

IN THE MISSOURI SUPREME COURT

Case No. SC90694

STATE OF MISSOURI ex rel. LISA POPE,
In her official capacity as
Platte County Assessor

Relator,

vs.

THE HONORABLE GERALD D. MCBETH,
Judge, Circuit Court of Platte County

Respondent.

BRIEF OF RESPONDENT

April 28, 2010

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STATEMENT OF FACTS

Introduction

This Court issued its preliminary writ in prohibition following the Respondent's decision to overrule Relator Lisa Pope's ("Pope") motion to dismiss. This case seeks review by extraordinary writ of a motion to dismiss. Where a motion to dismiss is at issue, the pleadings are presumed to be true in all regards. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 101 (Mo. banc 2010). This rule applies in mandamus actions. "We therefore look to the well-pleaded material facts in the petition and the return [to a mandamus] for our facts...." *State ex rel. State Tax Commission v. Briscoe*, 451 S.W.2d 1, 3 (Mo. 1970)

Respondent's Statement of Facts thus reflects the pleadings in this case.

Relator Pope asserts that this case is a challenge to the amount of the discretionary assessment she made of Kansas City Power and Light Company's ("KCPL") local property in Platte County. IT IS NOT. Rather, this case claims that Pope failed to perform ministerial duties imposed on her by statute in valuing KCPL's property. More specifically, Underlying Plaintiffs' aver that: (1) Pope failed to accept KCPL's sworn valuation of its local real property as its true value in money of that property and (2) failed to include local property of KCPL in her assessment of KCPL's property. The pleadings speak for themselves. They provide the operative facts. They are summarized following.

Facts that the Court Must Take as True

One of the Underlying Plaintiffs/Relators is the West Platte R-2 School District (“the School District”); it is a body corporate and politic, and is a duly constituted and authorized school district of the State of Missouri operating pursuant to authority granted it under the Revised Statutes of Missouri and the Missouri Constitution. The School District brought this action "under its authority to sue in order to protect its financial obligations to students of the School District and because the actions of the Defendant have and will continue to unlawfully deprive the School District of tax revenue due it under state law." App. A2, Pet. at ¶ 1.

The other Underlying Plaintiffs/Relators are Donald Wilson and John Collier. These gentlemen are residents and taxpayers of Platte County, Missouri and of the School District. *Id.* at ¶ 2, 3. These Plaintiffs/Relators brought this action as individuals and as taxpayers averring that the actions and failures to act of the Assessor have and threaten to continue to result in an unlawful deprivation to the School District of tax revenue due the School District.

The Defendant/Respondent in the underlying case is Lisa Pope. Pope is the duly elected Assessor of Platte County, Missouri. *Id.* at ¶ 4. Kansas City Power & Light Company, Inc., intervened in this case with the consent of the Underlying Plaintiffs/Relators.

In 2006, Kansas City Power & Light Company, Inc., a public utility, together with several partners and/or co-investors (together sometimes referred

to as “KCPL”), commenced an environmental retrofit of a coal-fired, electricity generating power plant commonly known as Iatan I in Platte County, Missouri, and more specifically on real property situated within the geographic area of the School District in Platte County, Missouri. Pet. ¶ 7. Iatan I has been fully permitted since 1980. It remained operational from 1980 until the Fall of 2008, when it went off line for construction (not maintenance) purposes for a period exceeding six months. Iatan I returned to distributing and/or generating electricity in the late Spring of 2009. *Id.* at ¶ 8, 9, 10.

The total cost of the Iatan I environmental retrofit according to a report of a staff member of the Missouri State Tax Commission is \$485,000,000. This amount represents a substantial increase over the anticipated cost of the environmental retrofit when KCP&L and its partners initially announced the construction costs for the Iatan I project. *Id.* at ¶ 11. The final cost is not known to Respondent, but is believed to be higher even than the publicly reported figure.

KCPL believed that Iatan I was completely operational in the Fall of 2008. Construction had been completed. A malfunction occurred when KCPL attempted to place the plant on line. This malfunction required KCPL to cease generating or distributing electricity at Iatan I and complete additional construction. This additional construction took more than one-half year to complete. During this period of time, Iatan I did not generate or distribute electricity. *Id.* at ¶ 10.

As with any construction project, the fixtures attached to the land became part of the real property owned by KCPL. KCPL filed the report required of it by § 151.110.1, RSMo 2000. That statute required KCPL to report “the true value in money” of its land under oath. *Id.* at ¶ 24. Nevertheless, Pope refused to accept KCPL's report of the “true value in money” of the now-completed, but not yet operational Iatan I project; instead she applied a 50% discount to the true value in money of the Iatan I real property reported by KCPL. *Id.* at ¶ 31, 32. Moreover, Pope concluded that the amount reported by KCPL should be divided as 50% real property and 50% personal property. App. at A79.

In 2006, KCP&L began the construction of a second coal-fired electricity generating and production facility called Iatan II. Iatan II is also physically located on real property situated in Platte County and within the geographic area of the School District. *Id.* at ¶ 12. Iatan II currently remains under construction, with an anticipated completion date in 2010. *Id.* at ¶ 13. KCP&L and its partners originally estimated that construction costs for Iatan II would be \$1.3 billion according to one published source. *Id.* at ¶ 14. A report of a staff member of the Missouri State Tax Commission states that final construction costs for Iatan II would be approximately \$1.9 billion. *Id.* at ¶ 15.

As to Iatan II, KCPL filed the report required of it by § 151.110.1, RSMo. That statute required KCPL to report the true value in money of its land under oath. *Id.* at ¶ 24. Nevertheless, Pope again discounted the true

value in money reported by KCPL for Iatan II by 50% of the reported true value in money before applying the tax rate. *Id.* at ¶ 31, 32. She concluded again that 50% of the amount reported was personal property and 50% was real property. App. at A79.

Section 151.110.1 required KCPL to provide under oath the true value in money of its land, which necessarily includes fixtures. KCPL is a sophisticated taxpayer; it cannot claim ignorance of the law. The report it filed as Form 30 is the report required by the State Tax Commission to respond to the duties imposed by § 151.110.1. App. at A77.

The Causes of Action Pleaded Are for Declaratory Judgment and Mandamus

The Plaintiffs/Relators in the underlying action pleaded counts for declaratory judgment, seeking to have the Respondent trial court declare the law. If the law is declared as the Underlying Plaintiffs suggest it should be, then the Underlying Plaintiffs seek a writ of mandamus to require the Assessor to perform the ministerial duties required of her by statute. There is no claim for damages; there is no prayer for an increase in the *proper* valuation; there is no challenge to any discretionary assessment made by the Assessor.

POINTS RELIED ON

I. RESPONDENT CORRECTLY CONCLUDED THAT THE UNDERLYING PLAINTIFFS/RELATORS HAVE STANDING.

Ste. Genevieve School District R II v. Board of Aldermen of City of Ste. Genevieve, 66 S.W.3d 6, 10 (Mo. banc 2002)

Committee for Educational Equality v. State, 294 S.W.3d 477, 484 (Mo. banc 2009)

Missouri State Med. Ass'n v. State, 256 S.W.3d 85, 87 (Mo. banc 2008)

Committee for Educational Equality, 294 S.W.3d at 485.

State ex rel. Sch. Dist. of Independence v. Jones, 653 S.W.2d 178, 185 (Mo. banc 1983)

II. PROHIBITION WILL NOT LIE TO PREVENT THE ENFORCEMENT OF STATUTORY DUTIES.

State ex rel. Halferty v. Kansas City Power & Light Co., 145 S.W.2d 116, 121 (Mo. 1940)

III. MANDAMUS IS THE PROPER REMEDY FOR ASSESSOR POPE'S FAILURE TO PERFORM MINISTERIAL DUTIES.

State ex rel. Thompson v. Jones, 41 S.W.2d 393 (Mo.1931)

ARGUMENT

Standard of Review Applicable to All Points

This Court issued its preliminary writ in prohibition based on Respondent's decision to overrule KCPL's motion to dismiss. For prohibition to issue based on the pleadings, review is the same as for a motion to dismiss.

"We therefore look to the well-pleaded material facts in the petition and the return [to a mandamus] for our facts...." *State ex rel. State Tax Commission v. Briscoe*, 451 S.W.2d 1, 3 (Mo. 1970). "A plaintiff is entitled to the benefit of every favorable inference which may reasonably be derived from the facts pleaded, ... for we must determine whether the plaintiff has invoked any substantive principle of law which would entitle it to relief. *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 84 (Mo.App. E.D.1994)." *Honigmann v. C & L Restaurant Corp.*, 962 S.W.2d 458, 459 (Mo.App. E.D.1998). "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009)(prohibition)(quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)). The plaintiff's allegations are taken as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Id.* The petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case. *Keveney v. Missouri Military Academy*,

304 S.W.3d 98, 101 (Mo. banc 2010). *Accord*, *Nazeri v. Missouri Valley College*,
860 S.W.2d 303, 306 (Mo. banc 1993).

I. Respondent Correctly Concluded that the Underlying Plaintiffs/Relators Have Standing.

Pope asserts that the Underlying Plaintiffs lack standing.

Standing is not a judgment on the merits, as Pope seems to argue. It is merely a preliminary, procedural conclusion that the person seeking relief has a genuine interest in the outcome of the litigation. "Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote." *Ste. Genevieve School District R II v. Board of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). Thus, standing exists if the well-pleaded petition asserts that a party seeking relief has some legally protectable interest in the litigation so as to be affected directly and adversely by its outcome. *Committee for Educational Equality v. State*, 294 S.W.3d 477, 484 (Mo. banc 2009) citing *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 87 (Mo. banc 2008). Indeed,

this Court has stated that "the capacity of a school district to sue and its authority to prosecute actions required to protect and preserve school funds and property is necessarily implied from the district's duty to maintain schools and conduct instruction within its boundaries." *State ex rel. Sch. Dist. of Independence v. Jones*, 653 S.W.2d 178, 185 (Mo. banc 1983) (finding that school districts were

not barred from bringing a declaratory judgment challenge to the State Tax Commission's future calculations of school funding monies).

Committee for Educational Equality, 294 S.W.3d at 485.

The Underlying Petition avers that

42. Defendant Lisa Pope has failed to assess the Iatan I and II real property at its true value in money.

43. Defendant Lisa Pope has failed to assess the personal property in use at Iatan I and Iatan II at its true value in money.

44. As a result of that failure, plaintiffs face a pecuniary loss attributable to the actions of Defendant Lisa Pope.

* * *

46. Respondent has a ministerial duty to employ the true value in money provided by KCP&L pursuant to Section 151.110 as the value of the property for assessment purposes without a further reduction.

47. Respondent has failed to perform her ministerial duty in that she has further reduced the true value in money before completing her assessment.

48. As a result of that failure, plaintiffs face a pecuniary loss attributable to the actions of Respondent Lisa Pope.

App. XXX, Pet. ¶¶ 42-44, 46-48.

Pope does not assert that the Underlying Petition fails to state a cause of action for a declaratory judgment; nor does she claim that the Underlying Petition fails to state a cause of action in mandamus. What she argues is that, on the merits, the Underlying Plaintiffs cannot win. But this is not a standing argument. Standing exists even if the party might lose on the merits.

And that is what Pope wants, a decision on the merits under the guise of standing. While all the parties would like an answer to the legal questions raised in this case at the earliest possible time, Respondent suggests that granting prohibition in this case has the potential to do damages to this Court's writ jurisprudence. It would also give short shrift to the role of Rule 74.04 and to the role of trial courts generally accepted in this Court's jurisprudence.

By Pope's own cited standards, prohibition does not lie in this case unless the Underlying Plaintiffs do not have standing. As Pope correctly notes "[P]rohibition will lie only where necessary to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party." *State ex rel. Toth v. Dildine*, 196 S.W.3d 663, 664 (Mo. App. E.D. 2006), citing *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547, 549 (Mo. banc 1990). None of those circumstances exists in this case.

Pope's reliance on *State ex rel. Cabool v. Texas County Board of Equalization*, 850 S.W.2d 102 (Mo. banc 1993) requires her to mischaracterize the averments of the Underlying Petition.

Against a direct attack that the school district had no standing to bring a mandamus action based on arguments identical to those launched by Pope, *Cabool* expressly authorized school districts to bring mandamus actions to enforce ministerial duties of assessors.

Initially, respondents argue that relators lack standing to pursue this mandamus action. The bases for respondents' assertion are this Court's holdings in *State ex rel. St. Francois County School Dist. v. Lalumondier*, 518 S.W.2d 638 (Mo.1975), and *City of Richmond Heights v. Board of Equalization*, 586 S.W.2d 338 (Mo. banc 1979). These cases held that neither a city nor a school district has standing to appeal, or seek review by certiorari of, an assessment by a board of equalization. The rationale for these decisions was that the legislature has provided a procedure for reviewing assessments and it made no provision for political subdivisions to challenge assessments. "No doubt such was originally omitted on the theory that public officials would adequately protect the interest of the state and its subdivisions." *Lalumondier* at 643. To permit political subdivisions to intercede would violate the legislative purpose.

Nevertheless, a narrow window exists by which even a member of the general public may seek mandamus against a public official. "The principle at the heart of [the writ of

mandamus] is that public officers are required to perform ministerial duties without any request or demand, and the entire public has the right to that performance.” *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992). Thus, where the duty sought to be enforced is a simple, definite ministerial duty imposed by law, the threshold for standing is extremely low. *Id.*

Cabool, 850 S.W.2d at 105 (emphasis added). *Cabool* then noted that mandamus was the proper cause of action and decided the appeal on the merits of the mandamus decision entered by the trial court. Because the school district had standing to bring the mandamus action in the circuit court, the Court could proceed to determine "whether apportionment of ad valorem property taxes on trucks used in interstate commerce is a simple, definite ministerial act imposed by law." *Id.* at 105. A bare majority of the Court found that the duty under review was not a ministerial duty.

However, Judge Elwood Thomas dissented, defining the issue thus: "[R]elators sought to use the writ to direct the assessor to require the taxpayer to establish a tax situs for the trucks outside Missouri before the assessor undertakes to apportion the property." *Id.* at 106 (Thomas, J. dissenting). Seen in that light, a statement of the issue with which the majority did not disagree, Judges Limbaugh and now Chief Justice Price joined Judge Thomas in concluding that "[t]he duty of

an assessor to require such a showing before undertaking the process of apportionment is a simple, definite duty clearly imposed by law." *Id.*

Despite the disagreement on the ministerial/discretionary issue, all seven judges in *Cabool* recognized the standing of a school district and of taxpayers to bring a mandamus action to challenge a local assessor's failure to adhere to statutorily imposed duties. Pope refuses to recognize that *Cabool* is not an original writ case filed in this Court challenging standing, but an appeal of a decision on a pleaded-in-the-circuit-court writ of mandamus decided by the trial court. Again, standing was directly at issue in *Cabool* and was decided in favor of allowing school district and taxpayers to enforce ministerial duties in a mandamus action.

The Underlying Petition pleaded its causes of action through the narrow window recognized by a unanimous Court in *Cabool*. Respondent here decided the procedural and standing issues in favor of the Underlying Plaintiffs and left the legal merits of the properly pleaded causes of action for decision at the summary judgment stage or, if necessary, at trial. All of that was subject to appeal.

Indeed, Pope honestly argues, and in so doing confuses, standing concerns with substantive merits of the Petition.

Plaintiffs' mandamus claim, and therefore standing, is premised on the allegation that the assessor had a clear, definite, and ministerial duty to assess the facility as described by Plaintiff. This

contention must fail as a matter of law as it is founded upon a misreading of the plan language of the relevant statutes

Pope Br. at 16. To repeat the settled law: Standing exists without concern for the merits. While a lack of standing may defeat a discussion of the merits; the presence of standing requires a court to move to the merits under the normal process -- by summary judgment or trial. Respondent understood that distinction; Pope does not. Thus, this case does not raise a proper subject for prohibition under this Court's current precedents.

What remains of Pope's Point I is a discussion of the merits of the well-pleaded Underlying Petition. Pope's merits discussion is founded on Pope's mischaracterization of the Underlying Petition, which is the only basis from which she can make any argument in the face of *Cabool*.

Turning to those merits, and to be clear, the gravamen of the Underlying Petition is that the Assessor may not employ a valuation that is less than the true value in money. § 137.115, RSMo 2000 (the “assessor shall annually assess all real property, including any new construction and improvements to real property, and possessory interests in real property at the percent of its true value in money.”) That is the constitutional description of the proper valuation for property, adopted by the people in 1982. See, Mo. Const. art X, § 4(b). In 1986, the General Assembly directed that electric companies provide the local assessor with a sworn statement of the true value in money of its land. § 151.110.1, RSMo 2000.

When that value is supplied according to the statute, that is the value the Assessor must employ -- and certainly not a 50% discount from that value. As noted in *Hermel, Inc. v. State Tax Commission* 564 S.W.2d 888 (Mo. banc 1978), the meaning of "true value in money" does not change; it is the polestar of valuation for assessment purposes. "This definition [of true value in money] has not changed from case to case." *Id.* at 897. As Pope candidly admits, if she was required to accept KCPL's sworn statement of value, that would constitute a ministerial duty. Pope Br. at 13.

But, Pope insists, she has the discretionary duty to appraise all local property. And this is where the battle lines in this case are clearly drawn. Either § 151.110.1 means what it says or it does not. If the former, then the School District and the Taxpayers have a right to an order of this Court requiring Pope to use KCPL's sworn true value in money" as the value of that property for ad valorem tax purpose. The Court will have concluded that Pope had no discretion to re-value KCPL's land. If the latter, then Pope's 50% discount of that reported value, which she describes as her discretionary appraisal, must prevail. The battle will be won or lost on this Court's willingness to let every word in the statute mean what it says -- or not.

To illustrate the difference that Pope fails to catch, assume hypothetically that the statutes mandate that all barns be valued at \$1,000 for assessment purposes. The statute removes all discretion from the assessor as to barns, establishing by law the valuation of the barns for assessment purposes. Now

suppose a local assessor valued a barn owned by a person who had helped her in her campaign at \$500 for assessment purposes. The establishment of the value of a barn is not a discretionary act under the statute; it is a ministerial act under the statute. The fact that an assessor may exercise her discretion to value office buildings does not also mean that all valuations are discretionary. Where the legislature has said how barns must be valued, that is the value of the barn. There is no discretion as to barns.

Mandamus will lie, in the hypothetical, to enforce the assessor's ministerial, mandatory duty to accept the legislature's valuation.

Pope's Failure to Perform a Ministerial Duty

a. The Legal Framework for Ad Valorem Taxation of Electric Utilities

First, for purposes of ad valorem taxes, electric utilities are taxed in the same way as railroad companies. Section 153.030.2 RSMo (2000) requires that real property and tangible personal property of “electric power and light companies” will be taxed in the same manner as “railroad property” in this state.

Further, the reports that an electric utility must file are the same reports that a railroad company must file. Section 153.030.2 requires

an authorized officer of any such ... electric power and light compan[y] ... is hereby required to render reports of the property of

such ... compan[y] ... in like manner as the authorized officer of the railroad company ... for the taxation of railroad property.

Id.

Chapter 151 relates to the taxation of railroads (and, by virtue of § 153.030.2, to electric power and light companies). Section 151.110.1, RSMo requires that:

“an **authorized officer** of every such railroad company [electric company] **shall**, in addition to the report required to be furnished to the county clerk, as described in section 151.030, no later than April first in each year, **furnish to each county assessor** in this state, **wherever any local property owned or controlled by such company may be located, a separate report, under oath** for the benefit of county and other local assessors, **specifically describing all lands by county tax map parcel number, situated in such county**, and not included in their returns to the state tax commission and county clerks, under sections 151.020 and 151.030, owned or controlled by such company, on the first day of January in each year, **and the true value in money thereof.**”

Id. (Emphasis added). Under this section, the electric utility must declare the "true value in money" of its real property under oath.

"A provision in a statute must be read in harmony with the entire section."

PDQ Tower Servs., Inc. v. Adams, 213 S.W.3d 697, 698 (Mo.App. W.D.2007).

Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously. *Id.* Where two statutory provisions covering the same subject matter are unambiguous when read separately but conflict when read together, the reviewing court must attempt to harmonize them and give effect to both. *City of Clinton v. Terra Found., Inc.*, 139 S.W.3d 186, 189 (Mo.App. W.D.2004); *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.* 248 S.W.3d 101, 107 (Mo.App. W.D.2008). "And courts presume every word in a statute has meaning. *Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen*, 92 S.W.3d 785, 788 (Mo. banc 2003)." *Missouri Prosecuting Attorneys v. Barton County* 2010 WL 1049420, 4 (Mo. banc 2010).

First, a discussion of the meaning of the word "assessment" is necessary. "Assessment" means the determination of the ad valorem tax due on specific property. The act of assessment is a three-step process, not a one step process. Assessment is *not* limited to determining the value of property. The State Tax Commission has admitted in other litigation that there are three steps that are part of the assessment process: (1) valuation; (2) categorization of the property by classification; (3) application of the proper tax rate.¹ See, App. at 73. KCPL's counsel agreed at oral argument in the trial court.

¹ Steps 1 and 2 together determine the "assessed valuation" of the property, that is, the value of the property based on its proper categorization. For example, if the true value in money of the property is \$100 and the property is personal

[Mr. Graves for KCPL]: [A]n assessment is many things. It's an appraisal, and then it's a classification within the Missouri constitutional scheme. Agriculture is one classification, residential, commercial. So there's an appraisal, there's an – a classification, and then there's a – an application of a tax break [sic] [rate] to a classification or – I'm sorry, then there's a – there's an assessed valuation based on the classification (inaudible) of the true – true value of money.... At the heart of that assessment is the appraisal. And nothing could be -- which is the setting of the true value in money.

App. at A64. Further, the State Tax Commission makes a distinction between appraisal and assessment in its own description of the assessment process. “It is our obligation at the State Tax Commission to *appraise* and *assess* railroad and public utility property....” State Tax Commission Assessor Manual III, 2 (2008).²

property, which is assessed at 33 1/3 of its true value in money, the assessed valuation is \$33.33. Section 151.100 permits a challenge to the assessed valuation, that is a challenge to either the true value in money or the assessor's categorization of the property or both.

² That assessment is necessarily this three step process is shown in the taxation of distributable property owned by utilities. The value of the utility property is determined by the State Tax Commission; the assessment of the

In addition, 12 C.S.R. 30-2.011(2) shows that "assessment" is a three-step process. The regulation draws the distinction between market value and assessment, valuation being a distinct step in the assessment process. "[E]ach assessor in the state shall provide a breakdown of the market value and assessment of the real estate held by each company within his/her jurisdiction on Form 30, Schedule 15."³

Read in the light of the proper meaning of the word "assess," the statutes to which Pope refers are harmonious. If they are not read that way, they conflict with one another.

property is completed in accordance with the levy of each taxing jurisdiction. "The assessed values by county are certified along with the other centrally assessed property (railroad and public utility) to the counties in the state." State Tax Commission Assessor Manual III, 7 (2008).

³ The breakdown that the regulation requires would not prohibit the use of KCPL's sworn true value in money of its real estate in the assessor's report. Nor do the forms prohibit the assessor from doing what the forms require – providing the "market value" supplied by KCPL as the "true value in money" as to real estate. What the forms do not permit is the assessor arriving at a valuation less than the true value in money – and that is what KCPL is required to supply under oath pursuant at § 151.110.1.

Pope cites three statutes that show that § 151.110.1 cannot be read to say what it says. Her argument that these statutes conflict with one another, proceeds from her apparent belief that the word "assessment" is a synonym for "appraisal/valuation."

First, Pope cites § 151.030, RSMo. That statute merely requires the railroad officer to file a report of *distributable* property in a county. Section 153.034.1 defines distributable property as property that is used directly in the generation or distribution of electric power. This report, then is merely to let the county clerk know what property a railroad/electric power company believes should be assessed by the state tax commission, not by the local assessor. This section sheds no light on and creates no conflict with § 151.110.1.

Second, Pope cites § 151.020.1(3)(a) for the proposition that the local assessors must include construction work in progress "as part of their analysis." Pope Br. at 13. Pope goes on to argue that the legislature's "silence evidences that the assessor is not performing a clerical function (ministerial)...." *Id.* at 13-14. Section 151.020.1(3)(a) simply does not speak to the issue raised by § 151.110.1. Silence does not create a conflict.

Third, Pope turns to § 151.110.3, That subsection provides that railroads and utilities file a report with the State Tax Commission by May 1 that contains the "true value in money of all local property as derived by the county assessor...." *Id.* (emphasis added). As to the statute itself, the word "derive" means to "take or receive esp. from a source." WEBSTER THIRD NEW

INTERNATIONAL DICTIONARY (2002) 608. By its own terms, § 151.030.3 assumes that an assessor will determine the "true value in money" from a source. "Derive" does not mean, as KCPL seems to argue, that the Assessor must make her own appraisal. Thus, § 151.110.1 requires that KCPL report the true value in money of its "land." The Assessor derives the true value in money from that source -- the KCPL report.

Moreover, local property includes both land and personal property. § 153.034.2. Section 151.110.1 applies only to land. And while land necessarily includes fixtures placed on the land, § 151.110.3 can be read in harmony with § 151.110.1 only if the former requires a report that includes what the assessor is required to value (the personal local property) and the true value in money of land is derived by the assessor from the KCPL sworn report of value required by § 151.110.1.

Pope's claim that she had no duty to assess the KCPL property at the true value in money provided by KCPL is a violation of a ministerial duty.

Pope's Failure to Assess land as Local Property

A local assessor is required to assess all local property of an electric company. § 151.100. That is a clear, ministerial duty. Pope was required to assess local property.

Section 153.034, RSMo (2000) distinguishes between local property and distributable property for purposes of local ad valorem taxation.

1. The term “**distributable property**” of an electric company shall include all the *real or tangible personal property which is used directly in the generation and distribution of electric power*, but not property used as a collateral facility nor property held for purposes other than generation and distribution of electricity. Such distributable property includes, but is not limited to: [list omitted.]

* * *

2. The term “**local property**” of an electric company shall include all real and tangible personal property owned, used, leased or otherwise controlled by the electric company not used directly in the generation and distribution of power and not defined in subsection 1 of this section as distributable property. Such local property includes, but is not limited to:

* * *

(2) Construction work in progress;

Id. (Emphasis added).

Under § 153.034, property that is not directly generating or distributing electricity is not distributable property. It is local property. If it is local property, it is locally assessed. If it is locally assessed property, the local assessor must assess it. § 151.100. Pope failed to do so, despite a duty to do so. "All local property ... shall be assessed by the proper assessors in the

several counties...." § 151.100, RSMo. Where the local assessor fails to include property that should have been assessed, mandamus lies to remedy that failure. *State ex rel. Thompson v. Jones*, 41 S.W.2d 393 (Mo.1931).

The Underlying Petition (which must be accepted as true) avers that Iatan I was neither generating nor distributing electricity for a period exceeding six months due to construction work in progress at that plant. It became local property for that period of construction. And because the relevant date for valuation is January 1 of a given year, that date determines when the assessor must decide whether property is local or distributable. For example, if Iatan II goes on line on December 31, 2010, it will become distributable property on that date. If, however, it goes on line on January 2, 2011, it will remain local property for tax purposes. The difference is the status of the property on January 1.

Pope's concern that power company property will bounce back and forth between local and distributable property betrays an unwillingness to let the law determine which is which. It is only where there is a substantial construction project that causes a plant to cease generating and distributing electricity for a continuous and substantial period of time that a property will revert to local assessment. If an explosion destroyed its plant and KCPL rebuilt the plant, under Pope's reasoning, the construction work in progress could never be assessed locally again because it had, for some period of time, become distributable property assessed by the State Tax Commission. The plain language of § 153.034 supports the Underlying Plaintiffs' its mandamus claim.

Pope cites no case and parses no statutory language for its merits conclusion that "Plaintiffs' interpretation was not intended by the legislature." Pope Br. at 18. The statute speaks for itself. The pleadings put the proper interpretation of the statute at issue. Respondent should be permitted to decide the pending legal issues.

The Declaratory Judgment Counts

Finally, as to Point I, Pope asserts that "Plaintiffs misreading and failure to harmonize R.S.Mo, §§151.110.1, 151.110.3 and 153.034 is determinative of the declaratory judgment counts as well." Pope Br. at 18.

Point I asserts a standing failure. Pope's argument is a merits argument. Summary judgment and appeal are the way courts historically have decided merits issues, not by way of mandamus.

Ste. Genevieve School District decides the standing issue in a manner contrary to Pope's argument. That case involved a declaratory judgment action filed by a school district. The Court concluded that both the school district and its taxpayers had standing based on averments in the Underlying Petition that the school district and the taxpayer stood to suffer a pecuniary loss.

CONCLUSION

Respondent correctly concluded that the Underlying Plaintiffs/Relators had standing to pursue their causes of action. The writ should be quashed.

II. Prohibition Will Not Lie to Prevent the Enforcement of Statutory Duties.

Pope's Point II suggests that allowing the Underlying Plaintiffs/Relators to proceed with their causes of action will "subject every county assessor and every assessment, to unlimited claims by taxpayers displeased with the assessor's valuations of their neighbor's property." Pope Br. at 19-20. Goodness!

This Court decided *Cabool* in 1993 and *Ste. Genevieve School District R-II*. The narrow opening described in *Cabool* and employed in this case has remained narrow. The hoards have not stormed the gates of the courthouses demanding to be heard. Rather, the long-accepted rules governing standing have continued to guard against the reign of terror Pope fears. These rules maintain that guard in this case, allowing only pleadings that invoke ministerial duties and assert a genuine pecuniary interest to be heard.

Pope's fears arise from her misunderstanding of this case. This is a challenge to her fidelity to the law, not to her exercise of discretion.

If the Underlying Plaintiffs prevail, nothing will happen in this case to the role of the assessor. It will remain what it has been -- to complete assessments in strict accordance with the instructions of the legislature. See, *State ex rel. Halferty v. Kansas City Power & Light Co.*, 145 S.W.2d 116, 121 (Mo. 1940)("The assessors have no jurisdiction to assess property otherwise than as the

statute prescribes..... Under our system of taxation * * * there can be no lawful assessment except in the manner prescribed by law").

If Pope follows the law, she need have no fear of litigation. That she failed to do so here, is the only reason this case was ever filed.

CONCLUSION

Point II should be denied.

III. Mandamus is the Proper Remedy for Assessor Pope's Failure to Perform Ministerial Duties.

Pope's final point asserts that no remedy exists for the Assessor's failure to perform the duties required of her by law. She claims that she has no authority to raise the valuation of property after August 15, 2010, unless ordered to do so by the State Tax Commission. This Court's Order requiring her to follow the law would result, she says, in an illegal act.

Pope cites no case for this proposition. None exists.

Pope's Point III betrays a fundamental misunderstanding of the role of the judiciary in government. It is the judiciary to which the Constitution entrusts the fashioning of remedies for wrongs committed. "That courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property of character...." Mo. Const. art. I, § 14. It is the quintessential role of the judiciary to stand between wrongdoers and those they have wronged, to judge, and to repair the damage caused by those for whom the law's requirements have meant nothing.

The limits to the Assessor's authority to act under the statute do not extend to a court's authority to provide a remedy. That is the point made in *State ex rel. Thompson v. Jones*, 41 S.W.2d 393 (Mo.1931). There, the local assessor failed to assess property of a pipeline company in 1929, for taxes payable in 1930. The State Tax Commission discovered the omission and assessed the property. By the

time the Supreme Court decided the case, the calendar had rolled to 1931. Noting that mandamus was the proper remedy to address the assessor's failure to perform the ministerial act of assessing property within the county, this Court concluded that the county clerk's failure to apply the new assessment could not prohibit the collection of the tax two years later. "[R]espondent's wrongful act in delivering the tax books to the collector without computing and extending the taxes on the assessment here in question will not deprive relators of the relief sought in this proceeding." *Id.* at 399. And the remedy sought? "[T]o compute and extend the taxes levied by lawful authority in Morgan County, Missouri, and by the State of Missouri, for the year 1930 against said property of said corporation..." *Id.* This Court ordered (in 1931) the levy of the tax from a previous year (1930), well after the close of time for the payment of the taxes, precisely for the reasons raised in this case – the failure of the assessor to perform the duties required of her.

Indeed, the notion that the Courts can order the assessor to follow the law is in the very nature of a legal remedy. Blindness to this legal truth is the core fallacy of Pope's argument; statutes limiting the authority of the assessor do not also limit the authority of the courts to provide a remedy.

When a court orders a public official to follow the law, it is the first unlawful act that requires a Court to order that the law be followed. That is the nature of mandamus -- not to break the law, but to enforce it.

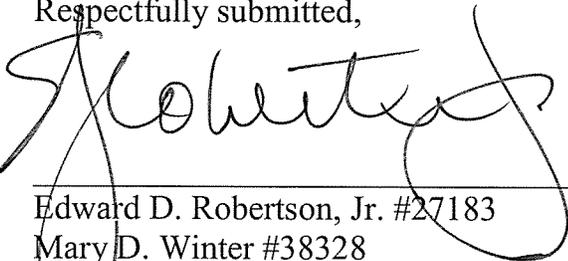
There is no claim that the duties shirked by Pope are unlawful duties. KCPL's argument that it would be *unlawful* for this Court to require Pope to perform a mandatory *lawful* act has no support in the law.

CONCLUSION

Relief by mandamus is available to the Underlying Plaintiffs if this Court finds that the duties imposed are mandatory, ministerial duties. Point III should be denied.

WHEREFORE, for the reasons stated, the preliminary writ should be quashed.

Respectfully submitted,



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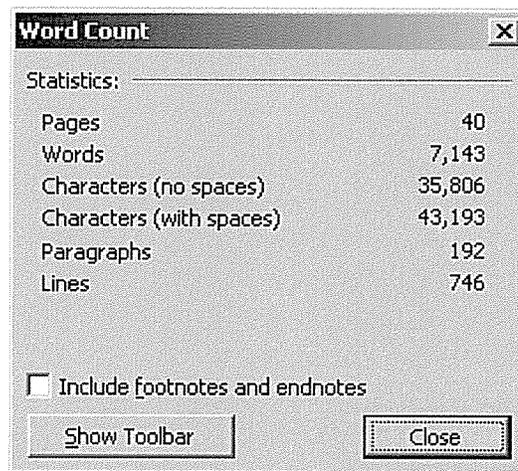
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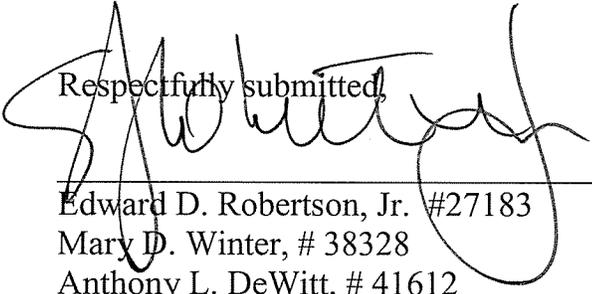
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 7,143 words. The word count was derived from Microsoft Word.



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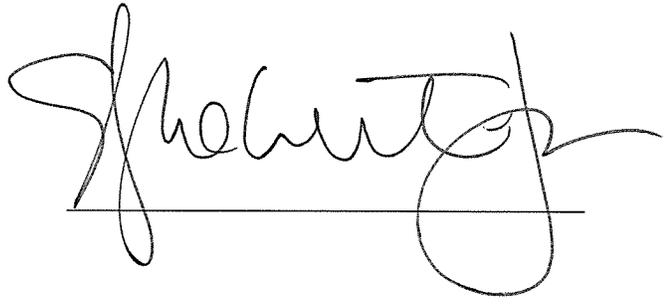
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A handwritten signature in black ink, appearing to read "Shelton", written over a horizontal line. The signature is highly stylized and cursive.