

Summary of SC92581, *William Douglas Zweig, et al. v. The Metropolitan St. Louis Sewer District*

Appeal from the St. Louis County circuit court, Judge Dan Dildine
Argued and submitted May 21, 2013; opinion issued November 12, 2013

Attorneys: MSD was represented by John L. Gianoulakis, Robert F. Murray and Kevin A. Sullivan of Kohn, Shands, Elbert, Gianoulakis & Giljum LLP in St. Louis, (314) 241-3963; and Susan M. Myers of MSD in St. Louis, (314) 768-6200. The ratepayers were represented by Richard R. Hardcastle III, Erwin O. Switzer, Kirsten M. Ahmad and George A. Uhl of Greensfelder, Hemker & Gale PC in St. Louis, (314) 241-9090.

Several organizations filed briefs as friends of the Court:

- The Missouri Municipal League, Missouri Association of Municipal Utilities, Missouri Joint Municipal Electric Utility Commission and Municipal Gas Commissions of Missouri were represented by Howard C. Wright Jr. of Carnahan, Evans, Cantwell & Brown in Springfield, (417) 883-6705; and Douglas L. Healy of Healy & Healy Attorneys at Law LLC in Springfield, (417) 864-8800.
- The Missouri Coalition for the Environment Foundation was represented by Elizabeth J. Hubertz of the Washington University School of Law Interdisciplinary Environmental Clinic in St. Louis, (314) 935-8760.
- The National Association of Clean Water Agencies, the National Association of Flood and Stormwater Management Agencies, the American Public Works Association and the Association of Missouri Cleanwater Agencies were represented by Matthew A. Jacober of Lathrop & Gage LLP in Clayton, (314) 613-2845; Aimee Davenport of Lathrop & Gage LLP in Jefferson City, (573) 893-4336; David W. Burchmore of Squire, Sanders & Dempsey LLP in Cleveland, Ohio, (216) 479-8500; and Nathan Gardner-Andrews of the National Association of Clean Water Agencies in Washington, D.C., (202) 833-3692.

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: Ratepayers sued a sewer district, alleging it violated the state constitution’s “Hancock amendment” when it implemented a stormwater charge without voter approval. The district appeals the trial court’s decision enjoining (stopping) future collection of a stormwater charge and awarding attorney fees and expenses; the ratepayers cross-appeal the court’s decision not to award monetary damages for the amounts already collected. In a decision written by Judge Paul C. Wilson and joined by four other judges, the Supreme Court of Missouri affirms the trial court’s decision. Judge Laura Denvir Stith concurs in the result of the decision without opinion.

The stormwater charge at issue here is a “tax,” not a “user fee,” and MSD’s levying of the charge without prior voter approval violated article X, section 22(a) of the Missouri Constitution. Application of the criteria in this Court’s 1991 decision in *Keller v. Marion County Ambulance District* and other relevant factors are legal issues to be determined by the court. As made clear in that case and later cases, the *Keller* criteria are intended only to help courts understand and apply a prior test for distinguishing taxes and fees, not as a roadmap for circumventing section 22(a). Here, both the *Keller* criteria and other relevant factors support the trial court’s conclusion

that MSD levied the stormwater user charge without prior voter approval in violation of the Hancock amendment. Although the Hancock amendment authorizes prospective relief such as the declaratory judgment and injunction awarded by the trial court, it does not expressly authorize Missouri courts to order a political subdivision to refund taxes collected in violation of section 22(a). Holding that the Hancock amendment does not authorize this Court to order MSD to refund the estimated \$90 million in stormwater charges MSD collected before the trial court's declaration that the charge was an illegal tax does not conflict with this Court's earlier decisions, as it has not addressed this question squarely until now. Further, the trial court did not abuse its discretion in ordering MSD to pay the ratepayers attorney fees and expenses pursuant to section 23 of the Hancock amendment. MSD does not allege the expenses were excessive or unreasonable, nor does it challenge the trial court's conclusions regarding the number of hours or hourly rate to be employed in calculating attorney fees. It challenges only the trial court's use of a multiplier in calculating attorney fees, but as this Court held earlier this year, use of such a multiplier is not an abuse of discretion. Accordingly, this Court affirms the trial court judgment in all respects and remands (sends back) the case for the limited purpose of the trial court hearing and determining the ratepayers' motion for appellate attorney fees and costs.

Facts: The Metropolitan St. Louis Sewer District (MSD) – which serves all of the city and part of the county – regulates all stormwater facilities throughout the district and, since 1989, began assuming ownership of and control over designated facilities as funds became available. Landowners need not have a physical connection to use MSD's stormwater drainage system – which is a combination of natural and artificial waterways, open and closed. Most stormwater passes through various natural and artificial collection devices – typically owned by the state transportation department, local municipalities or individual landowners – before entering MSD's drainage system. Of the stormwater draining through its system, MSD cannot tell where that water originated or how much a particular property discharges into the system during any particular period of time. In the past, MSD funded its stormwater operations with a combination of *ad valorem* taxes (based on the assessed value of real estate). Those revenues, however, were not sufficient. To remedy the shortfall, MSD in December 2007 replaced the existing stormwater revenue system with a “stormwater user charge” calculated based on the square footage of impervious area on each owner's property and phased in over several years.

William Zweig and a group of other ratepayers sued MSD, seeking declaratory and injunctive relief and damages on the ground that MSD violated article X, section 22(a) of the Missouri Constitution (part of what is commonly known as the Hancock amendment) when it implemented the “stormwater user charge” without prior voter approval. MSD implemented the first two phases of charges but stopped implementing them as this litigation proceeded and stopped collecting the charge in July 2010, when the trial court held MSD's action unconstitutional. Although it refused to order MSD to refund the charges it already collected, the court enjoined future collection of the charge and ordered MSD to pay the ratepayers' attorney fees and other expenses. MSD appeals the trial court's decision on the merits of the ratepayers' Hancock amendment claim and award of attorney fees and expenses. The ratepayers cross-appeal the court's refusal to enter a judgment against MSD for the amounts already collected.

AFFIRMED AND REMANDED.

Court en banc holds: The stormwater charge at issue here is a “tax,” not a “user fee,” and MSD's levying of the charge without prior voter approval violated article X, section 22(a).

(1) Article X, section 22(a) requires a political subdivision to obtain prior voter approval for “taxes,” which include “licenses and fees” and other levied charges, but not “user fees,” which are charged for an individual’s use of the political subdivision’s service. This Court’s 1991 decision in *Keller v. Marion County Ambulance District* offers five criteria to help tell taxes and user fees apart. The key distinction in *Keller* was between charges an individual recipient pays for actual services rendered and the district’s property tax revenue that assures minimal ambulance service. A genuine user fee is imposed only when a specific service actually is rendered in an individual transaction to a particular recipient. A broader charge imposed to ensure the availability of a service for an entire group of individuals is not a user fee but a tax that requires prior voter approval to be levied.

(2) Application of the *Keller* criteria and other relevant considerations are not facts to be determined solely by the factfinder and deferred to on appeal. Instead, they are a means of evaluating those facts and are intended only to shed what light they can on the application of article X, section 22(a), which is a question of law. It is regrettable the amount of money the parties have spent, at taxpayer expense, to prepare and submit expert testimony about how *Keller*’s criteria should apply. But there is very little need or value in such testimony, because these are issues of law that the trial court must apply for itself, and the appellate courts review the application of the *Keller* criteria without deference to the trial court’s findings. As such, arguments as to the proper application of *Keller* criteria and other relevant considerations can and should be made by counsel based on the facts agreed to by the parties or found by the court.

(3) *Keller* provides that no specific criterion is independently controlling but that, together, the criteria determine whether a charge is closer to being a true user fee or a tax denominated as a fee. As this Court held in 2011 in *Arbor Investment Co. LLC v. City of Hermann*, the *Keller* criteria are to be used only as reliable indicators, not constitutional divining rods. The *Keller* criteria were intended only to adapt this Court’s test adopted in 1960 in *Leggett v. Missouri State Life Insurance Company* (for distinguishing fees and taxes) to the Hancock context, not to replace the test completely or to be a roadmap for circumventing section 22(a). Before any meaningful guidance can be gleaned from the *Keller* criteria, under *Leggett* a court first must have a clear and complete understanding of the service the political subdivision claims to provide, which in turn requires an understanding of the particular recipients to whom the service supposedly is rendered in exchange for the fee as well as the transaction in which the exchange occurs. Courts since appear to have become frustrated in applying the *Keller* criteria in part because of the order in which those criteria are applied rather than their substance.

(4) The *Keller* criteria support the trial court’s conclusion that MSD levied the stormwater user charge without prior voter approval in violation of article X, section 22(a).

(a) First, it is important to identify the political subdivision’s service – the importance of which is made clear in *Leggett* but is not included in *Keller* until the fourth criterion. The relevant service provided by MSD is that it ensures the availability of its stormwater drainage system and oversight functions on a continuous and ongoing basis for the entire district. There can be no individual users of such a service – the only true “user” is the district itself, comprised of all 1.4 million residents together. MSD admits the landowners who pay the stormwater charge pay the same every month regardless of the amount of rain that falls or the amount of stormwater that runs off the landowner’s property into MSD’s drainage system. It concedes that it has no way to know how much stormwater

any particular landowner is discharging into the system at any particular time and that the amount of impervious surface on a particular property has nothing to do with the amount of stormwater that property discharges into MSD's system. MSD admits it has no way to measure an individual landowner's use of the drainage system. It further admits the stormwater charge is paid by landowners based on their contributions to the overall need for MSD's stormwater services. But "need" cannot be equated with "use," and MSD renders oversight services such as planning, permitting and public education regardless of whether a user pays the stormwater charge or owns land with impervious area.

(b) Next, the Court determines – based on the second *Keller* criterion – whether owners or users pay the charges. As *Keller* makes clear, if a political subdivision ties its charge to the use of its service and charges this fee to all who use the service, it is likely that the political subdivision is setting the price for rendering its services to individual users, so voter approval under section 22(a) is not required. But if the political subdivision ties the fee to residency or ownership instead of use, the charge is not a user fee and the political subdivision is levying a tax. Here, MSD admits it has no way to measure an individual landowner's use of the drainage system. MSD does not and cannot tie the obligation to pay the stormwater user charge to an individual landowner's use of MSD's "availability" service but expressly ties the obligation to pay the stormwater charge to the ownership of real property. Once MSD decided to impose the stormwater user charge as it did, there was nothing a landowner could do or refrain from doing that could affect whether the landowner would be obligated to pay the charge. As a result, the charge is not tied to any use of MSD's service and, in fact, does not even purport to be.

(c) Next, the Court determines – based on the first *Keller* criterion – whether the charge is required to be paid regularly or after use. What matters is not whether the payment of the charge is voluntary but whether the obligation to pay the charge is triggered by use of MSD's stormwater services rather than the payer's ownership of property. Because the users of the MSD's "availability" services are not individual landowners but the district as a whole, payment of the stormwater charge cannot be made "only on or after" an individual uses those services. Further, the payments are to be made monthly, and initial payments were deferred until a month after MSD implemented the stormwater charge. Neither the implementation date nor the due date was set with reference to any external event or objective criteria, and MSD provided no new or changed services to trigger the new charges.

(d) Next, the Court determines – based on the third *Keller* criterion – how much MSD is charging and whether the charge is a fixed amount or is based on usage. Here, there is no relationship between the "measure of service" – a landowner's individual contribution to the overall need for stormwater services – and the "level of services" – that individual's use of stormwater services because the services ensure the continuous and ongoing availability of the MSD stormwater drainage system and oversight services for the entire district. Unlike a utility, MSD charges its stormwater fee based on each landowner's contribution to the overall need for its services, not for the actual use of those services.

(e) Finally, the Court determines – based on the fifth *Keller* criterion – whether the services being provided have been provided historically and exclusively by the government, assuming that historically governmental services are more likely to be

funded by levying taxes. This Court long has recognized that MSD has broad governmental powers, exercising exclusively governmental functions, and performs no private, proprietary functions. Further, there is no evidence that any private entity ever has provided availability of a stormwater drainage system for individual landowners for a fee. Maintaining stormwater controls on one's own property is not "ensuring" the availability of such services.

(5) As this Court confirmed in *Arbor*, the *Keller* criteria are not the only indicia courts may consider when determining whether a political subdivision has levied a tax without voter approval. In fact, courts must consider other indicia whenever necessary to ensure that decisions regarding the application of article X, section 22(a) are fully informed. The other relevant factors presented by the parties here support the trial court's conclusion that MSD levied the stormwater user charge without prior voter approval in violation of section 22(a).

(a) The ordinance MSD enacted gives it a lien on the property of any ratepayer who fails to pay the stormwater user charge and expressly provides that this lien will have the same priority as taxes levied for state and county purposes, suggesting MSD was levying a tax when it implemented the charge.

(b) If a landowner does not pay the stormwater user charge, MSD does not claim the right to shut off that landowner's access to MSD's stormwater drainage and oversight services, as it has no means to do so. Instead, MSD will shut off that landowner's access to MSD's sewer services and the water supply services – services that have nothing to do with its stormwater services and, in the case of the water supply services, are not even provided by MSD. Such remedies are characteristic of how governments collect unpaid taxes, suggesting that MSD was levying a tax when it implemented this charge.

(c) MSD's political structure – under which district voters do not elect the MSD trustees directly but rather elect the city and county leaders who then select the trustees – has no bearing on whether section 22(a) requires voter approval before the MSD stormwater charge can become effective. References in *Keller* and *Arbor* to the voters' opportunities to elect the leaders of those political subdivisions were made in response only to the taxpayers' complaints about the amount of the charges and had nothing to do with the application of section 22(a).

(6) Although the Hancock amendment – embodied in sections 16 through 24 of article X of the state constitution – authorizes prospective relief such as the declaratory judgment and injunction awarded by the trial court below, the amendment does not expressly authorize Missouri courts to order a political subdivision to refund taxes collected in violation of section 22(a). It is well-established that, absent special circumstances not present here, a taxpayer is not authorized to a refund of illegal taxes unless the refund is authorized by law and the procedure for receiving a refund is followed. By its plain language, the only monetary relief the Hancock amendment authorizes courts to give is an award of expenses and attorney fees under section 23. A taxpayer's compliance with the procedures set out in section 139.031, RSMo, has no impact on whether the Hancock amendment, by itself, waives sovereign immunity and authorizes money judgments. The lack of express authority in the Hancock amendment to order MSD to refund amounts already collected is even more significant in light of its express authority under section 18(b) for the state to pay refunds for violations of section 18(a). In light of the Hancock

amendment's overarching purpose to limit taxes (and spending), unrestricted use of refunds as a remedy for all violations could do more harm than good.

(7) Holding that the Hancock amendment does not authorize this Court to order MSD to refund the estimated \$90 million in stormwater charges MSD had collected before the trial court's July 2010 declaration that the charge was an illegal tax does not conflict with this Court's earlier decisions. Nothing in *Beatty v. Metropolitan Sewer District* (known as *Beatty III*), decided in 1995; *Ring v. Metropolitan St. Louis Sewer District*, decided in 1998; or *City of Hazelwood v. Peterson*, decided in 2001; holds that the Hancock amendment, by itself, authorizes Missouri courts to order refunds or enter money judgments on any other basis when a political subdivision levies a tax without prior approval in violation of section 22(a). In fact, the extraordinary circumstances and limited scope of those decisions render the isolated statements the ratepayers have excised from the decisions inapplicable to the issue now before the Court. This Court never squarely has addressed this question until now, and it rejects that proposition.

(8) The trial court did not abuse its discretion in ordering MSD to pay the ratepayers approximately \$4.3 million for their attorney fees and an additional \$470,000 in expenses and so the order is affirmed. The only money judgment expressly authorized by article X, section 23 is an award of attorney fees and costs if a taxpayer's claim is sustained. Here, the ratepayers brought only one claim – that MSD violated section 22(a) by levying and collecting the stormwater user charge without prior voter approval – and that claim was sustained. That they only were awarded some of the remedies they sought for this violation does not limit their claim for attorney fees. As such, the trial court's decision not to attempt to excise the hours the ratepayers' counsel spent pursuing a refund remedy from the total hours spent pursuing their claim is affirmed. In addition, the payment of the ratepayers' out-of-pocket expenses is authorized by section 23, and MSD does not argue these expenses were excessive or unreasonable. Further, as this Court held in 2013 in *Berry v. Volkswagen Group of America Inc.*, the trial court's use of a multiplier in calculating attorney fees is not an abuse of discretion under long-standing Missouri law. The same reasoning regarding the multiplier in *Berry* applies to the hourly rate used here to calculate the lodestar (a method for calculating attorney fees by multiplying a reasonable hourly rate by a reasonable number of hours expended). The trial court here believed that, because it held refunds were not authorized, a multiplier was justified to ensure adequate representation for future taxpayers' claims under section 23. That section's purpose of ensuring taxpayers have access to qualified representation would be frustrated if, in extraordinary cases such as this one, the trial court could not ensure adequate compensation for the risks such counsel must assume to undertake such litigation. The trial court here made an adequate record concerning its calculation of the ratepayers' attorney fees, and MSD does not challenge the trial court's conclusions regarding the number of hours or the hourly rate employed. As such, the award of attorney fees is affirmed. The Court remands the case to the trial court for the limited purpose of hearing and determining the ratepayers' motion for appellate attorney fees and costs.