**IN THE SUPREME COURT OF MISSOURI**

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| **STATE EX REL. ASHBY ROAD PARTNERS, ET AL.,** | ) | |
| **Relators/Appellants,** | ) | |
| **vs.** | ) | **No. SC89529** |
| **STATE TAX COMMISSION OF MISSOURI,** | ) | |
| **Respondent.** | ) | |

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**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI**

**THE HONORABLE PATRICIA S. JOYCE, JUDGE**

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# SUBSTITUTE BRIEF OF APPELLANTS

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## JURISDICTIONAL STATEMENT

The appellants/relators are commercial property owners in St. Louis County who filed appeals from their property tax assessments based solely on discrimination before the State Tax Commission of Missouri. They brought this action in the Circuit Court of Cole County, seeking a writ prohibiting the Commission from enforcing its order requiring the appellants to produce in discovery and provide at trial proof of the market value of their properties. The Circuit Court of Cole County had jurisdiction over the writ proceeding. *State ex rel. Missouri State Bd. of Pharmacy v. Admin. Hearing Comm'n*, 220 S.W.3d 822, 825 (Mo. App. 2007); *State ex rel. Mississippi Lime Co. v. Missouri Air Conservation Comm'n*, 159 S.W.3d 376, 381 (Mo. App. 2005).

The Commission filed its answer to the writ petition before the circuit court entered an order on the petition. On July 3, 2007, after the parties submitted briefs and the circuit court heard arguments on the issues, the court entered its order and judgment denying relators' petition for a writ on the merits. L.F. 196. The court's judgment was final and appealable. *Delay v. Missouri Bd. of Probation & Parole*, 174 S.W.3d 662, 664 (Mo. App. 2005); *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971). Relators timely filed their notice of appeal on July 27, 2007.

Jurisdiction was proper in the Missouri Court of Appeals, Western District, pursuant to Article V, Section 3, of the Missouri Constitution and section 477.070 RSMo. On June 24, 2008, the Court of Appeals entered its opinion dismissing the appeal, based on its finding that the trial court's order was void. This Court entered its order granting transfer on September 30, 2008.

## STATEMENT OF FACTS

This appeal arises from an order entered by the State Tax Commission in the relators/appellants' ("the Taxpayers") commercial real property tax appeals. The Taxpayers each filed a Complaint for Review of Assessment challenging the St. Louis County Assessor's assessments of their commercial properties solely on the grounds of discrimination. The Taxpayers alleged that in 2003 and 2004, their properties were assessed at a greater percentage of true value than other commercial properties in the same taxing jurisdiction. L.F. 14-97. Their Complaints showed that the Board of Equalization had reviewed the Assessor's assessment and valuation of each property. In most cases, the Board determined that no correction or adjustment was necessary. L.F. 14-97. In two cases the Board lowered the Assessor's value and assessment. L.F. 42-43, 58-59.[1]

The Taxpayers' did not challenge the valuations assigned to their properties by the Assessor and the Board of Equalization. In each case, the Taxpayers agreed with the "true value" that the Assessor and/or the Board assigned. L.F. 14-96.

On June 26, 2006, Hearing Officer Luann Johnson entered an order directing the parties to stipulate to a "lead case" for resolution of the tax appeals. L.F. 99. Her order

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[1] Several appeals in the Commission were dismissed before the writ proceeding was initiated in the Circuit Court, and those dismissed cases were inadvertently listed in the case caption. L.F. 132, 143. After this appeal was filed, three more discrimination-only appeals were dismissed.

stated that "the issue of market value will be determined in this lead case, either by hearing or by stipulation, before we proceed to the issue of discrimination." L.F. 99. The Taxpayers filed a motion objecting to this order. They argued that the market value of their properties was not at issue because they had agreed with the "true value" assigned to the properties, and their tax appeals were based solely on discrimination. L.F. 101. They argued that it would not be an economical use of the Commission's resources to require proof of value, because a ratio study could prove the average level of assessment in the County and thereby prove the issue raised in the tax appeals. L.F. 101. The Taxpayers further argued that section 138.060, RSMo, prohibits the Assessor from advocating a value for the property that is higher than the "true value" he has assigned. L.F. 101. Section 138.060 states, "At any hearing before the state tax commission . . . of an appeal of assessment from a first class charter county . . . , the assessor shall not advocate nor present evidence advocating a valuation higher than that value finally determined by the assessor or the value determined by the board of equalization, whichever is higher, for that assessment period." § 138.060.1 RSMo; Appendix ("App.") at A-17. The Taxpayers requested that the order be amended to state that a lead case would be designated for nominal purposes only, because proof of the average level of assessment was necessary. L.F. 102.

Hearing Officer Johnson rejected the Taxpayers' arguments and denied their motion to amend. L.F. 104; App. at A-13. The Hearing Officer concluded that a ratio study would be a "useful tool" to determine the average level of assessment, but "standing alone," the ratio study would neither prove nor disprove discrimination. L.F.

105; App. at A-14. She further concluded that "nothing contained within Section 138.060, RSMo limits an Assessor's ability to use valuation evidence to defend against a claim of disparate treatment." L.F. 107; App. at A-16.

The Taxpayers timely filed a motion for reconsideration of the Hearing Officer's order, seeking the full Commission's review. L.F. 109. The Taxpayers again argued that Missouri law prohibited the use of valuation evidence to show a higher value of their properties than that assigned by the Assessor and found by the Board of Equalization. L.F. 116.

The Commission affirmed the Hearing Officer's order. L.F. 120; App. at A-9. The Commission held that, to prove their discrimination claims, the Taxpayers were required to first prove the market value of their properties "in order to determine the percentage of true value at which it is being assessed." L.F. 121; App. at A-10. The Commission stated:

> In order to obtain a reduction in assessed value based upon discrimination, the Complainants must (1) prove the true value in money of their property on tax day. *Koplar v. State Tax Commission*, 321 S.W.2d 686, 690 (Mo. 1959); and (2) show an intentional plan of discrimination by the assessing officials resulting in an assessment of that property at a greater percentage of value than other property, generally, within the same class within the same taxing jurisdiction. *Koplar*, supra, at 695. Complainants must first establish the market

value of their property in order to determine the true value at which it is being assessed.

L.F. 121; App. at A-10. The Commission recognized "a presumption that the Board of Equalization's value is correct, but that presumption can be rebutted by either party, and often in valuation appeals, the Respondent [the Assessor] advocates a value different than that established by the Board." L.F. 122; App. at A-11. The Commission stated that it was "only fair that in a discrimination case, the Respondent has ample opportunity to present evidence concerning any elements of the case, including evidence of the value of the subject property." L.F. 122; App. at A-11. The Commission stated that the Taxpayers could show value through several methods, but regardless of the method, "the value of the subject property is an element of [the Taxpayers'] claim and must be proved." L.F. 122; App. at A-11.

The Taxpayers sought review of the Hearing Officer's and the Commission's orders through a petition for a writ of prohibition filed in the Circuit Court of Cole County. L.F. 5, 124. The Taxpayers again argued that section 138.060 prohibits the Assessor from advocating a value of their properties that is higher than the true value assigned, and that the Hearing Officer's and Commission's orders permitted the Assessor to advocate a higher market value than the assigned true value, contrary to the statute. L.F. 7, 125. They noted that appraisals of commercial properties can cost several thousand dollars, and that the Commission's orders would force the Taxpayers to expend substantial amounts of money obtaining information irrelevant to the issue of whether the Assessor had assessed their properties at a higher percentage of true value than other

commercial properties in the same taxing jurisdiction. L.F. 7, 126. In its response, the Tax Commission conceded that a ratio study showing an overall assessment level below the statutory rate "could be evidence of discrimination in taxation," but that the Taxpayers nevertheless had to "show that their property is not one that is under-assessed." L.F. 132.

Before the circuit court entered an order on the writ petition, the Commission filed an answer to the petition. L.F. 2, 129, 134, 142. The circuit court subsequently denied the Taxpayer's request for a preliminary writ, but set the case for hearing. L.F. 3. The court heard arguments on the Taxpayers' writ petition and ordered the parties to submit supplemental briefs. L.F. 3, 145. The Taxpayers and the Commission filed supplemental briefs and, in addition, the St. Louis County Counselor entered her appearance on behalf of the St. Louis County Assessor and filed suggestions in opposition to the Taxpayers' petition. L.F. 146, 156, 163, 165, 178. On July 3, 2007, the circuit court entered its order and judgment denying the petition for a writ of prohibition on the merits. L.F. 196; App. at A-1.

The court found that the Taxpayers had to prove the value of their properties. The court stated that "absent a showing by Relators that their individual properties are over-assessed in comparison to other properties, Relators cannot sustain their burden of proof for discrimination." L.F. 201; App. at A-6. The court further found that section 138.060 "does not prohibit the Tax Commission from requiring proof that the individual property is suffering discrimination through evidence of its true value," and that "nothing in Section 138.060 limits the assessor's ability to use valuation evidence to defend against a

claim of disparate treatment." L.F. 201; App. at A-6. The court held that the Commission's orders were "in keeping with the burden of proof of discrimination, and are not arbitrary or onerous," and that requiring an appraisal to prove discrimination was within the Commission's discretion and jurisdiction. L.F. 202-03; App. at A-7, A-8. The court also held that the Taxpayers had not met the requirements for a writ, because "no Missouri case was cited where the cost of discovery was the sole reason for issuing a writ of prohibition," and because the Taxpayers had the statutory right to appeal any final decision of the Commission. L.F. 199, 202-03; App. at A-4, A-7, A-8.

The Taxpayers appealed the circuit court's judgment. The Missouri Court of Appeals, Western District, held that the circuit court's judgment was void, and dismissed the appeal. *State ex rel. Ashby Road Partners, L.L.C. v. State Tax Comm'n*, _____ S.W.3d _____, 2008 WL 2491956 at *2 (Mo. App., W.D., June 24, 2008). The court held that, because the circuit court did not enter a preliminary writ, it had no jurisdiction to grant or deny a petition for a permanent writ. *Id.* This Court granted transfer on September 30, 2008.

## POINT RELIED ON

**THE CIRCUIT COURT ERRED IN DENYING THE TAXPAYERS' PETITION FOR A WRIT OF PROHIBITION, BECAUSE THE COURT'S JUDGMENT ERRONEOUSLY DECLARED AND APPLIED THE LAW AND WAS NOT SUPPORTED BY THE RECORD BEFORE THE COURT, AND THE TAXPAYERS ESTABLISHED THEIR ENTITLEMENT TO A WRIT, IN THAT (1) CONTRARY TO THE CONCLUSIONS OF THE COURT AND THE COMMISSION, SECTION 138.060 RSMo PROHIBITS THE ASSESSOR FROM ADVOCATING A HIGHER VALUE FOR THE TAXPAYERS' PROPERTIES THAN THE "TRUE VALUE" ASSIGNED AND AGREED TO; (2) THE ISSUE OF MARKET VALUE THEREFORE IS WHOLLY IRRELEVANT TO THE TAXPAYERS' TAX APPEALS AND INADMISSIBLE IN HEARINGS BEFORE THE COMMISSION; (3) THE COMMISSION EGREGIOUSLY ABUSED ITS DISCRETION IN ORDERING THE TAXPAYERS TO PRODUCE BURDENSOME, EXPENSIVE DISCOVERY OF THE MARKET VALUE OF THEIR PROPERTIES AND PROVE THIS IRRELEVANT ISSUE AT TRIAL; (4) THE TAXPAYERS HAD NO ADEQUATE REMEDY BY APPEAL.**

*Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29 (Mo. banc 1988)

*State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138 (Mo. App. 2002)

*Vance Bros., Inc. v. Obermiller Constr. Services, Inc.* 181 S.W.3d 562 (Mo. banc 2006)

§ 138.060 RSMo

## ARGUMENT

**THE CIRCUIT COURT ERRED IN DENYING THE TAXPAYERS' PETITION FOR A WRIT OF PROHIBITION, BECAUSE THE COURT'S JUDGMENT ERRONEOUSLY DECLARED AND APPLIED THE LAW AND WAS NOT SUPPORTED BY THE RECORD BEFORE THE COURT, AND THE TAXPAYERS ESTABLISHED THEIR ENTITLEMENT TO A WRIT, IN THAT (1) CONTRARY TO THE CONCLUSIONS OF THE COURT AND THE COMMISSION, SECTION 138.060 RSMo PROHIBITS THE ASSESSOR FROM ADVOCATING A HIGHER VALUE FOR THE TAXPAYERS' PROPERTIES THAN THE "TRUE VALUE" ASSIGNED AND AGREED TO; (2) THE ISSUE OF MARKET VALUE THEREFORE IS WHOLLY IRRELEVANT TO THE TAXPAYERS' TAX APPEALS AND INADMISSIBLE IN HEARINGS BEFORE THE COMMISSION; (3) THE COMMISSION EGREGIOUSLY ABUSED ITS DISCRETION IN ORDERING THE TAXPAYERS TO PRODUCE BURDENSOME, EXPENSIVE DISCOVERY OF THE MARKET VALUE OF THEIR PROPERTIES AND PROVE THIS IRRELEVANT ISSUE AT TRIAL; (4) THE TAXPAYERS HAD NO ADEQUATE REMEDY BY APPEAL.**

The circuit court's conclusion that the Taxpayers must produce evidence and prove the value of their properties is contrary to section 138.060 and is not supported by the case law that the circuit court cited in its judgment. There is no case holding that in a discrimination-only tax appeal, the taxpayer must "prove" the property value that he does not challenge.

The circuit court also wrongly concluded that the Taxpayers did not establish their entitlement to a writ. The Taxpayers proved that the Commission egregiously abused its discretion in ordering the Taxpayers to produce burdensome evidence that, by statute, is wholly irrelevant to their claims and inadmissible.

The circuit court's judgment was not void, as the court of appeals held. Because the Commission filed an answer, the writ petition stood for the preliminary writ, and therefore the circuit court had jurisdiction to enter its judgment. The court of appeals erred in holding otherwise.

**A. Standard of review.**

Prohibition is the proper remedy for abuse of discretion by an administrative agency during discovery. *State ex rel. Missouri State Bd. of Pharmacy v. Admin. Hearing Comm'n*, 220 S.W.3d 822, 825 (Mo. App. 2007). The agency abuses its discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration. *Id.* An abuse of discretion also occurs where the agency "fails to follow applicable statutes." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007).

On appeal from the circuit court's denial of an extraordinary writ, the Court of Appeals determines whether the circuit court reached the correct result. *State ex rel. Gateway Green Alliance v. Welch*, 23 S.W.3d 861, 863 (Mo. App. 2000). The judgment will not be sustained where there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*

**B. <u>The circuit court's judgment erroneously declares and applies the law and is not supported by the evidence.</u>**

In applying section 138.060, the Commission and the circuit court were required to abide by the rules of statutory construction. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). Where the language is clear and unambiguous, the court may not construe it because there is no room for construction. *Id.* "In determining whether the language is clear and unambiguous, the standard is whether the statute's terms are plain and clear to one of ordinary intelligence." *Id.* A statute's plain language cannot be made ambiguous by administrative interpretation and thereby given a meaning different from that expressed. *Id.* Where statutory language is clear, courts must give effect to its plain meaning. *Vance Bros., Inc. v. Obermiller Constr. Services, Inc.*, 181 S.W.3d 562, 564 (Mo. banc 2006).

The language of section 138.060.1 could not be any clearer. It states, "At any hearing before the state tax commission . . . of an appeal of assessment from a first class charter county . . . the assessor shall not advocate nor present evidence advocating a valuation higher than that value finally determined by the assessor or the value determined by the board of equalization, whichever is higher, for that assessment period." § 138.060.1. Section 138.060 unambiguously prohibits the Assessor from arguing that the Taxpayers' properties are worth more than the assigned value. It does not distinguish

between appeals from assessments based on value and appeals from assessments based on discrimination.

Despite this clear language, and despite the Taxpayers' agreement with the value assigned by the Assessor and the Board, the Commission and circuit court held that the Taxpayers must produce evidence of the market value of their properties because the Assessor must be allowed to defend the case by advocating a higher value for the property. The Commission held that it was "only fair" that the Assessor have the opportunity to present "evidence of the value of the subject property." L.F. 122. The circuit court stated that "nothing in Section 138.060 limits the assessor's ability to use valuation evidence to defend against a claim of disparate treatment." L.F. 216. These holdings were directly contrary to the statute's plain language prohibiting the Assessor from making such an argument. By explicitly prohibiting the Assessor from advocating a higher value for the Taxpayers' properties, section 138.060 unambiguously limits the Assessor's ability to use valuation evidence to defend against the Taxpayers' claims. The statute's prohibition informs the Assessor that he should accurately assess property in the first instance, that he may not argue that his assessment is meaningless once it is challenged, and that any consequence of underassessing property – including property evaluated in a ratio study for a discrimination appeal – lies with the Assessor.

The Commission's and circuit court's holdings also were contrary to the record, which demonstrated the value of the Taxpayers' properties through the Taxpayers' agreement with the assigned value. Market value was, in effect, stipulated. It was

plainly unjust to require the Taxpayers to spend time and money producing evidence of an irrelevant, proven fact.

1. Appraisal evidence is not necessary to prove discrimination.

There is no need to introduce appraisal evidence of real property where the taxpayer has agreed to the value determined by the Assessor' office and section 138.060 makes evidence of a higher value irrelevant and inadmissible. A ratio study showing the common level of assessment would establish discrimination without evidence of market value. L.F. 148.

The ratio study would prove discrimination as follows. Assume the Assessor assigned a value of $1,000,000 to a taxpayer's commercial property. By statute, the assessed value of the property would be 32% of that value, or $320,000. § 137.115.5 RSMo; L.F. 148. Assume further that a ratio study proved that the average level of assessment for commercial property in the county was 25%. The ratio study would prove that the taxpayer's property – which has an agreed market value of $1,000,000 and an assessed value of $320,000 – was discriminatorily assessed; the property should have been assessed at 25%, for an assessed value of $250,000. L.F. 148. The Assessor would be ordered to lower the assessment of the taxpayer's property to the level of assessment determined by the ratio study. This is precisely what happened in *Savage v. State Tax Commission*, 722 S.W.2d 72 (Mo. banc 1986), a case in which this Court approved the admissibility of properly conducted ratio studies as evidence of discrimination. In *Savage*, the plaintiff taxpayers and the Assessor stipulated to the value of the taxpayers' properties in 1980 and 1981. *Id.* at 74. A ratio study showed that the average level of

assessment in the county for those years was, respectively, 20.9 and 20.5 percent of true value. *Id.* The Tax Commission ordered the Assessor to lower the assessment on the taxpayers' properties, and to refund the taxes paid in excess of that amount. *Id*.[2]

In the writ proceeding, the Commission conceded that a ratio study showing an overall assessment level below the statutory rate "could be evidence of discrimination in taxation." L.F. 132. The Commission argued that appraisal evidence was necessary, however, because the Taxpayers could prove discrimination only by proving that their properties were *not* worth more than the Assessor's valuation. L.F. 139. The Commission thus argued that the Taxpayers must assert the defense against their own claims that the statute explicitly prohibits the Assessor from asserting.

The Assessor likewise conceded that a ratio study was proof of discrimination, but argued that the right to advocate a higher value of the Taxpayers' properties was the only defense to the Taxpayers' claims. The Assessor argued that a study reflecting overall assessment below 32% would establish the "first component" in the Taxpayers' claims. The Assessor explicitly contended that, despite the language of section 138.060, he needed to advocate a value of the Taxpayers' property that was higher than the value finally determined: "By arguing that the Assessor cannot produce evidence of undervaluation for the purpose of showing lack of discrimination, Relators seek to foreclose the only defense available against such claims." L.F. 166. He argued that

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[2] The issue of whether the taxpayers had to prove the market value of their properties does not appear to have been raised in *Savage*.

evidence of a higher value was "the only evidence that could prove that the [Taxpayers'] properties are under-assessed." L.F. 169.

These arguments were not supported by the record. The Assessor could defend against the Taxpayers' claims through a ratio study showing that the Taxpayers' properties were assessed at the same percentage of true value as other commercial properties in the same taxing jurisdiction.

The Commission's and the Assessor's arguments also were not supported by the law. Both the Commission and the Assessor cited *Koplar v. State Tax Commission*, 321 S.W.2d 686 (Mo. 1959) to support their argument that a taxpayer must prove market value in a discrimination appeal. L.F. 157, 168. The circuit court also cited *Koplar*, stating, "Generally, the taxpayer must prove the true value in money of their property and then show discrimination by the assessor, resulting in an assessment of that property at a greater percentage of value than other property, generally, within the same class in that jurisdiction." L.F. 215, citing *Koplar*, 321 S.W.2d at 690. However, this Court in *Koplar* made no such ruling. Furthermore, *Koplar* pre-dated by decades the language in section 138.060 prohibiting the Assessor from advocating a higher value of the Taxpayers' properties. That language was added to the section in 1993.

Value was at issue in *Koplar*; it was not a discrimination-only appeal. The property owners contended that their properties were "intentionally, arbitrarily and systematically overvalued as compared with the valuation of other real property in Jackson County." *Koplar*, 321 S.W.2d at 687. The Assessor had increased the property values after receiving a letter from the Tax Commission "stating that the assessed

valuation of Jackson County would have to be increased ten percent in order to meet certain minimum requirements" of the Commission. *Id.* at 688. The Commission had estimated that the average ratio of assessments in Jackson County was 27.2% of the "market value of all real property," but this Court discounted the value of this ratio estimate based on *May Dept. Stores Co. v. State Tax Comm'n*, 308 S.W.2d 748, 761 (Mo. 1958), a case in which the Court rejected the use of an *improperly conducted* ratio study. *Koplar*, 321 S.W.2d at 689; *Savage*, 722 S.W.2d at 75, n.1. As noted on page 17, in *Savage*, the Court later approved the admissibility of ratio studies, stating that, to the extent *May Department Stores* announced a per se rejection of those studies, that rule would no longer be followed. *Savage*, 722 S.W.2d at 75.

While the Commission's ratio determination in *Koplar* was not persuasive evidence of discrimination, the assessor's testimony was. The assessor in *Koplar* admitted that he had discriminatorily assessed office space at a higher percentage of market value than any other properties. *Koplar*, 321 S.W.2d at 689. Despite this admission, the Commission approved the assessments. *Id.* at 690-91. The circuit court reversed the Commission's decisions, holding that the assessments violated the constitution, were unsupported by competent and substantial evidence, and were arbitrary, unreasonable and capricious. *Id.* at 691. In its judgment, however, the circuit court also fixed the value of the properties and determined the valuation for assessment of each property to remove the discriminatory portion of the Commission's assessed value. *Id.* On appeal, this Court held that the circuit court exceeded its jurisdiction in finding and directing the Commission to find the values and assessments in accordance with the

circuit court's determination. *Id.* at 696. This was because the Commission, and not the court, was vested with authority to correct any assessments shown to be improper, arbitrary and capricious. *Id.* at 697.

Nowhere in *Koplar* did the Court hold that a property owner must prove the market value of his property to prove discrimination. The property owners in that case challenged the assigned value and chose to offer evidence of market value rather than agree to the value assigned by the assessor and the board. Only the property owners offered any evidence in the Commission, and "no evidence was offered in support of the original assessments, or as affirmed and modified by" the Board of Equalization. *Koplar*, 321 S.W.2d at 689.

Unlike the property owners in *Koplar*, the Taxpayers here have agreed with the value assigned to their properties. To the extent the Taxpayers must provide any evidence of value, their agreement with the assigned value should suffice because the Assessor is statutorily bound by his valuation. § 138.060 RSMo. He cannot advocate a higher value. *Id.*

In support of its conclusions, the circuit court also cited *State ex rel. Platz v. State Tax Commission*, 384 S.W.2d 565 (Mo. 1964), and *Cupples Hesse Corporation v. State Tax Commission*, 329 S.W.2d 696 (Mo. 1959). L.F. 199. Neither case speaks to the issue in this case, and both cases, like *Koplar*, pre-date by decades the language in section 138.060.

In *Platz*, the plaintiff challenged the value that the assessor placed on her property. The plaintiff's "basic complaint" was that the assessor improperly assessed her property

"on the basis of the cost of construction of the dwelling upon it." *Platz*, 384 S.W.2d at 567. In *Cupples Hesse*, the plaintiff first challenged the assessments of land and improvements, and eventually abandoned his objections to the assessment of the land. *Cupples Hesse*, 329 S.W.2d at 698. At the hearing, the plaintiff's own expert testified that the only error made by the assessor was in valuing one building. *Id.* at 699. The plaintiff then failed to prove that the assessment was discriminatory. *Cupples Hesse* and *Platz* do not support the circuit court's judgment.

The Commission erroneously declared and applied the law in determining that section 138.060 does not limit the Assessor's ability to use valuation evidence in a discrimination claim, and the Commission egregiously abused its discretion in ordering the Taxpayers to produce valuation evidence. The circuit court, in turn, erroneously declared and applied the law in affirming the Commission's determination and in refusing to grant a writ.

**C. <u>The taxpayers satisfied the requirements for a writ.</u>**

A writ of prohibition is proper to prevent "boards, commissions, and other public bodies exercising quasi judicial powers from the doing of unauthorized acts or acts in excess of the authority vested in them." *State ex rel. Atkins v. Missouri State Bd. of Accountancy*, 351 S.W.2d 483, 489 (Mo. App. 1961); *see also State ex rel. Shea v. Bossola*, 827 S.W.2d 722, 724 (Mo. App. 1992). A writ of prohibition is appropriate when a court or commission abuses its discretion in discovery. *State ex rel. Mo. State Bd. of Pharmacy v. Admin. Hearing Comm'n*, 220 S.W.3d 822, 825 (Mo. App. 2007); *see also State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 11 (Mo. App. 2000). There are

several rules to consider in determining whether a writ should issue to prohibit enforcement of a discovery order.

First, the lower court must balance the need to discover the information against the burden of furnishing it. *State ex rel. Blue Cross & Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 169 (Mo. App. 1995); *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327 (Mo. App. 1985). "It is the affirmative duty and obligation of trial judges" to prevent the subversion of pre-trial discovery into a war of paper to "force an adversary to capitulate under economic pressure." *Nolan*, 692 S.W.2d at 328.

Second, "prohibition is an appropriate remedy to forbear patently unwarranted and expensive litigation, inconvenience, and waste of time and talent." *State ex rel. Nat'l Super Markets, Inc. v. Sweeney*, 949 S.W.2d 289, 292 (Mo. App. 1997); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. 1985). Parties to the proceeding – and even strangers to the proceeding – are entitled to pursue a writ if it will affect their interest. *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. 1997). The interest "may be to person or property, economic or noneconomic." *Id.*

Third, prohibition is the proper remedy when the trial court issues a discovery order requiring a party to produce irrelevant evidence. *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247, 251 (Mo. App. 1989); *State ex rel. McDonald v. Franklin*, 149 S.W.3d 595, 597 (Mo. App. 2004). For example, in *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9 (Mo. App. 2000), the Court of Appeals held that a writ was proper to prohibit the trial court from ordering plaintiff to produce discovery that exceeded the scope of his medical malpractice claim. In *Kawasaki*, *supra*, a products

liability action, the Court of Appeals issued a writ prohibiting the trial court from enforcing its order compelling responses to overly broad document requests that were not limited to the vehicle model or defective components at issue, or the time when the vehicle was manufactured. *Kawasaki*, 777 S.W.2d at 252-53. In *Franklin*, *supra*, the trial court was prohibited from enforcing its order requiring the plaintiff to produce information on her marital and employment history, because this information was irrelevant to the issues raised in plaintiff's suit for breach of contract and breach of warranty. *Franklin*, 149 S.W.3d at 596, 598-99.

Fourth, an order allowing discovery that is unnecessary under a governing statute is clearly grounds for a writ. On point is *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138 (Mo. App. 2002). In *BJC*, the plaintiff filed a medical malpractice suit in the City of St. Louis against several health care providers, including Missouri Baptist Medical Center, a non-profit corporation. *Id.* at 139. Section 355.176.4, which governs venue of actions against non-profit corporations, made venue in the City improper. *Id.* at 140. The trial court, however, denied the defendants' motion to transfer venue, and entered an order allowing the plaintiffs to conduct "venue discovery." *Id.* at 139. In accordance with this order, the plaintiffs served the defendants with interrogatories seeking irrelevant information on "agency and/or joint business venture issues." *Id.* at 141. The Court of Appeals issued a writ prohibiting the court from enforcing her "venue discovery" order, and ordered the court to transfer the case. *Id.* at 142. The Court reasoned that under section 355.176.4, "the only relevant venue facts are those relating to

where the non-profit corporation's principal place of business is located, where the cause of action accrued, and where the corporation's registered agent's office is located." *Id.*

These cases demonstrate that the circuit court should have issued a writ to prohibit the Commission from enforcing its discovery orders. The Taxpayers' burden of producing costly appraisal information clearly outweighs the Assessor's need for the information, because there is *no* need for it. The Taxpayers agreed with the Assessor's value, and section 138.060 makes appraisal information irrelevant by prohibiting the Assessor from advocating a higher value. Value is not at issue.

The circuit court held that the Taxpayers failed to demonstrate their entitlement to a writ because "no Missouri case was cited where the cost of discovery was the sole reason for issuing a writ of prohibition," and because "any person . . . may appeal a decision of the State Tax Commission to circuit court." L.F. 214, 217. The court was wrong, and it misstated the Taxpayers' argument. The Taxpayers never argued that the cost of producing the information was the sole reason for issuing a writ. They argued that a writ was appropriate because the Commission's orders required them to obtain costly information that was *completely irrelevant* in light of the record and section 138.060. Furthermore, an appeal of the Commission's final decision would not be an adequate remedy. As the Taxpayers argued to the court, appeal of the final decision would occur *after* the Taxpayers had spent a great deal of time and non-refundable money obtaining irrelevant appraisal information. L.F. 154.

The circuit court's judgment erroneously declared and applied the law and was contrary to the record. The judgment should be reversed.

**D. The circuit court's judgment was not void.**

The court of appeals erroneously dismissed the Taxpayers' appeal for lack of jurisdiction, after the issues had been fully briefed and argued. The court held that the writ proceeding never commenced, and the circuit court's judgment was void, because the order denying the preliminary writ deprived the circuit court of jurisdiction to proceed further. This finding was contrary to the law cited in the Court's opinion.

In its opinion, the court of appeals cited *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867 (Mo. App. 1992), but overlooked a holding in *Schaefer* that demonstrates the error of its reasoning. The court in *Schaefer* noted that the "usual procedure in a mandamus case is for the petition to be filed, the court to determine whether an alternative writ should issue, denial of the alternative writ or issuance of same, and answer to the alternative writ if issued. It is not the petition for the writ but the alternative writ in mandamus which corresponds to the petition in an ordinary civil action." *Schaefer*, 847 S.W.2d at 869. The court held, however, that "where the respondent appears without service of an alternative writ, and makes his return, *the petition stands as and for the alternative writ itself* for the purposes of the case and the return." *Id.* at 870 (emphasis added). A subsequent judgment on the merits is final and appealable. *Id*.

In reaching its decision, the court in *Schaefer* relied on this Court's decision in *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971), a case in which the respondent filed a motion to dismiss the writ petition before the court had entered an order on the petition. This Court held that the petition stood for the writ. *Meyer*, 467 S.W.2d at 855.

It therefore "disregard[ed] any deficiencies in the later issued alternative writ," and held that "the allegations of the petition, standing as the writ, [were] sufficient to present the issues involved." *Id.*

*Meyer* and *Schaefer* demonstrate that the Taxpayers' writ proceeding did commence, and the circuit court had jurisdiction to enter a judgment on the merits. The Commission appeared without service of an alternative writ and answered the petition for a writ. The petition therefore stood "as and for the alternative writ itself," and the allegations in the petition, standing as the writ, were sufficient to present the issues involved. *Schaefer*, 847 S.W.2d at 869; *Meyer*, 467 S.W.2d at 855. The circuit court's order purporting to deny the preliminary writ and setting the case for hearing merely "denied" a preliminary writ that already existed. The circuit court's subsequent judgment on the merits, entered after an answer was filed, after the issues had been fully briefed, and after the parties had appeared at a hearing and presented oral arguments, was final and appealable. *Schaefer*, 847 S.W.2d at 870. The court of appeals' opinion is contrary to settled law.

Even assuming the circuit court lacked jurisdiction to determine the merits, the court of appeals had jurisdiction to determine the issues on appeal, because it had discretion to treat the appeal as an original writ. *State v. Larson*, 79 S.W.3d 891, 894 n.8 (Mo. banc 2002), *Jones v. State*, 471 S.W.2d 166, 169 (Mo. banc 1971). In their motion for rehearing, the Taxpayers requested the court to exercise this discretion, but it declined to do so. In the event this Court finds that the circuit court lacked jurisdiction, the

Taxpayers respectfully request the Court to exercise its discretion to treat this appeal as an original writ proceeding, and determine the issues raised.

## CONCLUSION

The Taxpayers were entitled to a writ prohibiting the Tax Commission from enforcing its orders requiring the Taxpayers to produce in discovery and provide at trial proof of the market value of their properties. For the reasons discussed in this brief, the circuit court's judgment denying the Taxpayers' petition for a writ should be reversed, and this case should be remanded to the circuit court with instructions to enter a writ of prohibition. Alternatively, the Court should enter a writ prohibiting the Commission from enforcing its orders.

Respectfully submitted

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## CERTIFICATE OF SERVICE

A copy of this Substitute Brief of Appellants and a disk containing the brief were mailed on November 19, 2008, to the following:

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Substitute Brief of Appellants includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,686, excluding the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Symantec anti-virus program.

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