IN THE SUPREME COURT OF MISSOURI

Henry G. Lane, William and Margie Anglen, Lloyd Haley, Curtis Braschler, Gordon L. Trumbo, Beulah F. Alverson, Ernest W. Greenup, and Ronald M. Lucas,	)	
Appellants,	)	
v.	)	**No. SC 86116**
Patricia S. Lensmeyer, Boone County Collector, and the Columbia 93 School District,	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT
HONORABLE FRANK CONLEY, JUDGE

SUBSTITUTE BRIEF OF RESPONDENT COLUMBIA 93 SCHOOL DISTRICT

Alex Bartlett, Mo. Bar 17836
Husch & Eppenberger, LLC
235 E. High Street, P.O. Box 1251
Jefferson City, MO 65102
Telephone: (573) 635-9118
Facsimile: (573) 634-7854

ATTORNEYS FOR RESPONDENT COLUMBIA 93 SCHOOL DISTRICT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the Honorable Frank Conley in the Boone County Circuit Court.

The original Petition of Appellant Henry G. Lane against only the Columbia 93 School District ("School District" or "Columbia School District") alleged that the School District had adopted an total tax levy of $4.7544 per $100 assessed valuation for the 2001 tax year rather than an operating tax levy of $4.6668 which Lane asserted should have been adopted because of the provisions of Section 67.110, RSMo. (LF 10). Lane in his Petition sought declaratory, injunctive and/or tax refund relief. The Petition contained two counts, Count I and Count II. (LF 10-16). While Lane's Petition was filed on November 6, 2001, Lane took no action to secure a temporary restraining order or preliminary injunction prior to December 31, 2001, when the School District's property taxes became due and payable, nor did Lane take any action to request that a class be certified while Lane's original Petition was pending. (LF 1-4). On January 14, 2002, Plaintiff-Appellant Lane dismissed his original Petition with prejudice. Judge Conley entered the following Order:

> "Plaintiff appears personally and by counsel. Defendant appears by counsel. At Plaintiff's request, Counts I & II dismissed with prejudice and Plaintiff given leave to file 1st Amended Petition. Same filed. Summons order issued. FC/II" (emphasis added). (LF 44)

Consequently, since all of Lane's claims that the School District's 2001 total tax levy should have been $4.6668 per $100 assessed valuation because of the provisions of

Section 67.110, RSMo, rather than the $4.7544 tax levy that was adopted were finally adjudicated against Lane because of his voluntary dismissal with prejudice.

The Amended Petition in which Lane was joined by other Plaintiffs which was filed on January 14, 2002, asserted and sought relief for the same alleged unlawfulness as Lane had set forth in his original Petition – that the total 2001 tax levy of the Columbia School District should have been $4.6668 per $100 assessed valuation rather than $4.7544 because of an asserted violation of Section 67.110, RSMo. Plaintiffs under the Amended Petition sought refunds of taxes paid under protest pursuant to Section 139.031.2, RSMo. Plaintiffs also sought class certification.

Following an evidentiary hearing on the class certification issues, Judge Conley entered an order on August 21, 2002, denying class certification and which also found that "Plaintiffs should not be appointed as class representatives." (LF 167). Following an evidentiary hearing on the merits on August 23, 2002, Judge Conley entered a final judgment on September 27, 2002, which denied relief to the Plaintiffs. (LF 168-169). On October 28, 2003, Plaintiffs filed their Notice of Appeal to the Western District of the Missouri Court of Appeals.

The Western District of the Missouri Court of Appeals on May 18, 2004, issued an Opinion;[1] Respondents Lensmeyer and School filed their motions for rehearing and

[1] A copy of Court of Appeals Opinion as modified by the Court of Appeals on June 29, 2004, is set forth in the Appellants' Substitute Appendix at A6.

applications to transfer to the Supreme Court on May 28 and June 2, respectively, and on June 29, 2004, the Court of Appeals on its own motion modified its May 18 Opinion and overruled the motions for rehearing and applications to transfer to the Supreme Court.

The Applications for Transfer of the Respondents were filed in the Supreme Court on July 14, 2004, and on August 24, 2004, those Applications were sustained and the Appeal was ordered transferred to the Supreme Court. This Court therefore has jurisdiction of this appeal after transfer pursuant to the provisions of Article V, Section 10, Missouri Constitution, if the Appellants have standing and are "aggrieved" by Judge Conley's final judgment which upheld the school district levy. Appellant Lane, as well as most if not all of the other eight appellants, do not have standing and are not "aggrieved" so as to be able to maintain this appeal.

The voluntary dismissal with prejudice by Plaintiff Henry Lane of Counts I and II of his original Petition on January 14, 2001, adversely determined all of the issues as to Appellant Lane which he raised in his original Petition, including the issue of the lawfulness of the 2001 operating tax levy of the Columbia School District. The claims of the new Plaintiffs were not affected by the dismissal of the Lane claims. There were no claims by Lane in his original Petition other than those which were set forth in Counts I and II. The voluntary dismissal with prejudice of the claims set forth in his original Petition operates in the same manner as if there had been an adverse judicial determination on the merits as to Appellant Lane. *Williams v. Rape*, 990 S.W.2d 55 (Mo. App. W.D. 1999). Hence, by Lane's own action there was a determination, in effect, that insofar as Lane was concerned, the total 2001 tax levy of $4.7544 per $100 assessed

valuation of the Columbia School District was lawful. Lane was therefore not "aggrieved" by Judge Conley's final Judgment which upheld the School District's tax levy. Plaintiff Henry Lane cannot properly maintain this appeal and his appeal must be dismissed. *In Re Marriage of Echessa*, 74 S.W.3d 802 (Mo. App. S.D. 2002); *Segar v. Segar*, 50 S.W.3d 844, l.c. 846-847 (Mo. App. W.D. 2001) (party was not aggrieved and did not have standing to appeal when determination was made at party's request – "'A party is estopped and waives his right to appeal when judgment is entered at his request'"); *State ex rel. Heritage Valley Farm, Inc. v. Nixon*, 88 S.W.3d 496 (Mo. App. W.D. 2002) (disposition of issues by associate circuit judge with the agreement of a party precluded that party from being "aggrieved" so as to be entitled to a trial de novo in the same case).[2] The dismissal with prejudice of Lane's claims on January 14, 2002, did not, however, adjudicate the claims of the eight other individual Plaintiffs who became parties with the filing of the Amended Petition on January 14, 2002.

The School District's Motion to Dismiss Appeals in the Court of Appeals also raised the issue of whether the refund claim amounts in dispute were insufficient for the Plaintiffs to be "aggrieved" to have standing to litigate and appeal the issues posited in

[2] This issue was raised in the Court of Appeals in the Jurisdictional Statement to the School District's Brief and also in its "Motions of Respondent Columbia 93 School District to Dismiss Appeals and Incorporated Suggestions" ("Motion to Dismiss Appeals") filed on September 16, 2003, in the Court of Appeals.

this appeal. In *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. E.D. 2001) ("Koehr I"), the husband and wife plaintiffs paid their 1997 property taxes under protest and sought to recover $4.04 which they alleged to have been unlawful. The Court of Appeals in *Koehr I* held that where the Plaintiffs' tax refund claim was "just $4.04, or less than ten percent of the filing fee for this appeal" such was not a sufficient amount in order to secure appellate review of an adverse judgment by the trial court in refusing to order a refund.

Appellants claimed that the total 2001 tax levy should have been $4.6668 per $100 assessed valuation rather than $4.7544 per $100 assessed valuation which had been established – a different of $.0876 per $100 assessed valuation. The tax bills were in evidence. (Pl. CC. Exh. 1). Utilizing those tax bills and the $.0876 per $100 assessed valuation differential, the following can be discerned from Pl. CC. Exh. 1:

Plaintiff	Total Assessed Valuation	Amount of Refund Claim at Issue
Henry Lane	$610	$ .53[3]
William Anglen	$280	$ .26
Margie Anglen	-0-[4]	-0-

[3] $610 ÷ 100 = 6.10 x $.0876 = $.53. The same methodology is used with respect to each Plaintiff.

[4] Pl. CC Exh. 1 reflects that no property taxes were levied against Margie Anglen.

Lloyd Haley	-0-[5]		-0-
Curtis Braschler	$11,330		$ 9.93
Gordon L. Trumbo	$ 1,760		$ 1.54
Beulah Alverson	$11,770		$10.31
Ernest W. Greenup	$11,801		$10.34
Ronald M. Lucas	$ 960		$ .84
		Total All Plaintiffs	$33.75

Here, the total of all of the tax refund claims does not exceed the filing fee for this appeal. Furthermore, Appellants Henry Lane, William Anglen, Margie Anglen, Gordon L. Trumbo and Ronald M. Lucas each had amounts in issue of less than the $4.04 tax refund claim that the Court in *Koehr I* found to be insufficient to maintain an appeal.

Appellant Henry Lane, for example, only has at most a tax refund claim of $.53. The respective tax refund claims, both individually and collectively, are insufficient for the Appellants to be "aggrieved" within the meaning of Section 512.020,

[5] No tax bills were issued to Lloyd Haley, individually. A tax bill was issued to "Haley Lloyd and Lorreta C – Jr.", reflecting a total assessed valuation of $3,018 – which even if applicable would involve only a $2.64 refund claim. Real estate tax bills were issued to "Haley Joel L. & Lorreta C. Living T" reflecting an assessed valuation of $13,913, which even if applicable would involve only a $12.19 refund claim.

RSMo, or to have standing so as to be able to maintain their appeals from the judgment of the trial court.

STATEMENT OF FACTS

Original Petition of Appellant Henry Lane.

Appellant Henry Lane filed his original Petition against the Respondent Columbia School District on November 6, 2001. (LF 10, App. A-001). In that original Petition Lane alleged that the School District should have set a tax levy of $4.6668 per $100 assessed valuation for the year 2001 rather than the $4.7544 tax levy which was set by the School District for the 2001 tax year. (LF 10). The original Petition alleged that "[t]his action is brought pursuant to § 67.110 RSMo". No other statutory or constitutional grounds were asserted as the basis for the tax levy being unlawful. Lane alleged that the projected local property tax receipts would exceed the $56,232,505 in locally assessed property tax revenue required by the School District's budget by $1,055,220. Lane's Petition was in two counts, Count I being for declaratory judgment and Count II being for injunctive relief and tax refunds.

The School District filed a Motion to Dismiss on December 3, 2001, which asserted that no actionable relief could be granted for a violation of Section 67.110, RSMo, under the facts alleged. (LF 17-29). The Motion to Dismiss was noticed for hearing on December 10, 2001, before the Honorable Gene Hamilton, Judge of Division I. At that time Judge Hamilton recused himself. (LF 2). Lane then requested a change of judge. The Honorable Ellen Roper was then assigned to hear the case. (LF 2-3). She was disqualified by Appellant Lane. The Honorable Frank Conley was then assigned to hear the case. Memoranda in support of and in opposition to the motion to dismiss were filed, and oral arguments upon the motion to dismiss were presented to

Judge Conley at a hearing on December 28, 2001. Judge Conley at the conclusion of the December 28 hearing took the motion to dismiss under advisement. (LF 3).

From November 6 through December 31, 2001, Lane did not take any action to secure a temporary restraining order or preliminary injunction with respect to the collection of taxes, nor was any action taken to seek a class certification. (LF 2-3).

Dismissal of Lane Claims With Prejudice.

On January 14, 2002, the following proceedings occurred before Judge Conley:

> "Plaintiff appears personally and by counsel. Defendant appears by counsel. At Plaintiff's request, Counts I & II dismissed with prejudice and Plaintiff given leave to file 1st Amended Petition. Same filed. Summons order issued. FC/II" (emphasis added).

(LF 2, 44; App. A-008).

Filing of Amended Petition.

The Amended Petition was filed on January 14, 2002, after the dismissal of the original Petition. (LF 4, 14; App. A-009). In the Amended Petition the Plaintiffs allege the same grounds for unlawfulness as Lane did in his original Petition – that there had been a violation of Section 67.110, RSMo., by the School District adopting a total 2001 tax levy of $4.7544 rather than a tax levy of $4.6668. The Plaintiffs named in the Amended Petition were Henry G. Lane, William and Margie Anglen, Lloyd Haley, Curtis Braschler, Gordon L. Trumbo, Beulah F. Alverson, Ernest W. Greenup and Ronald M. Lucas. The Defendant named in the Amended Petition was Patricia S. Lensmeyer, Boone County Collector. (LF 45-52).

The Amended Petition in allegations applicable to its two Counts alleged that the "School District's approved budget for its 2001-2002 School Year . . . called for 2001 local property taxes to produce revenues of $56,232,505"; that the "total assessed valuation of property subject to the Columbia 93 School District's taxing authority and 2001 tax rate was $1,281,852,353"; that the "School District assumed that six percent of the 2001 billed property taxes would be uncollectible"; and that the "correct levy rate to produce the same amount of revenue called for in the budget would be $4.6668 per $100.000 of assessed valuation of property." (LF 48).

The Amended Petition then alleges with respect to both Counts that the School District adopted a levy rate of $4.7544. The Amended Petition then continued:

> "Utilizing the $4.7544 levy rate against the $1,281,852,353 total assessed valuation figure produces a total possible local tax revenue amount of $60,944,388 less six percent uncollectibles of $3,656,663 equals $57,287,725. This amount exceeds the budgeted revenue amount of $56,232,505 by $1,055,220. The School District's levy rate will thus produce local tax revenue of $1,055,220 more than its budget called for. The levy rate was excessive by 1.88%, and as a result, the school tax amount on all tax bills was overstated by that same percentage." (emphasis added). (LF 49).

Count I of the Amended Petition seeks a declaratory judgment with respect to the lawfulness of the School District's 2001 operating tax levy rate. In the prayer to Count I Plaintiffs ask that the Court "pursuant to § 139.031.2 RSMo, and pursuant to § 139.290

RSMo, require Defendant Collector not disburse to the Columbia 93 School District the amount of excessive and unlawful taxes in dispute in this cause, $1,055,220, so that the moneys are available for refund to the entire class in the event Plaintiff class prevails in this case" (emphasis added). (LF 50).

Count II of the Amended Petition seeks refunds and the prayer cites to only Section 139.031.2, RSMo (refunds of taxes paid under protest) and Section 139.290, RSMo (county taxes collected under an illegal levy). Plaintiffs allege that they and the Plaintiff class "are entitled either to a refund of 1.88% of their property taxes paid, or a credit or offset against future tax bills. . . .", and in the prayer to Count II again allege that "pursuant to § 139.031.2 RSMo, and pursuant to § 139.290 RSMo, require Defendant Collector not disburse to the Columbia 93 School District the amount of excessive and unlawful taxes in dispute in this cause, $1,055,220, so that the moneys are available for refund to the entire class in the event Plaintiff class prevails in this case" (emphasis added). (LF 50).

Joinder of the Columbia School District With Respect to the Amended Petition.

On February 21, 2002, the Respondent County Collector filed her Motion to Join the Columbia School District as a party defendant, or in the alternative, to dismiss action (LF 60-63), together with Supporting Suggestions. (LF 64-70). Plaintiffs filed a response opposing the joinder of the Columbia School District. (LF 71). On April 30, 2002, more than 90 days after the Plaintiffs had paid their 2001 taxes, the Circuit Court sustained the Defendant Collector's motion to join the Columbia School District. (LF 81).

Answers of Defendants.

Patricia Lensmeyer, Boone County Collector, filed her Answer which generally denied the allegations of the Amended Petition. The Collector further alleged (1) that the Amended Petition should be dismissed (1) because of the failure to join the Columbia School District inasmuch as the tax levy being challenged had been adopted by the School District and the County Collector has no statutory function to determine the tax levy, (2) that no class action could be certified because Section 139.031, RSMo, provided the exclusive remedy to pursue tax refunds, and (3) that the Amended Petition does not state a claim for relief under Section 67.110, RSMo. (LF 56-59).

The Columbia School District filed its Motion, Answer and Affirmative Defenses which (1) admitted and denied certain factual allegations, (2) denied that the District's operating tax levy for 2001 was unlawful, (3) stated that Plaintiffs had failed to state claims for which relief could be granted, (4) stated a violation of Section 67.110, RSMo, was not actionable, (5) stated that the claim(s) of Henry Lane were barred because of the dismissal of his original Petition with prejudice, (6) alleged that the Plaintiffs could not maintain a declaratory judgment action under Count II, (7) stated that the amounts claimed by the named Plaintiffs were insufficient to invoke the jurisdiction of the Courts, (8) stated that no class action could be maintained and that putative class members' claims were barred by sovereign immunity and (9) stated that in any event Plaintiffs were not entitled to attorneys' fees. (LF 82-92).

Class Certification Hearing.

Plaintiffs filed their Motion for Class Certification on June 21, 2002 (LF 93), along with their Supporting Suggestions. (LF 98-113). The Columbia School District filed its Response on July 3, 2002, opposing class certification. (LF 117-154). The County Collector also filed her Suggestions on July 3, 2003, opposing class certification. (LF 155-159).

A class certification hearing was held on August 2, 2002, before Judge Conley. At that hearing Plaintiffs called County Collector Patricia Lensmeyer and the Plaintiffs (with the exception of Mr. Lucas) as witnesses and exhibits were introduced into evidence. (Tr. 1-69). Defendants did not call witnesses.

Plaintiff Henry Lane testified that he had run for the school board four times and had lost each time. (Tr. 23, 32). Lane has no children in the Columbia School District and owns no real property in the Columbia School District. Lane worked as an independent auditor for several departments of the federal government. (LF 31). Since December 8, 1997, Lane has attended all but one of the Columbia School Board meetings. (Tr. 23). He attended and spoke at the School Board's public hearing with respect to the budget on June 11, 2001. (Tr. 32). He spoke at the School Board's public hearing on August 23, 2001, in opposition to the property tax rate. Lane indicated that "I explained to them the law". (Tr. 24). Lane thought that tax refund checks should be sent out without regard to whether or not a taxpayer desired a tax refund. (Tr. 33). After Lane filed his Petition in November 2001, he tried to enlist others to file their taxes under protest through the media. (Tr. 29-30).

The testimony of the Plaintiffs other than Mr. Lane was brief, mostly concerning their payments of taxes. (Tr. 41-68). The only Plaintiff with any children in school in the School District was Mr. Greenup. (Tr. 60).

Class Certification Denied.

On August 21, 2002, Judge Conley entered an Order Denying Class Certification. Judge Conley in that Order made the following findings and determinations:

> "The Court being fully advised, finds and determines the issues upon Plaintiffs' Motion for Class Certification in favor of the Defendants and against the Plaintiffs. The Court specifically finds and determines that as a matter of law a class action cannot be certified in this case and that the Plaintiffs should not be appointed as class representatives." (emphasis added).

(LF 167). See Order set forth in Appellants' Appendix at A-008.

Hearing on the Merits.

On August 23, 2002, the evidentiary hearing on the merits was heard before Judge Conley. (LF 8; Tr. 83, *et seq*.). The Plaintiffs called three witnesses – Defendant Boone County Collector Patricia Lensmeyer (Tr. 82); Kevan Snell, Director of Business Services for the Columbia School District and Treasurer for its School Board (Tr. 96); and Plaintiff Henry Lane (Tr. 172). None of the other Plaintiffs testified. The Defendant School District called Dr. Chris Straub as a witness (Tr. 202).

Judge Conley in his final Judgment found "that witnesses Kevan Snell and Dr. Chris Straub are knowledgeable and qualify as experts with respect to school finance in

Missouri and that their testimony is credible". (LF 168). The trial court made no such finding with respect to the testimony of Plaintiff Henry Lane.

Defendant County Collector Lensmeyer testified with respect to taxes paid and the procedures of the Boone County Collector's Office. (Tr. 82-95).

The Budgeting Process.

Kevan Snell, School District Director of Business Services and Treasurer for the School Board, testified with respect to the budgeting process, the Budget for the 2001-2002 fiscal year, amendments to the 2001-2002 Budget, the process of establishing tax rates for the 2001 tax year, and the impact of local property tax levies and the adjustment of those levies upon funding received from the State, and related matters. (Tr. 96-169).

Snell had been Director of Business Services for the School District for 21 years. (LF 96). He is generally responsible for assimilating the budget document and submitting it to the Board for consideration. (Tr. 97). Budgeting is a year-long process. Gathering information from administrative officials within the District takes from four to six months. (Tr. 115).

With respect to the budgeting process for the July 1, 2001, through June 30, 2002, fiscal year, the minutes of the School Board indicate that at the April 9, 2001, meeting when the new School Board was first constituted following the April 2001 school election, the Deputy Superintendent made a presentation with respect to the 2001-02 budget for the Board to consider, including a listing of then additional revenues, listing of costs to improve schedules, listing of additional salary and benefit costs and listing of projected additional needs. Dist. Exh. 3, pages 14-15.

At the May 14, 2001, Board meeting, the School District's Superintendent and Deputy Superintendent discussed the budgeting process and information from the preliminary 2001-02 budget that was being developed by Mr. Snell and his staff. As of that time, projected additional operating needs anticipated for 2001-02 had been pared to $9,564,891. Dist. Exh. 3, pages 24-26. At a Special Meeting of the School Board on May 24, 2001, the Deputy Superintendent reiterated the prior presentation on May 14 and noted additional budget items for consideration. Dist. Exh. 3, page 31.[6]

At the regular School Board meeting on June 11, 2001 (the last School Board meeting before the beginning of the July 1, 2001, to June 30, 2002, fiscal year), the Columbia School Board considered and adopted a School District Budget for the 2001-02 fiscal year. Dist. Exh. 3, pages 36-37 (Minutes); Pl. Exh. 4 (Budget document); App. A-036 through A-144. Before the Budget was considered by the Board, the Columbia Superintendent of Schools, Dr. James R. Ritter, reviewed the budget process for the Board and those in attendance. The Board Minutes (Dist. Exh. 3, page 36) reflect that:

> "Dr. Ritter reviewed the school district's budget process. Needs are first determined at the individual schools; school administrators then share the needs with central office administrators. Since the cost of the needs always exceeds available funds, priority discussions occur. Dr. Ritter and other

[6] Mr. Lane commented at the May 14 and 24, 2001, Board meetings "regarding the 2001-02 budget". Dist. Exh. 3, pages 26 and 31.

central office administrators review the list of priorities and determine which needs can be met. Mr. Snell and his staff then develop the preliminary budget. The preliminary budget is shared with the Board of Education and the public, and opportunities for Board discussion and public comment are provided."

The Board then took up and considered the matter of the approval of the 2001-02 School District Budget. It was moved and seconded that the Budget be approved. The School Board minutes (Dist. Exh. 3, page 37) then reflect:

"After discussion among Board members, President Ballenger invited public comment. Comments were received from the following individuals:

- Henry Lane, 1816 East Broadway
- Cheryl Haynes, 401 Silverthorn Drive, president of the Columbia Community Teachers Association

The vote on the motion was 7 yes—0 no."

The "Columbia School District Budget 2001-02" which was approved by the School Board on June 11, 2001, is a 99-page document. See Appendix, starting at A-036. The "Summary Budget – All Programs" for the 2001-02 projects the following total revenues and total expenditures:

	Budget 2001-02
Revenues:	**Total**
Local	$ 80,590.404
Intermediate	$ 2,403,975

State	$ 48,790,736
Federal	$ 8,492,762
Other	$ 314,500
Bonds Sold	$ 10,000,000
Total Revenues	$150,592,337
Expenditures:	
Salaries	$ 83,056,441
Benefits	$ 16,296,451
Services / Supplies	$ 27,682,907
Capital Outlay	$ 15,383,256
Other	$ 10,522,483
Total Expenditures	$152,941,538
Excess/(Deficit) Revenues Over Expenditures	$ (2,349,161)

Pl. Exh. 4, page 75. The Columbia School District 2001-02 Budget as adopted on June 11, 2002, is set forth in the Appendix at A-036 through A-144.

The 2001-02 Budget of June 11, 2001, projected revenues that would be received from property taxes as follows:

5111 Current Tax	$56,232,505
5112 Delinquent Tax	$ 2,070,000
5114 Intangible Tax	$ 111,065
5115 Surtax	$ 1,130,000

5116	In lieu of Tax Payments	$ 53,299
5221	State Assessed Utilities	$ 1,028,205

Pl. Exh. 4, page 71; Appendix A-114.

The Budget also included historical information with respect to the "collection ratio" for current taxes for each going back to 1993 and then the "collection ratio" for current taxes that was projected and used in the 2001-2002 Budget:

Fiscal Year	**Tax Rate**	**Assessed Valuation**	**Collection Ratio**
1993	$4.37	$ 664,624,859	93.84%
1994	$4.37	$ 724,155,842	94.92%
1995	$4.45	$ 763,909,133	95.09%
1996	$4.55	$ 810,703,075	95.31%
1997	$4.56	$ 873,346,561	95.73%
1998	$4.12	$1,042,836,063	96.02%
1999	$4.12	$1,090,964,765	95.00%
2000	$4.70	$1,141,693,888	94.14%
2001	$4.79	$1,195,928,843	93.93%
Projected 2002	**$4.7936**	**$1,247,951,747**	**94.00%**
Averages:			
5 Year			94.62%
3 Year			94.02%

Pl. Exh. 4, p. 76; Appendix A-120.

The 2001-02 Budget used the 94% collection ratio in projecting the actual "current taxes" shown in the budget which would be produced by application of the tax levy. Tr. 102-104, 111-113; Pl. Exh. 5; Pl. Exh. 4, p. 71; Appendix A-114. For the budgeting purposes, "current taxes" for 2001 would include only net 2001 taxes received by the School District in a timely basis from the Collector. "Current taxes" would not include taxes from past tax years nor would it include 2001 taxes paid after April of 2002. Those would be reflected in the "Delinquent Tax" account. Tr. 102-104. One and one-half percent of the School District taxes collected by the Collector are not paid over by the Collector to the School District, but are retained by the Collector for the statutory fees of the Collector and Assessor. Tr. 113; Sections 52.260 and 137.720, RSMo. A higher fee rate applies with respect to delinquent taxes collected.

The Appellants introduced exhibits which used a 94% collection ratio. See, Pl. Exh. 22 which was presented by Lane to the School Board at the tax rate hearing and introduced into evidence by the Appellants which repeatedly used a "collection ratio" of "94%." Tr. 172. See also Pl. Exh. 15 which was "prepared for the judge" by Lane and introduced into evidence by the Appellants to "show the calculation of the amount . . . we believe the Columbia School District realized because the property tax rate for 2001 was set higher than it should have been" (emphasis added). Tr. 186. Pl. Exh. 15 uses an "Estimated Collection Rate" of "94%" and then concludes:

"Revenue Receipts in Excess of the Budgeted Amount $1,055,220"

The record on appeal and the Appellants' Amended Brief in the Court of Appeals does not reflect that Appellants ever raised any issue with respect to the use of a

"collection rate" or the use of a "94% collection rate in the process of budgeting or in the process of determining tax levies. The total amount claimed by the Plaintiffs as being excessive was a total amount of "$1,055,220" (Tr. 196) – which does not include any amount attributable to the use of a "collection rate" factor of "94% (or conversely a six percent calculation of amounts not collectable).

The Budget Document approved on June 11, 2001, made the following projections –

	"Tax Rate	Assessed Valuation
	* * *	* * *
"Projected . . .	$4.7936	$1,247,951,747"

Pl. Exh. 4, page 76; Appendix A-120.

Dr. James R. Ritter, Columbia Superintendent of Schools, in his letter of transmittal (which is a part of the Budget document) of the Budget to the Board for consideration indicated:

> "The operating tax levy for the current year is $3.97. The proposed budget assumes the same operating levy for 2001-02. However, the actual operating levy will be decided in July 2001 based on information received at that time regarding preliminary assessed valuation, sales tax receipts, and the resulting tax rollback calculated according to the state auditor's tax formula."

Pl. Exh. 4; Appendix A-037.

The "projected " assessed valuation figure of $1,247,951,747 which was used in the Budget was formulated before the "Preliminary Notice of Aggregate Assessed Valuations" dated June 4, 2001, was received by the School District from the County Clerk. That "Preliminary Notice" indicated that the assessed valuation of property for 2001 was $1,267,797,234. Dist. Exh. 13; Tr. 131. Mr. Snell testified that he knew there would be better 2001 assessment figures later. Mr. Snell knew that personal property declarations of value continued to be processed through the summer. (Tr. 132).

At the time the 2001-02 Budget was formulated for review by the Board and the public in advance of the June 11, 2001, Board meeting:

- Preliminary assessed valuation figures for property within the District had not been received from the County Clerk.
- Assessed valuation figures for property within the District issued in the first part of June of 2001 were "preliminary", subject to adjustment and would be better at a later date. (Tr. 130-132).
- The School District did not know what the proration factor would be for allocation of basic state aid to the District under the state foundation formula. (Tr. 130).
- The School District had not received the worksheets from the State Auditor for use in calculating permissible tax rates for 2001. (Tr. 133).
- Projections from the Missouri Department of Elementary and Secondary Education ("DESE") re the amount of Proposition C sales tax revenues for the School District in 2001-02 had not been received. (Tr. 139).

- Projection from DESE re the amount of fair share (cigarette taxes) revenues in 2001-02 had not been received. (Tr. 139).
- Projections from DESE re the amount of free textbook (insurance premium tax) revenues in 2001-02 had not been received. (Tr. 139).
- The Columbia 93 School District did not know what levies other school districts in Boone County would set and, consequently, the amount of funds that the Columbia 93 School District would receive from taxes on state-assessed utilities was not known. (Tr. 126).

Determining the Tax Levies.

After the June 11, 2001, meeting, at which the Budget was approved, the School Board met next on July 13, 2001. At that meeting Superintendent Ritter advised that it would be necessary to hold the annual tax rate hearing after July 15 since the State Auditor forms had just been received. Mr. Snell advised re the status of updated assessment figures and indicated that he anticipated receiving final preliminary assessed valuation figures by the second week in August. The Board then set the tax rate hearing on August 23, 2003. School Board Minutes, Dist. Exh. 3, page 46.

On August 7, 2001, the School District received an assessed valuation update indicating that the total assessed valuation of property within the District was $1,281,852,353 – an increase from the projected figure of $1,247,951,747 used in the Budget and the projected figure of $1,267,797,234 reflected in the "Preliminary Notice" received from the County Clerk in June. Dist. Exh. 17; Pl. Exh. 4, page 76, Appendix A-120; Dist. Exh. 13.

Prior to the tax rate hearing before the Board on August 23, 2001, a notice of that meeting was published as required by law advising the public that the following levies were being proposed and that citizens would be heard at the tax rate hearing on August 23 at 7:30 p.m. –

Teachers Levy	$2.5581
Operating Levy	$1.3544
Capital Projects Levy	$0.0200
Debt Service Levy	$0.8019
Total	$4.7544

Pl. Exh. 9; Tr. 104-105. The proposed total levy rate was less than the $4.79 rate for the year 2000 and was also less than the projected rate of $4.7936 reflected in the Budget. Dist. Exh. 18.

The Board minutes reflect that the tax rate hearing was held before the Board on August 23, with the following occurring:

"**Tax Rate Hearing and Consideration of School District Tax Levy**

Dr. Cowherd [Deputy Superintendent] presented an overview of the process used to determine the proposed tax rate for the Columbia 93 School District for the 2001-02 school year. He noted that in order to receive maximum benefit from the state foundation formula, the school district must follow guidelines from the Missouri State Auditor's office. The recommended rollback of approximately 3.5 cents for 2001-02 complies with state statutes and the requirements of the state auditor's office. Dr.

Cowherd said the district could establish its debt service levy at a rate as high as $1.15 if it chose to comply with the state auditor's worksheets; however, district administrators have decided to leave the debt service levy the same as it was in 2000-01, at $.8219, as that amount was determined to be adequate to retire the district's bonds.

Mr. Snell presented details on assessed valuation and the calculations that went into determining the recommended 2001-02 tax levy. He recommended that the tax rate for 2001-02 be established as follows:

Teachers Fund	$2.5581
Incidental Fund	$1.3544
Capital Projects Fund	.0200
Levy for Operating Purposes	$3.9325
Debt Service Fund	.8219
Total	$4.7544

Mr. Snell explained that as a result of reassessment in 1997 and the fact that the Columbia 93 School District's levy went down, the district received an add-on levy which provided additional state revenue of approximately $4 million in 2000-01. If there is any voluntary rollback in either the Teachers Fund or Operating Fund, he said, the district would lose entitlement to this add-on levy.

It was moved by Mr. Headley that the 2001-02 tax rate be established at $4.7544 as recommended. The second was by Mr. Fay.

President Ballenger invited public comment on the proposed 2001-02 tax rate. Public comments were received from the following individuals:

- Henry Lane, 1816 East Broadway
- Julie Patterson, RR 10
- Orin Murray, 2712 Lacewood Drive

After discussion, the vote was 7 yes—0 no."

(Emphasis added). Dist. Exh. 3, pages 50-51.

The "Calculated Levy".

Mr. Snell and Dr. Straub both explained the effect of the "calculated levy", referred to as an "add-on levy" in the Board minutes. (Tr. 142-146, 156-159, 168-169, 204-207, 215-216). The "calculated levy" concept is a result of an amendment in 1996, which added language to subdivision (13) of Section 163.011, RSMo, defining "operating tax levy for school purposes" as used in the state school foundation formula for distributing funds to school districts. (Tr. 205, 207, 215). Dr. Straub identified the following part of subdivision (13) of Section 163.011 as the provisions providing for a "calculated levy":

"For the purposes of calculating state aid pursuant to section 163.031, for any district which has not enacted a voluntary tax rate rollback nor increased the amount of a voluntary tax rate rollback from the previous year's amount, the tax rate used to determine a district's entitlement shall be adjusted so that any decrease in the entitlement due to a decrease in the

> tax rate resulting from the reassessment shall equal the decrease in the deduction for the assessed valuation of the district as a result of the change in the tax rate due to reassessment. The tax rate adjustments required under this subdivision due to reassessment shall be cumulative and shall be applied each year to determine the tax rate used to calculate the entitlement; except that whenever the actual current operating levy exceeds the tax rate calculated pursuant to this subdivision for the purpose of determining the district's entitlement, then the prior tax rate adjustments required under this subdivision due to reassessment shall be eliminated and shall not be applied in determining the tax rate used to calculate the district entitlement. . . ." (emphasis added).

(Tr. 216; Senate Bill Nos. 795, 542 & 563 (1996)). Dr. Straub had been Superintendent of Schools in Jefferson City when reassessment occurred there requiring a rollback of the operating tax levy. A reduction in the operating tax levy would cause the amount of state aid received by a school district under the formula to also be reduced. (Tr. 204). The 1996 amendment provides that if taxes are required to be rolled back because of reassessment, for state aid purposes, the tax levy prior to the rollback nevertheless would be considered as what has come to be known as the "calculated levy" for state aid purposes. (Tr. 205). Dr. Straub further testified that if there was a reduction of the operating tax levy for any purposes other than a rollback due to reassessment or a Proposition C rollback, such would result as far as DESE is concerned in a school district loosing the benefit of the calculated levy. (Tr. 205-206). The Columbia School District

had a calculated levy of $.199879 because of a reassessment rollback in 1997. (Tr. 142-144). Any reduction of the operating tax levies from the rates adopted by the Board on August 28, 2001, would have resulted in a loss of state aid in the approximate amount of $4,043,000. (Tr. 145-146; Dist. Exh. 6). Mr. Snell testified in this respect –

> "A. To roll it back any more voluntarily would have eliminated the calculated levy."

(Tr. 145). And, Dr. Straub testified –

> "Q. So here we had a 19 cent calculated levy. If you reduce it below what was permissible for reassessment purposes, you would lose the whole 19 cents?
>
> A. You would lose the entire 19 cents."

(Tr. 206).

Dr. Straub and Mr. Snell both testified that it would not have been wise to reduce the debt service levy. (Tr. 208-209; 162-163). Lowering the debt service levy would adversely affect the School District's bond rating and the rate of interest it would have to pay on future bond issues. (Tr. 208-209; 163). While the debt service levy adopted for 2001 was $0.8219 (the same as for 2000), a debt service levy of up to $1.1529 could have been levied applying the State Auditor's guidelines. (Dist. Exh. 22, Form C; Tr. 218).

Mr. Lane also testified about the tax rate hearing on August 23. He indicated he had presented to the Board Plaintiff's Exhibit 22 which proposed a 3-cent reduction of the total tax rate from $4.7544 to $4.7244. (Tr. 192-193). Lane testified that such a $.03 reduction would have been in compliance with the budget laws, even though he claims in

the Petition and Amended Petition that the total tax levy had to be reduced from $4.7544 to $4.6668 – a reduction of $.0876. (Tr. 192-193; LF 10, 48).

Other Evidence at Hearing on the Merits.

Appellant Lane also testified that following the tax rate hearing on August 23, 2001, he complained about the Columbia School District officials to Kevin Crane, the Boone County Prosecuting Attorney, to Jay Nixon, the Missouri Attorney General, and to the Office of State Auditor Claire McCaskill. (Tr. 177-179; 198-199; Pl. Exhs. 24, 25 and 26). Lane's letters to the Boone County Prosecuting Attorney and to the Attorney General requested that the school officials be prosecuted for setting the total tax levy at $4.7544 rather than $4.6668 as Appellant Lane contended. (Tr. 198; Pl. Exhs. 24 and 25). Neither the Boone County Prosecutor, the Missouri Attorney General nor the Missouri State Auditor did anything about Appellant Lane's complaint. (Tr. 198).

Formal amendments were made to the Budget by the School Board on December 10, 2001, and on June 10, 2002. (Dist. Exhs. 24 and 25; Tr. 150, 166-167). With respect to those amendments, Mr. Snell indicated that it was normal for the School Board to amend the budget. There were "numerous amendments included" and "one effect was to increase the current tax revenues by $1,055,219". (Tr. 167).

During fiscal year 2001-02 there was a shortfall in funds actually received from the state. The amount received was $726,000 less than that which had been projected. (Tr. 127-128).

With respect to a variance of actual fund receipts from budgeted fund receipts, Dr. Straub testified from his experience in school finance, as a school administrator and as a

school consultant, a two percent variance is not "substantial". (Tr. 209). Dr. Straub then continued:

"Q. So that if the projected funds coming in from local tax revenues were exceeded by two percent the budgeted amount, you would not consider that to be substantial?

A. No. I, when I was a superintendent I used to advise my board that if they would evaluate my abilities in school finance by hitting my budgeted targets within two percent that I'd done a pretty good job. And they tended to agree with me over the years. There's a lot of variables that happen.

Q. And in the budgeting process, is that a moving target from the beginning to the end?

A. Budgeting process? For schools in the state of Missouri underneath current statutes? That's a moving target. Statutes said that you're supposed to have a budget adopted before the beginning of the fiscal year. To do that you don't even have the assessed valuation figures which don't allow you to even calculate your final tax rate. Anybody who says they can develop a final final school budget prior to beginning the fiscal year is, you can't do that. That's why the budget statutes allow for boards of education to amend their budgets.

* * *

The biggest single thing in Missouri school finance is the tax rate. Not only does it determine your local revenues, but as you've talked about earlier determines your state revenues. And to have any kind of a final budget adopted before you can set your tax rate is just nuts. You can't do it. You've got to come back and change it after you have that information. It's nobody's fault but it's just the way our statutes are." (emphasis added). (Tr. 209-211).

Judgment.

On September 27, 2002, Judge Conley entered a Judgment in favor of the Defendants and against the Plaintiffs and ordered the Amended Petition dismissed with prejudice. Judge Conley made the following findings and determinations:

"The Court, after considering the pleadings, the evidence, the written memoranda filed in this case and the oral arguments presented by counsel, finds the issues in favor of the Defendants and against the Plaintiffs. The Court finds that witnesses Kevan Snell and Dr. Chris Straub are knowledgeable and qualify as experts with respect to school finance in Missouri and that their testimony was credible. The Court specifically finds that the Defendant Columbia 93 School District in establishing its property tax levy rates for 2001 did not violate the provisions of Section 67.110 or Section 137.073, RSMo, as alleged in the Amended Petition. The Court determines that the provisions of Section 139.290,

RSMo, cited by the Plaintiffs, do not afford a procedure for securing any relief under the allegations and proof in this case."

(LF 168-169; Appellant's Appendix A 3).

POINTS RELIED ON

I.

The Trial Court Did Not Err In Determining That The School District Did Not Violate The Provisions Of Section 67.110, RSMo, Inasmuch As Such Determination Can Be Upheld For Each Of The Following Reasons –

State ex rel. Industrial Services Contractors, Inc. v. County Commission of Johnson County, 918 S.W.2d 252, 256 (Mo. banc 1996)

Salisbury R-I School District v. Westran R-I School District, 686 S.W.2d 491, 496 (Mo. App. W.D. 1984)

Southwestern Bell Telephone Company, Inc. v. Mahn, 766 S.W.2d 443, 445 (Mo. banc 1989)

Section 67.110, RSMo 2000

Sections 164.011, RSMo 2000

Rule 83.08(b)

A. Section 67.110 Is A General Statute Relating To The Fixing Of Tax Rates By Political Subdivisions; Section 164.011, RSMo, Is The Statute Which Specifies How Tax Rates Are To Be Fixed By School Districts; A Different Standard For Fixing Tax Rates Is Specified For School Districts In Section 164.011 Than The Provisions In Section 67.110 That "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As

Required In The Annual Budget"; And Hence The Plaintiffs Cannot Secure Relief Based Upon A Violation Of Section 67.110.

Greenbriar Hills Country Club v. Director of Revenue, 935 S.W.2d 36, 38 (Mo. banc 1996)

Salisbury R-I School District v. Westran R-I School District, 686 S.W.2d 491, 496 (Mo. App. W.D. 1984)

Section 67.110, RSMo 2000

Section 163.031, RSMo 2000

Section 164.011, RSMo 2000

B. Under The Circumstances Existing In August Of 2001 When The School Board Adopted The Tax Levy, The Tax Levy Which Was Adopted Complied With Any Requirement That The "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As Required In The Annual Budget".

St. Louis-Southwestern Railway Co. v. Cooper, 496 S.W.2d 836 (Mo. 1973)

Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505 (Mo. 1972)

Allen v. Public Water Supply District No. 5 of Jefferson County, 7 S.W.3d 537 (Mo. App. E.D. 1999)

Southwestern Bell Telephone Co. v. Mitchell, 631 S.W.2d 31 (Mo. banc 1982)

Section 164.011, RSMo Cum. Supp. 1975

Section 67.110, RSMo, 2000

Section 137.073, RSMo 1959

Section 137.073, RSMo 2000

Section 163.031, RSMo 2000

Rule 83.08(b)

C. The Adoption Of The Tax Levy By The School Board By Formal Action In August 2001 Following A Public Hearing Effected A De Jure or De Facto Amendment Of The Budget To Conform To The Revenues That Would Be Generated By The Tax Levy.

City of Perryville v. Brewer, 557 S.W.2d 457 (Mo. App. E.D. 1977)

Section 67.010, RSMo 2000

Section 67.030, RSMo 2000

D. Section 67.110 Does Not Provide For A Rollback Of Tax Levies When A Tax Rate Which Is Adopted Produces More Revenues Than Required To Fund An Annual Budget, And Plaintiffs Cannot Therefore Recover Tax Refunds.

Section 67.110, RSMo 2000

Section 137.073, RSMo 2000

E. The School Board In Adopting Tax Levies Acts Legislatively And No Action Will Lie To Challenge A Tax Levy Which Produces Revenues In Excess Of The Budgeted Amount.

State ex rel. Industrial Services Contractors, Inc. v. County Commission of Johnson County, 918 S.W.2d 252, l.c. 256 (Mo. banc 1996).

Bradford v. Phelps County, 210 S.W.2d 996 (Mo. 1948)

City of Beacon v. County of Duchess, 139 N.Y.S.2d 462 (App. Div. 1955)

Section 67.010, RSMo 2000

Section 67.030, RSMo 2000

Section 67.110, RSMo 2000

Section 164.011, RSMo 2000

II.

The Trial Court Did Not Err In Denying Class Certification Because A Class Action Will Not Lie For Tax Refund Claims And Also Because The Trial Court Found That The Plaintiffs Were Not Suitable Class Representatives.

Charles v. Spradling, 524 S.W.2d 820, 823 (Mo. banc 1975)

H.S. Construction Co. v. Lohman, 950 S.W.2d 331 (Mo. App. W.D. 1997)

State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission, 651 S.W.2d 130 (Mo. banc 1983)

Jenkins v. Missouri, No. 77-0420-CV-W-4, 1990 WL 362044 (U.S. Dt. Ct. W.D. Mo. October 29, 1990); affirmed 962 F.2d 762 (8th Cir. 1992); cert. denied 113 S.Ct. 322 (1992).

Section 139.031, RSMo 2000

Rule 52.08

Rule 83.08(b)

III.

The Trial Court Did Not Err In Joining The Columbia 93 School District As A Party With Respect To The Amended Petition Inasmuch As It Was The Tax Revenues Of The School District Which Are At Issue In This Case And Not Any Revenues Of Boone County Or Of The Respondent County Collector.

Ste. Genevieve School District R-II v. Board of Alderman of the City of Ste. Genevieve, 66 S.W.3d 6 (Mo. banc 2002)

State ex rel. School District of City of Independence v. Jones, 653 S.W.2d 178 (Mo. banc 1983)

ARGUMENT

I.

The Trial Court Did Not Err In Determining That The School District Did Not Violate The Provisions Of Section 67.110, RSMo, Inasmuch As Such Determination Can Be Upheld For Each Of The Following Reasons –

A. Section 67.110 Is A General Statute Relating To The Fixing Of Tax Rates By Political Subdivisions; Section 164.011, RSMo, Is The Statute Which Specifies How Tax Rates Are To Be Fixed By School Districts; A Different Standard For Fixing Tax Rates Is Specified For School Districts In Section 164.011 Than The Provisions In Section 67.110 That "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As Required In The Annual Budget"; And Hence The Plaintiffs Cannot Secure Relief Based Upon A Violation Of Section 67.110.

B. Under The Circumstances Existing In August Of 2001 When The School Board Adopted The Tax Levy, The Tax Levy Which Was Adopted Complied With Any Requirement That The "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As Required In The Annual Budget".

C. The Adoption Of The Tax Levy By The School Board By Formal Action In August 2001 Following A Public Hearing Effected A

De Jure or De Facto Amendment Of The Budget To Conform To The Revenues That Would Be Generated By The Tax Levy.

D. Section 67.110 Does Not Provide For A Rollback Of Tax Levies When A Tax Rate Which Is Adopted Produces More Revenues Than Required To Fund An Annual Budget, And Plaintiffs Cannot Therefore Recover Tax Refunds.

E. The School Board In Adopting Tax Levies Acts Legislatively And No Action Will Lie To Challenge A Tax Levy Which Produces Revenues In Excess Of The Budgeted Amount.

Standard of Review With Respect To Point I

This was a court-tried case. The standard for review of a trial court with respect to this Point I is as stated in *Nolte v. Corley*, 83 S.W.3d 28, l.c. 33 (Mo. App. W.D. 2002), that "[a]ppellate review of a court-tried case is covered by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The judgment of the trial court will be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Id*. at 32. The Court defers to the trial court's findings of fact, due to the superior ability of the trial court to judge the credibility of the witnesses. *B-Mall Co. v. Williamson*, 977 S.W.2d 74, 77 (Mo. App. 1998). All evidence and permissible inferences favorable to the prevailing party are accepted as true, while all evidence and inferences to the contrary are disregarded. *Id.*"

We note that the foregoing statement addresses the standard of review to be followed by an appellate court in Missouri reviewing the decision of a trial court. There

is also the related issue which goes to the merits and is discussed in the argument below concerning the extent to which a court may review a legislative determination made by a school board in establishing a tax levy. The establishment of a tax levy is the "'exercise of a legislative function, whether state or local.'" *State ex rel. Industrial Services Contractors, Inc. v. County Commission of Johnson County*, 918 S.W.2d 252, 256 (Mo. banc 1996).

Appellants in their Substitute Brief seem to assert that this Court is reviewing the Court of Appeals Opinion rather than the record on appeal. See, e.g., App. Sub. Brief at 25-32. This is an improper standard of review.

Furthermore, these assertions and Point I of the Appellants' Substitute Brief violate Rule 83.08(b) which specifies:

> "The substitute brief . . . shall not alter the basis for any claim that was raised in the court of appeals brief. . . ."

Appellants have "alter[ed]" their Point I from a claim that the School District's property taxes were excessive by $1,055,220" in their Amended Brief in the Court of Appeals to a claim in their Substitute Brief in this Court that the property taxes were excessive by "$4,711,883" – the increased amount being a claim that was never asserted by Appellants in the trial court, that was never asserted by them in the Court of Appeals, and that is not permissible under Rule 83.08. See, *Blackstock v. Kohn*, 994 S.W.2d 947, l.c. 952-953 (Mo. banc 1999) (appellants "did not raise this claim before the Court of Appeals. This Court, therefore, may not review the claim"); and *Linzenni v. Hoffman*, 937 S.W.2d 723, l.c. 726-727 (Mo. banc 1997) (appellant did not raise "those issues" in their Court of

Appeals brief and the issues must therefore be denied by the Supreme Court because of Rule 83.08).

A "Delta View" comparison of the changes made by the Appellants in their Substitute Brief from that which they asserted in their Amended Brief in the Court of Appeals is set forth in the Appendix at A-148-240.[7] See in particular the differences in their Point I – A-170-171, A-179-188, A-193-196.

Any claim or issue that the taxes were excessive by $4,711,883" or that the use of a 94% "collection rate" was improper is not subject to review by the Supreme Court.

Argument With Respect to Point I

Introduction

Appellants' claims are bottomed upon an alleged violation of Section 67.110, RSMo, by the Columbia School District adopting a total 2001 tax levy of $4.7544 per $100 assessed valuation rather than a total tax levy of $4.6668 per $100 assessed valuation which Appellants assert resulted in excessive taxes in the amount of

[7] This "Delta View" comparison in the Appendix was made by using the diskettes provided by Appellants' counsel for the Amended Court of Appeals Brief and the Substitute Brief in this Court. The language in red is language in the Court of Appeals Brief which was deleted in the Substitute Brief; the language in blue is language which is new in the Substitute Brief; and the language in green is language in the Court of Appeals Brief which appears at a different place in the Substitute Brief.

$1,055,220. This case does not involve any alleged violation of the Hancock Amendment by adopting the $4.7544 levy; it does not involve any claim of a lack of voter approval to adopt a $4.7544 levy; and it does not involve any alleged failure to roll back a tax levy because of reassessment.

It is important to clarify the amount of taxes which the Appellants claim to be excessive. In their Amended Petition they alleged:

> "20. Utilizing the $4.7544 levy rate against the $1,281,852,353 total assessed valuation figure produces a total possible local tax revenue amount of $60,944,388, less six percent uncollectibles of $3,656,663 equals $57,287,725. This amount exceeds the budgeted revenue amount of $56,232,505 by $1,055,220. The School District's levy rate will thus produce local tax revenue of $1,055,220 more than its budget called for. The levy rate was excessive by 1.88%, and as a result, the school tax amount on all tax bills was overstated by that same percentage." (emphasis added).

At **no place in their Petition** did the Appellants allege that it was improper or unlawful to subtract the "six percent uncollectibles of $3,656,663" in the manner which was done by the School District. The "Points" on appeal in Appellants' Amended Brief in the Court of Appeals did not raise any issue with respect to the six percent "uncollectibles" figure. The Court of Appeals Opinion *sua sponte* raised the "six percent uncollectibles" matter, and Appellants cannot here be heard to assert any claim based on uncollectibles. While the issue of "uncollectibles" or "collection rate" is not properly before this Court

for review, we nevertheless respond on the merits of that issue in response to Appellants' assertions in their Substitute Brief.

The "uncollectibles" do not constitute a "revenue" nor an "expenditure" within the meaning of Section 67.010 or any other provision of Sections 67.010 through 67.110 which are required, or even contemplated, to be within the budget formulated. Section 67.010 requires a political subdivision to project "revenues" and "expenditures" in a budget, but it does not require a projection of "uncollectibles" to be in a budget. The "uncollectibles" do not constitute a "revenue" inasmuch as the "uncollectibles" are not received by the School District as "revenues" in the School District's treasury. See, *Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983), holding that ". . . 'revenue' is defined as 'the annual or periodic **yield** of taxes, excises, customs, duties and other sources of income that a nation, state or municipality **collects and receives into the treasury for public use**. . . .' *Webster's Third New International Dictionary 1942 (1964)."* (emphasis added). This definition of "revenue" in *Buechner* has repeatedly been applied in subsequent cases in a myriad of contexts. Because the "uncollectibles" were <u>not</u> received into the treasury of the School District, they were not "revenues" which were required to be included in the budget.

And, similarly, the "uncollectibles" were <u>not</u> "expenditures" because they were <u>not</u> expended by the Columbia School District, let alone being expended from funds of the School District held in its treasury.

Furthermore, the Court of Appeals Opinion overlooked that Section 67.110.2 provides in the pertinent part herein in question for **calculating tax rates, not for**

calculations being made in adopting a budget. The provisions of Section 67.110.2 in question here provides that "the tax rates shall be **calculated to produce** substantially the same revenues as required in the budget adopted pursuant to this chapter. . . ." (emphasis added). Section 67.110 contemplates the setting of levies "**to produce**" the "$56,232,505" budgeted. (Op., p. 13) – not "to produce" a higher figure of "$60,944,388" which includes uncollectibles which are not "revenues" received by the School District (nor "expenditures").

Furthermore, to put the "uncollectibles" in perspective, the following factors should be considered:

- 1.5 percent of the School District taxes which are received by the County Collector are **never paid over** to or received by the School District, but instead are paid over by the Collector to Boone County as fees. See Section 52.260, RSMo, which provides for a one percent "collecting" fee of the amount the Collector collects, and Section 137.720, RSMo, which provides for a one-half of one percent fee that is withheld by the Collector and paid over to Boone County for the prorated cost of "assessing" properties. Consequently, 1.5 percent of the current school taxes collected by the Boone County Collector is never remitted as "revenues" to the treasury of the School District.
- Each year the School District also budgets a revenue item for "delinquent taxes" which it receives. This budgeted amount was $2,070,000 for the 2001-02 school year. Consequently, of the taxes levied in a particular fiscal

year, a "revenue" item in an amount of approximately $2 million in "delinquent taxes" has been projected in the School District budget, for each year over the last several years to be received. Consequently, in each year delinquent taxes in an amount equal to approximately three percent of the "current taxes" is received by the School Districts as "revenues" under the "delinquent tax" revenues line item.

- As a result of 1.5% of the taxes collected by the Boone County Collector going for fees which the School District never receives and over 3% percent of the 2001 taxes not being paid in a timely manner but instead being later received as "delinquent taxes," such accounts for over 4.5% of the 6% allowance for "uncollectibles." The balance of the "uncollectibles" of between one percent and 1.5% represents monies which are not collected by the Boone County Collector and which are never received as "revenues" by the School District.

The budget forms prepared by the Commissioner of Education pursuant to Section 67.090 do not provide for any "uncollectibles" to be budgeted as "revenues" or "expenditures." Consequently, the methodology used by the Columbia 93 School District in making an allowance for "uncollectibles" in the computations at the time tax levies are set in August, rather than at the time of the adoption of a budget in June, is universally followed by school districts throughout the state.

We further note that *Southwestern Bell Telephone Co. v. Fuerstein*, 529 S.W.2d 371 (Mo. banc 1975), relied upon in the Court of Appeals Opinion is not relevant to the

construction of the budget provisions in Sections 67.010 and 67.110, RSMo, inasmuch as *inter alia*, (i) those budget provisions were not involved in *Fuerstein*, (ii) the concepts of "revenues" received into the treasury of the District and "expenditures" made from the treasury of the District as defined in Section 67.010 were not involved in *Fuerstein*, (iii) the concept of what a particular levy actually "produce[s]" in "revenues" for the District in Section 67.110 was not involved in *Fuerstein*, and (iv) the statute involved in *Fuerstein* was a much earlier version of Section 137.073, RSMo, a statute which is not at issue in this case.

This Point I sets forth reasons why Judge Frank Conley's determination that the School District did not violate Section 67.110, RSMo, in setting its 2001 tax levies. If we are correct on any one of the five reasons set forth in subpoints A. through E, then the Appellants are not entitled to relief and the Judgment below must be affirmed. This Point I is directed to Points I and II in Appellants' Amended Brief. Also, if the Appellants are not entitled to relief based upon a violation of Section 67.110, RSMo, then the issues which Appellants posit in their Point III (failure to certify a class) and Point IV (joinder of the School District as a party) become moot or are at most harmless error.

Section 67.110, RSMo, upon which Appellants posit relief, provides in pertinent part:

> "1. Each political subdivision in the state . . . shall fix its ad valorem property tax rates as provided in this section not later than September first for entry in the tax books. Before the governing body of each political subdivision of the state, . . . fixes its rate of taxation, its budget officer shall

present to its governing body the following information for each tax rate to be levied: The assessed valuation by category of real, personal and other tangible property in the political subdivision as entered in the tax book for the fiscal year for which the tax is to be levied, . . . the amount of revenue required to be provided from the property tax as set forth in the annual budget adopted as provided by this chapter, and the tax rate proposed to be set. . . .

2. . . . The tax rates shall be calculated to produce substantially the same revenues as required in the annual budget adopted as provided in this chapter." (emphasis added).

The budgeting process for a school district in Missouri is at best an "inexact practice" as this Court in *Salisbury R-I School District v. Westran R-I School District*, 686 S.W.2d 491, 496 (Mo. App. W.D. 1984) (per Shangler, J.):

"The school district budget process is an inexact practice.

* * *

The revenues derive from local county, state and federal sources. The local revenues are from the school district levy, and comprise the most significant component of anticipated income. The local revenues also include income from food services, activity fees, and other such miscellaneous sources. Other significant income derives from the short-term investment of tax receipts, but that fluctuates with the current interest rate.

> The school district budget extends from July 1 to June 30. The estimated budget must be approved by the board of education before July 1 of the year, and the Estimate of Required Local Taxes [for the local revenue component of the budget] must be submitted – along with the rate of levy to be extended against the assessed property in the district – to the county clerk by July 15[8] of the year. The preponderant portion of the taxes, however, are paid to the schools during the early months of the calendar year, so that from July through December [the first half of the budget year, but the last half of the tax revenue income year], a district has less ready money to spend than may be currently owed. That compounds the uncertainty of the budget process."

Id. at 496 (bracketed language supplied by Court in its Opinion).

The Court in *Salisbury R-I School District* then went on to describe how a school board typically deals with the uncertainty in the budgeting process. The Court stated:

[8] The statutes have been changed and now provide for the tax levy rates to go to the County Clerk by September rather than July 15. Thus, in adopting tax levies in August, the School District will have additional knowledge which may make part of the budget adopted in June obsolete.

> "A typical technique a school board employs to allay that possibility of imbalance . . . is to 'plan a surplus' – an 'end balance to get through from July 1st to the end of the year.'"

Id. Thus, in *Salisbury R-I School District* the Western District recognized that because of timing issues with the receipt of tax revenues and the difficulty a school district has in predicting its revenues and expenses, it is often necessary for a school district to factor in a surplus in order to ensure that the school district will have the cash available to meet its obligations from July 1 though the end of the year.

This Court in *Southwestern Bell Telephone Company, Inc. v. Mahn*, 766 S.W.2d 443, 445 (Mo. banc 1989), cited the foregoing reasoning in *Salisbury R-I School District* with approval, noting –

> "The School district budget process has been described as an 'inexact practice', due in part because neither revenues nor expenditures can be predicted with certainty."

The budgeting process for a school district has become more complex and entails more uncertainties than were present at the time *Salisbury R-I School District* was decided in 1984. That is evident from the record in this case. Budgeting at the Columbia School District is a year-round process. The annual budget exceeds $150 million. The Budget document, which is in summary form, is approximately 100 pages of financial details. Pl. Exh. 4. The complexities, myriad of factors and uncertainties involved in formulating a budget by projecting receipts and expenditures is apparent by a cursory review of Chapters 163 and 164, RSMo – and even by just reviewing a few of the

sections in those chapters – Sections 164.011 (annual estimates of required funds and establishing tax rates), 163.011 (definitions for Chapter 163), 163.015 (operating levy), 163.021 (eligibility for state aid), 163.031 (state aid – entitlements – apportionments), and 163.036 (estimates of daily average attendance). Other state statutes, state regulations, federal statutes and federal regulations have to be considered, as well as the political uncertainties of full funding, reduced funding or the possibility of withheld funds by state or federal sources. Tax rates by other school districts which are beyond the control of the Columbia School District have an affect upon the distribution of taxes received from state-assessed railroad and utilities properties and also how the state aid "pie" is to be divided.

At the time the School District's budget was formulated and circulated to the School Board and made available to the public before the June 11, 2001, Board meeting, the School District had not received from the Boone County Clerk the preliminary assessment figures for locally assessed property within the School District. The figure estimated for total assessed valuation in the Budget document was $1,247,951,747. (Pl. Exh. 4, p. 76, App. A-120). The "Preliminary" Notice in June from the County Clerk reflected an assessed valuation of $1,267,797,234. Dist. Exh. 13; Tr. 131. On August 7, 2001, the information received from the County Clerk indicated a total assessed valuation as of that date of $1,281,852,353 – a figure which was still subject to change in the "equalization process". Dist. Exh. 17. Consequently, there was an increase of $33,900,616 in the total locally assessed valuations figure from that projected in the Budget adopted on June 11 to the figure available at the August 23 tax rate hearing. The

total tax levy rate of $4.7936 projected in the June 11 Budget dropped by $.0392 to $4.7544 at the August 23 tax rate hearing.

At the time the June 11 Budget was adopted –

- The School District had not received the worksheets from the State Auditor for use in calculating permissible tax rates for 2001. (Tr. 133).
- The School District did not know what the proration factor would be for basic state aid to the District under the state foundation formula and could therefore not predict with certainty what basic state aid under the formula would be available to the District. (Tr. 130).
- Projections had not been received from the Missouri Department of Elementary and Secondary Education ("DESE") re the amounts of Proposition C sales tax revenues, fair share (cigarette tax) and free textbook insurance premium tax) revenues for the District for 2001-02. (Tr. 139).

Consequently, it is clear that for the Columbia School District as well as other Missouri school districts the budgeting process is "inexact", as described in *Salisbury R-I School District*, *supra*, and *Southwestern Bell*, *supra*, and is also a moving target as described by Dr. Straub in his testimony:

> "A. Budgeting process? For schools in the state of Missouri underneath current statutes? That's a moving target. Statutes said that you're supposed to have a budget adopted before the beginning of the fiscal year. To do that you don't even have the assessed valuation figures which don't allow you to even calculate your final tax rate. Anybody who says

they can develop a final final school budget prior to beginning the fiscal year is, you can't do that. That's why the budget statutes allow for boards of education to amend their budgets.

* * *

The biggest single thing in Missouri school finance is the tax rate. Not only does it determine your local revenues, but as you've talked about earlier determines your state revenues. And to have any kind of a final budget adopted before you can set your tax rate is just nuts. You can't do it. You've got to come back and change it after you have that information. It's nobody's fault but it's just the way our statutes are." (emphasis added). (Tr. 210-211).

A. Section 67.110 Is A General Statute Relating To The Fixing Of Tax Rates By Political Subdivisions; Section 164.011, RSMo, Is The Statute Which Specifies How Tax Rates Are To Be Fixed By School Districts; A Different Standard For Fixing Tax Rates Is Specified For School Districts In Section 164.011 Than The Provisions In Section 67.110 That "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As Required In The Annual Budget"; And Hence The Plaintiffs Cannot Secure Relief Based Upon A Violation Of Section 67.110.

While Section 67.110, RSMo, is general statute relating to the fixing of ad valorem tax rates by all political subdivisions, Section 164.011, RSMo, is a specific

statute which governs only how school districts establish their tax levies. Section 164.011, not Section 67.110, governs how school districts are to set their tax levies.

Section 67.110 was last amended in 1987. Section 164.011 has been amended and reenacted after that date in 1994, 1995, 1996 and 1996. These amendments have been made to take into account the requirements which school districts as distinguished from other political subdivisions must consider in fixing tax rates. Section 164.011 recognizes that a school district receives revenues from many sources, not just ad valorem tax revenues.

Section 164.011 provides:

> "The school board of each district annually shall prepare an estimate of the amount of money to be raised by taxation for the ensuing school year, the rate required to produce the amount, and the rate necessary to sustain the school or schools of the district for the ensuing school year, to meet principal and interest payments on the bonded debt of the district and to provide the funds to meet other legitimate district purposes. In preparing the estimate, the board shall have sole authority in determining what part of be total authorized rate shall be used to provide revenue for each of the funds as authorized by section 165.011, RSMo." (emphasis added).

The provisions of Section 164.011 authorized the Columbia School Board to adopt the 2001 tax levies which totaled $4.7544 per $100 assessed valuation without taking into consideration the "substantially the same revenues" language contained in

Section 67.110. The provisions of a special statute relating only to school districts prevails over the provisions of a general statute relating to political subdivisions generally**.** "When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general." *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996).

It is also noted that *Salisbury R-I School District*, *supra*, when discussing the "school district budget process" did not make any reference to the budget provisions within Chapter 67 relating to political subdivisions generally but only referred to provisions in Chapter 164 relating only to school districts.

In 1993 the state school foundation formula was dramatically changed with the enactment of Senate Bill 380 which adopted a guaranteed tax base system. The amount of the local operating tax levy[9] drives the amount of state aid a school district will receive. Consequently, the adoption of local tax levies drives not only the amount of local property taxes that are to be received, but also the amount of basic state aid which is to be received under the school foundation formula, Section 163.031, RSMo. This system was not in effect when Section 67.110 was last amended in 1987. Section 164.011 provides different criteria for school districts in estimating and establishing tax levies than the "substantially the same revenues as required in the annual budget" test in

[9] The term operating tax levy includes all tax levies except the debt service tax levy.

67.110 for political subdivisions generally. The tax rates adopted by other political subdivisions do not impact directly the amount of state aid which they receive.

Hence, the "substantially the same revenues as required in the annual budget test" test in Section 67.110 upon which Appellants rely is inapplicable to school districts and the Judgment below must be affirmed.

B. Under The Circumstances Existing In August Of 2001 When The School Board Adopted The Tax Levy, The Tax Levy Which Was Adopted Complied With Any Requirement That The "Tax Rates Shall Be Calculated To Produce Substantially The Same Revenues As Required In The Annual Budget".

Assuming, *arguendo*, that the criterion of "tax rates must be calculated to produce substantially the same revenues as required in the annual budget" set forth in Section 67.110, RSMo, is applicable to school districts, the School District met that criterion in establishing its 2001 tax levies and the judgment below must therefore be affirmed.

The wording in Section 67.110 upon which Appellants rely is –

> "The tax rates shall be calculated to produce substantially the same revenues as required in the annual budget adopted as provided in this chapter." (emphasis added).

The word "revenues" is used in the plural and is not limited to "revenue" from local property taxes, but must and should be interpreted as the "revenues" produced by the tax levies from all sources, including basic state aid under the school foundation formula.

For when local operating tax levies are increased, such generally results in additional state funds being received by a school district under the school foundation formula. And when local operating tax levies are decreased, such generally results in less state aid being received by a school district under the school foundation formula. Section 163.031, RSMo. (Tr. 210-211).

Appellants look only to the amount a part of local tax "revenue" which the levies would generate, not to the total amount of the "revenues", both local and state, which the levies would generate or reduce. The School District in projecting revenues must, and properly can, under Section 67.110, if applicable, take into consideration the "revenues", including both local and state, that the tax levies would produce.

Here, it is clear from the record, and both Mr. Snell and Dr. Straub so testified, that if the total operating levies were reduced by any amount below the amount set by the School Board on August 23, 2001, such would have resulted in a loss of $4,043,000 in state revenues because of the effect of what is known as the "calculated levy". The "calculated levy" concept results when a school district rolls back its tax levies as the Columbia 93 School District did in 1997. For as long as the School District does not voluntarily roll back its operating tax levies more than what it was required to do by the reassessment rollback, the School District has the benefit for state aid purposes under the school foundation formula of the operating tax levies in effect prior to the reassessment rollback. See discussion of the "Calculated Levy", *supra*, in the Statement of Facts.

The evidence was that the Missouri Department of Elementary and Secondary Education ("DESE") and others (except for Appellants, and later the Court of Appeals

Opinion) uniformly concluded that a reduction of the levy under the circumstances here would be considered a "voluntary" rollback with a resulting loss of the $4 million state aid benefit by application of the "calculated levy." The change to what is now Section 163.011(13) to provide for a "calculated levy" was made in 1996 by Senate Bill Nos. 795, et seq. That statutory change required that the rollback be one that is "**resulting from the reassessment**" in order for the "calculated levy" to be available. A reasonable reading of the "calculated levy" provision requires that the rollback be because of the biennial "reassessment" not because of any other reasons such as Section 67.110, RSMo. A rollback caused by any budgeting requirement in Section 67.110, RSMo, is not a rollback "resulting from the reassessment" and is therefore "voluntary." Consequently, had the School District rolled back its levy for budgeting reasons rather than as a "resulting from the reassessment," it is clear from the statute itself that it would have been "voluntary" within the meaning of the "calculated levy" provisions. This comes from a reading of the statutory provisions adopted in 1996 and **not just** from the testimony which reflected the interpretation that DESE and others take in calculating state aid to be distributed under the formula.

Inasmuch as DESE was not and is not a party to this litigation, the discussion in the Court of Appeals Opinion relative to the "calculated levy" and the rollback because of Section 67.110 being involuntary is not binding on DESE. Such fact in and of itself gives the Columbia School District and many other school districts similarly situated concern for the future since DESE may still consider a rollback by reason of Section 67.110 to be

a “voluntary” rollback rather than a rollback “resulting from the reassessment” since it was not a party to this litigation.

The interpretation enunciated by the Court in the Court of Appeals Opinion also leaves open the ability of a school district to “play with the system” by securing state aid predicated on the “calculated levy” and at the same time further reduce its local tax rates. All a school district would have to do would be to underestimate the district’s assessed valuation during the June budget process and then be “forced” to roll back its tax levy rates in August based upon higher and more current assessed valuation figures which are then available. Such would maintain the level of state aid but allow the school district to roll back its local levy rates. Because such a situation could be so easily manipulated, this demonstrates that a “roll back” not “resulting from the reassessment” but rather because of Section 67.110 is in fact a “voluntary” rollback within the meaning of what is now Section 163.011(13), RSMo.

Consequently, it is clear that if the levies had been reduced from $4.7544 to $4.6668 as contended by the Plaintiffs, such would have resulted in a loss of state “revenue” of approximately $4 million. Such would have then caused the projected “revenues” to be $4 million less than the “revenues required in the annual budget”.

The Appellants assert that the levies totaling $4.7544 established by the School District generated $1,055,220 more revenues than projected by the June 11 Budget. Appellants fail to consider, however, that the adoption of the total levy of $4.6668 which they assert should have been adopted would have resulted in $4 million less revenues than projected by the June 11 Budget.

Lane asserted at the public hearing on August 23, 2001, and again at trial that a reduction of the total tax levy from $4.7544 to $4.7244, or a reduction of $.0300, would have brought the Columbia School District into compliance with the budget laws. (Pl. Exh. 22, Tr. 192-193). Appellants taking the position that a $.0300 reduction would satisfy the budget laws completely undercuts the contention of the Appellants that a reduction of $.0876 was required. Applying the $4.7244 total tax levy to the total assessed valuation of taxable property in the School District ($1,281,852,353) would produce tax billings of $60,559,832.57.[10] Using the 94% collection rate to be collected during the current period, the current collections would be $56,926,242.62. The difference between $56,926,243 which Appellant Lane said would be satisfactory and the $56,232,505 which Appellants plead cannot be exceeded would be **$693,738**.

This $693,738 figure stands in stark contrast to (i) the $1,055,220 figure pleaded in the Amended Petition and the Appellants' Amended Brief in the Court of Appeals and (ii) the $4,711,883 figure now asserted by the Appellants (in violation of Rule 84.08(b)) belatedly adopting the *sua sponte* holding of the Court of Appeals with respect to the 6% "uncollectible" allowance. See, the June 25, 2004, *Columbia Tribune* (http://www.columbiatribune.com/2004/Jun/20040625News005.asp) discussing the 100 percent collection rate expected by the Court of Appeals May 18 Opinion:

[10] $1,281,852,353 assessed property valuation ÷ 100 = 12,818,523.52 x $4.7244 = $60,559,832.57.

"Even [Appellant Henry] Lane says 'it's just not reasonable for the courts to expect school districts to assume a 100 percent collection rate, noting the school district must turn over 1.5 percent of collections back to the counties in fees.'"

If all of the projected revenues in the June 11, 2001, Budget are taken into account, i.e., $150,592,377, the $1,055,220 which Appellants plead to be in excess would only be .7007% of the total projected revenues of $150,592,377. If the $1,055,220 figure is reduced to conform to the $4.7244 levy which Mr. Lane testified would be acceptable so that only $361,482 would be in "excess", such "excess" would only be .2400% of the total projected revenues.

Consequently, the total "excess" tax revenues which the Appellants "contend" or have "agreed" would be excessive would be 1.8425% of the applicable revenues on the high side or no more than .2400% of the applicable revenues. The trial court could have found from the evidence that anything less than a 2% deviation was substantial compliance. Dr. Straub, who the trial judge found to be a credible expert, testified that from his experience as a school administrator, a 2% deviation in projected revenues would not be considered to be "substantial". (Tr. 209). Therefore, it would have been proper for the trial court to have concluded that the tax rates were "calculated to produce substantially the same revenues as required in the annual budget" (emphasis added). Therefore, the Judgment must be affirmed.

Even where a tax levy rollback because of reassessment is specifically required by Section 137.073 which has a "substantially the same" standard, the cases have held that a

rollback which reduces the levy to assure a rollback of taxes to within 2% of the target meets the "substantially the same" standard.

In *St. Louis-Southwestern Railway Co. v. Cooper*, 496 S.W.2d 836 (Mo. 1973), the Court defined the phrase "substantially the same" in Section 137.073, RSMo. Section 137.073 addresses the setting of a tax levy by a taxing entity from a tax limitation concept. Section 137.073 provided:[11]

> "Whenever the assessed valuation of real or personal property within the county has been increased by ten percent or more over the prior year's valuation, . . . , and such increase is made after the rate of levy has been determined and levied by the . . . school board . . . , then such taxing authorities shall immediately revise and lower the rates of levy to the extent necessary to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy. Where the taxing authority is a school district it shall only be required hereby to revise and lower the rates of levy to the extent necessary

[11] Section 137.073 has been amended numerous times since *St. Louis-Southwestern Railway Co.* was decided. It no longer has the "ten percent" provision, but it does contain a provision requiring a taxing authority to revise its tax rate to produce "substantially the same amount of revenue as was produced in the previous year" when certain other conditions are present.

> to produce from all taxable property substantially the same amount of taxes as previously estimated to be produced by the original levy, plus such additional amounts as may be necessary approximately to offset said district's reduction in the apportionment of state school moneys due to its increased valuation."

(Emphasis added.) The Court acknowledged that the phrase "substantially the same amount" must be interpreted with the recognition that a rate which would yield precisely the same amount of revenue would be virtually impossible to determine. *Id.* at 841. With these parameters in mind, the Court defined "substantially the same" to mean "practically," "almost," or "essentially." *Id.* at 842.

St. Louis-Southwestern Railroad decided whether particular levies complied with the "substantially the same" requirements of Section 137.073. At issue in the case was the proper mean school tax rate for school districts within a county for railroad and utility property assessed by the State Tax Commission. While a 9.3 percent excess collection[12] was held to not be substantially the same, one of the railroad companies bringing the action had asserted that the correct levy rate should have been $3.08. The Court noted

[12] $125,187 excess levy / $1,346,912 in taxes estimated to be produced by original levy = 9.3 percent excess.

that the $3.08 levy would have produced approximately $75,000 or 5.5 percent[13] in excess of the original estimate of taxes. Despite the fact that the levy produced over $75,000 in excess revenues the Court concluded that the $3.08 rate proposed by the railroad met the requirements of Section 137.073. Consequently, *St. Louis-Southwestern Railway Co*. instructs that a 5.5 percent variance between the estimated taxes and the taxes actually produced meets the requirements of being "substantially the same." Here, the alleged variance by Mr. Lane is at most only a 1.8425% variance – a percentage which is much less than the approved 5.5% variance in the *St. Louis-Southwestern Railway Co.* case.

In *Missouri Pacific Railroad Co. v. Kuehle*, 482 S.W.2d 505 (Mo. 1972), the Court reached a similar result when deciding whether a particular levy complied with the "substantially the same" language of Section 137.073. In *Kuehle*, the total amount of taxes which would have been produced under the original levy was $3,169,434. *Id.* at 507. The Court held that a levy rate which produced $263,244, or 8.3 percent more than was originally estimated, failed to comply with the "substantially the same" language of Section 137.073. However, Plaintiffs in the action had proposed a levy which produced $80,000, or 2.5 percent more in taxes than the original estimate of $3,169,434. The Court

[13] $75,000 excess levy /$1,346,912 in taxes estimated to be produced by original levy = 5.5 percent excess

found that Plaintiffs' suggested rate met the "substantially the same" requirements of Section 137.073. *Id.* at 509.

The Court of Appeals has recognized that a two percent variance in a budget is not a "substantial" amount. In *Allen v. Public Water Supply District No. 5 of Jefferson County*, 7 S.W.3d 537 (Mo. App. E.D. 1999), the Court was asked to decide whether the trial court erred in ordering a particular parcel of land "detached" from a public water district. On appeal, the water district argued that the detachment would adversely affect the water district. The Court of Appeals disagreed, noting, among other things, that the water district's projected income from the land at issue was only $13,383 or 2 percent of the water district's annual budget of $600,000. *Id.* at 539. The Court found that the $13,383 projected income would not "substantially affect [the water district's] annual budget" and permitted the detachment of the land. *Id.* at 539, 541.

Thus, Missouri case law dictates that variances of two percent or less in revenues or budgets are insubstantial amounts, even when a statute specifically requires a rollback, taxpayers' rights are at issue. If applicable, Section 67.110 only requires the tax rate to produce "substantially the same" revenues as required in the annual budget. A variance of between .2400% and 1.8425% under Missouri law is miniscule and meets the "practically," "almost," "essentially," definition of "substantially the same" – particularly when one considers that school district budgeting in Missouri is "inexact", has many variables and is a moving target.

Appellants reference Section 137.073, RSMo, in their Amended Brief. That reference and reliance is misplaced. We note that in *Southwestern Bell Telephone Co. v.*

Mitchell, 631 S.W.2d 31 (Mo. banc 1982), the taxpayers brought an action pursuant to section 137.073 alleging that the taxing entities within Jackson County, Missouri, failed to revise and lower their levy rates to the extent necessary because of a reassessment rollback to produce from all locally assessed property substantially the same amount of taxes as previously estimated to be produced by the original levies. The taxpayers alleged, among other things, that two of the taxing entities had set their taxes on their "estimate of need" to produce revenues higher than the amounts stated in their budgets. The Court stated:

> "Section 137.073 is not a vehicle to test the propriety or legality of a taxing authority's determination or procedure for determination of how much money it needs in order to operate.
>
> * * *
>
> A suit pursuant to § 137.073 simply does not look behind the estimate of need or the taxes originally estimated to be produced. Instead, the taxes previously estimated to be produced is a starting point of the statute.
>
> * * *
>
> Whether the taxes estimated to be produced by the taxing authority must be the same amount as its budgeted need or is in contravention of the budget is not an issue in a § 137.073 suit. . . ." (*Id.* at 36-38, emphasis added).

We note in retrospect that the amount of state revenues actually received from the state during the 2001-02 fiscal year were actually $726,000 less than had been projected in the June 11, 2001, Budget. (Tr. 127-128). Consequently, it was very prudent for the School Board to have adopted the levy which it did. After September 1, 2001, it would have been too late for the School Board to have adopted a higher tax levy.

Therefore, even if, *arguendo*, the "substantially the same" language of Section 67.110 is applicable, the total tax levy adopted by the School Board on August 23, 2001, complied with this criterion and Judge Conley could have so found. The Judgment of the trial court must therefore be affirmed.

C. The Adoption Of The Tax Levy By The School Board By Formal Action In August 2001 Following A Public Hearing Effected A De Jure or De Facto Amendment Of The Budget To Conform To The Revenues That Would Be Generated By The Tax Levy.

It is that Section 67.030, RSMo, (Appendix, A-018) which is a part of the budgeting laws relating to political subdivisions, specifically permits the governing body of a political subdivision to revise, alter, increase or decrease the items contained in a budget after the budget is first adopted:

> "The governing body of each political subdivision may revise, alter, increase or decrease the items contained in the proposed budget, subject to such limitations as may be provided by law or charter; provided, that in no event shall the total authorized expenditures from any fund exceed the estimated revenues to be received. . . ."

The formal action of the School Board in adopting the tax levies which it did on August 23, 2001, was, in effect, an amendment of the budget pursuant to Section 67.030. Whether it be considered as a formal amendment or a de facto amendment is of no real consequence. The only amendment to the budget which Section 67.030 indicates should not be made is one which results in "the total authorized expenditures from any fund exceed[ing] the estimated revenues to be received."

This conclusion is further buttressed by the provisions of Section 67.010, RSMo, (Appendix, A-017) which is another part of the budgeting laws relating to political subdivisions which provides:

> "In no event shall the proposed expenditures from any fund exceed the estimated revenues to be received plus the unencumbered balance or less any deficit for the beginning of the budget year; provided, that nothing herein shall be construed as requiring any political subdivision to use any cash balance as current revenue or to change from a cash basis of financing its expenditures" (emphasis added).

Consequently, these statutes make clear that the object of the budget laws was primarily intended to assure that there are sufficient revenues to cover projected expenditures. None of these sections contain a provision which prohibit budget amendments which will increase revenues.

In *City of Perryville v. Brewer*, 557 S.W.2d 457 (Mo. App. E.D. 1977), the City, rather than adopting a "formal budget" under Section 67.010 used the financial statements prepared by accountants for the pervious year "as a basis upon which they

estimated the succeeding year's income and expenses necessary to operate each of the City departments. If additional funds were needed, a study was made of the financial condition of the City, the balances which it had and a determination would then be made as to whether additional expenditures in any particular category would be made." 557 S.W.2d at 457. The Court then indicated that while "it did not condone" these informal actions, it found that the "evidence indicated conservative financial management of the affairs of the city" (*Id*.) and rejected a contention of illegality.

Here, there was much more than in *City of Perryville*. Formal action was taken on August 23. If a budget amendment was required, the formal action on August 23, 2001, effectively amended the School District's Budget of June 11; Appellants cannot complain; and Judge Conley could have so found.

Therefore, for this additional reason, the Judgment of the trial court should be affirmed.

D. Section 67.110 Does Not Provide For A Rollback Of Tax Levies When A Tax Rate Which Is Adopted Produces More Revenues Than Required To Fund An Annual Budget, And Plaintiffs Cannot Therefore Recover Tax Refunds.

Section 67.110, RSMo, does not contain any provisions for a rollback of tax rates or for a refund in the event that the adopted tax rates produce more than "substantially the same revenues as required in the annual budget". Section 137.073, RSMo, which was originally enacted in 1955 and has since been amended, has in each version of the law

specifically required a political subdivision when there has been an increase of assessed valuation above a specified amount to rollback tax levies.

Section 137.073 provided in 1955 and does at the present time provide that when the assessed valuation in a taxing district increases to a point which exceeds a certain amount (this amount has varied over the years), the taxing district then must rollback the tax rates.

There is no similar language in Section 67.110 which directs that there be any rollback of levies when a levy generates more revenue than set forth in a school district's budget. There is also no provision in Section 67.110 which provides for court actions to secure refunds, while there are provisions in Section 137.073 relative to actions for tax refunds.

Because Section 67.110, RSMo, does not direct that a political subdivision reduce its tax levies when the tax levies reach a certain point, it is clear that the General Assembly did not intend that a taxpayer would have a legal right to require a reduction in the tax rates and therefore be entitled to a tax refund because the revenues which the tax rates would produce would be more than projected in an earlier adopted Budget.

For this additional reason, the Judgment of the trial court must be affirmed.

E. The School Board In Adopting Tax Levies Acts Legislatively And No Action Will Lie To Challenge A Tax Levy Which Produces Revenues In Excess Of The Budgeted Amount.

When the Columbia School Board adopted the 2001 tax levies on August 23, 2001, it was acting legislatively. A public hearing regarding the proposed levy rates was

noticed by publication. Mr. Lane appeared before the Board and made a presentation. Whether it be a person who appears before a School Board to oppose proposed levy rates or one who appears before a committee of the Missouri House or Senate to oppose a proposed tax measure, it is still the legislative body which makes the decision to adopt or not to adopt the levy rates or the tax measure. The establishment of a "'levy' 'denotes exercise of legislation function, whether state or local, determining that a tax shall be imposed and fixing [the] amount, purpose and subject of the exaction.'" (emphasis added). *State ex rel. Industrial Services Contractors, Inc. v. County Commission of Johnson County*, 918 S.W.2d 252, l.c. 256 (Mo. banc 1996). "Absent a statutory directive to the contrary, therefore, the [school board] . . . may lawfully set the amount of the . . . [levy rates] within the statutorily prescribed limitations. . . ." (emphasis added). *Id*. at 257. Here, the levy rates which were set did not violate the Hancock Amendment, did not violate the property tax rollback provisions of Section 137.073, complied with the provisions of Section 164.011, and did not violate the specific directions in Section 67.010 or Section 67.030 that there be sufficient projected revenues to cover projected expenditures. The governing bodies of school districts because of the complexities of budgeting revenues from uncertain state and federal sources, have been given discretion under Section 164.011 and Section 67.110 to exercise their legislative judgments in determining what revenues will substantially cover the projected expenditures. For when Sections 67.010, 67.030 and 67.100, which are a part of the budgeting laws relating to political subdivisions, are read together, the only "statutory directive" is that there will be sufficient revenues to cover projected expenditures.

Section 67.010 also provides that a budget will provide a "comprehensive plan" so that all aspects of projected revenues, not just local property tax revenues, are considered in an analysis of the budget. Budget laws in Missouri were first enacted in Missouri in 1933 at the height of the Depression. *State ex rel. Armontrout v. Smith*, 182 S.W.2d 571, l.c. 574 (Mo. banc 1944). There can be no doubt that the overriding intent of budget laws in Missouri is to try to make as certain as possible that there will be sufficient revenues to cover projected expenditures.

It is further clear that actions by a the governing bodies of local governmental entities in making budget determinations and acting to assure that there are sufficient revenues to cover projected expenditures are not subject to judicial review. In *Bradford v. Phelps County*, 210 S.W.2d 996 (Mo. 1948), judicial review was sought of alleged violations of the County Budget Law. The Court held that the alleged violations of the Budget Law were not subject to judicial review:

> "The County Budget Law makes it more expedient for the county court to perform its duty, that is, the County Budget Law provides 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traube v. Buchanan County, 341 Mo. 727, 108 S.W.2d 340, 342. It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. In

giving such discretionary managerial powers and duties to the county courts, the Legislature has not provided an appeal whereby a circuit court may review the county court's acts in the exercise of its discretion and whereby the circuit court can substitute its own independent judgment. See again and compare State ex rel. Dietrich v. Daues, supra."

210 S.W.2d at 999-1000 (emphasis added).

See also, *City of Beacon v. County of Duchess*, 139 N.Y.S.2d 462 (App. Div. 1955), where a claim was asserted that the real estate taxes levied "were too high and, in fact, could have been eliminated entirely had the surpluses been estimated correctly". The Appellate Division rejected this contention, holding that "courts do not have the power to review the exercise of discretionary powers by a municipal corporation as to estimates of money required to carry on the affairs of the municipality." *Id*. at 463. And, in *Saxton v. Carey*, 406 N.Y.S.2d 732, 735 (Ct. App. 1978), where questions about the form of a budget were raised, the Court of Appeals rejected the claims, holding –

"It is, rather, a function of the political process, and that interplay between the various elected representatives of the people. . . ."

Here it was the "function" of the Columbia School Board, the "elected representatives of the people", to establish the 2001 tax levies. While the record reflects that Mr. Lane ran four[14] times unsuccessfully for the Columbia School Board, neither he

[14] While outside the record, Mr. Lane ran again for the Columbia School Board at the April 2003 and April 2004 elections – and lost.

nor his followers who have joined in this lawsuit to secure tax refunds totaling $33.75 (see Statement of Facts, *supra*) are on the School Board to make the legislative decision with respect to the tax levies.

While a judgment creditor or a bond holder might have standing to question a levy that was too low, the Plaintiffs do not have standing to question a levy that was too high – particularly when they only have $33.75 at stake. In *Koehr v. Emmons*, 55 S.W.3d 859, l.c. 864 (Mo. App. E.D. 2001), the Court held that where the Plaintiffs' tax refund claim was "just $4.04, or less than ten percent of the filing fee for this appeal" such was not a sufficient amount upon which to predicate standing to litigate the issue. (emphasis added).

Here, Appellant Lane's refund claim is only 53¢, and there are only three Appellants who might have refund claims of more than $4.04 – with those three Appellants having only $9.93, $10.31 and $10.04 at stake, respectively. See, Jurisdictional Statement, *supra*.

For these additional reasons, the Judgment of the trial court should be affirmed.

II.

The Trial Court Did Not Err In Denying Class Certification Because A Class Action Will Not Lie For Tax Refund Claims And Also Because The Trial Court Found That The Plaintiffs Were Not Suitable Class Representatives.

Standard of Review

The standard for review of whether an action can proceed as a class action for a tax refund is first an issue of law. See, *State ex rel. Lohman v. Brown*, 936 S.W.2d 607, l.c. (Mo. App. W.D. 1997), holding that "it is well established that class actions are not available in tax refund cases in Missouri". If Appellants can surmount that hurdle, then the standard of review for a trial refusing to certify a class is an abuse of discretion standard. See, *State ex rel. American Family Insurance Company v. Clark*, 106 S.W.3d 483 (Mo. banc 2003), holding that a "'[D]etermination of whether an action should proceed under Rule 52.08 ultimately rests within the sound discretion of the trial court.' *Ralph v. Am. Family Mut. Ins. Co.*, 835 S.W.2d 522, 523 (Mo. App. 1992)."

Point III of Appellants' Substitute Brief, like their Point I, violates the provisions of Rule 83.08(b) by raising additional issues which were not asserted in their Amended Brief in the Court of Appeals. See, *Blackstock v. Kohn*, 994 S.W.2d 947, l.c. 952-953 (Mo. banc 1999); *Linzenni v. Hoffman*, 937 S.W.2d 723, l.c. 726-727 (Mo. banc 1997); and discussion under Standard of Review under our Point I, *supra*. See "Delta View" comparison of Appellants' different Point IIIs in Appendix at A-173 and A-211 and the new issue of "virtual representation" at A-215-216.

Argument In Response to Appellant's Point III

Unless Plaintiffs can secure a reversal of Judge Conley's determination that Plaintiffs were entitled to a tax refund, Appellants' Point III requesting a reversal of Judge Conley's refusal to certify a class is a moot issue and need not be reached.

We join in the arguments and authorities of Respondent Lensmeyer in her Brief in response to Appellants' Point III and incorporate them by reference here.

The starting point to consider as to whether a class action can as a matter of law be certified is the firmly established premise in Missouri that a governmental entity such as a school district cannot be sued without its consent. *Community Federal Savings & Loan Association v. Director of Revenue*, 752 S.W.2d 794, 797 (Mo. banc 1988) ("*Community Federal I*"); and *Community Federal Savings & Loan Association v. Director of Revenue*, 796 S.W.2d 882 (Mo. banc 1990) ("*Community Federal II*"). As a result, when the legislature provides by statute that a governmental entity may be sued, the governmental entity may be sued only in the manner and to the extent provided by the statute. *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. banc 1975). It follows that in the absence of statutory authority, taxes voluntarily paid, although erroneously paid, and even though the tax is unconstitutional or was imposed in violation of law, cannot be refunded. *Community Federal I*, 752 S.W.2d at 797. Consequently, class actions for tax refunds are not permitted, unless the refund statute in question specifically provides that a taxpayer may bring a class action on behalf of the class.[15]

[15] This case is not predicated upon a violation of the Hancock Amendment. Consequently, cases predicated upon an action to "enforce" the Hancock Amendment under Section 23 of Article X of the Missouri Constitution which might result in a refund are not in point.

In *H.S. Construction Co. v. Lohman,* 950 S.W.2d 331 (Mo. App. W.D. 1997) plaintiffs sought to establish a class action to recover illegally collected "local" use taxes under Section 144.748, RSMo. The United States Supreme Court and the Missouri Supreme Court had previously struck down the "local" use tax as unconstitutional. Section 144.190, like Section 139.031.1 and .2, , provided a method for an individual taxpayer to obtain a refund of his or her taxes but did not provide any specific language authorizing a class action. The Court of Appeals held:

> "The plaintiff's suggested method of collection is by means of a class action, which is not permitted by the limited waiver of § 144.190. The prescribed statutory remedies for recovery of the taxes paid are exclusive. *Ackerman Buick, Inc. v. St. Louis County,* 771 S.W.2d at 346. Our courts 'have consistently held that taxes, once paid, can only be recovered through proper statutory proceedings, and that the statutes must be adhered to.' *Id.* The procedures set forth in § 144.190 does not contemplate a class action lawsuit as a means for recovery. 'The legislature has established a policy with regard to claims for refunds. The courts are not entitled to judicially amend the statutes to provide for additional process of arranging for taxpayers refunds.' *State ex rel. Lohman v. Brown*, 936 S.W.2d 607, 611 (Mo. App. 1997)."

Id. at 333 (emphasis added).

In *State ex rel. Ellsworth Freight Lines, Inc. v. State Tax Commission,* 651 S.W.2d 130 (Mo. banc 1983), a refund of truck registration and license fees was sought on a class

action basis. In reversing the Circuit Court which had certified a class, the Court reasoned:

> "We do not agree that Missouri law allows a class action as sought here. *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975), held that a class action cannot be used to claim refunds of improperly collected sales taxes. Respondents attempt to distinguish it because § 144.190.2, RSMo 1969, requires claims to be brought by each 'person'. That was not the basis of the holding. It held that as § 144.190 specified the method by which sales tax refund claims may be made, and as there was no provision there that could be claimed on behalf of a class of taxpayers, the state had not consented to be sued in such a manner. That holding is applicable here. Section 136.035, RSMo 1978, provides the Missouri procedure for the initiation of claims for refunds of the fees paid here. That section does not authorize a class action and therefore under Missouri law one may not be maintained here."

651 S.W.2d at 132. See also, *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975), holding that a class action would not lie to recover sales taxes; and *State ex rel. Lohman v. Brown*, 936 S.W.2d 607 (Mo. App. 1997).

Absent a statute authorizing a refund of taxes, taxes which are paid, even if unconstitutionally levied, are not subject to refund. *Community Federal I* and *Community Federal II.* And, any statute which provides for a refund of taxes paid must

be strictly construed against the taxpayer. *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458 (Mo. banc 2003).

Section 139.031, RSMo, does not authorize a class action. The procedures set forth in that section provide procedures to be followed by each "taxpayer" to secure a refund – the payment under protest, the written protest statement and the initiation of a lawsuit within 90 days. The word "taxpayer" is used in the singular – not taxpayers in the plural or taxpayers as a class. Not only that, the requirement is set forth in Section 139.031 that "every taxpayer" must "commence" an action within 90 days. Consequently, a class action cannot be maintained under Section 139.031, RSMo.

In *Jenkins v. Missouri*, No. 77-0420-CV-W-4, 1990 WL 362044 (U.S. Dt. Ct. W.D. Mo. October 29, 1990), the Court addressed contentions that refunds of 1987 property taxes resulting from an additional levy of $1.95 for all taxpayers, not just those who had paid their property taxes under protest pursuant to Section 139.031, RSMo The property taxes resulted from a $1.95 levy which had been imposed in 1987 by order of the United States District Court, as part of the Kansas City desegregation litigation. The United States Supreme Court determined that the $1.95 property tax levy was unconstitutional. See, *Missouri v. Jenkins*, 495 U.S. 33 (1990).

Prior to the decision of the United States Supreme Court, some taxpayers had paid under protest their 1987 property taxes imposed as a result of the $1.95 tax levy and then had joined in a timely lawsuit filed in the Jackson County Circuit Court which continued on that Court's docket while the litigation was ongoing in the federal courts to determine the lawfulness of the $1.95 levy. Other taxpayers did not pay their taxes under protest.

After remand from the Supreme Court, the matter of property tax refunds came on for hearing before United States District Judge Russell G. Clark. The assertions were made that it would violate fundamental fairness and due process to refuse to refund the taxes to all taxpayers. Judge Clark disagreed. He stated:

> "In order for a taxpayer to be eligible for a refund, the taxpayer must have protested the tax at the time of payment and must have filed a petition seeking recovery of the taxes in the circuit court within ninety days after filing the protest. Mo. Rev. Stat. § 139.031.
>
> * * *
>
> "The Court agrees that the plain language of section 139.031 applies to this case and a refund is appropriate only for properly protested 1987 taxes."

Id. at 3, 4 (emphasis added). Consequently, the District Court concluded that only those taxpayers who had paid their taxes under protest and who had within 90 days filed an action in circuit court to secure a refund were entitled to a refund.

The District Court's decision was affirmed by the Eighth Circuit in *Jenkins v. State of Missouri*, 962 F.2d 762 (8th Cir. 1992) (per Gibson, John R., J.). The Eighth Circuit found that refunds could only be paid to those taxpayers who had actually followed the refund procedures specified in Section 139.031, RSMo:

> "Missouri courts have held that '[a] taxpayer's failure to follow the mandate of [section 139.031.1] has consistently been held to bar his claim of impropriety of any part of the taxes he has paid . . . unless such a refund is expressly authorized by another statutory provision.' *Buck v. Leggett*,

813 S.W.2d 872, 877 (Mo. 1991) (en banc). * * * Thus, even though this tax did not originate under state law, we conclude that it would be subject to the protest requirement." (emphasis added).

962 F.2d at 765-66. Certiorari with respect to the Eighth Circuit's affirmance was thereafter denied by the United States Supreme Court at 113 S.Ct. 322 (1992). The Eighth Circuit noted that $23,140,758 in taxes as a result of the unlawful levy had been paid by taxpayers who had not followed the Section 139.031 protest procedures. Consequently, there were no refunds of the $23,140,758 in taxes which the United States Supreme Court had determined could not be lawfully collected because each of the taxpayers paying those taxes had failed to follow the procedures set forth in subsections 1 and 2 of Section 139.031, RSMo.

Appellants place mistaken reliance upon the "mistakenly or erroneously paid" and "mistakenly or erroneously levied" provisions in subsection 5 of Section 139.031 in a vain attempt to avoid the strict requirements for paying taxes under protest provisions of subsections 1 and 2 of Section 139.031. Subsection 5 does not help Appellants' class certification argument.[16] Subsection 5 requires that a claim under that subsection commence –

". . . upon written application of a taxpayer. . . .

[16] Because the Appellants themselves paid taxes under protest pursuant to subsections 1 and 2 of Section 139.031, the application of subsection 5 is not an issue which involves the claims of the named Appellants.

* * *

Such application shall be filed[with the county collector] within one year after the tax is mistakenly or erroneously paid." (emphasis added).

The statute requires "a written application" to be "filed" by "a taxpayer", i.e., each taxpayer, who has a claim pursuant to subsection 5 of Section 136.031.

In *Ellsworth Freight Lines, Inc., supra*, , the Supreme Court construed a similar provision which was contained in Section 136.050 which provided for "a claim for refund" to be filed with the Director of Revenue" within two years". As discussed above, the Supreme Court held that the procedures set forth in the statute had to be followed and that a class action was not authorized.

And, Section 144.190, RSMo, providing a procedure for sales and use tax refunds provides for a "claim for refund must be in writing" and filed with the Director of Revenue" within three years from the date of overpayment." This Court and the Court of Appeals have held that class actions are authorized by Section 144.190, RSMo, and therefore no class is authorized for sales and use tax refunds. *Charles v. Spradling*, *supra*; *H. S. Construction Company v. Lohman*, *supra*; and *State ex rel Lohman v. Brown*, 936 S.W.2d 607 (Mo. App. W.D. 1997).

Consequently, because subsection 5 of Section 139.031, RSMo, does not authorize a class action, under binding precedent in Missouri, the Appellants cannot rely upon subsection 5 of Section 139.031 as an authorization to maintain a class action.

Additionally, the Appellants by quoting from *Community Federal I* relating to the construction of the words "overpayment[17] or erroneous payment" in Section 136.035 do not bring the claims here within the "mistakenly or erroneously paid" language of subsection 5 of Section 139.031. The "mistakenly or erroneously paid" and "mistaken or erroneously levied" language in subsection 5 has been interpreted in a very limited fashion. An analysis of the history of Section 139.031 demonstrates that subsection 5 of Section 139.031 has no application here.

Section 139.031, RSMo, was enacted in 1969 by passage of Senate Bill No. 39, which consisted of five sections. Those five sections as originally enacted are set forth in Opinion No. 79, Attorney General John C. Danforth, February 10, 1970, set forth in the Appendix at A-144.

These five sections became subsections 1 through 5 of Section 131.031, RSMo 1969. In the current version of Section 139.031, RSMo. Cum. Supp. 2003, the revised versions of sections 1 and 2 are subsections 1 and 2, section 3 is subsection 4, section 4 is subsection 5, and section 5 is subsection 6.

From 1969 until May 17, 2004, there was only one appellate decision in which any relief has been granted to a taxpayer pursuant to the "mistakenly or erroneously" provisions in what was Section 4 in the 1969 enactment and which, as amended, is now Section 139.031.5, RSMo, -- that case being *Crest Communications v. Kuehle*, 754

[17] Subsection 5 of Section 139.031 does not mention "overpayment".

S.W.2d 563 (Mo. banc 1988). **No relief** has been granted to the taxpayer in the other cases where relief was requested by a taxpayer under Section 139.031.5 (or its predecessor Section 139.031.4) in any of the other cases which are cited in the Court of Appeals Opinion at pages 26-27 – *Missouri American Water Company v. Collector of St. Charles County, Missouri*, 103 S.W.3d 266 (Mo. App. E.D. 2003) (dismissal of petition seeking relief under Section 139.031.5 affirmed; "As the Supreme Court has since pointed out, the facts of *Crest* were unique and resulted in a unique outcome."); *Quaker Oats Company v. Stanton*, 96 S.W.3d 133 (Mo. App. W.D. 2003) (per Breckenridge, J.) (Judgment in trial court for taxpayer reversed with respect to claim under Section 139.031.5); and *Buck v. Leggett*, 813 S.W.2d 872 (Mo. banc 1991) (taxpayer asserting refund claim under Section 139.031.5 denied relief; "A taxpayer's failure to follow the mandate of that subsection [139.031.1, payment under protest] has consistently been held to bar his claim of impropriety of any part of the taxes he has paid"; "Nor is plaintiff aided by *Crest Communications*. . . . *Crest* is not applicable to the facts of this case."]

Community Federal Savings and Loan Association v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988), next cited in the Opinion did not interpret the provisions of Section 139.031 pertaining to local taxes, but instead interpreted Section 136.035 pertaining to refunds of taxes paid to the Director of Revenue. Section 136.035 **does not contain any payment under protest provisions**, whereas Section 139.031 **does** have payment under protest provisions.

Our research indicates the following additional cases in which some assertions or mention of Section 139.031.5 (or its predecessor Section 139.031.4) was made and relief was denied:

- *Stanton v. Wal-Mart Stores, Inc.*, 25 S.W.3d 538 (Mo. App. W.D. 2000). Taxpayer asserted entitlement to refund, *inter alia*, under Section 139.031.5; judgment denying relief affirmed. "This strict and literal construction was again applied in *Buck v. Leggett*. . . . Buck attempted to avoid his failure to timely appeal an assessment on the ground that the taxes had been 'mistakenly' paid under § 139.031.5 by his mortgage company from an escrow account."
- *General Motors Corporation v. City of Kansas City*, 1994 WL 49620 (Mo. App. W.D. Feb. 22, 1994). Court finds that a Kansas City license tax was unconstitutional. Court notes that *Crest* held that Section 139.031.5 only applies to county collectors and not city collectors. "The cases other than *Crest Communications* which interpret § 139.031 consistently involve protests filed by taxpayers paying taxes collected by county collectors." The Court then concluded that no part of Section 139.031 applied to payment of taxes under protest to city collectors. The Court then held, however, that taxpayer General Motors might be entitled to a refund under the common law and the Court directed a remand so that General Motors could amend its claim to assert a refund entitlement pursuant to the common law.

The Supreme Court thereafter granted transfer thereby vacating the February 22, 1994, Opinion. The Supreme Court then remanded the appeal to the Western District of the Court of Appeals for reconsideration in light of *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. banc 1994) (Limbaugh, J.). In *Armco*, the Supreme Court held that a Kansas City license tax was illegal. The Court found that a refund of the taxes paid under protest to a city collector could be allowed. In reaching the conclusion the Court noted – "*Crest Communications*, however, is much more limited. . . . As we have noted, subsection 5 pertains only to taxes 'mistakenly or erroneously paid,' and not, as in this case, to taxes paid under protest." Consequently, *Crest Communications* is inapplicable."

On remand, in *General Motors Corporation v. City of Kansas City*, 895 S.W.2d 59 (Mo. App. W.D. 1995), cert. denied 516 U.S. 909 (1995), the Court of Appeals restated its holding that the Kansas City license tax was unconstitutional, but then held that General Motors was **not entitled to any refund**. "Because GM did not comply with § 139.031.1 [payment of taxes under protest], it is ineligible for a tax refund, as a matter of law."

- *Ring v. Metropolitan St. Louis Sewer District*, 1998 WL 7440, Mo. App. E.D. 1998. Plaintiffs asserted that they were entitled to tax refunds under Section 139.031.5 with respect to taxes which had been previously declared to be unconstitutional and based their arguments on *Crest Communications*. The Court then looked to the **facts** involved in *Crest Communications*,

found that *Crest Communications* was distinguishable and refused to permit a refund pursuant to Section 139.031.5.

The appeal was thereafter transferred to the Supreme Court, and the opinion of the Supreme Court is reported in *Ring v. Metropolitan Sewer District*, 969 S.W.2d 716 (Mo. banc 1998). The Supreme Court in its Opinion did **not** discuss the provisions of Subsection 5 of Section 139.031.

- *Gershman v. St. Louis County*, 963 S.W.2d 290 (Mo. App. E.D. 1997). Plaintiff taxpayer sought a refund of property taxes pursuant to Section 139.031.5 and also pursuant to Section 139.290. The trial court ordered a refund holding that the reclassification of property from residential to commercial was illegal. The Court of Appeals reversed, distinguished *Crest Communications* and held that the taxpayer was **not entitled to relief** under the "mistakenly and erroneously paid" provisions of Section 139.031.5, nor was the taxpayer entitled to recovery under the provisions of Section 139.290, RSMo.
- *Lake St. Louis Community Ass'n v. State Tax Commission*, 759 S.W.2d 843 (Mo. App. E.D. 1988). Claims of taxpayer were <u>not</u> predicated upon Section 139.031.5. Court only referred to Section 139.031.5 when describing in a footnote the statutory provision that was involved in *Crest Communications*.
- *B & D Investment Co., Inc. v. Schneider*, 646 S.W.2d 759 (Mo. banc 1983). Summary judgment against taxpayer claiming a refund of property taxes

affirmed by the Supreme Court. Taxpayer did not at the time of paying property taxes comply with the requirement set forth in Section 139.031(1) that at the times of payment of the property taxes, a written statement had to be filed. The Court held that –

> "It is implicit in the decisions of this Court reviewed above that under such circumstances, the taxpayer's remedy under § 139.031(1) was exclusive ." (p. 763, emphasis added).

The taxpayer contended that "it is at least entitled to recover the taxes paid for 1979 by reason of § 139.031(4) [before renumbering to § 139.031.5]," but this Court denied relief.

- *State ex rel. Council Apartments, Inc. v. Leachman*, 603 S.W.2d 930 (Mo. 1980). Court affirmed summary judgment against taxpayer in taxpayer's action pursuant to Section 139.031(4) [now Section 139.031.5]. A tax refund was requested on the grounds that the property was used for charitable purposes and therefore exempt. Court held that this situation could not be construed to involve a property tax which was "mistakenly or erroneously paid" and that therefore no refund could be recovered.
- *State ex rel. Crawford County R-II School District v. Bouse*, 586 S.W.2d 61 (Mo. App. S.D., en banc 1979). School District brought action against the county collector seeking to recover for tax refunds made by the collector to the Frisco Railroad without a court judgment having first been entered in payment under protest provisions of Section 139.031. Trial court granted

summary judgment in favor of the collector. The Court of Appeals, sitting en banc, per Flanigan, C.J., with three Judges concurring and two Judges concurring in result, reversed and remanded. Judge Flanigan's Opinion for the Court did not discuss what was then Section 139.031(4), but one of the concurring Judges (no other Judges joined) filed a brief Concurring Opinion which noted with respect to the provisions of Section 139.031(4):

> "The Attorney General, Opinion No. 97, February 10, 1970, has given his opinion that this sub-section has no application to the refund of taxes paid as the result of an allegedly excessive levy. This opinion indicates the sub-section is applicable to errors or mistakes such as double payment of the same tax." (emphasis added).

The concurring Judge then further briefly discussed the provisions of Section 139.031(4), but then noted that because of the interpretation which was in effect at that time with respect to the scope of cases construing the revenue laws being within the exclusive jurisdiction of the Supreme Court, the "opinion of this court should not be interpreted as construing the scope of Section 139.031(4)." Inasmuch as the collector had third partied in the taxpayer who had received the refund, the Frisco Railroad, the taxpayer certainly did not prevail since the Frisco Railroad was left in the case when the case was remanded so that the School District could pursue the Collector and the Collector could pursue the Frisco Railroad.

While this writer may have missed some appellate case discussing or construing the provisions of what is now Section 139.031.5, the above-cited cases are all that have been found. We now turn to a discussion of what we believe to be the only case allowing a taxpayer to proceed with an action pursuant to Section 139.031.5 – *Crest Communications v. Kuehle*, 754 S.W.2d 563 (Mo. banc 1988) (per Rendlen, J., with Donnelly, J., dissenting without opinion, and Robertson, J., concurring in result without opinion). In this case the taxpayer, Crest, was involved in the cable television business in Cape Girardeau and Jackson, Missouri. The taxpayer filed its property tax listing for 1985 valuing its real and personal property at $309,577. The assessor raised the 1985 assessed valuation of the property to $1,148,930 and the taxpayer was given notice of such raised assessment for 1985. The taxpayer pursued his administrative remedies with respect to the 1985 taxes and also paid his 1985 taxes under protest. While those proceedings were pending, the taxpayer filed his real and personal property tax listing for 1986 with the assessor listing a total 1986 valuation of $278,028. The assessor raised the valuation for 1986 to $1,148,930, but **did not give the taxpayer any notice of a raised assessment as required by Section 137.180**. The taxpayer paid the 1986 taxes without any protest. On January 23, 1987, the State Tax Commission reduced the 1985 valuation to $519,265. Then, on March 16, 1987, the taxpayer made written applications to the County Collector and the City Collectors of Cape Girardeau and Jackson for a tax refund with respect to the 1986 taxes for the taxes on the difference between the self-assessed value of $278,028 and the assessor's $1,148,930 value, asserting an entitlement under Section 139.031.5 because the taxes had been "mistakenly or erroneously paid." When

refunds were not received from the Collectors, suit was filed. The trial court sustained the motions to dismiss of the Collectors.

The Supreme Court reversed and remanded, holding:

> "As is obvious from the previous discussion of the effect of an assessor's failure to provide the taxpayer with notice of increased valuation, an increase without notice is invalid, and payment of such an increase by the taxpayer falls within the plain meaning and scope of taxes 'mistakenly or erroneously paid' in the context of § 139.031, at least in a case in which the public authorities are well aware of the disagreement with the taxpayer over valuation, as indicated here by the 1985 valuation litigation. Like the taxpayer who makes a double payment of his tax bill, the plaintiff here has alleged payment of taxes not owed. . . ."

It is noted that Judge Rendlen refers back to the Concurring Opinion in the *Crawford County R-II School District* case, discussed above, and notes with approval the *Atty. Gen. Op. No. 97* of February 10, 1970. 754 S.W.2d at 563-64. Judge Rendlen notes that "there are some differences between the language used in § 136.035 and § 139.031." *Id*.

Since the decision in *Crest Communications*, the appellate courts in Missouri have consistently limited *Crest* to its particular facts and the courts have not, until the May 18 Opinion in this case, extended or applied Section 139.031.5 to be a procedure to secure a refund.

Mo. Atty. Gen. Op. No. 97, dated February 10, 1970, which was cited with approval by Judge Rendlen in *Crest Communications* and in the concurring opinion in

Crawford County R-II School District does **provide guidance** and a copy of that Opinion is in our Appendix at A-114. The following reasoning in Opinion 97 is particularly important in the context of this case and is as applicable now as it was in 1970:

> "Although the language of this law is ambiguous, it is apparent that provision is made for **two separate tax recovery procedures, one relating to errors in payment covered by Section 4** [§ 139.031.5], **and the other relating to illegality on grounds other than mistake or error in payment set forth in Sections 1, 2 and 3** [§§ 139.031.1, .2, and .4]. This is borne out of the language used. Section 1 refers to 'any taxes assessed' and allows a taxpayer to contest the tax if the statutory procedures are followed. However, Section 4 refers to tax 'mistakenly or erroneously paid' and provides a different procedure for recovering taxes in this category.
>
> "The legislature has recognized the fact that while a tax may be legally assessed, **errors or mistakes in payment will` and do occur as, for example, double payment of the same tax. In these cases it was considered unnecessary to resort to litigation** where the error is acknowledged by the taxing collecting officials. Thus, Section 4 authorizes a refund of taxes in this category by administrative determination. The fact that the authors of this Bill were mindful of this is illustrated by the language of Section 4 of Senate Bill No. 39 as originally introduced and before amendment. In pertinent part the original bill stated:

'Section 4. Any collector of taxes who collects any tax from a taxpayer who previously had paid the same tax to the collector shall refund the duplicate payment * * *'

"**It is our view that these sections are mutually exclusive. If this were not the case, the provisions relating to payment under protest, impounding of funds and determination by litigation in court would be meaningless.**

"Therefore, if the case involves taxes objected to for reasons other than error or mistake in payment, it is governed by Sections 1, 2 and 3 of the Bill." (emphasis added).

While there have been some amendments to what is now Section 139.031.5 since its original enactment, it still remains as one of "**two separate tax recovery procedures" with each being mutually exclusive**.

We further note that a 1989 amendment to Section 139.031.5 added a provision for "credit[ing] against the **taxpayer's tax liability in the following taxable year** any real or personal property tax mistakenly or erroneously levied. . . . (emphasis added). Consequently, since the taxes in this case involve 2001 property taxes, the only instance in which a taxpayer might receive a credit would be upon the "taxpayer's tax liability in the following taxable year" which would be the property tax liability for the 2002 tax year.

Still a further impediment exists with respect to any refund pursuant to the provisions of Section 139.031.5 which the Court did not recognize or consider, and that is

where any funds would come from for a refund. *Crawford County R-II School District*, *supra*, teaches that a County Collector may be liable for the improper disbursement of refunds. Section 139.031.5 only makes provision for **funds to be made available to the Collector to pay refunds by a County or the City of St. Louis**. There is **no** provision requiring a school district to make available funds to a collector to use to make refunds under Section 139.031.5, nor is there any provision allowing the Collector to make setoffs for prior year refunds against school district tax monies which the Collector receives for subsequent years.

Therefore, the law is clear that a class action cannot be maintained pursuant to Section 139.031. The language of Sections 139.031 does not specifically provide for class actions.

No procedure other than Section 139.031, RSMo, is available to secure a tax refund. Section 137.073 relates only to situations where a reassessment rollback of a tax levy is required under that statute, not to a claim predicated upon Section 67.110. Appellants cite no authority holding that Section 137.073 has any application.

But, in any event, since Appellant Lane's original Petition was dismissed with prejudice, no claims for property tax refunds can be maintained except by taxpayers who complied with the payment under protest provisions of Section 139.031, RSMo, because the Amended Petition was not filed prior to December 31, 2001, and the refund claims are therefore untimely. See, Concurring Opinion of Judge Wolff in *Green v. Lebanon R-III School District*, 13 S.W.3d 278, l.c. 286 (Mo. banc 2000) ("*Green I*"); *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. E.D. 2001) ("*Koehr I*"); *Green v. Lebanon R-III*

School District, 87 S.W.3d 365 (Mo. App. S.D. 2002) ("*Green II*"); *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. E.D. 2002); and *Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. E.D. 2002) ("*Koehr II*").

In *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. E.D. 2001) ("*Koehr I*"), the Court considered Judge Wolff's Concurring Opinion in *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000) ("*Green I*") which reasoned that any court challenge to the lawfulness (including any alleged Hancock Amendment violations) of property tax levies and resulting property taxes must be filed in Court prior to December 31 of the tax year in question, except for the recovery of particular taxes paid under protest pursuant to procedures and requirements of Section 139.031, RSMo. The Court of Appeals in *Koehr* recognized and held with respect to Judge Wolff's Concurring Opinion in *Green I*:

> "Although we are not bound by Judge Wolff's opinion, we nonetheless find it persuasive and adopt it as a correct declaration of the law." (emphasis added) 55 S.W.3d at 893.

The Supreme Court denied transfer.

In *Green I* the majority opinion reasoned that because the issue of timeliness had not been reached by the trial court, the trial court could consider on remand "whether the requests for refund were timely filed." 13 S.W.3d at 284. Thereafter, the Honorable George M. Flanigan, Senior Judge (who was assigned as trial judge subsequent to the remand), entered Judgments dismissing the cases because the petitions seeking declaratory relief with respect to tax refunds were not filed before December 31 of each

of the tax years in question. The *Green* Plaintiffs were not relying upon the payment under protest provisions of Section 139.031, RSMo.

These Judgments of dismissal were affirmed on appeal in *Green II.* In *Green II* the Southern District quoted with approval from *Koehr I,* including the above-quoted language and the reasoning that any suit for relief under the provisions of Section 137.073, RSMo, had to be commenced prior to December 31 of the tax year in question. In *Green* II the Court stated at 87 S.W.3d at 367-368:

> "*Koehr* found persuasive the following portions of Judge Wolff's concurring opinion:
>
> 'Quoting from *Ring v. Metropolitan St. Louis Sewer Dist*., 969 S.W.2d 716, 718-19 (Mo. banc 1998), Judge Wolff pointed out that enforcement of the right granted in the Hancock Amendment may be accomplished in two ways: (1) a suit to enjoin collection of the tax until its constitutionality can be determined, or (2) a *timely* action for a refund. Noting that, aside from a provision authorizing attorney's fees, the enforcement provision of the Hancock Amendment, section 23, is not a consent to a suit for a money judgment, Judge Wolff reasoned that an action for refunds must conform to statutory requirements. [*Green I*, 13 S.W.3d at 287]. Judge Wolff pointed out the only civil action allowing taxpayers to challenge a tax levy contemplated by the statute, section 137.073.8 RSMo Supp. 1999, is one for injunctive relief. *Id*. at 288. If such an injunctive action is timely instituted, the statute provides for refunds of amounts erroneously paid

regardless of whether the taxes are paid under protest. Section 137.073.9, RSMo 2000. Judge Wolff reasoned that the pendency of the injunction suit gives the taxing authority notice of the challenge to its tax rate brought on behalf of all taxpayers, thus justifying the statutory waiver of the protest requirement. *Id*. However, neither chapter 137 nor chapter 163, which governs the state's foundation aid formula, makes any provision for revision of tax rates once they have gone into effect unless there has been an action to protest or challenge the rates prior to their becoming effective. *Id*. There is, however, a provision for adjustments for protested taxes due in the current year for which notice of the protest was received in the current year. *Id*. (citing section 163.031.6.2, RSMo 2000). Failure to require notice to the taxing authority prior to the date taxes are due would also be contrary to the purpose of the Hancock Amendment. *Id*. at 289. Finally, Judge Wolff pointed out that the time limitation on refunds found in section 137.073.9 is not a statute of limitations but a deadline for judicial action. *Id*. There is no statutory authorization for an action for refunds, only for an injunction or an order revising the tax rate.' *Koehr I*, 55 S.W.3d at 863."

And, in *Koehr II*, the Plaintiffs asserted that they could secure tax refund relief based upon the Hancock Amendment and cited, as the Appellants have here with respect to their statutory refund claims, *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001). The Eastern District in *Koehr II* considered and distinguished *Hazelwood*:

"*City of Hazelwood* is factually distinguishable from the present case. In that case, the City of Hazelwood annexed an area for which Florissant Valley First District was to provide fire, emergency and ambulance services. The taxpayers of the annexed area paid taxes to Hazelwood and the city in turn paid the Florissant Valley First District for their services. An election was held to increase the tax rate in the Florissant Valley Fire District, and the voters approved the increase. After the election, a contest was filed and while the contest was pending, the district levied the increase. The city of Hazelwood paid the increased amount; however, they did so under protest. The election was ultimately set aside and a new election took place. The increase did not meet with voter approval after the second election. Subsequently, the City of Hazelwood brought suit for a refund of the taxes. The issue before the Missouri Supreme Court was whether the Hancock Amendment must be read in conjunction with the election laws of the state in order to determine whether a tax increase is constitutional. The district attempted to argue that the tax increase was valid while the election contest was pending, pursuant to the state's election statutes; therefore, the collection of the increased tax could not be a violation of the Hancock Amendment because it was approved by the voters. However, the court determined that the constitutionality of the tax increase was to be determined from the plain language of the Hancock Amendment itself. *Id.* at 39.

"The present case is not a question of the determination of the constitutionality of a tax increase based on a statute and the constitution. Rather, it is a procedural question concerning the timeliness of filing an action where the remedy sought is a refund of taxes allegedly collected in violation of the Hancock Amendment. It has been determined that the statutes which provide the mechanism by which taxpayers can protest taxes must be followed when the tax is challenged on a constitutional basis. *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. 2002). 'Once paid, taxes, even taxes collected under an unconstitutional statute, can only be recovered through proper statutory proceedings. This procedure applies to taxes challenged as violations of the Hancock Amendment to the Missouri constitution.' *Id*. Thus, the failure to timely protest the payment of alleged unconstitutional taxes and to timely commence an action for the refund of such taxes is fatal, even where the challenge is based on the Hancock Amendment." (Emphasis added).

It is noted that in *Hazelwood* no issue of timeliness of filing suit was raised by the political subdivision (the Florissant Valley Fire Protection District), nor was it asserted by the political subdivision that any tax refund claims for taxpayers had to be brought pursuant to Section 139.031, RSMo. See also, the superceded opinion of the Eastern District of the Court of Appeals in *Hazelwood* at 2000 WL 459713 which does not reflect that either issue was raised.

It is further noted that the Court in *Hazelwood* was careful to limit its holding to a determination that "[under] the specific facts of this case, the court did not abuse its discretion . . ." 48 S.W.3d at 36. The specific facts of the case relate to an election called by the Florissant Valley Fire Protection District on August 6, 1996, to approve a 10¢ tax levy. The results of the election as certified on August 19, 1996, were close, with there being a margin of 13 votes favoring the tax increase. 48 S.W.3d at 38. "While the election contest was still pending, the District levied the tax increase" (emphasis added). 48 S.W.3d at 38. The trial court in the election contest case set aside the election results, and this decision was affirmed on appeal in *McBride v. Board of Election Commissioners*, 945 S.W.2d 622 (Mo. App. E.D. 1997). The filing of the *McBride* case satisfied the "before December 31" requirements enunciated by Judge Wolff in his Concurring Opinion in *Green I*, which was then adopted after the *Hazelwood* opinion by the Eastern District of the Court of Appeals in *Koehr I* and the Southern District of the Court of Appeals in *Green II.* The taxpayers in both *Koehr I* and *Green II* unsuccessfully asserted that because of *Hazelwood*, their actions were not foreclosed.[18] Those assertions were, however, rejected just as this Court should reject them here.

[18] The *Koehr I* plaintiffs filed an unsuccessful Application for Transfer in the Supreme Court which was docketed as Case No. SC83959. At pages 2 and 6 of that Application, the *Koehr I* plaintiffs asserted that the Court of Appeals Opinion in *Koehr I* was "contrary to" and "inconsistent with" *Hazelwood*. The Application for Transfer was denied on October 23, 2001. See Supreme Court file in its Case No. SC83959.

Appellants also rely with respect to the class action issue upon *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716 (Mo. banc 1998). This reliance is misplaced. Judge Wolff in his Concurring Opinion in *Green I* also relied upon *Ring* for his conclusion that a "timely action" must be brought. Judge Price wrote a separate Concurring Opinion in *Green I* indicating that he was "persuaded by Judge Wolff" that significant issues existed with respect to whether "taxpayers claims were properly and timely asserted" but he believed the trial court in *Green* should first reach and consider those issues. Judge Price authored *Hazelwood* and also relied upon *Ring* (which he had also authored) in his *Hazelwood* Opinion.

Ring did not involve ad valorem property taxes but rather sewer fees of the Metropolitan St. Louis Sewer District imposed by its Ordinance No. 8657 adopted on May 13, 1992, to be effective on July 1, 1992. A suit ("*Beatty*") alleging that the sewer fees were taxes which were subject to the voter approval requirements of Hancock was

---

The undersigned counsel was counsel for the school districts in *Green II* and counsel for the Appellants here was counsel for the Appellants in *Green II*. The Briefs of the Appellant taxpayers in *Green II* made essentially the same arguments based upon *Hazelwood* as the Plaintiffs here make. The Appellant taxpayers in *Green II* also sought transfer asserting that the Court of Appeals decision in *Green II* was contrary to *Hazelwood*. Their Application for Transfer was denied by the Supreme Court on October 22, 2002, in its Case No. SC84823.

commenced on June 17, 1992, before the sewer fee charges became effective. Also, the trial court made its determination on June 29, 1992, before the sewer fees became effective. See, *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 793-94 (Mo. banc 1995) ("*Beatty III*"). In *Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217 (Mo. banc 1993) ("*Beatty II*"), the Court held that the sewer fees imposed by Ordinance No. 8657 were taxes which could not under Hancock be imposed without voter approval.

In *Beatty III*, 914 S.W.3d at 793, the Supreme Court expressly held that "*MSD* [the St. Louis Metropolitan Sewer District] has expressly waived sovereign immunity pursuant to its Ordinance Number 8657, section 12" (emphasis added). Consequently, sovereign immunity was not a bar to a class action suit in *Ring*.

Hence, in *Beatty* and *Ring* there had been a waiver of sovereign immunity by the taxing district and a suit challenging the taxes was commenced and heard before the tax became effective. Plaintiffs here cannot take any comfort from *Ring* upon which *Hazelwood* relied.

Therefore, except for the payment of taxes under protest by a taxpayer and maintaining a tax refund claim by that taxpayer pursuant to Section 139.031, there can be no suit maintained for a refund of property taxes. Therefore, no class action will lie.

But even if, *arguendo*, a class action is not precluded as a matter of law, the Appellants must here demonstrate that they meet each of the requirements of Rule 52.08(a) and that it was an abuse of discretion for the trial court to deny class certification. That they have not done and cannot do.

The prerequisites of Rule 52.08(a) are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. These are the same requirements as set forth in Section 137.073.8 for class certification; however, as we have hereinabove discussed, that statute is not applicable to the type of claims which the Plaintiffs assert in this case.

If the prerequisites of subsection (a) of Rule 52.08 are met, a Court must then decide whether the action fits into one of the three types of class actions set forth in subsection (b) of the Rule.

Not only have the Appellants failed to demonstrate in their Amended Brief that all of the prerequisites of Rule 52.08 were met and that Judge Conley abused his discretion in denying class certification, the Appellants are faced with the hurdle that Judge Conley affirmatively found that the Appellants were not suitable class representatives. See Judge Conley's August 21, 2001, Order Denying Class Certification (LF 167; Appellants' Substitute Appendix A-2) where he concluded:

"[T]he Plaintiffs should not be appointed as class representatives."

This conclusion by the trial court was not an abuse of discretion. Appellant Lane and his positions have repeatedly been rejected by the voters within the Columbia 93 School District, and hence by most of the putative class. The actual monetary amounts claimed by the Appellants are *di minimus*. See *Koehr I, supra*. Quite obviously, they represent only a small, dissident minority of residents within the School District.

Taxpayers with children in the schools of the School District will receive a benefit from additional funding for the School District and would not benefit from a loss of $4 million in state funding because of the loss of the benefits of the calculated levy. Because of these differing interests within the putative class, the Appellants simply are not proper class representatives. See, *Alston v. Virginia High School League, Inc.*, 184 F.R.D.57 (W.D. Va. 1999); *Bonser v. State of New Jersey*, 605 F.Supp. 1227 (D.N.J. 1985); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000); and *Hedges v. Wauconda Community Unit School District No.* 118, 807 F.Supp. 444 (N.D. Ill. 1992), vacated as moot 9 F.3d 1295 (7th Cir. 1993).

Consequently, if there is a need to reach the class certification issue, for the reasons hereinabove set forth and also for the reasons set forth in the Brief of Respondent Lensmeyer, Judge Conley's Order denying class certification should be upheld.

III.

The Trial Court Did Not Err In Joining The Columbia 93 School District As A Party With Respect To The Amended Petition Inasmuch As It Was The Tax Revenues Of The School District Which Are At Issue In This Case And Not Any Revenues Of Boone County Or Of The Respondent County Collector.

Standard of Review

In Missouri, the Court of Appeals reviews a trial court's joinder of a party pursuant to Rule 54.02 under an abuse of discretion standard. *Feinstein v. Feinstein*, 778 S.W.2d 253, 257 (Mo. App. E.D. 1989). "In reviewing an alleged abuse of discretion, we

review the trial court's ruling to determine whether it was supported by substantial evidence, was against the weight of the evidence, or was the result of a misapplication of the law. *Boatmen's First Nat'l Bank v. Krider*, 844 S.W.2d 10, 11 (Mo. App. W.D. 1992)." *Fuller v. Ross*, 68 S.W.3d 497, 500 (Mo. App. W.D. 2001).

Argument in Response to Appellants' Point IV

The tax revenues which are at issue in this case are revenues generated from tax levies imposed by the Columbia School District and are revenues of the School District – not of the Respondent Collector or Boone County. Because the tax revenues of the Columbia School District are directly at issue, the School District was properly made a party to this action. *Ste. Genevieve School District R-II v. Board of Alderman of the City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. banc 2002). See also, *State ex rel. School District of City of Independence v. Jones*, 653 S.W.2d 178 (Mo. banc 1983).

The Columbia School District adopts as its own the arguments and authorities set forth by Respondent Lensmeyer in her Argument Under Point II of her Brief, and incorporates those arguments and authorities as if fully set forth herein.

The issue here is the School District's levies, not whether a particular property owner's property was properly assessed or whether particular property was exempt from taxation as were the situations in *State ex rel. Brentwood School District v. State Tax Commission*, 589 S.W.2d 613 (Mo. 1979), and *Alexian Brothers Sherbrooke Village v. St. Louis County*, 884 S.W.2d 727 (Mo. App. E.D. 1994), cited by Appellants.

With respect to *Bartlett v. Ross*, 891 S.W.2d 114 (Mo. banc 1995), cited by the Appellants, the intervention of the Kansas City School District came long after the

validity of the taxes were determined in federal court and long after all refunds that could be made to taxpayers who had paid taxes under protest had been made. The taxes involved were property taxes for 1987 which had been imposed by Judge Russell Clark of the United States District Court for the Western District of Missouri in the desegregation litigation in *Jenkins v. Missouri*, discussed *supra*. In 1990 the Supreme Court in *Missouri v. Jenkins*, 495 U.S. 33 (1990), held the tax imposed by the District Court to be unconstitutional. Judge Clark on October 29, 1990 in *Jenkins v. Missouri*, *supra*, determined that with respect to $23,140,758 in property taxes which had not been paid under protest, those funds would go to the Kansas City School District. With respect to those taxpayers who had paid their taxes under protest in the action pending in the Jackson County Circuit Court, i.e., the *Bartlett v. Ross* litigation, such monies were to be paid to those taxpayers. Monies aggregating over $11 million were distributed to those taxpayers who had paid their taxes under protest and who could be found. That was accomplished by October of 1993 and there remained $480,000 in refund checks which had been issued but which had not been cashed. Subsequent to October of 1993 the Kansas City School District for the first time sought intervention which was granted in January of 1994.

The Circuit Court and the Supreme Court in *Bartlett* held that the Kansas City School District did not have any interest in the unclaimed monies which were still held because the refund checks had not been cashed. Clearly, it had been finally determined in the *Jenkins* litigation that the Kansas City School District was not entitled to the tax monies that had been paid under protest in 1987. The Jackson County Circuit Court in

Bartlett before the intervention of the Kansas City School District had also determined that all of the tax monies were to be distributed to the taxpayers who had paid the taxes under protest in 1987, thereby divesting the Kansas City School District of any interest in those monies.

In *Bartlett*, the Kansas City School District, because of adjudications, had no interests in the monies that could not be distributed because the checks had not been cashed. In such circumstances it is for the Court having jurisdiction over the monies to determine the "appropriate recipients" to whom the monies should be distributed, as was recently held in *In re Ancillary Adversary Proceeding Questions*, 89 S.W.3d 460 (Mo. banc 2002); and *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002).

In *Bartlett*, even though it had been previously been judicially determined that the Kansas City School District was not entitled to the undistributed monies in question, the Kansas City School District was permitted to intervene. Here, the Columbia School District does have an interest in the tax monies which were paid by the Appellants under protest and which continue to be held pending a final determination of the entitlement of the Plaintiffs to the taxes paid under protest. The Columbia School District was and is a necessary and proper party.

We also note that since the Appellants seek refunds on a class action basis of monies which are not held by the Respondent Lensmeyer, the Appellants on behalf of a putative class are seeking funds already received by the Columbia School District.

Taxing authorities have repeatedly been joined over the years as defendants along with the Collectors in actions brought pursuant to Section 139.031. See, e.g., *Asarco v.*

McHenry and South Iron County School District, 679 S.W.2d 863 (Mo. banc 1984); *Union Electric Company v. Collector of Revenue and Farmington School District R-7*, 562 S.W.2d 370 (Mo. banc 1978); *Missouri Pacific Railroad Co. v. Jones and the Cass County Reorganized School District, et al.*, 544 S.W.2d 541 (Mo. 1976); *Southwestern Bell Telephone Company v. Bond and Miller County Reorganized School District No. 2*, 595 S.W.2d 365 (Mo. App. W.D. 1980); *Missouri Pacific Railroad Company v. Campbell and the Arcadia Valley R-2 School District, et al.*, 502 S.W.2d 354 (Mo. 1973); *Missouri Pacific Railroad Co. v. Kuehle and the Cape Girardeau School District No. 63, et al.*, 482 S.W.2d 505 (Mo. 1972); *Southwestern Bell Telephone Co. v. Mitchell and Central School District No. 38, et al.*, 631 S.W.2d 31 (Mo. banc 1982); *Union Electric Company v. Toulouse and Crystal City School District, et al.*, 572 S.W.2d 167 (Mo. banc 1978); *Southwestern Bell Telephone Co. v. Fuerstein and Francis Howell School District, et al.*, 529 S.W.2d 371 (Mo. 1975); and *St. Louis-Southwestern Railway Company v. Cooper and Reorganized School District No. R-1, et al.*, 496 S.W.2d 836 (Mo. 1973).

Many of the foregoing cases involved situations where a school district intervened or was made a party after suit was filed. These cases make clear beyond cavil that the Columbia School District was and is a proper party.

Furthermore, the Appellants are not aggrieved by the joinder of the Columbia School District and cannot be heard to complain on appeal.

Judge Conley did not abuse his discretion by making the Columbia School District a defendant in this action.

CONCLUSION

The Judgment of the trial court should be affirmed.

HUSCH & EPPENBERGER, LLC

By:_____
ALEX BARTLETT, #17836

Monroe House, Suite 300
235 East High Street
Jefferson City, MO 65101
Office: (573) 635-9118
Fax No: (573) 634-7854

Attorneys for Columbia 93 School District

CERTIFICATE OF COMPLIANCE
WITH RULE 84.06

The undersigned certifies:

1. That this Brief complies with Rule 84.06; and

2. That this Brief contains 27,824 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.

3. That the disks accompany this Brief have been scanned for viruses, and to the best of his knowledge are virus-free.

4. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

_____

Alex Bartlett

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief along with a double-sided, high-density IBM PC compatible disk with the text of the Brief were either hand-delivered or mailed via United States Mail, postage prepaid, on October 13, 2004, to Craig S. Johnson, Col. Darwin Marmaduke House, 700 East Capital, P. O. Box 1438, Jefferson City, MO 65102, attorney for Appellants; to John L. Patton, 601 East Walnut, Room 207, Columbia, MO 65201, Attorney for Respondent Patricia S. Lensmeyer; to Melissa Randol and Susan Goldammer, 2100 I-70 Drive Southwest, Columbia, MO 65203, and to Penny Rector, 398 Dix Road, Suite 201, Jefferson City, MO 65109.

Alex Bartlett