IN THE
SUPREME COURT OF MISSOURI

NO. SC92581

WILLIAM DOUGLAS ZWEIG, *et al.*,
on behalf of themselves and all others similarly situated,
Plaintiffs/Respondents/Cross-Appellants,

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,
Defendant/Appellant/Cross-Respondent.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
Cause No. 08SL-CC03051
HONORABLE DAN DILDINE (By Order of this Court)
CIRCUIT COURT JUDGE

SUBSTITUTE REPLY BRIEF OF PLAINTIFFS/RESPONDENTS/CROSS-APPELLANTS THE RATEPAYERS

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INTRODUCTION

By arguing that the ratepayers are not entitled to a refund of all amounts it unlawfully collected from them, MSD is asking this Court to establish a rule of law that would eviscerate the Hancock Amendment. According to MSD, a governmental body that raises taxes without a vote of the people in violation of Hancock can keep and spend the money collected, even when the legal challenge comes within months of the imposition of the unconstitutional charge. MSD allows an exception for those individuals who file statutory refund claims, but for everyone else unwilling to go to the time and expense of filing a lawsuit to preserve their refund claim for a charge which, on average, is $3.00-$5.00, they are out of luck. MSD's argument is candid, even if not well-grounded legally: MSD needed the money, it spent the money, and its non-voter-approved Charge is more fair than the voter-approved system that had been in place, so no refund should be required.

There was an alternative: MSD could have put its new Charge to a vote of the people either when it was instituted, during the litigation, or after it lost at the trial court. If the new system for raising money (almost four times more money annually than was collected under the old system) is as fair as MSD claims, MSD should have made its case to the people. If the voters approved the new system, it would not matter that there was not the correlation between runoff and the Charge that MSD argued existed, but that the trial court found did not exist. Instead, MSD has incurred great costs to argue to judges that it should be able to levy its new Charge without voter approval.

The rule of law that MSD seeks and that is necessary for it to prevail on the refund issue would provide government officials with disincentives to comply with Hancock. If this Court denies the taxpayers a refund of the unlawful Charges, the practical effect will be that MSD (and other governmental bodies) will know that if they need to raise funding for any reason, they can simply levy any new charge they want and label that charge a "user fee." If taxpayers file a Hancock suit, the government will be comforted in knowing that it will not be required to return any of the money collected and spent except to the few who may have followed the onerous statutory requirements and filed and renewed tax refund claims for a charge that the government claimed was not a tax in the first place. Indeed, if this case is affirmed in all respects, MSD's antipathy toward putting new charges to a vote suggests that it would tweak the Charge, claim that the tweaked Charge constitutes a user fee, and plan on collecting a few more years while any new challenge worked its way through the court system.

The government would also be virtually immune from a class action refund if compliance with the tax protest statutes were required. The requirement would create a Catch-22: if the representative plaintiffs had not complied with the tax protest statute, they would not have standing to seek a refund. And if they had complied, they would not likely be representative of a class who had not.

This Court should apply the Hancock Amendment as it was written, order the trial court to devise an appropriate refund mechanism, and let MSD and other governmental bodies know that the judicial system will ensure that there are consequences when those bodies fail to obtain voter approval for a new or increased "tax, license or fee."

ARGUMENT

I. The trial court's judgment denying Plaintiffs' refund request should be reversed because the court erroneously applied and declared the law in ruling that Plaintiffs' Hancock Amendment refund claims are barred by Mo. Rev. Stat. §139.031 [Relating to Plaintiffs' Points Relied On I, III and V and Sections I and II of MSD's Response].

A. Contrary to MSD's assertion (and the trial court's erroneous holding), this Court has held that Section 23 of the Hancock Amendment permits taxpayers to seek a refund of taxes collected in violation of Section 22(a).

MSD's position is that it is allowed to keep all of the money that it collected from its unlawful Charge because the "operative language of . . . Hancock" Section 23 does not provide for a refund of the taxes MSD unlawfully collected in violation of Section 22(a). (MSD Br. 90-91.) In support of its contention, MSD cites Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo.banc 1995), for the proposition that the Hancock Amendment is not a consent to suit for a money judgment. (MSD Br. 64.) But Fort Zumwalt is both factually inapposite and superseded by two more recent decisions of this Court. Id. at 923 (holding that "sovereign immunity protects the state from a money judgment for a violation of Section 21").

The application of sovereign immunity was clarified in Ring v. MSD, 969 S.W.2d 716, 719 (Mo.banc 1998). In Ring, MSD made, and this Court rejected, the exact argument MSD makes here – that under Fort Zumwalt, taxpayers may not obtain a

money judgment for a violation of Hancock. Id. at 718. In response, the taxpayers, who sought refunds of MSD's unlawful wastewater taxes, argued that "this is a case in which the right to a money judgment is essential to enforce article X, section 22(a) and the Court must infer or imply that article X, section 23 acts as a waiver of sovereign immunity when a political subdivision collects a tax increase in violation of article X, section 22(a)." Id. This Court agreed, distinguishing the Ring taxpayers' Section 22(a) challenge against MSD from the Fort Zumwalt taxpayers' Section 21 challenge against the State:

> The constitutional right established in article X, section 22(a), assures taxpayers that they will be free of increases in local taxes unless the voters approve those increases in advance.
>
> * * *
>
> The enforcement of the right to be free of increases in taxes that the voters do not approve in advance may be accomplished in two ways: First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article X, section 22(a), and collects that tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional right established in article X, section 22(a), may be enforced only by a timely action to seek a refund of the amount of the unconstitutionally-imposed increase. This case falls into the second category.

> *Without deciding the merits of the claim presented by the plaintiffs here, we hold generally that article X, section 23, operates as a waiver of sovereign immunity and permits taxpayers to seek a refund of increased taxes previously collected by a political subdivision in violation of article X, section 22(a).*

969 S.W.2d at 718-19 (emphasis added). Thus, this Court has expressly held that Section 23 allows taxpayers a refund of taxes unlawfully collected under Section 22(a). MSD's argument and the trial court's conclusion to the contrary (LF1803, ¶64) should be rejected.

B. MSD's claim (and the trial court's erroneous declaration) that Plaintiffs must follow the protest procedures in §139.031 to obtain a refund are contrary to this Court's decisions in Ring v. MSD and City of Hazelwood v. Peterson.

MSD contends that this Court's holding in Ring that a taxpayer may obtain a Hancock refund by simply filing a timely challenge "has since been clarified" by Judge Wolff's concurring opinion in Green v. Lebanon R-III School District, 87 S.W.3d 365 (Mo.banc 2000) and by certain decisions of the Eastern District Court of Appeals to include the additional requirement that taxpayers must also follow the procedures in §139.031. (MSD Br. 91.) But Green and its progeny have done no such thing. In fact, Plaintiffs are not aware of any Missouri case that has ever held that a taxpayer who timely filed a Hancock refund action within months after a new monthly charge was imposed was *also required* to follow §139.031. A review of Green and related Court of

Appeals' cases cited by MSD and the trial court illustrates that the true concern of the court in each instance was the fact that the class action refund claims at issue were not filed until well after the taxes were due and collected; therefore, the taxing authority had no notice of the classwide challenge until after it spent the money.[1] (See Pl's Opening Brief, Plaintiffs' Appeal, Section I.C, pp. 108-114.)

These cases are readily distinguishable on that basis, as it cannot be seriously disputed that Plaintiff Zweig's filing of this class action a mere ninety days after MSD first imposed its monthly Charge on him was timely. (LF1782, Fact.-Find. ¶1, LF1784, Fact.-Find. ¶7.) Indeed, Plaintiffs' timely action gave MSD ample notice and opportunity to prepare for the trial court's adverse decision almost two years later. (LF1787-88, Fact.-Find., ¶¶18-19.) The trial court recognized that there was no "lack of notice" issue here, as it made the factual finding that MSD knew – before it even enacted the Stormwater Ordinances – that imposing its Charge without a vote could invite a taxpayer Hancock challenge. (LF1787-88, Fact.-Find. ¶¶18-19.) In fact, it seems that the trial court itself had doubts (despite its ruling) that §139.031 applied to Plaintiffs' timely-filed

[1] Although Judge Wolff opined in Green that a taxpayer seeking a refund must also comply with the "statutory scheme," his opinion was not shared by the majority, and, to the extent it could be read as requiring compliance with §139.031, this Court, sitting *en banc*, expressly rejected it the following year in Hazelwood. Green, 13 S.W.3d at 287 (Wolff, J., concurring); City of Hazelwood v. Peterson, 48 S.W.3d 36, 41 (Mo.banc 2001).

claims, because it stated in its later judgment that had MSD not spent all of the money it unlawfully collected, "a refund of roughly $90,000,000 would have been ordered to Plaintiffs." (LF2648, ¶30.)

Moreover, this Court's majority opinion in Hazelwood – decided after Green – put to rest the idea that §139.031 could ever apply to a Hancock refund action. In an effort to avoid this Court's clear pronouncement of the law in Hazelwood, MSD attempts to downplay and distinguish Hazelwood as a case "limited . . . to its own unique facts" that merely "involved the interpretation of Hancock in conjunction with Missouri's election contest statutes." (MSD Br. 93.) But there is nothing particularly "unique" about Hazelwood's facts. To the contrary, just like this case, Hazelwood was a taxpayer class action brought to collect a refund of increased taxes levied by a political subdivision without voter approval. Hazelwood, 48 S.W.3d at 37-38. And the fact that Hazelwood dealt with a Hancock challenge to an election contest statute rather than a municipal ordinance mattered not in this Court's decision. This Court did not limit its decision to the specific facts of the case; rather, it broadly held that "the Hancock Amendment . . . operates as a wholly independent mechanism for the refund of unconstitutional taxes" and that "Missouri's statutory procedures [specifically, section 139.031] do not govern the remedies found in article X [the Hancock Amendment] of this state's constitution." Hazelwood, 48 S.W.3d at 41.

As Plaintiffs filed a timely action challenging MSD's Charge (LF1782, Fact.-Find. ¶1; LF1784, Fact.-Find. ¶7), under Ring and Hazelwood, Plaintiffs are entitled to a

refund of all Charges unlawfully collected by MSD, and the trial court's judgment ignoring this binding precedent and denying a refund to the Class must be reversed.

C. Contrary to MSD's contention, so called "strict compliance" with §139.031 serves no purpose where Plaintiffs timely file a Hancock refund action and is impossible in the context of a class action.

MSD contends that "strict compliance with §139.031 is required to assure that government can function properly when tax issues arise," suggesting that taxpayers needed to follow §139.031 to force MSD to escrow the Charges it collected while this suit was pending. (MSD Br. 99.) In a case like this one where a timely Hancock challenge was made, MSD's contention is nonsensical. MSD argues that a taxpayer must follow §139.031, because if not, the taxing entity might collect and spend taxes for many years, operating under the assumption that its tax is valid, and then suffer extreme hardship when those taxes are ultimately challenged and adjudged illegal. (MSD Br. 97-98.)

But the doomsday scenario painted by MSD could not be further from the facts of this case. In fact, it is difficult to understand how this argument could possibly support MSD's position here, given that Plaintiffs filed this action within mere months after MSD first billed the Charge. Accordingly, MSD had almost two years' notice to prepare for an adverse decision. (LF1782, Fact.-Find. ¶1; LF1784, Fact.-Find. ¶7.) It was MSD that decided – with full knowledge of the potential outcome of the lawsuit – to take no action to prepare for such a decision. MSD can hardly argue that Plaintiffs needed to follow the statutory protest procedure to protect MSD from itself.

Furthermore, it would be patently unreasonable to require that, to receive a Hancock refund here, every one of the over 400,000 class members would have to (1) pay the Charge under protest *each month* after receiving a MSD bill; (2) submit a written statement to MSD with each payment outlining every ground on which he claims the Charge is illegal (taking care not to omit any potential basis, or risk waiver), and (3) initiate a new lawsuit against MSD – and pay the $97.00 filing fee (and service costs) – *every 90 days* to protest a bill that is, on average, around $3.00 to $5.00 per month per taxpayer.[2] (LF459,¶34.) Given the onerous nature of this procedure when applied in this context, it is not surprising that this Court in both Ring and Hazelwood found that the mere timely filing of a class action will suffice to state a claim for a Hancock refund, as applying §139.031 would only provide an incentive for political subdivisions to defy the Hancock Amendment.[3]

[2] MSD makes the specious argument that "§139.031 can easily be met with amendments to petitions." (MSD Br. 99.) Not surprisingly, MSD cites no authority in support of its contention, which flies in the face of the plain text of the statute.

[3] The onerous nature of the statute would not be subverted even if this Court held that only the named plaintiff must comply with §139.031, because then the defendant would argue that the court should decline certification because the plaintiff would not be typical of the overwhelming majority of the class who likely would not comply.

Therefore, contrary to MSD's claim, what MSD calls "strict application" of §139.031 would serve no purpose here except to deprive the taxpayer class of the very relief for which Hancock was enacted.

D. Granting a refund would not require the trial court to revisit its class certification decision.

MSD also suggests that if a refund is granted, the court's class certification decision should be revisited, because the court certified a class "in order to deny the refund." (MSD Br. 98-99.) To the extent MSD is raising a new claim of error, MSD failed to preserve it by not raising it in its Points Relied On – or anywhere else in its Opening Brief. Mo. Sup. Ct. R. 84.04 and 84.13; see also, e.g., Berger v. Huser, 498 S.W.2d 536, 539 (Mo. 1973). Further, courts do not certify classes to grant or deny relief on the merits; rather, courts are tasked with reviewing the evidence and determining whether the class certification requirements are met. Meyer ex rel. Coplin v. Fluor Corp., 220 S.W.3d 712, 715 (Mo.banc 2007) ("A class certification hearing is a procedural matter in which the sole issue is whether plaintiff has met the requirements for a class action. Thus, the trial court has no authority to conduct a preliminary inquiry into whether the plaintiff has stated a cause of action or will prevail on the merits.") (internal citation omitted). That is exactly what the trial court did here, entering judgment certifying a refund class after consideration of each requirement in Rule 52.08. (LF1789-1801.) Therefore, if this Court considers MSD's argument to the contrary, it should be rejected.

II. The trial court's judgment denying Plaintiffs' refund claim should be reversed because the court erroneously applied the law in holding that the equities supported a wholesale denial of a refund [Relating to Plaintiffs' Point Relied On II and Section III of MSD's Response].

The sole basis for MSD's "weighing the equities" argument (and the trial court's holding in that regard) is the following statement made by this Court in Ring after it remanded the taxpayers' Hancock challenge to MSD's wastewater charges to the trial court for consideration of class certification and refund eligibility:

> We are also confident that if the trial court determines that a class action is appropriate and that the plaintiffs' claims entitle them to prevail on the merits, it will fashion a remedy that will acknowledge both the taxpayers' rights under article X, section 22(a), and the important obligations MSD bears under the environmental laws of the nation and state.

Ring, 969 S.W.2d at 718-19. MSD (and the trial court) have, in essence, elevated this dicta to a holding of this Court, stating that in order to determine whether a refund is appropriate in a Hancock challenge, the court must only balance the equities. (MSD Br. 72.) While this dicta may suggest that equitable principles may be considered in fashioning a remedy for a Hancock violation (e.g., timing of the suit or means of providing refunds), it does not stand for the proposition that the court's determination of whether a refund should be granted is a simple balance of the equities. The trial court misapplied the law when it read Ring as imposing such a requirement.

MSD makes the blanket assertion that the Ring dicta supports the trial court's denial of a refund. Yet the trial court's decision not to grant *any* refund of almost two years worth of taxes unlawfully collected and spent by MSD *during the pendency of this timely-filed lawsuit* cannot be reconciled with this Court's recognition in Ring that "[t]he constitutional right established in article X, section 22(a), *assures* taxpayers that they will be free of increases in local taxes unless the voters approve those increases in advance." Ring, 969 S.W.2d at 718-19 (emphasis added). MSD also fails to explain how the complete denial of a refund to Plaintiffs "acknowledge[s] . . . the taxpayers' rights under article X, section 22(a)" at all. Id.

MSD likewise takes no responsibility for its failure to take any action to prepare for an adverse decision. MSD boldly claims that it was Plaintiffs who "sat idly by" while MSD collected and spent all of the Charges. It contends, without benefit of citation, that Plaintiff should have sought a preliminary injunction to force MSD to suspend the Charge during the litigation. (MSD Br. 98, 101.) MSD's argument ignores the fact that had Plaintiff Zweig moved for an injunction, Missouri law would have required Zweig to post a bond to cover MSD's potential damages if the suit was not ultimately successful. Mo. Sup. Ct. R. 92.02(d). Although Zweig brought this suit as a class action, no class had been certified at the time of filing, and thus Zweig himself would have needed to secure a substantial bond to enjoin MSD's collection of $90 million in unlawful Charges. Requiring a single taxpayer to incur such a significant expense and risk of loss – particularly where the Charge at issue amounted to, on average, around $3.00 to $5.00 per month (LF459,¶34) – would be unrealistic. That noted, Plaintiffs sought and were

granted permanent injunctive relief. (LF435, ¶3; LF438, ¶15(e); LF449, ¶60; LF451, ¶2(4); LF1789, ¶22; LF1806, ¶5.)

MSD also makes the unfounded claim that Plaintiffs "sat on their rights" by opposing an expedited hearing on the merits. (MSD Br. 101.) The trial court made no such finding, because the evidence does not support it. Much of the delay between the filing of this lawsuit and trial stemmed from two delays in judge assignment: one due to retirement of the original judge, and the other due to recusal of, first, the new judge assigned, and later, the entire St. Louis County judiciary. (LF2-6, LF1813, LF1857-62.) Once a permanent judge was assigned to the case, it was tried within seven months. (LF6, 8-12.) In the interest of judicial economy and efficiency, Plaintiffs even agreed to (and did) try this case in two phases, with their refund claims only being heard in the event Plaintiffs were successful on their Hancock declaratory judgment claim. (LF1543-44, ¶¶6-7; LF1783-84, ¶¶2-5.)

If MSD were truly concerned with expediting this matter to conserve taxpayer funds, one would expect that MSD would have joined in Plaintiffs' Application to Transfer the case to this Court prior to a decision by the Court of Appeals. Zweig, et al. v. MSD, Application for Transfer, No. SC91911 (July 22, 2011). Obviously unconcerned with the costs of an additional round of appeals, MSD not only did not join, but instead *opposed* Plaintiffs' Application. Id., Suggestions in Opposition to Transfer (Aug. 1, 2011). Thus, MSD can hardly claim that it should be exempt from a refund because Plaintiffs failed to expedite this matter.

In spending all of the money it collected, MSD made the calculated decision not to mitigate its risk in the event of an adverse Hancock judgment, even though it had a contingency plan in place. As the trial court found, before Plaintiffs filed suit, MSD knew that it could face a taxpayer Hancock suit over its Charge. (LF1787-88, Fact.-Find. ¶¶18-19.) In anticipation of such a suit, when it enacted the Charge, MSD decided *not* to repeal the *ad valorem* tax portion of its old funding program, but rather, reduced it to zero, so that it could "restore this funding should MSD be sued." (LF1549-50, Fact.-Find. ¶29; LF1788, Fact.-Find. ¶19.) But after suit was filed and the contingency realized, surprisingly, MSD chose *not* to mitigate its risk and decided not to restore the $0.24 fee or the *ad valorem* tax pending the outcome of the litigation. (Tr.1359:18-1360:2.) Indeed, taking such action would have been nonsensical according to MSD, because MSD could not be expected to sit back and await the outcome of a lawsuit brought by a few taxpayers (MSD Br. 101-02) – ignoring that this lawsuit sought class certification and a refund of *all* Charges collected. (LF434-52.)

In its Response, MSD tries to excuse its failure to mitigate the risk of an adverse judgment by claiming that it "could not simply stop collecting the Charge and reinstate the $0.24 fee and ad valorem taxes when suit was filed" because "[t]he Rate Commission had found that the [old] tax system was unfair." (MSD Br. 102.) Of course, the trial court made no such factual finding in its judgment. (LF1782-89.) Further, the fallacy in this argument is MSD's suggestion that its Rate Commission's opinions are akin to those of an independent regulatory body like the Missouri Public Service Commission, when,

in reality, MSD's hand-picked Commissioners simply make "recommendations" that can be wholly rejected by MSD. (Pls' Tr. Ex. 22, §§7.040,7.230,7.240,7.300.)

To that end, despite the Rate Commission's purported finding that the old tax system was "unfair," MSD had no difficulty restoring it after the trial court ruled against MSD on Plaintiffs' Hancock claim. Given that MSD so easily restored the old tax system funding when it desired to, one cannot help but wonder whether MSD chose not to avail itself of its contingency plan after suit was filed in an effort to maximize its damage from a refund – playing, in a sense, a game of chicken with the court, hoping to convince the court that the financial hardship of a refund tipped the "equities" in favor of MSD. It worked at the trial court. (LF2648, ¶30.) It should not work here.

Perhaps the simplest way for MSD to have mitigated its risk during the pendency of the lawsuit would have been to put the Charge to a public vote, if the old taxing program was really so "unfair" to ratepayers as MSD contends. (MSD Br. 102.) Yet MSD failed to do that as well.

Rather, MSD's management chose to spend every last dime it collected, and ask the court to save it from its own self-inflicted predicament. (Tr. 1334:17-1336:4.) Indeed, MSD continued to collect its Charges even *after* the trial court ruled the Charge unconstitutional and, more surprisingly, continued to *spend* that money. (Compare Tr. 1363:16-1365:25;1367:6-11 with 1372:24-1373:10 (testifying that MSD continued to bill the unlawful Charge to District residents for approximately a month after entry of judgment).) In addition, after the Phase I judgment was entered, MSD executives did not even meet to discuss whether they would cease billing the unlawful Charge to District

residents until more than a month after the Charge was adjudged unconstitutional. (Tr. 1315:11-17.) MSD's behavior should not be countenanced by this Court, and it certainly does not tip the equities in MSD's favor. Allowing MSD to retain the taxes it unlawfully collected eviscerates the purpose behind the Hancock Amendment. Absent a refund award, there is nothing to prevent political subdivisions like MSD from raising money by increasing taxes without a public vote, and then spending all of the money collected prior to a judicial determination that the taxes are unlawful. This is even more true where the officials running the political subdivision (here, MSD's Board members) are not elected.[4] Thus, the trial court's judgment denying Plaintiffs' refund claim should be reversed.

[4] In an attempt to refute Plaintiffs' statement that MSD's Board is not publicly elected, MSD improperly cites to a newspaper article that is not part of the appellate record. (MSD Br. 65.) This extra-record material cannot be considered by this Court. See, e.g., In re Foreclosures of Liens, 334 S.W.3d 444, 449-50 (Mo.banc 2011); Daly v. Kansas City, 317 S.W.2d 360, 364 (Mo. 1958). In any event, Hancock applies to all political subdivisions; it requires that even those run by elected officials subject their new taxes or tax increases to a public vote.

III. The trial court's judgment denying Plaintiffs' refund claim should be reversed because it erroneously applied the law in that, under the rationale articulated by this Court in Beatty v. MSD, MSD's Ordinance No. 13022 expressly authorizes refunds of unlawfully collected charges [Relating to Plaintiffs' Point Relied On IV and Section IV of MSD's Response].

A. Under Beatty, Ordinance No. 13022 expressly authorizes refunds of unlawfully collected Charges.

The plain language of MSD Ordinance No. 13022 (imposing the Charge) provides for refunds of any Charges "over-billed" to and "overpaid" by its customers. This Court in Beatty v. MSD, 914 S.W.2d 791, 796-97 (Mo.banc 1995), held that similar language concerning "overpayment" in MSD's wastewater ordinance expressly authorized a refund. Yet, MSD argues that the court correctly declined to grant a refund based on Beatty because MSD's Director of Finance testified that refunds were not intended when MSD drafted the ordinance. The trial court, however, did not make this factual finding in its judgment. (LF1782-89.)

Nor can such after-the-fact characterizations of intent override the plain language of MSD's Ordinance. Ordinances are interpreted using the same rules of statutory interpretation that apply to state statutes. Sunswept Props., LLC v. Northeast Pub. Sewer Dist., 298 S.W.3d 153, 159 (Mo.App.E.D. 2009). "The primary rule of statutory interpretation is to give effect to legislative intent," which is to be determined by the court based solely on a review of "the plain language of the statute." Brinker Mo., Inc. v. Dir. of Revenue, 319 S.W.3d 433, 437-38 (Mo.banc 2010); Parktown Imps., Inc. v. Audi

of Am., Inc., 278 S.W.3d 670, 672 (Mo.banc 2009). None of MSD's purported "intentions" articulated by Ms. Zimmerman are apparent from the plain language of the Ordinance itself, and therefore they are not relevant to the Court's construction of it.

MSD contends that Beatty should be limited to its facts – that, because the Beatty suit was brought on behalf of only three plaintiffs and this suit is a class action, Beatty should not apply here. (MSD Br. 105.) But the broad language of MSD's wastewater ordinance (providing that "overpayment by any [p]erson of any charges . . . may be used as a set-off") in Beatty would have required refunds to *all taxpayers* had Beatty been brought as a class action. The language in Ordinance No. 13022 is equally broad here, providing that "[i]n the event said parcel is being over-billed by the District, and the current owner of said parcel can verify such over-billing, then the District shall refund the current owner of the parcel any amount verified to be overpaid by said owner." (Pls' Tr. Ex. 2.) In fact, the language in Ordinance 13022 provides an even more compelling case for a refund than the Beatty ordinance, as it provides that MSD "shall refund" any amounts "over-billed" and "overpaid," whereas the Beatty ordinance merely provided that MSD "may" use amounts overpaid as a setoff. Id.

This Court should, therefore, reaffirm its holding in Beatty and find that the plain language of Ordinance 13022 explicitly authorizes a refund of all illegally collected Charges to the taxpayers who "overpaid" them. Beatty, 914 S.W.2d at 796. After all, as this Court noted, "[u]nder the facts of this case it would be glaringly unjust to prohibit party plaintiffs from recovering taxes paid under an ordinance that provided for credit-

refunds of overpayments, after a successful challenge to the ordinance's constitutionality." Beatty, 914 S.W.2d at 800 (denying MSD's motion for rehearing).

B. MSD's contention that Plaintiffs failed to meet their burden of proof on their refund claim is unfounded.

MSD makes the untenable argument that the trial court denied Plaintiffs' refund claim because Plaintiffs failed to carry their burden of proving how the refund should be distributed to class members. (MSD Br. 104.) Setting aside the fact that MSD cites no authority demonstrating that Plaintiffs must offer solutions on how to fund a refund in order to prove their entitlement to one, MSD's claim ignores its own agreement that Plaintiffs were not required to put on evidence regarding the precise amount of a refund due to the Plaintiffs and each class member. (LF1711-12.) Indeed, after MSD's counsel submitted that it would be extraordinarily burdensome for them to identify and calculate all of those figures, Plaintiffs agreed to stipulate that the trial court would retain jurisdiction to determine how a refund could be achieved and to identify the amount due to each class member, which issue would only be reached by the court if it granted Plaintiffs a refund. (Id.; see also Tr. 1100:24-1101:24.) As this circumstance never came to pass, MSD can hardly argue with a straight face that Plaintiffs failed to meet their burden in this regard.

Even though Plaintiffs were not required to offer suggestions as to how a refund could be achieved, Plaintiffs *did* advise the trial court that when the taxpayers succeeded in their Hancock challenge to MSD's unlawful wastewater charge in Ring, the terms of a $30 million settlement with MSD allowed MSD to provide refunds to class members

through credits on future billings. (LF1587; Tr. 1307:3-11;1308:11-24;1419:9-1420:15; Pls' Tr. Ex. 91, ¶ 17.) See also Ring v. MSD, 41 S.W.3d 487, 490 (Mo.App.E.D. 2000). MSD has not offered a reason why it couldn't follow the same procedure to refund its unlawful Charges to taxpayers in this case.

IV. In the event the trial court's refund judgment is reversed and a refund is ordered, MSD is not entitled to a set-off or other reduction of the amount of Plaintiffs' refund claim [Relating to Section IV of MSD's Response].

A. In the event a refund is ordered, MSD is not entitled to a set-off for any amounts it could have generated from taxes it voluntarily chose not to impose.

Having failed to avail itself of its contingency plan of reinstating the *ad valorem* taxes after suit was filed, MSD asks this Court to pretend that it did in the event it reverses the trial court's refund judgment and orders a refund. Specifically, MSD asks the Court to offset the refund by the amount MSD could have collected under the voter-approved *ad valorem* property taxes and $0.24 flat stormwater charge. (MSD Br. 106.) MSD argues that "Hancock prohibits only tax *increases*." (Id. (emphasis in original).) Of course, the Hancock Amendment prohibits not only increases in taxes, but *any new taxes not authorized by law in 1980*, the date of adoption of the Hancock Amendment. Mo. Const., art. X, §22. It is uncontested that MSD's Charge did not exist in 1980. And, in its Hancock judgment, the trial court made the factual finding that MSD's stormwater user Charge was a "new" tax within the meaning of Section 22(a). (LF1573, ¶126.) Therefore, MSD's contention is meritless.

As the trial court recognized in its Hancock judgment, MSD's Charge was *not* simply an increase of an existing voter-approved charge, but instead was a wholesale *replacement* of MSD's prior stormwater *ad valorem* tax and flat fee program with an entirely new schedule of monthly so-called "Stormwater User Charges" imposed on each District property based on its impervious surface area. (LF1547, 1549, 1564-65, ¶¶ 20, 28, 91.) Because MSD chose to implement a completely new stormwater funding program, and to repeal the voter-approved flat fee and reduce its *ad valorem* taxes to zero during the pendency of Plaintiffs' Hancock claim, and because the trial court determined that the Stormwater Ordinances were void from their very date of enactment, MSD must refund all Charges billed and collected. (Id.; see also LF1574, ¶131.) There is no legal basis to reduce that award by an amount that might have been collected had MSD decided to implement its contingency plan sooner than it did.

B. Plaintiffs timely challenged Ordinance Nos. 12560 and 12789 by filing this lawsuit.

As a continuation of its argument that §139.031 bars Plaintiffs' claims, MSD contends that Plaintiffs are not entitled to a refund of amounts collected in the few months before Plaintiffs filed suit. (MSD Br. 106.) The inapplicability of §139.031 to this Hancock challenge and Plaintiffs' fulfillment of the "timely filed" requirement are discussed above in Section I and in Point Relied On I in Plaintiffs' Opening Brief. In addition, the trial court made the explicit finding that MSD's Ordinances enacting its Charge were void from the very date of their enactment. (LF1574, ¶131.) Therefore,

Plaintiffs are entitled to a full refund of all amounts they paid to MSD from the inception of the unlawful Charge.

MSD similarly contends that Plaintiffs are not entitled to a refund of amounts collected between December 13, 2008, the effective date of Stormwater Ordinance No. 12789, and the date Plaintiffs amended their Petition to include a reference to that Ordinance (June 24, 2009). (MSD Br. 106.) This argument also fails, as Stormwater Ordinance No. 12789 was identical to the original Stormwater Ordinance No. 12560 that was in effect at the time Plaintiffs filed this lawsuit; the only "amendment" made by Ordinance No. 12789 was a rate increase from $0.12 to $0.14. Plaintiffs' lawsuit put MSD on notice in 2008 that taxpayers challenged MSD's Charge on the basis that it was enacted without a public vote. The fact that MSD chose during the following year to once again raise its Charge (again without a public vote) by making minor changes to its original Ordinance does not affect Plaintiffs' entitlement to a refund; Plaintiffs' lawsuit challenged MSD's entire unlawful stormwater Charge scheme, and therefore Plaintiffs' amended petition related back to their original petition. See Rule 55.33(c); compare Ordinance No. 12560 (Pls' Tr. Ex. 5) to 12789 (Pls' Tr. Ex. 3). Accordingly, in the event that the trial court's refund judgment is overturned, Plaintiffs are entitled to a full refund of all Charges unlawfully collected by MSD.

V. There is no reason for this Court to revisit its decision in Ring v. MSD as MSD requests [Relating to Section V of MSD's Response].

A. This Court got it right when it ruled in Ring – a case brought by taxpayers against the same entity involving nearly identical issues – that a taxpayer may seek a refund of taxes imposed in violation of Hancock by filing a timely action.

Recognizing that this Court's decisions in Ring and Hazelwood do not support the trial court's ruling and MSD's position, MSD urges this Court to revisit and overrule its decision in Ring holding that sovereign immunity does not bar a timely action seeking a refund of unconstitutionally-imposed taxes. (MSD Br. 106-111.) In doing so, MSD attempts to analogize and apply the holding of Fort Zumwalt to this case. (MSD Br. 106-08.) For all of the reasons already discussed above in Section I.A and recognized by this Court in Ring, Fort Zumwalt is factually inapposite.

It should also be noted that MSD raised in Ring – and this Court rejected – the *exact same argument* that it now makes in its brief. Id. at 718. MSD offers no compelling reason for this Court to revisit its ruling in Ring – a case that is *factually on all fours with this case* – as it was brought by taxpayers challenging an unlawful tax imposed in violation of Hancock by the very same entity, MSD. In fact, MSD does not point to any single circumstance that has changed since this Court rendered its decision. For the same reasons set forth above in Section I.A, this Court's recognition in Ring that "the constitutional right established in article X, section 22(a), assures taxpayers that they will be free of increases in local taxes unless the voters approve those increase in

advance" rings just as true today as it did when this Court's decision was handed down. Id. at 718. MSD's contention that a refund is "not essential" to Plaintiffs' claim under the facts of this case – where MSD unilaterally chose to impose an unlawful tax on voters without their approval, collect over $90 million from taxpayers, and then spend all of that money during the pendency of the taxpayers' challenge to its validity – hardly presents a compelling reason for this Court to hold to the contrary.

Ring's holding that a timely lawsuit is the only prerequisite for a Hancock refund claim also makes practical sense, as the whole purpose behind §139.031 is to provide notice to the taxing authority that the taxpayer claims the tax is illegal, to allow judicial review of the taxpayer's claim, and to alert the taxing authority of the need to segregate and hold the taxes collected pending the outcome of the suit – and that purpose is fully served by the timely filing of a Hancock challenge. Ring, 969 S.W.2d at 718-19; B & D Inv. Co. v. Schneider, 646 S.W.2d 759, 762 (Mo.banc 1983); Adams v. Friganza, 344 S.W.3d 240, 248 (Mo.App.E.D. 2011).

Accordingly, this Court's clear pronouncement of the law in Ring should not be disturbed.

B. This Court's decision in Taylor v. State does not support a denial of Plaintiffs' refund request, as Taylor did not involve a refund.

MSD cites to Taylor v. State, 247 S.W.3d 546 (Mo.banc 2008), throughout its Response Brief, making the strained argument that this Court should revisit Ring based on its decision in Taylor, and further arguing that Taylor supports the trial court's decision denying a refund to the ratepayers. (MSD Br. 91, 92, 94, 100, 109, 110.) But

Taylor is not on point, because the plaintiff in Taylor was not seeking a refund. Rather, Taylor was a lawsuit brought by a taxpayer after this Court in Brooks v. State had declared Missouri's Concealed-Carry Act unconstitutional as violative of Hancock's "unfunded mandate" provisions. Based on this Court's earlier decision in Brooks, the Taylor plaintiff brought a lawsuit requesting a finding that all concealed carry permits issued under the unconstitutional Concealed Carry Act be deemed "null and void.[5]" Taylor, 247 S.W.3d at 548.

In its decision limiting Taylor's remedy to merely an "interpretive" one, this Court noted that Taylor was *not* requesting a refund of amounts paid for the concealed carry permits. Id. In fact, Taylor had no standing to do so, because he had not actually been assessed, or paid, any fee for any such permits (it does not appear that he even obtained a permit). Id. Therefore, this Court's decision gave Taylor all that he had standing to request – reaffirmation of its decision in Brooks declaring that the Concealed Carry Act violated Hancock. Id. In its opinion, this Court specifically noted that "there is no question [raised] as to a damages remedy." Id. at 549. It further stated that damages relief would not be appropriate in Taylor's case in any event, because it would not remedy an unfunded mandate. Id. ("The remedy for an unfunded mandate is to declare the mandate unconstitutional or to declare that the state must provide full funding.")

[5] No refund was requested in Brooks either. Brooks v. State, 128 S.W.3d 844 (Mo.banc 2004).

Thus, Taylor does not support a denial of Plaintiffs' refund request or provide a reason for this Court to revisit its decision in Ring, because Taylor did not involve a refund.

CONCLUSION

For these reasons, this Court should reverse the trial court's judgment denying the Class a refund of all Charges unlawfully collected by MSD.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with Rule 55.03 and the requirements of Rule 84.06(b), and contains 7,632 words (excluding the cover, signature block and this certificate) as determined by the software application for Microsoft Word.

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