Louis County there are usually numerous speculators who attend and bid at judicial sales. In this case none deemed the property worth purchasing.

The factors outlined in *Swift* give us insight as to why. A review of the court record told them that the property was occupied by someone who had not contributed to its purchase, was unwilling to move, and instead of agreeing to a sale by a realtor, dug in her heels dragging out litigation rather than preparing to move. She refused to cooperate to maximize the price with a non-judicial sale.

It would be unrealistic for a prospective buyer to expect her cooperation in vacating the property at the request of a new purchaser. It would not have taken much sophistication for potential buyers to realize that Hardin drug this case out through delays and meritless appeals for over four years, and that a purchaser could expect similar delays and costly litigation.

Potential bidders would also, as noted in *Swift*, weigh the likely condition of the home. The property had for some time been used by Hardin to conduct her Diamondz in the Ruff adult entertainment business. (L. F 13). Buyers likely realized that the property would not be left clean and neat after having to evict its

occupants. The probability that it would be left in deplorable shape was a realistic expectation in this case. The existence of those factors in this case resulted in the decision of the marketplace that the property had no value at the sale. That is the best evidence. The price it brought in this sale is the best evidence of its value in a fair sale as this sale was fair and conducted by the book. Sonia Long has followed all the rules and Hardin none.

Appellant is not urging this Court reexamine existing law but urging this court to change the law. Her position seems to require the Court to say how much enough is when a judicial al occurs. How can the court say what price is right? Would it be ten percent, twenty, fifty?

Sonya Long attended the sale not knowing if there would be several bidders or one. She made an offer that was the highest. The trial Judge rightly weighed the facts and equities and most reasonably exercised her discretion to overrule Appellant's motion to overturn the sheriff's sale.

In this case the injustice, if any has been to Sonya Long. Sonya has complied with all rules and directions of the Court while Hardin has been dilatory and has now managed to drag this litigation out into a fifth year while she continues to reside in the home free of charge. The record is clear that Hardin did not make any payments on the thirty year mortgage on the house while Sonya made the

paymentsd of the principle, taxes and insurance for at least twenty-two of the thirty year term. (LF 13-14).

Sonya has had to pay house payment for her residence throughout this litigation while Hardin has used the house primarily paid for by Sonya at no cost. Assuming a conservative monthly rent or house payment of $800 in north St. Louis County, Hardin has received $32,000 in free housing costs just while the case has been pending and has been allowed to operate her Diamondz in the Ruff adult "entertainment" business at the property rent free. (L.F. 13).

How then does the relief requested by Hardin not work an inequitable, unjust and unconscionable result for Sonya?

Can the Court require Hardin to repay Sonya for real estate taxes she has paid since the judgment? Who would request a new sale and pay the publication costs? Neena is comfortable and has demonstrated no willingness to move. She certainly will not initiate a sale.

The partition judgment allowed the parties the opportunity to list the property with a realtor which would have brought a sale of the home at an arm's length transaction at a value that reflected the actual market. Hardin refused to do so preferring her established pattern of delay. To require Sonya to wait for another period of time, spend additional money for publication costs and attorney fees when she has done nothing wrong would be the real miscarriage of justice.

It is respectfully submitted that this case contains no issues of general interest and does not require the reexamination of existing law.

The trial court weighed the law, evidence, and the history of the case properly and fairly in overruling Hardin's Motion to set aside the sale. The Appellate Court recognized that there was no abuse of discretion in her ruling.

In light of the foregoing, the trial court did not abuse its discretion in refusing to set aside the sheriff's sale and order a new sale to take place.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should affirm the trial court's judgment and order denying Appellant's motion to set aside the sheriff's sale.

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06(b)

The undersigned hereby certifies that on the 12 day of October, 2015, a true and correct copy of the foregoing brief was sent through the Court's electronic filing system, to attorney of record got Appellant:

THOMAS R. CARNES,
3827 Gustine Avenue
St. Louis, Missouri 63116

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,983 words. The undersigned further certifies that an electronic message copy of the brief has been filed with the Court and served on Appellant's Attorney simultaneously.

/s/ *Cyntyhia S. Holmes*