

**IN THE SUPREME COURT OF MISSOURI**

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 REPLY BRIEF OF APPELLANTS**

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## 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.**

Both the Assessor and the Commission contend that evidence of value is critical to the Taxpayers' claims of discrimination, and the Taxpayers therefore must prove that the Assessor's value is correct. In view of the statutory and regulatory scheme governing this case, acceptance of the respondents' arguments would place the Taxpayers in an untenable and illogical position. As the trial court found, the Taxpayers will be required to conduct a costly appraisal of their properties. L.F. 201-02, App. at A-6 – A-7. They will have to expend additional sums to present expert testimony at the hearings before the Commission. The Taxpayers will have to incur this substantial expense, in both time and money, even though they *agree* with the Assessor's or Board of Equalization's determination of value. Thus, unlike a valuation appeal where the Taxpayer disagrees with the Assessor's or Board's determination of value, the Taxpayers are being ordered to prove that the presumptively correct, unchallenged value is indeed correct.

The Assessor and the Commission also argue that the Assessor can present evidence of a higher value even though such evidence is specifically prohibited by statute, and the Commission's regulations state that this evidence can be presented only to *sustain the Assessor's or Board's valuation*. The Assessor and Commission therefore

argue for an absurd result: although value has never been challenged, the Taxpayers must incur the expense of proving the correctness of a value they assert is correct, and the Assessor may use this evidence for the sole purpose of proving that the agreed value is correct. The Court should not affirm the imposition of such a ludicrous requirement upon the Taxpayers.

1. The circuit court's judgment was final and appealable.

For the first time in this litigation, the Commission argues that the circuit court lacked jurisdiction over the writ proceeding because it denied the preliminary writ. However, it cites only cases showing that when an answer is filed before a preliminary writ is issued, the petition stands for the writ. The Commission gives this Court no basis for holding that the circuit court lacked jurisdiction.

The Commission argues that the circuit court did not decide the “merits of the controversy” because the court did not decide the merits of the underlying action in the Commission. Comm’n Brief at 13, 14. It argues that “the circuit court’s decision does not determine the Taxpayer’s legal issues before the State Tax Commission,” that the decision “is not *res judicata* for any issue,” and that an appeal therefore should not lie. Comm’n Brief at 15. These arguments misapprehend the nature of the writ proceeding.

The Taxpayers never asked the circuit court to decide the merits of their tax appeals before the Commission. They asked the court to determine whether the Commission abused its discretion in ordering the Taxpayers to produce evidence of and prove commercial property values that they did not challenge and that the Assessor, by

law, could not challenge as being too low. The Commission acknowledges the Taxpayers' claims in its brief. Comm'n Brief at 17.

The circuit court decided the merits of the issue raised in the writ proceeding. The court held that section 138.060 did not prohibit the Commission from ordering the Taxpayers to prove value. L.F. 201. It held 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. It held that the Commission's order did not create an undue burden on the Taxpayers. L.F. 201-02. The court unquestionably decided the entire controversy placed before it.

The Commission argues that the Taxpayers moved for a writ in separate stages. It states that after the circuit court denied a preliminary writ, "Taxpayers then sought a permanent writ of prohibition." Comm'n Brief at 7. This is incorrect. The Taxpayers sought a preliminary and a permanent writ in a single writ petition. They prayed "for issuance of a prompt Preliminary Writ of Prohibition," and further prayed that "the writ be made absolute." L.F. 11. They did not separately file a petition for a permanent writ after the preliminary writ was denied. Upon receiving service of the writ petition, the Commission did not merely enter its appearance and declare that, pursuant to Rules 97.04 and 97.05, it would answer the petition upon entry of a preliminary order in prohibition. It filed a response to the writ petition and suggestions in opposition more than a month before the circuit court ever entered an order. When the Commission responded to the writ petition, the petition stood "as and for the alternative writ itself." *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 870 (Mo. App. 1992). Contrary to the

Commission's argument, the Taxpayers have not ignored the declaration in *Schaefer* that "where the court below dismisses the petition following answer of motion directed to the merits of the controversy and in doing so determines a question of fact or law, the order is final and appealable." Comm'n Brief at 13. The Taxpayers, in fact, *rely* on this declaration as a basis for finding that the Western District erred in holding that the circuit court lacked jurisdiction and never entered an appealable order.

The Commission does not cite any case suggesting that the circuit court's judgment was void. *Wheat v. Missouri Bd. of Probation & Parole*, 932 S.W.2d 835 (Mo. App. 1996) supports the Taxpayers' position. *See* Comm'n Brief at 14. The court of appeals in *Wheat* recited the rule in *Schaefer* that a judgment denying a writ petition, following an answer or motion directed to the merits, is final and appealable. *Wheat*, 932 S.W.2d at 838. The circuit court in that case had denied the petition for a writ after issuing a Show Cause Order to the defendant Board. *Id.* The Board submitted a response directed to the merits of the controversy, and the circuit court made findings of fact and conclusions of law addressing substantive arguments in the writ petition. *Id.* Because it was unclear from the record whether the trial court went beyond a "mere discretionary refusal to entertain the writ," the court of appeals treated the case "as if a preliminary writ had been issued and then quashed," and therefore treated the denial of the writ as final and appealable. *Id.*

*Wheat* demonstrates that the court of appeals should not have dismissed the Taxpayers' appeal. The record here clearly demonstrates that the trial court went beyond a mere discretionary refusal to entertain the writ. After reviewing the petition for a writ

and responses, and after hearing arguments, the circuit court entered a single docket entry purporting to deny a preliminary writ, but setting the case for hearing. L.F. 145. After the hearing, the circuit court ordered the parties to file additional briefs. L.F. 145. The court then denied the permanent writ on the merits. Under *Wheat*, the court of appeals certainly should have found that the circuit court adjudicated the issues and that its order was final and appealable.

*State ex rel. Albert v. Adams*, 540 S.W.2d 26 (Mo. banc 1976) also supports the Taxpayers' position. In *Adams*, a trespass case, this Court entered a writ prohibiting the trial court from entering a default judgment against the relator, who allegedly had failed to give complete answers to interrogatories as to the location of a road used pursuant to an easement. *Id.* at 28. The underlying suit sought to have the relator obtain a survey of the road and make the survey available to the landowners. *Id.* at 30. The Court noted that it was "not for the relator to provide [the survey] under the sanctions of the discovery process," particularly given the fact that the plaintiff landowners had not shown that they were unable, without undue hardship, to obtain the survey themselves. *Id.* In prohibiting the circuit court from entering a default judgment, the Court stated, "We have not been cited to any authority where under a comparable state of facts sanctions in the discovery process were used to force a shift of such 'expense' from one party to another. In fact, the law is otherwise and a party is to be shielded from unwarranted expense or oppression." *Id.* at 30.

In this case, the Taxpayers seek a writ to shield them from the unwarranted expense and oppression of having to produce in discovery and prove at trial property values that they do not challenge. *Adams* aids the Taxpayers.

Finally, *Augsburger v. MFA Oil Co.*, 940 S.W.2d 934 (Mo. App. 1997), has nothing to do with whether the circuit court's judgment in this case was final and appealable. In *Augsburger*, an insurer filed a petition for a writ of mandamus in the Court of Appeals, seeking an order directing the circuit court to grant the insurer's motion to intervene in the underlying case. *Id.* at 936. The court of appeals denied the writ petition without opinion. *Id.* When the circuit court's order denying the motion to intervene and for a stay was later challenged in the insurer's appeal, the respondents argued that the issue was *res judicata* based on the denial of the writ petition. *Id.* at 937. The court of appeals disagreed, stating that "the mere denial of a writ [without opinion] does not necessarily reflect any view by this court regarding the merits of the cause, and therefore the doctrine of *res judicata* does not apply under such circumstances. *Id.*

In contrast to *Augsburger*, this case involves the denial of a petition for a writ of prohibition through a judgment addressing the merits of the writ. *Augsburger* is completely inapplicable.

The Taxpayers' writ proceeding commenced when the Commission filed its response to the writ petition. The circuit court's judgment was entered on the merits, after hearing and briefing. The circuit court had jurisdiction, and its order clearly was final and appealable.

2. Property value is proven through agreement.

As the Commission acknowledges in its brief, in *Savage v. State Tax Commission*, 722 S.W.2d 72 (Mo. banc 1986), “the taxpayer and the assessor stipulated as to the true value of the property, so no additional evidence was necessary. Once discrimination was shown, the assessed values were reduced to the levels shown by the ratio studies, as the true value was stipulated.” Comm’n Brief at 25. The situation in *Savage* is present here. The Assessor and/or the Board of Equalization have assigned a value to the Taxpayers’ commercial properties. The Assessor is precluded by law from advocating or presenting evidence advocating a higher value for the property. § 138.060.1. The Taxpayers agree with the value assigned by the Assessor. As the Assessor points out in his brief, section 12 CSR 30-3.075 allows the Commission to receive valuation evidence for the sole purpose of “sustaining the assessor’s or board’s valuation, and not for increasing the valuation of the property under appeal.” Assessor’s Br. at 11-12. Therefore, the assigned value is the only relevant valuation evidence. It is the value that the Assessor must accept, that the Commission must sustain, and that the Taxpayers have agreed to. In these circumstances, as in *Savage*, market value is proven. If a ratio study shows that the average level of assessment in the county is less than 32% of true value, the Commission should order the Assessor to lower the assessment on the Taxpayers’ properties and refund the excess taxes paid. *See Savage*, 722 S.W.2d at 74.

The crux of the Commission’s and the Assessor’s argument is that the Assessor should not have to accept his own assessment. The Assessor states that it “does not ‘agree’ that Appellants’ properties are accurately assessed,” and that the Taxpayers

should not “preclude Assessor from defending against their discrimination charge by introducing evidence that Appellants’ properties” are worth more than the assigned value. Assessor’s Brief at 12-13. The Commission likewise argues that the Assessor should be permitted to argue that a taxpayer’s property is not under-assessed. Comm’n Brief at 23. These arguments ignore the clear language of the statute. It is immaterial that the Assessor wants to argue that the Taxpayers’ properties are worth more than the assigned value. Section 138.060 prohibits this argument, and 12 CSR 30-3.075 prohibits the Commission from receiving evidence for the purpose of increasing the assigned value. At best, any evidence of market value may only be received for the purpose of sustaining a value that the Taxpayers already agree to.

The Assessor argues that if he “is only presenting evidence to preserve and not raise his valuation, he cannot be charged with ‘advocating’ a higher value – a fact which is implicitly acknowledged” in 12 CSR 30-3.075. Assessor’s Brief at 11-12. But this argument raises an obvious question. If the Assessor wants only to preserve his valuation, and the Taxpayers likewise want only to preserve the Assessor’s valuation, why should the Taxpayers be forced to obtain additional evidence of value? The Assessor’s argument that he wants only to preserve his valuation supports the Taxpayers’ argument that value is already proven by agreement.

Furthermore, the Assessor is wrong in arguing that his “*only* option” for defending the Taxpayers’ claim is to prove that the property is worth more than the assigned value (an argument that is directly contrary to his claim that he seeks only to preserve his valuation). *See* Assessor’s Brief at 12. In their tax appeals, the Taxpayers allege that

their properties were assessed at a greater percentage of true value than other commercial properties in the same taxing jurisdiction. As proof of this claim, the Taxpayers may introduce a ratio study, which is based on actual sales of commercially classified properties in St. Louis County. The Assessor can defend against the claim by challenging the Taxpayers' ratio study and by producing his own ratio study showing that other commercial properties were not assessed at a lower percentage of true value. The Commission concedes this fact in its brief; it states that "nothing in the language of § 138.060 prevents the assessor from challenging the countywide ratio study." Commission's Brief at 23. *Savage* also recognizes the Assessor's ability to defend against a discrimination claim by challenging the ratio study. In affirming the judgment in that case, the Supreme Court noted that "no testimony was introduced by [the assessor] to challenge the assessed valuations of the individual properties contained in the ratio studies." *Savage*, 722 S.W.2d at 77. Nothing prevents the Assessor from defending against the Taxpayers' claims. The applicable law merely prohibits the Assessor from arguing that the Taxpayers' property is worth more than the assigned value. This prohibition does not result in an "absurd and unreasonable consequence," as the Assessor claims. Assessor's Brief at 13. The prohibition protects taxpayers. It broadly applies to "any" appeal of an assessment. It informs the Assessor that a market value determination that the Assessor deems correct for collecting taxes will be deemed correct for purposes of refunding taxes unless the taxpayer chooses to contest the value.

Both the Commission and the Assessor rely on *Koplar v. State Tax Commission*, but they consistently ignore the fact that *Koplar* involved claims of overvaluation *and*

discrimination. As the Taxpayers' noted in their opening brief, the property owners in *Koplar* alleged that their properties were intentionally and arbitrarily overvalued compared to the values assigned to other properties in the county. *Koplar*, 321 S.W.2d 686, 687 (Mo. 1959); Appellants' Brief at 19. The Assessor had increased some property values after receiving a letter from the Tax Commission stating that the valuation of county property needed to be increased ten percent in order to meet certain Commission requirements. *Id.* at 688. Contrary to the Commission's claim in its brief, the property owners' introduction of evidence showing market value in *Koplar* was not "odd" (Comm'n Brief at 24); evidence of market value was relevant because the plaintiffs challenged value. Comm'n Brief at 24. However, nowhere in *Koplar* did the Court hold that in a discrimination-only appeal where the assigned property value is not challenged, the taxpayer must introduce evidence of market value. Neither the Commission nor the Assessor has directed this Court to such a holding in that case.

Although both respondents argue that the Taxpayers must produce evidence of market value, neither respondent explains why a taxpayer's agreement with the Assessor's and Board's valuation is insufficient evidence of market value. By law, this valuation is a market value determination.

Section 137.115 governs the Assessor's obligation to assess property. In mandatory language, the statute states that the Assessor "shall" assess commercial real property at thirty-two percent of its "true value." §§ 137.115.1, 137.115.5 RSMo. The true value "is the price which the property would bring from a willing buyer when offered for sale by a willing seller. Thus, the true value is the fair market value of the

property on the valuation date.” *Missouri Baptist Children’s Home v. State Tax Comm’n*, 867 S.W.2d 510, 512 (Mo. banc 1993). The Taxpayers have never contended that the fair market value determined by the Assessor or the Board of Equalization is incorrect. To the extent proof of market value is required in their discrimination appeals, that proof is satisfied by the Taxpayers’ agreement with the market value determination. This proof, coupled with the Taxpayers’ ratio study, will establish discrimination.

The Commission abused its discretion in ordering the Taxpayers to prove the unchallenged market value of their properties. The circuit court erred in denying the Taxpayers’ petition for a writ. Its judgment should be reversed.

3. The Taxpayers proved their entitlement to a writ.

The Commission makes the disingenuous argument that the Taxpayers have an adequate remedy by appeal, stating, “There is no evidence in the record as to the amount of money the required proof would cost.” Comm’n Brief at 29. The Assessor and Commission are well aware that, to obtain the market value evidence required by the Commission, the Taxpayers would have to hire certified commercial appraisers to examine their properties and prepare appraisal reports. The Taxpayers informed the circuit court that an appraisal of commercial property can cost several thousand dollars (L.F. 125, 142), and the Commission and Assessor never contended otherwise. In her order, the circuit court acknowledged that “an appraisal costs money. L.F. 202; App. at A-7. Furthermore, the valuation evidence is not limited to appraisal reports. Discovery requests in the underlying proceeding seek all manner of information on value, and compiling the information involves time and expense. The attorney fees incurred in

analyzing valuation evidence and preparing the presentation of this evidence at the hearing will be costly. The time spent questioning witnesses on this issue at the hearing will be costly, and a waste of the parties' and Commission's time. The Taxpayers would not be able to recoup their costs after appeal. They have no adequate remedy by appeal.

The Commission acknowledges that “prohibition is the proper remedy for abuse of discretion by the trial court or administrative agency during discovery.” Comm'n Brief at 30. That situation is present here. The Hearing Officer's and Commission's orders are contrary to section 138.060, unreasonable, against the logic of the circumstances, and indicate a lack of careful consideration. A writ is appropriate. *State ex rel. Metro. Transp. Services, Inc. v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. 1990); *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002).

The Commission attempts to distinguish *Messina, supra*, noting that the Missouri Supreme Court granted a writ in that case because there were less intrusive and costly means for obtaining the information. The Commission states that the Taxpayers “suggest no less intrusive or costly means for this matter.” Comm'n Brief at 30. This is not true. The Taxpayers have consistently argued that their agreement with the Assessor proves market value, and that there is no need to incur the cost – in time and money – of proving that the Assessor and Board were correct. *Messina* supports this argument. This Court in *Messina* stated that discovery “allows access to relevant, non-privileged information, while minimizing undue expense and burden.” *Messina*, 71 S.W.3d at 606. A writ was issued because the “undue burden and expense, annoyance, and oppression” of deposing

the defendant's executives outweighed the need for the requested information, which was available by other means. *Id.* at 609. The same reasoning applies here.

The Commission wrongly held that the Assessor may advocate a different value than the value assigned to the Taxpayers' properties. L.F. 122. Its discovery orders are contrary to section 138.060.1, and constitute an abuse of discretion and a misapplication of the law. The Taxpayers are entitled to a writ of prohibition, and the circuit court erred in refusing to grant the writ. The Court of Appeals then erred in dismissing the Taxpayers' appeal. The circuit court's judgment should be reversed.

## CONCLUSION

For the reasons discussed in this reply brief and in the Substitute Brief of Appellants, the circuit court had jurisdiction to enter its judgment, and its judgment was not void. The circuit court erred in denying the Taxpayers' petition for a writ of prohibition. Its judgment should be reversed. Alternatively, this Court should "give such judgment as the court ought to give," and enter a writ prohibiting the Commission from enforcing its orders. *See* Rule 84.14.

Respectfully submitted

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Substitute Reply 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 3,733, 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.