IN THE SUPREME COURT OF MISSOURI

JAMES SCHLERETH, Appellant & Cross-Respondent,	)	
vs.	)	Supreme Court No. SC89402
JANE TILLMAN HARDY, Respondent & Cross-Appellant.	)	

From the Circuit Court of Jefferson County, Missouri

Twenty-Third Judicial Circuit

Division 3

Honorable M. Edward Williams

RESPONDENT & CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

RESPONDENT & CROSS-APPELLANT'S POINT I

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT THE FACSIMILIE SIGNATURE ON THE COLLECTOR'S DEED WAS A PROPER WITNESS SIGNATURE BECAUSE SUCH SIGNATURE WAS NOT THE LEGAL SIGNATURE OF THE PERSON WITNESSING THE DEED IN THAT IT WAS A FACSIMILIE OF SOMEONE ELSE'S SIGNATURE AND NOT THE SIGNATURE OF THE ACTUAL WITNESS TO THE DEED.

Regardless of whether or not the duty to witness the Collector's Deed is delegable, the Collector's Deed bears neither the actual signature of the County Clerk nor the actual signature of any Deputy County Clerk. Nor does it indicate the title "Deputy County Clerk." (Legal File Vol. I p. 14).

RESPONDENT & CROSS-APPELLANT'S POINT II

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT COULD NOT CHALLENGE THE COLLECTOR'S

DEED BECAUSE APPELLANT DID NOT PAY THE POST-SALE REAL ESTATE TAXES ACCRUING ON THE PROPERTY BEFORE OBTAINING A COLLECTOR'S DEED, IN THAT THE STATUTE REQUIRING APPELLANT TO PAY SUCH TAXES WAS NOT SATISFIED BY RESPONDENT'S PAYMENT THEREOF.

Section 140.440 RSMo 2000, as in effect at the time of sale, states in pertinent part as follows:

> Every holder of a certificate of purchase ***shall before being entitled to apply for deed*** to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate…. [emphasis added]

Appellant did not reimburse Ms. Hardy for them until November, 2006 pursuant to the Consent Judgment filed November 8, 2008 (Legal File Vol. I p. 43). Construing this in terms most favorable to Appellant, it would appear under the terms of Section 140.440, Appellant was not entitled to apply for the deed until he reimbursed the taxes to Ms. Hardy. His payment of the taxes does not moot the matter because of Ms. Hardy's offer of payment, pursuant to Section 140.600 RSMo, contained in Paragraph 17 of her Answer, Affirmative Defenses, Cross-Claim and Counterclaims to

Appellant's Petition to Quiet Title filed on November 30, 2004 (L.F. Vol I at page 23).

RESPONDENT & CROSS-APPELLANT'S POINT III

THE TRIAL COURT ERRED IN THAT PORTION OF IT'S ORDER GRANTING RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT WHICH DETERMINED THAT RESPONDENT'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION WAS NOT VIOLATED BECAUSE THE COLLECTOR OF REVENUE DID NOT ADVISE RESPONDENT THAT HER PROPERTY HAD BEEN SOLD FOR TAXES WHEN SHE APPEARED IN PERSON AT THE COLLECTOR'S OFFICE IN THAT THE COLLECTOR HAD A POLICY TO ADVISE OTHER TAXPAYERS THAT THEIR PROPERTY HAD BEEN SOLD FOR TAXES WHEN OTHER TAXPAYERS APPEARED IN PERSON AT THE COLLECTOR'S OFFICE.

Appellant suggests in his Reply Brief that Ms. Hardy is not claiming any statute or policy is unconstitutional. Appellant's Reply Brief p. 18. To clarify, and notwithstanding the statement at page 43 of Respondent's Brief to the contrary, Ms. Hardy *is* claiming that the Collector's policy is unconstitutional in both its genesis and application.

Ms. Hardy acknowledges that the Collector had no obligation whatsoever to adopt the policy. Ms. Hardy maintains that, whether or not there was an obligation to adopt the policy, if the policy is adopted, it must be constitutional. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 37 L. Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U. S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989); *City of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L.Ed.2d 1060 (2000). In each of those cases the state actor was neither required nor obligated to adopt the particular policy it adopted. Yet in each case the United States Supreme Court determined that the adopted policy had to be constitutional or it would fail.

Appellant is correct when he asserts that equal protection analysis begins with a determination of whether the state action impacts a suspect class or impinges on a fundamentally protected right. Property rights are fundamentally protected rights under *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). The Collector's policy directly affects Ms. Hardy's fundamental right to her property and her equal protection claims thus are appropriate. Because a fundamental right is affected, any consideration of suspect class analysis is superfluous and inappropriate.

The next step in equal protection analysis is to determine which test to

apply. There are three under the federal constitution (strict scrutiny, rational basis and intermediate) and two in Missouri (strict scrutiny and rational basis.) *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006). *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) (strict scrutiny); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L.Ed. 1234 (1938) (rational basis); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976) (intermediate). In her first brief, Ms. Hardy analyzed the Collector's policy under both the strict scrutiny and rational basis tests, arguing the policy satisfied neither test. Respondent's Brief at pages 40-46.

The Collector has stated that as of March 4, 2008 "she advises her deputies that at such time as a taxpayer appears in person to pay their taxes, **if it is discovered** that the property has been sold at a previous tax sale, said deputy **may orally notify** the taxpayer that the property has been sold. [emphasis added]" (L.F. Vol. I 129). The Collector's policy has two parameters: first, the discovery of the previous tax sale; and, second, the notification of the taxpayer. In other words, the policy to orally notify taxpayers of previous tax sale of their property first makes a classification on the basis of whether the previous tax sale is discovered by the Collector at the time the taxpayer appears to pay taxes on the property. Then the second

parameter appears to indicate with the use of the word "may" that the deputy collector *can* exercise his or her discretion on whether or not to notify the taxpayer if the previous tax sale was discovered.

The first parameter, which classifies taxpayers on the basis of whether the previous tax sale "is discovered," is the classification challenged by Ms. Hardy. Respondent's Brief at page 39. As discussed in Ms. Hardy's first brief, the Collector knows that the property was sold. Thus, "discovering" it would appear to be a distinction without a difference and, therefore, an arbitrary classification.

Taking it one step further, assuming *arguendo* that the deputy collector who accepted Ms. Hardy's tax payments did not have constructive knowledge of the previous tax sale, then "if" it is discovered would mean "if" the particular deputy at the payment window either already has actual knowledge or finds out in the process of accepting payment that a prior tax sale had occurred. While the record in this case is silent on the deputy collector's state knowledge, one's state of knowledge is not a subject of the exercise of any discretion. It would appear to be completely up to chance, and therefore, arbitrary. This alone is enough to make the policy unconstitutional.

Appellant focuses on the second parameter, the "may" inform the taxpayer language. Even if this use of "may" might refer to the application of discretion by an official, that still does not cure the defect with the "if" parameter. Ms. Hardy argues that the use of "may" in the context of this policy does not refer to the application of discretion. No standards, rules or conditions (other than the discovery of the fact of sale) for its exercise appear in this record. It seems to be at the whim of the deputy collector as to whether the information pertaining to prior sale is provided. This would run afoul of the proscription contained in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 226 (1886). In that case the City of San Francisco failed to renew the licenses to operate a laundry for no apparent reason other than that the applicant was Chinese rather than Caucasian. While this type of racial discrimination is not applicable to Ms. Hardy's case, the Court's discussion at 118 U.S. at pages 366-368 of the legal sense of the official application of discretion is. It requires more than simply the exercise of "mere will and pleasure." *Id*., 118 U.S. at 367. Because the Collector's policy has no standards to apply in the making of a judgment it does not involve the application of discretion.

Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2149, 170 L.E. 2d 975 (2008), a case cited by Appellant in support of the proposition

that an application of discretion is not subject to equal protection review is not applicable because there appears to be no legal discretion exercised in Ms. Hardy's case. *Engquist* was a case which determined that equal protection rights did not obtain to a class of one when the state was acting as an *employer* as opposed to acting as *sovereign*. The discretion that the state exercised in Engquist was "simply the broad discretion that typically characterizes the employer-employee relationship." *Id*., 128 S. Ct. at 2155. Thus, Engquist was required to show more to maintain an equal protection claim in an employer-employee relationship. Such requirement does not obtain in Ms. Hardy's case because in her case the state is acting as sovereign.

Additionally, the speeding ticket analogy (*Id*., 128 S. Ct. at 2157-2158) from *Engquist* would be improper for application to Ms. Hardy's case because, as discussed above, the deputy collector is not exercising legal discretion and Ms. Hardy's conduct in this case is not criminal. See also the discussion below of the lawful/criminal distinction set forth in *Sims v. Cunningham*, 203 Va. 347, 124 S.E.2d 221 (1962).

Appellant argues that absent an intentional or purposeful discrimination, Ms. Hardy, as a class of one, can have no complaint. This simply is not the case. *Allegheny*, *supra*; *Sioux Bridge, supra*. In these

cases, there was no showing of any intent or purpose to discriminate. Nor was there any showing of ill will toward the taxpayer. The policies at issue failed because the policies did not treat all similarly situated taxpayers equally. *Engquist* does make it clear that equal protection rights protect individuals, not just groups or classes. *Enquist*, *supra*, 128 S. Ct. at 2150.

The cases cited by Appellant for his proposition that Ms. Hardy must show intentional or purposeful discrimination are easily distinguishable. First, In *Mackay Tel. & Cable Co. v. Little Rock*, 250 U.S. 94, 39 S.Ct. 428, 63 L.Ed. 863 (1919) the Court determined there was no violation of equal protection when a license tax ordinance was enforced less stringently against other companies maintaining telegraph poles than it was against Mackay. The U.S. Supreme Court found the taxing ordinance was neither unfair nor an "unwarranted burden" on interstate commerce. *Id*., 250 U.S. at 99, 39 S.Ct. 428, 63 L.Ed. 863. More importantly, and unlike Ms. Hardy's case, it does not appear that Mackay alleged or offered to show discrimination or unequal treatment among those similarly situated either at trial or in the Arkansas Supreme Court. *Id*., 250 U.S. at 100, 39 S.Ct. 428, 63 L.Ed. 863. The Arkansas Supreme Court case has no mention of any equal protection arguments. *Mackay Tel. & Cable Co. v. Little Rock*, 131 Ark. 306, 199 S.W. 90 (1917).

Similarly, in *Schmidt v. City of Indianapolis*, 168 Ind. 631, 80 N.E. 632 (1907) the City's demurrer to Schmidt's equal protection defense to the $5.00 fine on the charge of operating an unlicensed brewery, or depot or agency of a brewery, was sustained after Schmidt declined the opportunity to amend his pleading to more precisely state such defense. No such demurrer or issue has been made about the sufficiency of Ms. Hardy's pleadings, nor has she been charged with a crime.

In *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L.Ed. 497 (1943) the Court found that the State Canvassing Board violation of a state statute in refusing to certify a winner of a state primary election did not make its members subject to damages under the Civil Rights Act of 1871 and affirmed the dismissal of plaintiff's action because the right to a state office was purely a state law issue. The state statue was fair on its face and plaintiff's pleading did not make out any further facts showing discrimination.

Ms. Hardy would argue, notwithstanding any statement to the contrary in her first brief, that the Collector's policy is not fair on its face. Further, as *Snowden* points out, even when an action is fair on its face intentional or purposeful discrimination "may appear on the face of the action taken with respect to a *particular* class or *person*, [citation omitted] or

it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself [citation omitted]." *Id*., 321 U.S. at 8, 64 S. Ct. 397, 88 L.Ed. 497.

Snowden recognizes that purposeful discrimination may be evidenced by "a systematic undervaluation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect…is the same as though the discrimination were incorporated in and proclaimed by the statute. [citations omitted]. *Id*., 321 U.S. at 9, 64 S. Ct. 397, 88 L.Ed. 497. Thus, *Snowden* reconciles itself with the *Allegheny*, *supra*, line of cases and permits equal protection examination where, as here, similarly-situated taxpayers would be treated differently for no apparent reason.

At no time in the proceedings of this matter in the Circuit Court of Jefferson County has Appellant raised any issue with the sufficiency of Ms. Hardy's pleading of her equal protection arguments. Nor does he do so here, except to state that Ms. Hardy has not alleged the clerk intentionally refused to tell her that her property was previously sold (Appellant's Reply Brief at page 18) which appears not to be required under *Snowden*, as the failure of

equal protection may be inferred either from the policy itself or its application.

In *Sims v. Cunningham*, 203 Va. 347, 124 S.E. 2d 221 (1962) the dismissal of a prisoner's writ of habeas corpus was upheld. Sims complained that by increasing his term of incarceration due to the existence of his prior Virginia in-state convictions, while the state did not investigate increased terms for inmates with out-of-state prior convictions as required by Virginia statute, the state essentially denied him the equal protection of the law. The court determined that even if Sims' increased penalty was due to the state's laxity in applying the statute it did not amount to a denial of equal protection, saying "[p]rotection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime." 124 S.E.2d at 225, quoting *People v. Montgomery*, 47 Cal.App.2d. 1, 117 P. 2d 437 (1941). The concurring opinion in *Sims* sheds further light on the matter, indicating that the equal protection challenger must show that he has been injured. *Id*., 124 S.E. 2d at 227. In Ms. Hardy's case she has been injured. Her property is subject to being lost in summary fashion and none of her conduct has been criminal.

CONCLUSION

For the reasons set forth above the Summary Judgment in favor of Ms. Hardy should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Respondent's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count and line count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 3317, exclusive of the cover, signature block, certificates of service and compliance, and appendix.

The undersigned further certifies that the disks filed with the Respondent's Brief and served on Appellant were scanned for viruses and found to be virus free.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent & Cross-Appellant's Reply Brief containing an Appendix and a CD containing the aforementioned Reply Brief were mailed to each of the following by depositing same with the United States Postal Service in St. Louis County, Missouri, with first-class postage pre-paid on the 27th day of January, 2009:

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