

Summary of SC91109, *Arbor Investment Co., LLC, et al. v. City of Hermann*

Appeal from the Gasconade County circuit court, Judge Gael D. Wood

Argued and submitted December 15, 2010; opinion issued May 31, 2011, and modified July 19, 2011, on the Court's own motion

Attorneys: Arbor was represented by James E. Mello, Jeffery T. McPherson and Thomas B. Weaver of Armstrong Teasdale LLP in St. Louis, (314) 621-5070. The city was represented by Kenneth Heinz, Edward J. Sluys and Carl L. Lumley of Curtis, Heinz, Garrett & O'Keefe PC in Clayton, (314) 725-8788; and David P. Politte of Zick, Voss & Politte in Washington, Mo., (636) 239-1616.

Several entities filed briefs as friends of the Court. The state attorney general's and state auditor's offices were represented by State Solicitor James R. Layton of the attorney general's office in Jefferson City, (573) 751-3321. The Missouri Municipal League was represented by Daniel G. Vogel, Erin P. Steele and Paul V. Rost of Cunningham, Vogel & Rost PC in St. Louis, (314) 446-0800. The Missouri Public Utility Alliance, Missouri Joint Municipal Electric Utility Commission and Municipal Gas Commission were represented by Howard C. Wright Jr., a solo practitioner in Springfield, (417) 883-6705; and Douglas L. Healy of Healy & Healy in Springfield, (417) 864-8800.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A group of individuals and businesses who obtain various utility services from the city of Hermann appeal the trial court's grant of summary judgment against them in their lawsuit against the city in which they allege that increases in their utility charges should be considered increases in taxes rather than fee increases, and so should be subject to the Hancock Amendment. In a unanimous decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the trial court's judgment that, under the test established in *Keller v. Marion County Ambulance District*, the utility charge increases are not taxes but rather increases in user fees.

Facts: Hermann is the exclusive provider of certain utility services in Hermann. Arbor and the other plaintiffs own property in Hermann, are utility customers and, for several years, have paid one or more of Hermann's utility charges. Since November 1980, the city has increased one or more of these utility rates at various times without a vote of the people. A state auditor's report for 2003 found that, in the aggregate, the utility charges may include additional substantial sums that Hermann says substitute for the sums that would be paid to the city by a private provider of utility service and that defray the added infrastructure and other collateral costs of these utilities. The record shows similar charges above direct cost were made in at least some other years. A varying portion of these sums are transferred from the city's utility accounts to the city's general accounts each year. Hermann also charges a quarterly 10-percent gross receipts tax or gross receipts surcharge that certain of the utilities themselves paid on their own gross receipts. In addition, beginning in approximately 2003, the city has imposed a quarterly "communications fee" on some utility accounts to defray the cost of constructing and operating a 911 call center.

Arbor and the other utility customers filed suit, asserting that these transfers and charges are

grossly in excess of the city's costs of providing the services and that its transfer of a portion of the resulting revenue from the city's utility accounts into the city's general fund account helps finance non-utility-related city operations, making the utility charges a hidden tax. Arbor alleges that this violates the Hancock Amendment (article X, section 22(a) of the Missouri Constitution), which requires a vote of the people before taxes can be increased. The trial court granted Hermann's motion for summary judgment. Arbor appeals.

AFFIRMED.

Court en banc holds: (1) The utility fees imposed by Hermann are user fees, and their increase does not violate the Hancock Amendment. *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. banc 1991), clarifies that the Hancock Amendment bars only increases in taxes, not increases in user fees, without a public vote. *Keller* set out a five-factor test for determining whether increases in charges are simply increases in user fees or are really hidden tax increases. These factors continue to provide a useful guide in distinguishing user fees from taxes and, in most cases, consideration of them will allow conclusive determination as to whether a charge is a user fee or a tax. When the result of considering these factors is ambiguous, however, a court may consider additional factors that may be relevant in a particular situation, just as this Court in *Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217 (Mo. banc 1993), considered the additional factor of whether the failure to pay the charge resulted in a lien as opposed to simply providing a basis to cut off service.

(2) The trial court did not err in granting summary judgment to the city. The charges in question here are fees, not taxes. The charge to the utilities themselves of a gross receipts surcharge or tax is not a charge against the users and, therefore, is not subject to the Hancock Amendment. Further, the first four of the *Keller* factors favor a finding that the charges are a fee. First, the utility charges are paid only after provision of the utility service. Second, Hermann residents not receiving utility services pay no charges, whereas those who do receive utility services do pay charges. Third, the record shows that the amount of a customer's bill depends on the amount of the utility service used. Fourth, the parties agree that Hermann is providing a service, although Arbor claims that the fee charged is disproportionate to the service given. The fifth *Keller* factor is whether the activity historically and exclusively has been provided by the government. Historically, utility services are provided both by private companies and by public entities, making this factor ambiguous. If considered in light of the historical provision of services in Hermann, because for decades the city has been the sole provider of these services, this single *Keller* factor militates in favor of finding the charge to be a tax.

On balance, however, the five *Keller* factors strongly show the charge is a fee, not a tax. The fact that Hermann is the sole provider of the utility services and the other facts noted above do not call for a different result. This also was the case in *Keller*. Furthermore, here, as in *Beatty*, failure to pay the utility fees results only in the utilities being shut off rather than a lien on the utility users' property. The facts show that the charges are user fees, not taxes.