

IN THE MISSOURI SUPREME COURT

No. SC 89529

STATE EX. REL. ASHBY ROAD PARTNERS, ET AL.

Appellants,

v.

**STATE TAX COMMISSION OF MISSOURI,
And PHILIP MUEHLHEAUSLER, ASSESSOR OF ST. LOUIS COUNTY,**

Respondents

**APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
THE HONORABLE PATRICIA S. JOYCE, CIRCUIT JUDGE**

SUBSTITUTE BRIEF OF THE RESPONDENT STATE TAX COMMISSION

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JURISDICTIONAL STATEMENT

Appellant Taxpayers are commercial property owners in St. Louis County, who filed appeals with the Missouri State Tax Commission concerning the assessment of their properties. Specifically, Taxpayers claimed discrimination in the assessment of commercial property.

Taxpayers filed for a writ of prohibition in the Circuit Court of Cole County, seeking a writ prohibiting the State Tax Commission from requiring Taxpayers to produce evidence of the market value for each individual property. The circuit court denied a preliminary writ, accepted additional briefing and argument, and then denied Taxpayers a writ. [LF 196]

Taxpayers filed an appeal with the Court of Appeals, Western District, with jurisdiction premised on Article V, § 3 of the Missouri Constitution. The Court of Appeals issued its decision on June 24, 2008, dismissing the appeal, based upon a finding that the circuit court lost jurisdiction after denial of the preliminary writ. *State ex rel. Ashby Road Partners, LLC v. State Tax Comm'n*, --- S.W.3d ---, 2008 WL 2491956 (Mo.App. W.D. 2008).

Taxpayers moved for rehearing and transfer, which the Court of Appeals denied. On September 30, 2008, this Court entered an order granting transfer. The jurisdictional issue raised by the Court of Appeals is more fully addressed in this Brief, starting on page 11.

STATEMENT OF FACTS

Appellant Taxpayers' Statement of Facts recites the relevant facts, but it also recites in several places the arguments raised in this appeal. For ease of the Court, the facts can be briefly summarized as follows:

Taxpayers filed actions in the State Tax Commission claiming that their commercial properties were suffering discrimination in tax assessment. [LF 6, ¶ 1] Specifically, Taxpayers alleged that their individual properties were overassessed in comparison with other similar properties in St. Louis County. [LF 6, ¶ 2]

Prior to hearing, the State Tax Commission ordered that a lead case be designated, and that the Taxpayers produce: (1) a ratio study demonstrating that discrimination existed in county assessment of commercial properties; and, (2) evidence of the market value for the Taxpayers' individual properties. [LF 120, 121-122] The countywide ratio study could be used in all subsequent discrimination cases. [LF 7-8, ¶ 5; LF 106]

Taxpayers filed a Petition for a writ of prohibition with the Cole County Circuit Court, seeking an order requiring the State Tax Commission to eliminate the requirement of evidence as to their property's market value. [LF 5] The other party to the State Tax Commission proceeding, the county assessor, was not named as a party in the prohibition action at circuit court, but later intervened. [LF 5, 163, 165]

The circuit court denied Taxpayers a preliminary writ of prohibition on March 19, 2007. [LF 3] Taxpayers then sought a permanent writ of prohibition. Again, the circuit court denied granting a writ, and denied Taxpayers any relief in a July 3, 2007, Judgment. [Appendix A1; LF 196]

Taxpayers filed an appeal with the Court of Appeals, Western District. [LF 204] The Court of Appeals dismissed the appeal, based upon a finding that the circuit court lost jurisdiction after denial of the preliminary writ. *State ex rel. Ashby Road Partners, LLC v. State Tax Comm'n*, --- S.W.3d ---, 2008 WL 2491956 (Mo.App. W.D. 2008).

The Court of Appeals denied Taxpayers' motion for rehearing and transfer of the case. Taxpayers then filed a motion for transfer with this Court, and this Court granted transfer of this case on September 30, 2008.

STANDARD OF REVIEW

Because the disposition of the underlying writ request is discretionary, the matter is reviewed on appeal only to determine whether the circuit court abused its discretion. *State ex rel. Miss. Lime Co. v. Mo. Air Conservation Comm'n*, 159 S.W.3d 376, 386 (Mo. App. W.D. 2004). Discretionary rulings are presumed correct, and an abuse of discretion occurs only if the ruling is “clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice.” *State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740, 745 (Mo. App. E.D. 1998)

Normally the proper remedy to contest the denial of a writ is to request an extraordinary writ from a higher court and not a direct appeal. *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 741 S.W.2d 114, 115 (Mo. App. W.D. 1987). If this Court treats this matter as a request for a writ, then the standard of review is based on an abuse of discretion by the State Tax Commission. If the Court views it as an appeal, then this Court examines whether the circuit court abused its discretion in denying a writ.

The issuance of a writ is a discretionary act, *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757, 760 (Mo. App. W.D. 2007) and a writ of prohibition does not issue as a matter of right. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999). A writ will only lie to prevent “an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.” *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). A writ of prohibition is an extraordinary remedy that is to be used “with great caution and forbearance and only in cases of extreme necessity.” *State ex rel. Miss. Lime Co.*, 159 S.W.3d at 383.

ARGUMENT

Taxpayers have cases pending in the State Tax Commission that are premised on a claim that discrimination in the taxation of commercial property is so pervasive in St. Louis County that relief needs to be granted. Such relief would take the form of lower taxes for those properties suffering from discrimination.

The State Tax Commission ordered Taxpayers to produce a ratio study, demonstrating the existence of countywide discrimination, and evidence of the market value for each of their properties, showing its true market value. In other words, the Tax Commission required that each Taxpayer show not just that there was discrimination, but that they were actually the victim – and not the beneficiary – of any such discrimination in assessment. [LF 121-122]

But Taxpayers argue that evidence showing market value of their property is irrelevant. [LF 6-7] Taxpayers' theory is that once discrimination is shown to exist in the county, the trier of fact must presume that any protesting taxpayer is automatically the victim of discrimination, and a lower value must be assigned to the taxpayer's property.

The fallacy of Appellants' theory is easy to demonstrate through a hypothetical. Assume that Taxpayers are able to show countywide discrimination. If every commercial property owner in St. Louis County then sought relief as Appellants have, every piece of commercial property would be presumed to be suffering discrimination, and the assessment for that property – and the resulting property taxes – would be reduced. That result is nonsensical. The individual property evidence is not only relevant, it is indispensable.

But as discussed below, the Court need not reach that result now. The question is posed not on appeal from any Commission judgment, but by a writ of prohibition, in an effort to override in advance the Commission's decision concerning what will be relevant at the hearings that have not yet convened. If Taxpayers' theory had merit, it could be raised after the Commission acts, when we know whether they are really aggrieved and suffering from discrimination.

At this time, it is unknown whether Taxpayers will prove that there is countywide discrimination. Therefore, any decision as to the sufficiency of evidence of actual harm to the Taxpayers due to discrimination is, at this point, an advisory opinion. However, the Taxpayers still have a right to appeal any decision of the State Tax Commission that they disagree with, no writ is required, nor should any writ be issued at this time.

Under the circumstances, this Court should deny the writ of prohibition, uphold the discretionary rulings of the State Tax Commission and the circuit court, and allow the Taxpayers' claims to be developed and resolved at a hearing.

1. Jurisdiction for this Appeal.

This case was accepted on transfer after the Court of Appeals dismissed the Taxpayers' appeal based on jurisdiction. As such, the State Tax Commission will address the jurisdictional issue first.

Taxpayers sought a preliminary writ of prohibition from the circuit court. The circuit court denied Taxpayers a preliminary writ, allowed the parties to brief and argue the issues, and then denied the writ of prohibition. [LF 3, 196]. This Court could follow the Court of Appeals and dismiss the appeal.

Taxpayers contend that the circuit court retained jurisdiction after denying the preliminary writ, as the State Tax Commission “appeared without service of an alternative writ and answered the petition for writ.” [Brief at 27] As such, Taxpayers argue that the “circuit court’s order purporting to deny the preliminary writ and setting the case for hearing merely ‘denied’ a preliminary writ that already existed.” *Id.*

But no preliminary writ was ever granted in this case. Taxpayers filed their Petition and Suggestions in Support, and had a summons served on the State Tax Commission. [LF 2] The Tax Commission filed a Response to the Petition and Suggestions in Opposition. [LF 129, 134] The circuit court denied a preliminary writ with a one line docket entry on March 19, 2007. [LF 3] The circuit court issued no order or injunction to the State Tax Commission concerning this matter. Taxpayers are incorrect that the circuit court “merely ‘denied’ a preliminary writ that already existed.”

Taxpayers also contend that even if the circuit court lacked jurisdiction once a preliminary writ was denied, the Court of Appeals should have treated their appeal as an original writ. [Brief at 27] Taxpayers ask this Court to do the same. Normally the proper remedy to contest the denial of a writ is to request an extraordinary writ from a higher court, not a direct appeal. *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 741 S.W.2d 114, 115 (Mo. App. W.D. 1987).

Even if this matter is treated as an original writ proceeding, Taxpayers cannot meet the requirements identified by this Court warranting a writ of prohibition. This is especially relevant here, as Taxpayers have a statutory right to both judicial review of any State Tax Commission decision, and then an appeal to the appellate courts.

Although not specifically raised by the Court of Appeals, nor by the Taxpayers, there are a limited number of appellate cases where an appeal following denial of a writ was found proper, despite the absence of a preliminary writ. In each instance, the trial court considered and decided the merits. In *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971), this Court noted that for a writ of mandamus, the alternative writ is the first pleading, and the petition is *ex parte*. Therefore, where the respondent appears without service of an alternative writ and makes his return, “the petition stands as and for the writ itself for the purposes of the case and the return.” *Id.* at 855.

The Court of Appeals cited *Meyer* in *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867 (Mo.App. E.D. 1992), stating that “[w]here, however, the respondent appears without service of an alternative writ, and makes his return, the petition stands as and for the alternative writ itself for the purposes of the case and the return. *Id.* at 870. Taxpayers cite this language as supporting their argument that an appeal was proper. [Brief. p. 26]

But Taxpayers failed to cite the next line in *Schaefer*: “Where the court below dismisses the petition following answer or motion directed to the merits of the controversy and in so doing determines a question of fact or law the order is final and appealable.” *Id.* In *Schaefer* the circuit court denied a writ of mandamus and dismissed the case. The court of appeals found that it had jurisdiction, as the respondents had responded to the original writ petition, not an alternative writ, thereby raising sufficiency of the allegations, a question of law. *Id.* at 870

This case does not present a situation where it is unclear if the circuit court decision was a mere discretionary refusal to entertain the writ, or if there was a decision on the merits.

See, e.g., *Wheat v. Missouri Bd. of Probation & Parole*, 932 S.W.2d 835 (Mo.App. W.D. 1996) (a show cause order was issued, but the writ was denied in an order with findings of fact and conclusions of law. Court of appeals treated the case “as if a preliminary writ had been issued and then quashed, and thus will treat his denial of the writ as appealable.”). The decision did not decide the merits of the underlying action.

Generally, denial of a writ does not reflect any view by the court as to the merits of the cause, and the doctrine of *res judicata* does not apply under those circumstances. *Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 937 (Mo.App. W.D. 1997). The *Augspurger* court cited this Court’s decision in *State ex rel. Albert v. Adams*, 540 S.W.2d 26, 30 (Mo. banc 1976), holding that a judgment denying a writ of prohibition without written opinion is not *res judicata* unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits.

Here, the circuit court’s Judgment does not decide the merits of the underlying case. There is no decision on discrimination countywide, nor is there any decision whether any Taxpayer is suffering any harm. Nothing about the circuit court Judgment precludes Taxpayers from trying their case, putting on any evidence they choose, or taking an appeal from an adverse judgment.

The Judgment’s findings of fact merely recite the parties, the pending State Tax Commission cases, and the Commission orders that are the subject of the writ request. [LF 196-197; Appendix A-1, 2]. None of the circuit court’s findings would preclude any legal argument by the Taxpayers at their State Tax Commission hearing.

The conclusions of law are summed up in a section entitled “The requirements for a writ of prohibition are not met.” [LF 203; Appendix A-8] Therein, the court states that it is deciding not to issue a writ based on discretion, and is not trying to decide substantive law. The Judgment notes that the “actions of the Commission are in keeping with its authority and jurisdiction concerning discovery and evidence. Relators have not shown that the Commission’s decision as to the use of a county ratio study is outside its jurisdiction. Similarly, requiring an appraisal to demonstrate actual discrimination is within the Commission’s discretion and jurisdiction.” [LF 203; Appendix A-8]

Further, the Judgment notes that the Taxpayers have a statutory right to appeal, and “[a]s Relators may appeal any decision, the requirements for a writ of prohibition are not met.” [LF 203; Appendix A-8] The Judgment concludes by noting that there was no demonstration of another, less costly, means of establishing proof of discrimination, nor that Taxpayers established that they will suffer considerable hardship and expense.” *Id.*

The circuit court’s decision does not determine the Taxpayers’ legal issues before the State Tax Commission. Nor does the decision preclude any appeal after hearing. The circuit court’s decision is not *res judicata* for any issue. Taxpayers should litigate their cases before the State Tax Commission, and, if they dislike the outcome, they should file their statutory appeals.

Regardless of how this Court views the matter, the request for a writ should be denied. If the circuit court lost jurisdiction after denial of the preliminary writ, then no appeal would lie, and Taxpayers should file another request for a writ. If the Taxpayers’ appeal is proper,

or if this Court treats this appeal as a new writ application, Taxpayers still have not met the requirements for a writ.

2. The three specific instances warranting a writ are not present.

Taxpayers' brief has a single point relied on, containing four separate issues. But Taxpayers' arguments raise just two basic questions for this Court: (1) are the requirements for a writ of prohibition present; and, (2) did the State Tax Commission and the circuit court abuse their discretion? The answer to both questions is no.

This Court has limited the granting of a writ of prohibition to three specific instances: (1) where a judicial or quasi-judicial body lacks personal jurisdiction over a party, or lacks jurisdiction over the subject matter the body is asked to adjudicate; (2) where a lower tribunal lacks the power to act as contemplated; and, (3) the very limited situations when an "absolute irreparable harm may come to a litigant if some spirit or justifiable relief is not made available to respond to a trial court's order," or where there is an important question of law decided erroneously that would otherwise escape review on appeal and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. *Mo. State Bd. of Registration for the Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo. banc 2003); *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. banc 1998).

As shown below, none of the three instances are present in this case. Therefore, Taxpayers cannot demonstrate that the requirements for a writ are present.

A. The State Tax Commission has personal and subject matter jurisdiction.

Taxpayers do not contend that the State Tax Commission lacks personal jurisdiction over them. Instead, Taxpayers claim an abuse of discretion in the Commission's rulings as to the conduct of the hearings.

Here, Taxpayers filed their action with the Commission, and do not contend that the Tax Commission is without authority to hear the discrimination case. As such, this is not a case where the challenge is to the personal or subject matter jurisdiction of the tribunal. *See, State ex rel. Ford Motor Co. v. Nixon*, 219 S.W.3d 846, 849 (Mo. App. W.D. 2007) (“Prohibition is an independent proceeding to correct or prevent judicial proceedings that lack jurisdiction.”)

Since the State Tax Commission has jurisdiction over the parties and the matter, no writ of prohibition is justified based on jurisdictional grounds.

B. The State Tax Commission has the power to act by issuing the order.

The second instance where a writ of prohibition may be issued is where a lower tribunal lacks the power to act as contemplated. Such is not the case here. Taxpayers arguments are really an attempt to obtain a ruling as to what evidence is needed to prove discrimination, and hence, relief. But this Court is reviewing denial of a writ, and the question is whether the State Tax Commission or the circuit court abused their discretion. No such abuse can be shown.

This Court has noted that the State Tax Commission acts in a judicial capacity. *Cupples Hesse Corp. v. State Tax Commission*, 329 S.W.2d 696, 702 (Mo. 1959). And the Tax Commission's decisions as to the value of property are judicial in nature. *State ex rel. State Tax Commission v. Briscoe*, 451 S.W.2d 1, 5 (Mo. banc 1970).

This Court has also been “loathe to substitute its judgment for the expertise of the Commission in matters of property tax assessment. Absent clear abuse, we will ‘stay our hand[s].’ ” *Savage v. State Tax Commission*, 722 S.W.2d 72, 75 (Mo. banc 1986). The *Savage* Court also noted that the proper methods of valuation and assessment of property are delegated to the State Tax Commission. *Id.*

With respect to its discretion in handling discovery and evidence at an administrative hearing, the State Tax Commission is treated like a court:

A trial court, and by extension the Commission, retains broad discretion over the discovery process and the admissibility of evidence. The court may admit or exclude challenged evidence on the basis that it was not disclosed according to discovery rules. Appellate courts will not interfere with those decisions unless there is a clear showing of abuse of discretion. An abuse of discretion occurs when a court's ruling is so clearly against the logic of the circumstances before it and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a dearth of careful, deliberate consideration. The court did not abuse its discretion if reasonable persons can differ as to the propriety of its action.

Daly v. State Tax Commission, 120 S.W.3d 262, 267 (Mo.App. E.D. 2003) (citations omitted)

The State Tax Commission’s handling of tax issues involves both constitutional and statutory requirements. Real property in Missouri is divided into three classes: residential, agricultural, and commercial. Mo. Const. Art. X, § 4 (b), §§137.016, 137.115.5, RSMo Cum. Supp. 2005. The taxation for each class of real property is to be uniform. Mo. Const., Art. X, § 3. Commercial property is assessed at 32% of the property’s true value. §137.115.5, RSMo.

Taxpayers claim that their individual commercial properties are assessed at the correct true value, but that other similarly situated commercial properties in the county are assessed at a lower true value. [LF 6-7, ¶ 2] Since all commercial property is assessed at 32% of its true value, this argument boils down to an assertion that the Assessor is undervaluing the true value of a number of properties in the county. As such, Taxpayers claim that their properties are overassessed in comparison, and, hence, discriminated against. [LF 6, ¶ 1, 2]

Due to the number of claims involving discrimination (515 pending before the Commission [LF 197; A-2]), the State Tax Commission designated a lead case, and ordered that a “ratio study” be submitted reflecting the overall assessment level of commercial property in St. Louis County. [LF 7, ¶ 3; LF 131, ¶ 19]

The “ratio” in a ratio study is a comparison of the Assessor’s value to the actual market value of the property. As commercial property is assessed at 32% of the Assessor’s value, the ratio figure is compared to 32%. Undervaluation causes a lower assessment number: e.g., property with a market value of \$100,000, assessed at 32% yields \$32,000; but if the Assessor sets the value at only \$80,000, assessment at 32% yields \$25,600 – thereby assessing the property at 25.6% of market value, not 32%. If this was consistent countywide,

the overall assessment level in the ratio study would be 25.6%, reflecting undervaluation by the Assessor.

The Commission's Order states that the countywide ratio study used in the lead case may be cited as evidence in any subsequent action. [LF 7-8, ¶ 5; LF 106] Assuming that the ratio study demonstrates that there is discrimination, the Commission further ordered that the Taxpayers must produce evidence for each parcel of property at issue, showing its true value. [LF 121-122] These decisions are within the State Tax Commission's discretion.

A ratio study showing that the overall assessment level for commercial property is below the statutory rate could demonstrate discrimination. As this Court noted: "we believe that these ratio studies are substantial evidence of the average level of assessment within [the county]." *Savage v. State Tax Commission*, 722 S.W.2d at 77. In fact, where the taxpayer's ratio study was flawed, no discrimination was established. See, *Town & Country Racquet Club v. State Tax Commission of Missouri*, 811 S.W.2d 403 (Mo.App. E.D. 1991)

Claims of discriminatory assessment are well-known in Missouri law. *Savage v. State Tax Commission*, 722 S.W. 2d at 74; *Koplar v. State Tax Com'n*, 321 S.W.2d 686 (Mo. 1959); *Cupples Hesse Corp. v. State Tax Commission*, 329 S.W.2d at 698; and, *State ex rel. Platz v. State Tax Commission*, 384 S.W.2d 565 (Mo. 1964). If discrimination is shown, and if Taxpayers demonstrate that their property is overassessed in comparison, then their property taxes will be lowered. *Savage*, 722 S.W.2d at 79 (taxpayer has the right to have his "assessment reduced to the percentage of that value at which others are taxed"). Absent such a showing, there is no relief awarded to the taxpayer.

Here, Taxpayers challenge the requirement that they produce evidence as to their individual property's market value. Such evidence would demonstrate the difference between market value and the assessor's valuation of the property. Taxpayers' position is that once assessment discrimination is shown to exist in the county, their individual properties must have their assessed value adjusted to compensate for the discrimination.

Generally, to have standing to raise a constitutional issue, the party's rights must have been affected. *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). Evidence of discrimination in countywide assessments does not automatically mean that Taxpayers' individual parcels of property are suffering from discrimination. Requiring proof of discrimination is within the Tax Commission's discretion, and no statute prohibits an order requiring such proof of discrimination.

As it is presumed that an assessor's valuation is correct, the burden is on Taxpayers to rebut that presumption with proof, and to show that their property is suffering discrimination. *Koplar v. State Tax Comm'n*, 321 S.W.2d 686, 693 (Mo. 1959). As this Court stated in *Savage*, to have discrimination, the assessment of the taxpayer's property must, in the absence of an intentional plan or design of discrimination, be so grossly excessive as to be entirely inconsistent with an honest exercise of judgment. 722 S.W.2d at 78. While the countywide ratio study may show discrimination exists, by itself the study does not prove discrimination as to a particular parcel of property.

Requiring evidence of value and discrimination is well within the Tax Commission's authority. Under § 138.430.2 [a copy is found in Appendix A3], the Tax Commission "may inquire of the owner of the property . . . regarding any matter or issue relevant to the

valuation, subclassification or assessment of the property.” Evidence of the market value of the property demonstrates whether the Assessor set the property’s value above, below, or right at its market value. If the property is assessed at less than its market value, then the property is actually underassessed, and is enjoying lower taxes. It may not be suffering from discrimination.

Requiring proof of discrimination for a particular piece of property, through evidence of its market value, is both logical and reasonable. Yet Taxpayers claim that a writ was appropriate, as “the Commission’s orders required them to obtain costly information that was *completely irrelevant* in light of the record and section 138.060.” [Brief, p. 25, emphasis in original] Taxpayers put forth no evidence as to cost, and their reliance on § 138.060, RSMo is misplaced.

The reliance by Taxpayers on § 138.060, RSMo, [a copy is found in Appendix A2] is misplaced, as the statute does not control the evidence or burden of proof in a discrimination case. Under the statute, the Assessor is prevented, in the hearing, from arguing for a value in excess of the assessed value placed on the property by the Assessor or the Board of Equalization. § 138.060.1, RSMo. The statute does not prohibit a ratio study, nor does it prohibit proof of discrimination by evidence of the market value of the property.

The Commission’s order does not permit the Assessor to argue for a value contrary to § 138.060, RSMo. Nor does the order permit the Assessor to argue that the property is actually underassessed, and ask for an increase in value. Section 138.060 does not prohibit the Tax Commission from requiring proof from the Taxpayers that their individual parcel property is actually suffering from discrimination.

Curiously, Taxpayers claim that they agree with the Assessor's valuation of their property, and this establishes its market value. [Brief, p. 16-17] But this is not a stipulation by the Taxpayers and the Assessor as to market value (as was done in *Savage*). Instead, Taxpayers unilaterally agree with the Assessor's valuation, and want the Tax Commission to accept that as the market value of the property. While the Commission may, absent other proof, assume that the Assessor's valuation is correct, in a discrimination case, the threshold showing is that the Assessor's valuations are consistently wrong, hence the discrimination.

Taxpayers are not stipulating that the Assessor's value on all properties is correct: to do so would be fatal to a discrimination claim. Therefore, Taxpayers cannot have it both ways, attacking the Assessor's values as discriminatory (thereby showing that the Assessor's valuations are not entitled to a presumption of accuracy), while at the same time requiring the trier of fact to accept that their property value was correctly determined by the same Assessor.

Taxpayers also argue that the circuit court was wrong in stating that § 138.060 does not limit the assessor from using valuation evidence "to defend against a claim of disparate treatment." [Brief, p. 16; LF 216] Taxpayers have the burden of proof and the Commission's order is directed to the Taxpayers. Nothing in the language of § 138.060 prevents the assessor from challenging the countywide ratio study, nor does the statute prevent the assessor from arguing that an individual taxpayer's market value evidence for his property shows no discrimination.

Following Taxpayers' argument is inherently inconsistent. Applying § 138.060, RSMo, as urged by Taxpayers means that the Tax Commission must assume that all

properties are assessed at their market value. But if that is so, it begs several questions: If all properties are at market value, then which properties are the underassessed ones, causing the discrimination? And, if underassessment is so widespread that there is countywide discrimination, why is the Commission prohibited from determining if a particular piece of property is already enjoying underassessment, and, therefore, no harm?

Taxpayers argue that the circuit court decision was wrong, as the *Koplar* court did not require evidence of market value by the taxpayers. [Brief, p. 19] *Koplar* was, like the situation here, a discrimination case brought by commercial taxpayers. 321 S.W.2d at 687-8. An examination of the case shows that the circuit court's denial of a writ was correct.

Oddly enough, the *Koplar* taxpayers actually put on evidence as to the market value of their individual properties from professional real estate appraisers. 321 S.W.2d at 690 and 694. The Tax Commission found this testimony "not credible," and found no discrimination. *Id.* at 694. But this Court stated that a review of that credibility issue was not material, as the overall issue overall was one of competent and substantial evidence. *Id.* This Court overturned the Commission's decision, holding that it was arbitrary, unreasonable, and capricious under the circumstances, and found evidence of discrimination. *Id.* at 695-6.

Specifically, the *Koplar* Court noted that the county assessor candidly testified that he was not assessing the value of downtown business properties at their market value. *Id.* at 691. The assessor admitted that he put a higher assessment on office space. *Id.* at 694. As this Court noted, "this testimony was sufficient to show an intentional discrimination resulting from a purpose and design to discriminate." *Id.* at 695.

But as to individual taxpayer relief, the *Koplar* Court overturned the circuit court's determination setting the property's assessed value, and remanded the case for such a determination by the State Tax Commission. 321 S.W.2d at 697. By remanding the case for a value determination, the *Koplar* Court held that discrimination existed, but evidence as to the value of the individual properties, in light of the discrimination, needed to be set by the Commission. What the *Koplar* Court did not do was order an automatic reduction of the assessed value based solely on the fact that there was discrimination. The individual property's value still needed to be examined and determined.

Koplar requires the taxpayer to submit evidence of discrimination, and the *Koplar* taxpayers put on evidence of market value, and evidence demonstrating that discrimination existed in the assessment of commercial properties. Similarly, in *Savage* the taxpayer and the assessor stipulated as to the true value of the property, so no additional evidence was necessary. 722 S.W.2d at 74. Once discrimination was shown, the assessed values were reduced to the levels shown by the ratio studies, as the true value was stipulated. *Id.* at 79.

But here, the county assessor does not admit to discrimination in assessing commercial property, nor is there a stipulation by the Taxpayers and the assessor that the assessed value is the true market value of the property. As such, Taxpayers must produce evidence to show countywide discrimination in the assessment of commercial property, and evidence as to the market value of their properties, to demonstrate that the property is suffering discrimination.

Even more curious, Taxpayers argue on p. 25 of their Brief that: "Value is not at issue." But value is at the core of the discrimination claim, as assessments are directly tied

to the values placed by the Assessor on the commercial properties. The Assessor's valuation versus the market value shows discrimination, and the entitlement (if any) to relief. What Taxpayers really mean is that the value of their property should not be at issue, thereby avoiding proof of injury due to discrimination.

Taxpayers assert that the Assessor is systematically undervaluing commercial property countywide, to such an extent that discrimination should be found. It is therefore inconsistent for Taxpayers to assert that their property's value (as determined by the Assessor) must be accepted as the correct market value, right after demonstrating that the Assessor is not correctly assessing commercial property countywide. Section 138.060, RSMo does not require the tribunal to accept this evidentiary presumption; neither does the caselaw.

Taxpayers want § 138.060, RSMo to set a presumption that the value of their property is at market value, and therefore suffering discrimination. But curiously, this was the same argument put forth by the appellants in *Koplar* (which included the State Tax Commission) to demonstrate that the assessed values were not discriminatory. 321 S.W.2d at 693. The *Koplar* Court, while noting the presumption that the assessor's valuation is proper, further noted that the presumption "was one of fact and was rebuttable and only served the place of evidence, until the respondents, the owners of the mentioned properties, came forward with the evidence hereinbefore set out." *Id.* This Court noted that the presumption could not be applied in *Koplar*, due to the evidence. *Id.* at 693-4.

Taxpayers are required to demonstrate actual discrimination, not just a presumption. But regardless of whether the evidence consists of appraisals or assessor admissions, the

burden is still on the Taxpayers to prove their case. Thus, even in *Koplar*, the court remanded the matter to the Tax Commission to determine the value of the individual properties, and the amount for assessment. 321 S.W.2d at 697. The same determination will be done here, if and when the Taxpayers establish that: (1) there is discrimination, and, (2) that their property is actually suffering due to discrimination.

The State Tax Commission has not abused its discretion. Taxpayers bear the burden of proof to prove harm due to discrimination. The Commission's order is within its discretion, is not prohibited by statute, and is not contrary to longstanding case law. It is not an abuse of discretion for the Commission to require the Taxpayer to demonstrate that it is actually suffering discrimination before any relief can be ordered. No writ should issue.

In addition, the Circuit Court did not abuse its discretion in denying Taxpayers both a preliminary and a permanent writ. Those decisions are consistent with the examination of writs and administrative tribunals in *State ex rel. Rosenberg v. Jarrett*, 233 S.W.3d 757 (Mo. App. W.D. 2007).

A writ of prohibition does not issue as a matter of right; rather, it is discretionary and will lie only to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *Id.* at 760. A writ of prohibition is an extraordinary remedy that is to be used "with great caution and forbearance and only in cases of extreme necessity." *Id.* at 760.

"The general rule is that, if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court." *State ex rel. K-Mart Corp. v. Holliger*,

986 S.W.2d 165, 169 (Mo. banc 1999). “[P]rohibition will not lie to control administrative or ministerial functions, discretionary actions, or legislative powers. However, if abuse of that discretion is so great as to be an act in excess of jurisdiction and is such as to create injury which cannot be remedied on appeal, prohibition may be appropriate.” *Id.*

The determination of evidence is well within the discretion of the State Tax Commission. The circuit court did not act outside its jurisdiction, nor are Taxpayers’ complaints ones that cannot be addressed on appeal. No writ is justified.

C. Taxpayers will have the right to appeal, and there is no irreparable harm.

The party seeking a writ bears the burden of establishing that the respondent exceeded its jurisdiction and that no adequate remedy is available by way of appeal. *State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm’n*, 159 S.W.3d 376, 383 (Mo. App. W.D. 2005)

It is undisputed that once the State Tax Commission rules, Taxpayers will have the right to appeal an adverse decision to circuit court for judicial review. § 138.430.1, RSMo. If the original decision is by a Hearing Officer, the aggrieved party can appeal that to the Tax Commission, § 138.431, RSMo, and if the party disagrees with the decision of the Commission, they can appeal to circuit court. § 138.432, RSMo.

In fact, this appeal actually mirrors what is supposed to happen after there is a hearing and the State Tax Commission makes a decision: the losing party appeals to the circuit court for judicial review. The circuit court determines if the Commission’s decision was: (1) unconstitutional, (2) in excess of statutory authority, (3) unsupported by competent and substantial evidence upon the whole record, (4) unauthorized by law, (5) made upon

unlawful procedure or without fair trial, (6) arbitrary, capricious or unreasonable, or (7) involves an abuse of discretion. §536.140.2(1)-(7), RSMo.

The challenges raised in Taxpayers' point relied on are the same as those found in the judicial review statute: erroneously declaring and applying the law (§ 536.140.2(4)); not supported by the record (§ 536.140.2(3)); and, that the Commission egregiously abused its discretion (§ 536.140.2(6)). All of these arguments are reviewable on appeal.

But Taxpayers contend that an appeal is not an adequate remedy, as an "appeal of the final decision would occur *after* the Taxpayers had spent a great deal of non-refundable money obtaining irrelevant appraisal information." [Brief, p. 25; emphasis in original] It should be noted that the State Tax Commission hearing has not been held (due to this action and appeal) and Taxpayers have not actually litigated their issues. Moreover, there is no evidence in the record as to the amount of money the required proof would cost.

Further, following Appellant's argument makes every Tax Commission decision on discovery or evidence subject to a writ, as every appeal would occur after the petitioner "had spent a great deal of non-fundable money obtaining irrelevant" discovery or evidence. This effectively takes away the discretion on such issues from the Commission and creates a new set of oversight procedures and decision-making in the courts.

Taxpayers cite no Missouri case where a dispute over relevancy automatically creates a situation where an appeal is not an adequate remedy. Likewise, Taxpayers cite no Missouri case where a claim of irreparable harm due to the expenditure of time or money is automatically a situation where an appeal is not an adequate remedy. If such were the case,

then every dispute over relevancy would be decided by writ, not appeal. In addition, no case has been found where cost alone was the basis for granting a writ.

Instead, the courts examine the writ or prohibition requests to determine if an abuse of discretion is involved, and the writ petitioner has the burden to prove abuse of discretion. *State ex rel Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). Prohibition is the proper remedy for abuse of discretion by the trial court or administrative agency during discovery. *Missouri State Bd. of Pharmacy v. Administrative Hearing Comm'n*, 220 S.W.3d 822, 825 (Mo.App. W.D. 2007).

The *Board of Pharmacy* Court permitted the requested discovery of personnel records (and quashing the circuit court's writ of prohibition), but noted that the relevance of such records, their admissibility, and the need for a protective order would be left up to the administrative body handling the case. 220 S.W.3d at 826-7. This Court did not try to judge admissibility or relevance of the records. But here, Taxpayers are essentially asking this Court to make those determinations prior to the Commission hearing.

Like the *Board of Pharmacy* decision, an examination of other writ cases (including those cited by the Taxpayers) demonstrates that the courts avoid substituting their discretion for that of the administrative body. Similarly, the courts prefer to identify a less intrusive means for discovery, especially if a privilege or confidential information is involved.

Where a discovery dispute (including a claim of cost) involved depositions of top Ford Motor Company executives, this Court noted that the evidence might be gathered by less intrusive and costly means. *State ex rel Ford Motor Co. v. Messina*, 71 S.W.3d at 607. Taxpayers suggest no less intrusive or costly means for this matter.

Although no privilege or confidential information is present here, courts have issued writs to protect that type of information. *State ex rel. Pooker v. Kramer*, 216 S.W.3d 670 (Mo. banc 2007) (discovery of doctor expert was overly broad, touching on privileged and confidential information; trial court should examine for less intrusive means); *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 11-13 (Mo.App. W.D. 2001) (medical records and physician-patient privilege for conditions not in the petition).

Where discovery was outside the bounds of the pleadings, it was also curbed by writ. *State ex rel. BJC Health System v. Neill*, 86 S.W.3d 138, 142 (Mo. App. E.D. 2002). In *BJC*, the trial court denied a motion to transfer venue, but permitted discovery to establish the proper venue. *Id.* at 139. Given those circumstances, and citing § 355.176, RSMo as to service on a non-profit corporation, the court of appeals held that the only relevant venue facts for discovery were the corporation's principal place of business, where the cause of action accrued, and where the corporation's registered agent was located. *Id.* at 142.

Taxpayers cite this Court to *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167 (Mo.App. S.D. 1995), where the court of appeals granted a writ, noting that the need for discovery should be weighed against the burden of furnishing it. *Id.* at 169-170. But the facts of that case show that it does not apply to this situation.

The information sought in *Blue Cross* consisted of confidential trade secrets, and the court stated that keeping cost arrangements out of the hands of competitors, along with the invasion of non-party privacy rights, outweighed the need for the documents. *Id.* at 170-171. Likewise, a writ was denied where allegedly confidential and proprietary documents were

required to be produced, subject to a protective order. *State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm'n*, 159 S.W.3d 376 (Mo.App. W.D. 2005).

No privilege or confidential information is involved in this case, nor is there a dispute over a less intrusive means of providing the information. Instead, Taxpayers want a writ, claiming that certain evidence is irrelevant and costly. But given the broad discretion of a trial court concerning discovery, a writ will issue to control an abuse of discretion concerning discovery only where it amounts to an injustice. *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 11 (Mo.App. W.D. 2001). No such injustice is present here.

The appellate courts have avoided second-guessing both administrative tribunals and circuit courts concerning relevancy and admissibility issues. Missouri statutes set up a process for the circuit courts to judicially review decisions of administrative tribunals under Chapter 536, RSMo. Writs of prohibition should not become a mechanism to determine, prior to hearing, both the relevancy and admissibility of evidence. To do otherwise strips the administrative bodies of their discretion and decision-making authority, and creates a series of interlocutory writs or appeals whenever a legal issue arises.

No writ should be warranted in this matter. The State Tax Commission's order was within its discretion, and the circuit court's denial of a writ was also within its discretion. Taxpayers must prove harm arising from alleged discrimination, and evidence of market value for their property is both relevant and definitive on that issue. No abuse of discretion, amounting to an injustice, is present in this case.

CONCLUSION

The decisions of the State Tax Commission and the circuit court should be affirmed,
and no writ should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief, along with a disk containing the Brief, was sent via U.S. Mail postage prepaid, or sent via e-mail on this 19th day of December, 2008, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06.

Based on the word count of the Microsoft Word program, the undersigned also certifies that the total number of words contained in this brief is 7,477, excluding the cover, signature block, and certificates of service and compliance.

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

Mark E. Long, Assistant Attorney General

APPENDIX

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