

IN THE SUPREME COURT OF MISSOURI

Case No. SC94269

AIRPORT TECH PARTNERS, LLP, and STENTOR COMPANY, LLP,

Appellants,

v.

STATE OF MISSOURI and CITY OF KANSAS CITY, MISSOURI

Respondents.

**Appeal from the Circuit Court of Cole County
Honorable Jon Beetem, Circuit Judge
Case No. 12AC-CC00223**

**REPLY BRIEF OF APPELLANTS
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Section 137.392, RSMo 10

ARGUMENT

I.

(Reply to Argument I of City’s Brief and Section of Argument of State’s Brief Titled “The Assessor did not apply the statute”)

Both the State and the City recognize there were two affidavits filed in the summary judgment record in this case, one by Airport Tech Partners and Stentor Co. and the other by the City. Although both affidavits address the same issue in the case—the extent to which the fourth sentence of Section 137.115.1 was applied by the Platte County Assessor to the subject parcel—and one affidavit states it was applied and the other says it was not, the State and City argue there was no genuine dispute between the two affidavits on this point.

The City’s argument is largely reduced to putting its own gloss on the affidavit of Eldon Kottwitz which had been produced by Airport Tech and Partners. For Mr. Kottwitz to have been able to state that the Assessor’s office had applied Section 137.115.1, the City argues, the Assessor would have needed documents such as the lease or lease terms and the costs of construction of the improvements but Kottwitz did not state that such information had been available or used. Brief of Respondent City at 5. Paragraph 6 of the Kottwitz affidavit, the City continues, does not show that Kottwitz or anyone else with the Assessor’s office gathered the information and formally performed the computations

necessary to formally apply the fourth sentence of Section 137.115.1 to the TCC property. Brief of Respondent City at 5-6. (Paragraph 6 of the Kottwitz affidavit states, “In our opinion, applying the provisions of the fourth sentence of Section 137.115.1 to the leasehold interests reduced their assessments to zero”). The use of the prefatory language to the paragraph, “In our opinion,” the City adds, reduces the evidentiary weight of the statement because “One does not have to guess if one has actually done it.” Brief of Respondent City at 5-6.

With respect to paragraph 7 of the Kottwitz affidavit, the City argues that because Kottwitz used the phrase “estimated the assessed value”, he could not have performed the computation called for by Section 137.115.1, because “actual application” requires gathering information and performing the necessary mathematical formula. Brief of Respondent City at 6. Further, taking the sentence “we did not individually value the leasehold interests in the fee,” the City goes on to argue that the affidavit states that the Assessor’s office did not apply Section 137.115.1 to the subject property. Brief of Respondent City at 6.

With respect to the opposing affidavit proffered by the City, the City makes a qualitative comparison of it to the affidavit of Kottwitz. The Everly affidavit, it claims is more believable because he stated that he reviewed and considered the records of the Assessor’s office and he could find no record that contained the information needed to apply Section 137.115.1. Brief of Respondent City at 6.

The State makes the same arguments as the City but also resorts to the dictionary to try to construe the statements of Kottwitz in his affidavit and the email in Exhibit A to the petition as though the undertaking here was the same as parsing the meaning of a statute through canons of statutory construction. Brief of Respondent State at 25-27.

The error in the State' and City's argument is threefold. They misrepresent the Kottwitz statements by engaging in games of semantics. They fail to appreciate the issue to which the conflicting Kottwitz and Everly affidavits apply. Finally, they turn the summary judgment review standard into one by which the trial judge applies weight and credibility to the evidence before him and rules according to his determinations of weight and credibility.

Contrary to what the State and City argue, the Kottwitz affidavit does clearly and unequivocally state that Section 137.115.1 was taken into consideration by the Assessor's office but that it was deemed unnecessary to make an assessment of the possessory interest because Kottwitz and others in the office concluded, albeit summarily, that due to the effect of applying the fourth sentence of Section 137.115.1 to the TCC property, the result would be a \$0 true value in money and assessed value. The fundamental flaw in the State and City argument is that Kottwitz and the Assessor's office could, in fact, make preliminary estimates and judgments about the relationship between the potential value of the possessory

interest in the subject property and the cost of constructing the improvements without leaving a paper trail. The property record card for the subject property, Exhibit A to the complaint, substantiates this—less than a year after the improvements were completed, the Assessor determined those improvements consisting of 348,553 square feet had a value of \$22 million. [L.F. 171; App. A17.] Obviously, a structure of that size and value involved substantial construction costs. The Assessor’s office had to know something of the building and its costs to come to that conclusion of value.

Further, the Everly affidavit does not assert that Section 137.115.1 was not applied by the Assessor’s office to the TCC property. It simply stated there was no paper record to show that a formal computation was done. Thus, it is based solely on the inference that if it isn’t written down, it didn’t happen. In direct contradiction of this inference, the Kottwitz affidavit and Exhibit A do state the estimate of the application of Section 137.115.1 was done and that a record was not made of the process of making the estimation because it was deemed unnecessary out of administrative convenience.

This highlights the second problem with the argument of the State and City. They would have the Court believe that the issue here is the true value in money of the subject property. The presence or absence of records reflecting the costs of construction of the improvements, the specifics of the lease of the subject property

and how that relates to the “bonus value” of the leasehold, and computations using those amounts may have significance if the Kottwitz affidavit was being offered as an expert opinion of value for the subject and such an opinion was being challenged either on the proper foundation for the opinion or the weight to be given the opinion because of the information known to and considered by the person expressing that opinion of value.

However, the issue here is not whether \$0 or some other value is the correct opinion of value for the subject property. The issue is whether the process outlined in Section 137.115.1—a process Airport Tech and Stentor claim is unconstitutional and invalid—was the deciding factor in not assessing the possessory interest in the improvements, even though the Assessor determined they otherwise had a true value in money of \$22 million. The Kottwitz information clearly and unequivocally states that the process was the deciding factor.

Finally, the briefs of the State and City make clear that what they are really arguing with respect to the summary judgment evidence is that the Everly affidavit evidence is more credible than the Kottwitz affidavit evidence, and, accordingly that the Everly evidence should control the decision on the issues while the Kottwitz evidence should be completely disregarded. The standard for summary expressly precludes weighing the evidence presented on the summary judgment motion and making credibility decisions:

A genuine issue of material fact exists when the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. The question is whether essential facts are disputed, not whether those facts are more likely to be true.

Hoops & Assocs. v. Financial Solutions and Assocs., 395 S.W.3d 594, 597 (Mo. App. E.D. 2013). See, also, *Miller v. City of Wentzville*, 371 S.W.3d 54, 57 (Mo. App. E.D. 2012). In ruling on a motion for summary judgment, the court may not disregard testimony, question its accuracy, or rule on the basis that one party's evidence is more believable than contradictory evidence. "The trial court is not allowed to make credibility determinations when considering summary judgment motions[.]" *United Missouri Bank v. City of Grandview*, 105 S.W.3d 890, 898 (Mo. App. W.D. 2003).

There was a genuine issue of material fact in this case as there were essential facts in dispute. The trial court erred in granting summary judgment for the State and City given the existence of the genuine issue.

II.

(Replies to Argument II of City’s Brief and Sections of Argument of State’s Brief Other Than “The Assessor did not apply the statute”)

The State and City misstate the standing argument of Airport Tech and Stentor, viewing the challenge as based on “less property tax revenues being collected by a taxing jurisdiction than in a year prior to the use of the method of that valuation.” Brief of Respondent City at 9. The total absence of taxpayer harm, the City argues, is predicated on the following rationale:

The land is owned by the City of Kansas City, Missouri and was unimproved prior to the leasehold at issue. So, that land was never subject to property tax assessment by Platte County, the City of Kansas City, Missouri or any other taxing jurisdiction situated within Platte County and it created no property tax revenues. Regardless of the valuation method used, if and when TCC KCI Logistics I’s leasehold becomes subject to property tax assessment, it could never reduce the total amount of property tax revenues received by any tax jurisdiction for property or possessory interests located within its jurisdictional boundaries.

Brief of Respondent City at 9-10. The State comes at this argument from a different position, arguing: “total assessed value will go down only if the leasehold

was part of total assessed valuation and created tax revenue *before* application of the statute” and “There is no evidence that the Assessor determined the true value of any leasehold or new construction or improvements on the City’s fee and applied an assessment rate to that value before he applied the statute in 2012.” Brief of Respondent State at 23.

Airport Tech’s and Stentor’s taxpayer standing is not, and never has been, based on tax revenues collected from one year to the next. It is based on the relationship between the aggregate assessed value in the taxing jurisdiction and the tax levy imposed on individual properties subject to the levy in that jurisdiction from the year in which the assessment was made and the tax levied. The arguments made by the State and City evidence their lack of understanding of the property tax process in Missouri.

Section 137.115 requires the Assessor to make a list of taxable properties in the jurisdiction, to determine the true value in money for those properties and to convert those true values in money to assessed values based on the statutory percentage of true value in money to be applied to the different classes and subclasses of property. §137.115, RSMo. The true value in money of the properties is determined as of January 1 of the year in which the property is being assessed and property tax levied. *Id.* The prior year and the revenues produced in that year by a single property or in the aggregate nowhere factor into the process

and neither the status nor the any other factor relative to property values in 2011 or before were factored into what the Assessor was doing.

After completing this task, the Assessor “returns” the assessor’s book to the governing body of the county on July 1 of that year. §137.245, RSMo. (The assessor’s initial values are subject to adjustment if the taxpayer appeals the assessment to the county board of equalization and is successful in obtaining a reduction, but these adjusted values are entered into the assessor’s book when he turns it over the governing body of the county on July 1. *See, e.g.*, 137.385, RSMo.) On receipt of the assessor’s books by the county governing body, the county clerk prepares abstracts “of the assessment book showing the aggregate amounts of different kinds of real, personal and other tangible property and the valuations of each for each political subdivision in the county entitled to levy ad valorem taxes except for municipalities maintaining their own tax or assessment books.” §137.245.3, RSMo. Depending on the class of county, the abstracts are distributed to the political subdivisions authorized to levy a property tax between July 15 and August 15 of the year. *Id.*

The tax levy of each political subdivision is determined from the abstract. To use counties as an example, the county determines what its permissible revenue needs will be for the upcoming fiscal year through the budget process. That dollar amount is divided by the aggregate assessed property value for the county to arrive

at the tax rate levy which is necessary to produce the revenues needed for the upcoming fiscal year budget adopted by the county. The tax levy for that year is set accordingly. §§137.055 & 137.390, RSMo. The levy is to be set either by September 20 or October 1, depending on the class of county. *Id.* Once the levy is set, the county clerk applies the levies from all the taxing districts in the county imposing a property tax (not just the county levy but all taxing districts imposing a property tax) in the real estate and personal property tax books. The completed tax books are delivered to the county collector on or before October 31. §137.392, RSMo. From these, the collector generates the tax bills and mails them to the property owners.

Whatever might have occurred in 2011 with respect to the subject property has no bearing on the tax levy process and has nothing to do with basis on which taxpayer standing is claimed by Airport Tech and Stentor in this action. Their standing is based on (i) the exclusion of the January 1, 2012 true value in money and assessed value for the TCC property based on application of Section 137.115.1; (ii) the absence of January 1, 2012 values for the TCC property from the assessor's books returned to the county on July 1, 2012; (iii) the absence of the January 1, 2012 values for the TCC property from the abstracts prepared by the county clerk and distributed to the taxing districts between July 15 and August 15, 2011; (iv) the reduction in the aggregate assessed values in the abstracts distributed

to the taxing districts because of the absence of the January 1, 2012 values for the TCC property from the abstracts; (v) the increase in the tax levy as a result of the reduced aggregate assessed value brought about by the absence of the January 1, 2012 values for the TCC property; (vi) the application of that higher levy to the assessed values for the properties owned by Airport Tech and Stentor, resulting in a higher tax owed on those properties; (vii) the issuance of a tax bill to Airport Tech and Stentor that reflected the higher levy produced by the absence of the January 1, 2012 values for the TCC property; and (viii) the payment of taxes by Airport Tech and Stentor that were inflated by the absence of the January 1, 2012 values for the TCC property. Each step in this chain of events leading to the increased tax levy applied to the Airport Tech and Stentor properties had its genesis in and was directly attributable to the alleged unconstitutional application of the fourth sentence of Section 137.115.1 to the TCC possessory interest. The increased levy applied to the Airport Tech and Stentor properties occurred irrespective of anything that happened in the 2011 tax year.

The City also makes the peculiar argument that Airport Tech and Stentor lacked standing because, even if the fourth sentence of Section 137.115.1 had been applied to the TCC property and the levy was increased as a result of the true value in money and assessed value of the TCC property being set at \$0, “Appellants would not be adversely affected any differently than ATC [sic] KCI Logistics I

would be by an increased levy.” Brief of Respondent City at 10. The obvious defect in this argument is that the tax burden on TCC resulting from application of Section 137.115.1 and the resulting increased levy to the \$0 assessed value placed on the TCC possessory interest by application of the fourth sentence of Section 137.115.1 is a \$0 tax liability for TCC, while applying the increased levy to the positive assessed value on the Airport Tech and Stentor properties produces a positive dollar amount tax liability attributable to the increase in the levy.

The State cites *In re Removal of Human Remains in Cemeteries in Kansas City*, 297 S.W.3d 616, 618 (Mo. App. W.D. 2009), for the proposition that the fourth sentence of Section 137.115.1 was a legislative change to the bonus value method of determining the true value of money for leaseholds subject to the provision. Brief of Respondent State at 18. Section 137.115.1 was not a disputed issue in *In re Removal of Human Remains* and the provision the State cites comes from the statement of the facts. There is nothing to indicate that the court was doing anything other than reciting the gloss the City (who was also a party to that case) put on the statute. Clearly, the statement was *dicta*.

Even so, the court’s factual discussion makes some interesting observations about the factual effect of Section 137.115.1. First, the court notes that the fourth sentence singles out for the benefit it provides only possessory interests on airport property. *Id.* (“the purpose of the bill was to change the ‘bonus value’ method of

taxing real property leasehold interests on airport property”) (emphasis added).¹

No other commercial sub-classification of property was affected or intended to benefit from the provision. Even if the intent in amending Section 137.115.1 to

¹ Although not necessary for deciding the issues at this stage of the proceedings, Airport Tech and Stentor do not agree that “bonus value” is the proper measure of true value in money of the “possessory interest” being assessed under Section 137.115.1. Bonus value does not value the possessory interest a tenant has in the property so much as it values the bargain reached between lessor and lessee since it measures the difference between market rent and the actual rent on the property. Yet, when a tenant such as TCC invests its own money in improving a property at a significant sum, transfers those improvements to the owner of the land on which the improvements were built, and takes out a long-term lease that extends beyond the economic life of the property, the value of TCC’s possessory interest is not in the increment between market rents and actual rents but in the economic benefit it derives from the economic use made of the property over the term of the lease. This is particularly true with respect to property maintained as an investment property, such as a warehouse built by TCC but subleased to others for the stream of income that sublease provides. In Airport Tech’s and Stentor’s view, the possessory interest in the subject property should be measured by the true value of the property minus the value of the reversion to the City at the end of the lease.

add the fourth sentence had been to accomplish what the State argues, the provision still does not pass constitutional muster. It is not the position of the State that the provision was added to cure something so deficient in the well-recognized methods of valuing real property interests that their application were consistently mis-valuing possessory interests in airport property and that the legislature had to define the method of valuing these properties to bring their assessment into compliance with the constitutional mandate to assess property according to its value. Neither State nor City argue that the well-established methods for valuing properties long recognized under law, *see, e.g., Snider v. Casino Aztar*, 156 S.W.3d 341, 346 (Mo. banc 2005), including the method of valuing the bonus value in leasehold interests, *St. Louis County v. Boatmen's Trust Co.*, 857 S.W.2d 453, 456 (Mo. App. 1993), facially or in application do not comport with the constitutional mandate for assessing properties. They just argue that the legislature determined to impose a different method of valuation that was to benefit only airport properties.

In re Removal of Human Remains also recognized that the fourth sentence of Section 137.115.1 “could result in a significant decrease in the property value subject to ad valorem property taxation, in some cases resulting in a 100-percent property tax abatement.” 297 S.W.3d at 618. As this statement indicates, the purpose behind the fourth sentence of Section 137.115.1 was not to cure a deficiency in the constitutional mandate to assess real property by its value

produced by the traditional methods of valuing property. It was, instead, a means to provide a lucrative tax benefit to a very limited number of otherwise taxable properties.

The State, in fact, unwittingly recognizes that the provision is designed to provide such a lucrative tax benefit and not to arrive at a constitutionally-compliant true value in money: “Rather than applying the assessment rate of 32% to the bonus value of a leasehold, the fourth sentence of subsection 1 of §137.115 requires the assessor to apply that rate to the bonus value reduced by the cost to the lessee of any new construction or improvements on the property.” Brief of Respondent State at 18-19. In other words, while all other properties in the commercial subclassification of real property are assessed at 32% of their true value in money and all other bonus values of leasehold interests in commercial properties are valued at 32% of their true value in money, possessory interests in airport properties subject to the challenged provision are assessed at 32% of the otherwise true value in money of the interest assessed minus the costs of construction of improvements. Those properties are effectively assessed at something less than 32% of their true value in money once the statutory reduction of the costs of improvements is made.

CONCLUSION

The trial court erred in granting summary judgment in favor of the State and City. The judgment of the trial court should be reversed and the matter remanded to the court for full proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 10th day of October, 2014, a true and correct copy of the foregoing Reply Brief and Appendix thereto was served on the following by eService of the eFiling System and a Microsoft® Office Word 2010 version was e-mailed to:

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The undersigned counsel further certifies that this Reply Brief:

- (1) contains the information required by Rule 55.03;
- (2) complies with the limitations in Rule 84.06(b) and contains 4,253 words, determined using the word count program in Microsoft® Office Word 2010; and
- (3) the Microsoft® Office Word 2010 version e-mailed to the parties has been scanned for viruses and is virus-free.

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