In the Missouri Court of Appeals
Eastern District

DIVISION TWO

WILLIAM DOUGLAS ZWEIG, et al.,	)	No. ED96110
	)	
Plaintiffs-Respondents/	)	
Cross-Appellants,	)	
	)	Appeal from the Circuit Court of
v.	)	the County of St. Louis
	)	Cause No. 08SL-CC03051
THE METROPOLITAN ST. LOUIS	)	Honorable Dan Dildine
SEWER DISTRICT,	)	
	)	
Defendant-Appellant/	)	
Cross-Respondent,	)	Filed: March 27, 2012

This case involves a Hancock Amendment challenge.

Background and Procedural History

In 2007, the Metropolitan St. Louis Sewer District (MSD) adopted a new stormwater "user charge."[1] The charge was imposed on every property within the sewer district with an impervious area at a rate of $0.12 per one hundred square feet of impervious area on the property. Unimproved properties were assessed no charge, and properties that had impervious area but drained internally or directly into a waterway

[1] Prior to the imposition of the 2007 "user charge," MSD funded the operation and maintenance of its stormwater and drainage through a $0.24 flat tax charged to all property owners and additional tax at varying rates up to $0.10 per $100 of assessed property value in 21 different subdistricts. Both of these taxes had been submitted to and approved by the voters.

were given a 50% credit. The charge was assessed on all properties with impervious area, including property owned by tax-exempt, non-profit, and governmental agencies. MSD's Board approved the rate change but did not submit the issue to the voters.

In 2008, property owner William Zweig filed a class action suit against MSD seeking a declaration that the new charge constituted an unconstitutional "tax" under the Hancock Amendment because MSD had not submitted it to a vote.[2] The petition also sought injunctive relief from the charge, a refund of amounts collected by MSD under the new rate structure, and attorneys' fees. Upon stipulation of the parties, the trial court certified the class as to the claims for declaratory and injunctive relief, but not to the refund claim. The case was bifurcated with a trial regarding the constitutionality of the user charge held first, followed by a trial to determine the appropriate relief. William Zweig and the other taxpayers (taxpayers) prevailed in the first phase of the case – the trial court found that the charge was an unconstitutional tax. In the second phase, the court certified the class and granted prospective relief, but denied taxpayers' refund claim. The court also awarded taxpayers' attorneys' fees and costs.

On appeal, MSD claims the trial court erred in holding that the new charge was a tax as opposed to a user-fee. On cross-appeal, taxpayers claim they were entitled to a refund of amounts they had already paid under the unconstitutional tax. MSD also claims the trial court erred in the amount of attorneys' fees it awarded to taxpayers.

Standard of Review

As the judgments challenged on appeal were made pursuant to a court-tried case,

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[2] In pertinent part, the Hancock Amendment provides: "In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefore . . . ." MO. CONST. art. X section 11(c)

Murphy v. Carron is the proper standard of review. *Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist.*, 941 S.W.2d 615, 619 (Mo. App. E.D. 1997). This Court will affirm the judgment unless there is no evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The trial court's award of attorneys' fees is reviewed for abuse of discretion. *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 184 (Mo. App. W.D. 2002).

Discussion

This case comes before us as a challenge under the Hancock Amendment to a "charge" imposed by the MSD without a vote. MSD argues that the charge is a user fee and not a tax, and therefore not subject to the provisions of the Hancock Amendment. The taxpayers counter that the charge is indeed a tax and pursuant to the Hancock Amendment, MSD was required to put the proposed change to a vote.

To determine whether a charge is a tax or a user fee, this Court must consider the five factors set out in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. banc 1991). *Arbor Inv. Co., LLC v. City of Hermann*, 341 S.W.3d 673, 683 (Mo. banc 2011). But, as Justice Holstein so astutely points out in his concurrence in *Beatty v. Metropolitan St. Louis Sewer Dist.*, analysis under *Keller* is fraught with difficulty because the factors developed in that opinion are so vague and manipulatable that they necessarily result in repetitive litigation and are ultimately unworkable. 867 S.W.2d 217, 222 (Mo. banc 1993). One would be hard pressed to find a case more demonstrative of the problems identified by Justice Holstein than the one before us. Both sides attempt to obfuscate the factors to their advantage. The ordinance imposing the "charge" was clearly drafted with the *Keller* factors. At the same time, the taxpayers conflate the

factors, which confuses the issues. Unfortunately, as Justice Holstein also recognized, the *Keller* analysis is the current state of the law and this Court is bound to abide by it. *Id.*

We shall attempt to analyze each of the five *Keller* factors as distinctly and succinctly as possible.

Factor One: When is the fee paid?

The first factor in the *Keller* analysis examines when the fee is paid. *Keller*, 820 S.W.2d 301, 304 n.10. "Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee." *Id.*

This first factor perfectly illustrates Justice Holstein's criticism of *Keller*. The cases analyzing this factor lack uniformity and are all over the board. In *Missouri Growth Ass'n v. Metropolitan St. Louis Sewer Dist.*, a case applying the *Keller* analysis to a MSD waster water charge, this Court relied on the language of the ordinance imposing the charge as proof that that the fee was paid only after the service was provided. 941 S.W.2d 615, 623 (Mo. App. E.D. 1997). In *Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City*, the Western District analyzed a fee charged by the City's Fire Department for yearly required fire inspections of businesses and multifamily residential buildings. 231 S.W.3d 208 (Mo. App. W.D. 2007). The Court held that "the critical inquiry under this factor is not the timing of the fee 'but the regularity with which the fee is paid.'" *Id.* at 212 (quoting *Beatty v. Metro. St. Louis Sewer Dist.*, 867 S.W.2d 217, 220 (Mo. banc 1993)). Applying this holding, the Court

found that even though the fee was paid after the inspection was conducted, because the fees were incurred on a regular basis, i.e. they had to be paid yearly, this charge was more like a tax than a user fee. *Id.*

MSD relies on the language of the ordinance imposing the stormwater "fee" and *Missouri Growth* as evidence that the first factor should have been decided in its favor. The ordinance reads, in pertinent part: "All bills for Stormwater User Charges shall be. . . issued monthly for services provided in the preceding month." This language tracks the language approved in *Missouri Growth*. However, this is the only evidence MSD cites in support of this factor.

The taxpayers argue that MSD had the *Keller* factors in mind when it drafted this ordinance, and was simply attempting to manipulate the analysis. Taxpayers point to the fact that there was no variation in the amount of the bills from month-to-month as evidence that property owners were not being billed for services they had already received. They argue that this fact demonstrates that the charge was billed without regard to when the service was actually used. The taxpayers' argument more correctly relates to factor three – whether the amount of the fee is affected by the level of goods or services provided to the fee payer.

To the extent that there exists any principled way to approach this factor, the stormwater charge appears to be more like a tax than a fee. MSD relies solely on the wording of the ordinance to show that the fee is charged after the service is provided. If a municipality could satisfy the *Keller* factors based solely on the language of the ordinance, the municipality could simply draft an ordinance around the *Keller* factors, disguising every tax as a user fee. This would render the Hancock Amendment

meaningless. Such a result is untenable. Without any additional evidence supporting MSD's position, the fact that the fee is charged periodically tips the scales in favor of taxpayers under this factor.

This is not to say that any time a fee is charged periodically, the first factor is resolved in favor of a tax. That is clearly not the state of the law. *See Arbor Inv. Co., LLC v. City of Hermann*,341 S.W.3d 673, 684 (Mo. banc 2011); *Missouri Growth*, 941 S.W.2d at 623. And logic dictates the same result. Certainly bills for some "user fees" are sent to property owners on a periodic basis, such as monthly utility bills, but this is because those services are used by the property owners on a continuous basis. This Court's holding is limited to the proposition that a municipality may not rely *solely* on the language of an ordinance to satisfy this factor; it must provide some evidence that property owners actually used the service during the previous billing cycle. *See Arbor Inv. Co., LLC v. City of Hermann*, 341 S.W.3d 673, 684 (Mo. banc 2011); *Missouri Growth*, 941 S.W.2d at 623. In *Arbor* and *Missouri Growth*, the municipality also sent out monthly billing statements, but these were for services which the property owners used on a monthly basis – gas, electric, water, trash, etc. There was no evidence from MSD that the taxpayers in this case used the stormwater service on a monthly basis.

MSD argues that taxpayers' use of this service is "continuous and ongoing" because the infrastructure to provide the service must be in place at all times, justifying its monthly billing cycle. The permanence of infrastructure is just not a consideration under factor one. Take *Beatty* for example. In *Beatty*, our Supreme Court considered a Hancock Amendment challenge to a flat-rate sewer charge. *Beatty*, 867 S.W.2d at 218. Obviously, the infrastructure for a sewer system must be in place at all times whether it is

being used or not. The Court still found the first factor against MSD. *Id.* at 220.

Factor Two: Who pays the fee?

The second *Keller* factor looks at who pays the fee. *Keller*, 820 S.W.2d 301, 304 n.10. "A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged." *Id.*

The focus under this factor is not the percentage of residents charged the "fee," but whether those residents being charged are actually receiving the service. *See Beatty*, 867 S.W.2d at 220. Nearly all residents may be charged a fee, but if nearly all residents are receiving the service related to that fee, this factor should be resolved in favor of the municipality. *Arbor*, 341 S.W.3d at 684.

MSD argues that the fact that it does not charge properties with no impervious area proves that it does not blanket bill customers. However, MSD admits that it charges residents whose run-off does not drain into the MSD system. MSD claims that such charges are justified because these residents are receiving a service in the form of MSD's regulatory and planning activities. But if this were the case and part of MSD's fee was for these ancillary services, those residents with no impervious surface are also receiving this benefit and should therefore be charged for the service. MSD's charge is either for the stormwater service, in which case those residents whose run-off does not drain into the MSD should not be charged, or the charge is for sewer *and* ancillary services, in which case all residents receive the service and therefore all residents should be charged. Because there is no connection between the receipt of services and charge of the fee, we

resolve this factor in favor of the taxpayers.

Factor Three: Is there a connection between the charge and the service?

The third *Keller* factor looks for a relationship between the amount of the charge and the level of services being provided. *Keller*, 820 S.W.2d 301, 304 n.10. "Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer." *Id.*

"In order for a governmental charge to appear to be a user fee under Keller's third criteria, the charge imposed must bear a *direct* relationship to the level of services a "fee payer" actually receives from the political subdivision." *Beatty*, 867 S.W.2d at 220 (emphasis original).

MSD challenges the trial court's judgment requiring a direct relationship between the amount of stormwater discharged from a property and charge to the property owner.[3] MSD cites *Beatty*, *Missouri Growth*, *Building Owners*, and most recently *Arbor*, for the proposition that anything other than a flat-rate charge should resolve the third factor in favor of the municipality. MSD claims that any charge that varies by individual resident satisfies this factor. This is simply not what these cases instruct. These cases all found a direct relationship between the amount of the fee and the level of service provided. Variation of charge between individual property owners alone is not enough – the variation must be directly related to the level of service being provided to that owner. *Id.*

To the extent that MSD challenges the trial court's factual finding that there was

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[3] The judgment reads: "[I]n order to satisfy Keller factor three, there must be direct relationship between the amount of stormwater discharged from a property and the amount of impervious area on that property."

no relationship between impervious area and stormwater system usage, it likewise fails. The taxpayers presented two experts who opined that there is no direct relationship between impervious area and stormwater runoff. The trial court found these experts credible. We defer to that determination. *Hance v. Altom*, 326 S.W.3d 133, 135 (Mo. App. S.D. 2010).

MSD also argues that the trial court erred in applying a one-to-one linear relationship requirement under this factor. There is simply nothing in the trial court's decision indicating that it adopted this standard.

Given the trial court's factual finding that there was no relationship between the method used by MSD to calculate the charge and an individual property owner's stormwater system usage, this factor is resolved in favor of the taxpayers.

Factor Four: Is the government providing a service?

The fourth factor focuses on whether the government is providing a service. *Keller*, 820 S.W.2d 301, 304 n.10.

> If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.

Id.

This factor is easily resolved in favor of MSD. It is undisputed that MSD provides a service in developing and maintaining the stormwater runoff system and through other ancillary activities. The trial court erred in ruling otherwise.

The trial court appears to have applied a new consideration under this element – whether the municipality provided a "new" service after it changed funding schemes.

There is no support for this consideration in the caselaw. The relevant analysis under this factor is simply whether the city provides any service in return for the charge, not whether it provides a "new" service. *Missouri Growth*, 941 S.W.2d at 624.

The trial court also conflated the analysis under this factor with factor two. In its discussion of this factor, the trial court considered the fact that certain residents are charged stormwater user charges but do not receive any service.[4] This is more properly a consideration under factor two, and, as such, does not support the trial court's conclusion.

This factor is resolved in favor of MSD.

Factor Five: Has the service historically been provided by the government?

The final *Keller* factor is concerned with who has been the historic provider of the service. *Keller*, 820 S.W.2d 301, 304 n.10. "If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment." *Id.*

"[T]he fifth Keller factor turns on whether the government is or is not the 'exclusive' provider of services." *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550, 562 (Mo. App. E.D. 1998).

The overwhelming evidence supports the trial court's conclusion that MSD is the exclusive provider of these services. MSD did not present any evidence of private entities having provided, or currently providing, stormwater runoff services. Further, by the plain language establishing the MSD, it has "control" of the sewer and drainage

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[4] Implicit in this finding is a concession that MSD does indeed provide a "service."

system. MSD Ordinance No. 12560.

MSD argues that because developers are required to construct and maintain certain stormwater structures, that it does not exclusively provide the stormwater runoff service. There is a distinction between the construction and maintenance of a component of the stormwater runoff system and the providing of that service. Although MSD may not construct and maintain every component of the system, it still maintains a certain degree of control over those components and is the exclusive provider of the overall service. Certainly homeowners are responsible for constructing and maintaining their lateral connection to the municipal sewer lines, but no reasonable person would argue that this means the municipality does not provide the sewer service.

This factor is resolved in favor of the taxpayers' position.

If the five factors set out in *Keller* clearly determine whether a fee is a user charge or a tax, the analysis stops there and the court need not consider other factors. *Arbor*, 341 S.W.3d at 683. However, if the *Keller* factors do not clearly decide the case, the court may consider other factors. *Id.* In this case, the *Keller* factors are dispositive of the issue. Although the trial court erred in stating that Missouri courts take a mathematical approach in applying the *Keller* factors, as four of the five factors weighed in favor of a finding that MSD's fee was a tax subject to the Hancock Amendment, the trial court did not err in its ultimate conclusion. *Id.* at 682.

MSD argues that under the trial court's analysis, it is impossible to institute this much-needed stormwater charge in a way that would satisfy the Keller elements. This may indeed be the case. But, that does not mean MSD cannot impose this charge; it only

requires that it submit the proposed change to a vote. If this change in fee structure is as vital as MSD claims it is, MSD should take its case to the voters, not to the courts.

This Court holds that the stormwater charge challenged in this case is an unconstitutional "tax."

* * *

In its second point on appeal, MSD claims that even if the trial court was correct in finding that the stormwater charge was a tax, it erred in the amount of attorneys' fees it awarded. MSD cites three instances of error under this point. It argues (1) that the trial court impermissibly applied a multiplier to the lodestar; (2) that the trial court impermissibly awarded taxpayers' attorneys fees for unsuccessful claims; and (3) that the trial court's award to the taxpayers' attorneys for expenses and expert fees is not allowed under the statute.

As to the multiplier issue, the trial court and both parties concede that this is an issue of first impression in Missouri courts. In calculating the amount of the attorneys' fees award, the trial court first determined the lodestar amount and then multiplied that amount by two.[5] The court explained it was enhancing the lodestar amount for seven reasons: because it was a contingency fee case, for the excellent results obtained, for counsels' skill and expertise, because of the novelty and difficulty of the case, due to counsels' out-of-pocket expenses, given the size of the class, and because of the vigorous defense presented by MSD. MSD argues the court had no authority to enhance fees in this manner.

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[5] "The lodestar, the starting point in determining attorneys' fees, is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate." *Alhalabi v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518, 530 n.6 (Mo. App. E.D. 2009).

Although the issue of a lodestar multiplier is one of first impression in Missouri, it has been addressed by the U.S. Supreme Court. This Court adopts Justice Alito's well-reasoned approach to the matter as announced in *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662 (2010).[6] In that case, the Court, when analyzing the issue of multipliers in statutory fee-shifting cases, stated that the goal of 42 U.S.C. Section 1988 (and it could reasonably be inferred, fee-shifting provisions in general) is to induce competent attorneys to take meritorious cases, and not to improve the financial lot of attorneys. *Id.* at 1672-73. The Court went on to declare that the lodestar method "yields a fee that is presumptively sufficient to achieve this goal." *Id.* at 1673. The Court held that there is a "strong presumption" that the lodestar amount results in reasonable compensation for an attorney, but that presumption may be overcome and the fee enhanced "in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Id.* at 1673. The Court identified three circumstances when it may be appropriate to enhance the lodestar amount.[7]

As an initial matter, the Court stated that the novelty and complexity of the case or the quality of an attorney's performance are generally not sufficient reasons to enhance the lodestar amount because these factors are already taken into consideration when calculating the lodestar. *Id.* However, a fee may be enhanced when "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true

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[6] The Court was analyzing the fee-shifting provisions of 42 U.S.C. Section 1988. The relevant portion of that statute provides that the court "may allow the prevailing party . . . reasonable attorney's fee as part of the costs. This language is very similar to the fee-shifting provision in this case, which provides: ". . .if the suit is sustained, [the taxpayer] shall receive. . . his costs, including reasonable attorneys' fees. . ." MO. CONST. art. X, Section 23.

[7] It should be noted that this does not appear to be an exhaustive list but only guidance as to what constitutes rare circumstances.

market value, as demonstrated in part during the litigation." *Id.* at 1674. But in such cases, the trial judge must identify specific proof linking the attorney's ability to a prevailing market rate. *Id.*

"Second, an enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted." *Id.* Again, in such cases, the amount of the enhancement "must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard rate of interest to the qualifying outlays of expenses." *Id.* at 1674-75.

Finally, an enhancement may be appropriate when an attorney's performance involves an exceptional delay in the payment of fees. *Id.* at 1675. As the normal state of a contingent fee arrangement is that the attorney will not receive compensation until after the end of the case, enhancement is not proper unless the attorney incurs costs in the face of an *unanticipated* delay, especially where such delay is unjustifiably caused by the defense. *Id.* (emphasis added).

As enhancements are appropriate only in rare circumstances, when a trial court makes such an enhancement to the lodestar amount, it must provide a reasonably specific explanation of the reasons for its decision. *Id.* at 1677. "Unless such an explanation is given, adequate appellate review is not feasible, and without such review, widely disparate awards may be made, and awards may be influenced (or at least, may appear to be influenced) by a judge's subjective opinion regarding particular attorneys or the importance of the case." *Id.*

More particularly, indeed a reading of the Hancock Amendment gives no hint of a

"multiplier." We are not free to invent a theory when constitutional limits grant none. Taxpayers' counsel charged substantial hourly fees. They are sufficient.

The reasons given by the trial court in support of its enhancement were the same reasons it considered in determining the lodestar amount, essentially resulting in a double "recovery" for the attorneys, exactly what the Court in *Perdue* was trying to avoid. While an enhancement may be appropriate in a few rare cases, this is not one of those. The trial court's decision to double the lodestar amount is reversed.

Second, MSD claims the trial court erred in not reducing the taxpayers' attorneys' fees for time spent on the unsuccessful refund claim.[8] MSD is correct that generally a party may not recover attorneys' fees for unsuccessful claims. *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989).

> On the other hand, if the claims for relief have a common core of facts and are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole making it difficult to divide the hours expended on a claim-by-claim basis, such a lawsuit cannot be viewed as a series of distinct claims. Instead, where a plaintiff's claims are related and he has obtained excellent results overall, his counsel should recover a fully compensatory fee that should not be reduced simply because he has not prevailed on every litigated claim.

Alhalabi, 300 S.W.3d at 530-31.

In Phase II of this case, all the taxpayers' claims were based on the same core of facts and legal theories – whether class certification was proper and the appropriate relief.[9] While the taxpayers did not prevail on every form of relief sought, the trial court did not err in concluding the taxpayers' attorneys' excellent results in having the refund

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[8] See discussion *infra*.

[9] MSD failed to make any argument in its brief as to how Respondents' refund claim rested on a different core of facts or legal theory from the other claims. It simply ignored this line of cases. It is not this Court's job to fashion MSD's argument for them. *See Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978).

class certified and obtaining prospective relief entitled attorneys to full compensation, including fees for the unsuccessful refund claim.

Finally, MSD claims the trial court erred in awarding the taxpayers' attorneys' money for expenses and experts' fees. MSD argues that such expenses are not contemplated in the provision for costs in Article X, Section 23. The definitive statement regarding awards for "costs" in Hancock Amendment cases comes from *Roberts v. McNary*, in which our Supreme Court said "Moreover, the language in [section] 23 referring to costs makes clear that a successful taxpayer-plaintiff shall be reimbursed for *all* out-of-pocket expenses in pursuing the litigation." *Roberts v. McNary*, 636 S.W.2d 332, 338 (Mo. banc 1982) (overruled on different grounds by *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991)) (emphasis added).[10] None of the cases cited by MSD in opposition of the proposition involve Hancock Amendment challenges, and as such, are unavailing.

While the trial court erred in enhancing the lodestar amount, it did not err in awarding taxpayers attorneys' fees for time spent on the unsuccessful refund claim and for other expenses and experts' fees.

Taxpayers' Cross-Appeal

In their first point on cross-appeal, the taxpayers claim the trial court erred in ruling they were precluded from receiving a class refund due to their failure to follow the requirements of Section 139.031.[11] Respondents argue that after *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 41 (Mo. banc 2001), taxpayers seeking a refund based on a

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[10] This proposition was reaffimed by this Court in *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506, 513 (Mo. App. E.D. 1998).

[11] All statutory references are to RSMo (2008) unless otherwise indicated.

Hancock Amendment violation are not required to follow the provisions of Section 139.310. Just as MSD overread the cases pertaining to the third *Keller* factor, Respondents overread the implications of *Hazelwood.* The specific issue the Court was addressing in that case was whether Missouri law permitted the use of class actions in tax refund cases. *Id.* at 40. The Court held that the plaintiffs may bring a Hancock challenge as a class action suit and that the trial court did not err in certifying that particular class. *Id.*

In this case there is no challenge to the trial court's certification of the refund class. Instead, the issue is whether the members of that class were required to follow the statutory requirements of Section 139.031 in order to be granted a refund. In *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002), decided *after Hazelwood*, this Court specifically addressed this question and held that the procedures established in Section 139.310 "appl[y] to taxes challenged as violations of the Hancock Amendment to the Missouri constitution. Taxpayers who fail to protest property taxes under 139.031 cannot obtain refunds."[12]

Respondents argue that, regardless of *Hazelwood* and *Metts*, they were not required to adhere to Section 139.310 by operation of MSD Ordinance No. 13022, Section 12, and *Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791 (Mo. banc 1995). In *Beatty*, our Supreme Court determined that a refund was authorized by an ordinance similar to No. 13022. *Beatty*, 914 S.W.2d at 796. However, the issue the Court was deciding in that case was whether MSD was immune from suit based on

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[12] Since the Hazelwood decision this Court has explicitly required taxpayers to follow the requirements of Section 139.310 in order to obtain refunds based on Hancock challenges in at least three cases. *Koehr v. Emmons*, 55 S.W.3d 859, 863 (Mo. App. E.D. 2001); *Koehr v. Emmons*, 98 S.W.3d 580, 584 (Mo. App. E.D. 2002); *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002).

sovereign immunity, not what procedures taxpayers were required to follow to be entitled to a refund. *Id.* As such, the case is inapposite to the taxpayers' position.

The trial court did not err in finding that the taxpayers were precluded from obtaining a refund due to their failure to follow the requirements of Section 139.031. The taxpayers failure to timely protest the charge was fatal to their refund claim, even based on a Hancock challenge.

In their remaining points on cross-appeal, taxpayers cite other errors in the trial court's denial of their refund claim. However, as the first issue of the taxpayer's cross-appeal is dispositive, this Court will not address these other issues.

Respondent Zweig additionally seeks attorneys' fees and costs on appeal. Respondent asks for two hundred twelve thousand, one hundred fifty seven dollars and fifty cents ($212,157.50) in fees and one thousand, two hundred fifty six dollars and seventy eight cents ($1,256.78) in costs. We have considered the request line for line and find that one hundred and one thousand, five hundred dollars ($101,500) is an appropriate award for attorneys' fees. We find the costs of one thousand, two hundred fifty six dollars and seventy eight cents ($1,256.78) appropriate.

Conclusion

The MSD stormwater charge challenged in this case is a tax subject to the Hancock Amendment. The trial court's judgment as to this point is affirmed. While taxpayers' were entitled to an award of attorneys' fees both for time spent on the unsuccessful refund claim and for expenses and expert fees, the trial court erred in enhancing the lodestar amount. The trial court's judgment awarding attorneys' fees for time spent on the refund claim and for expenses and expert fees is affirmed, while its

judgment doubling the lodestar amount is reversed. Finally, the taxpayers' failure to adhere to the requirements of Section 139.031 was fatal to their refund claim. The trial court's judgment as to this point is affirmed.[13]

It is the further Judgment and Order of this Court that Respondent Zweig have and receive as attorneys' fees and costs on appeal the sum and amount of one hundred two thousand, two hundred fifty six dollars and seventy eight cents ($102,256.78) from the Respondent MSD, for which execution may issue.

Kenneth M. Romines, J.

Kathianne Knaup Crane, P.J. concurs.
Lawrence E. Mooney, J. dissents.

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[13] The dissent cites cases from five states – none of these cases dealt with a constitutional provision such as the Hancock Amendment, nor indeed with a case such as *Keller*.

Additionally, the "empirical" studies cited by the dissent were not before the circuit court and thus are not before us. To repeat – we hold only that the before MSD can impose this scheme the voters must approve.

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THE METROPOLITAN ST. LOUIS SEWER DISTRICT,	)	Honorable Dan Dildine
	)	
Defendant-Appellant/	)	
Cross-Respondent.	)	Filed: March 27, 2012

DISSENT

I respectfully dissent from the majority's holding that the stormwater user charge is an unconstitutional tax.

MSD enacted an ordinance that imposed an individualized user charge based on the impervious surface of its customers' lots for stormwater services that had been rendered. It bears the hallmarks of a user charge under *Keller*.[1]

[1] Although the distinction between a fee and a tax may differ from state to state, common factors exist. Although not precedential, the weight of authority merits our consideration. The majority of courts have held stormwater service charges a user fee, not a tax. *McCleod v. Columbia County*, 599 S.E. 2d 152 (Ga. 2004); *Long Run Baptist Ass'n v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 775 S.W.2d 520 (Ky. App. 1989); *City of Littleton v. State*, 855 P.2d 448 (Colo. 1993); *Zelinger v. City and County of Denver*, 724 P.2d 1356 (Colo. 1986); *Smith v. Spokane County*, 948 P.2d 1301 (Wash. App. 1997); *Teter v. Clark County*, 704 P.2d 1171 (Wash. 1985); *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998); *Church of Peace v. City of Rock Island*, 2005 Ill. App. LEXIS 448 (2005); *see also* Avi Brisman, *Considerations in Establishing a Stormwater Utility*, 26 S. Ill. U.L.J. 505, 520 (V)(C)(3)(2002)(discussing fee vs. tax challenges).

Stormwater user fees based on impervious surface are the industry norm.[2] They are based on the impacts that each property has on stormwater service demands. And empirical studies have demonstrated that impervious surface area is the single most significant factor influencing these impacts.[3] Indeed, engineering literature has validated the equity of this methodology for stormwater management user fees.[4]

MSD bears important obligations under the environmental laws of the nation and state. *Ring v. Metropolitan St. Louis Sewer Dist.*, 969 S.W.2d716, 719 (Mo. banc 1998). The stormwater user fee established to discharge those obligations equitably apportions its costs, represents the industry norm, and is founded on sound engineering principles.

Lawrence E. Mooney

LAWRENCE E. MOONEY, JUDGE

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[2] Elizabeth A. Brabec, *Imperviousness and Land-Use Policy: Toward an Effective Approach to Watershed Planning*, 14 J. HYDROLOGIC ENGINEERING 425, 427 (2009). Cited to us in the amicus curiae brief, filed in support of MSD, by Missouri Coalition for the Environment Foundation.

[3] *Guidance for Municipal Stormwater Funding* (NAFSMA 2006), 2-36 to 37. Available at: http://www.nafsma.org; and at: http://cfpub.epa.gov/npdes/stormwater/munic.cfm. Cited to us in the amicus curiae brief, filed in support of MSD, by National Association of Clean Water Agencies, The National Association of Flood and Stormwater Management Agencies, and The American Public Works Association.

[4] A comprehensive bibliography compiled by the Center of Urban Policy and the Environment at the School of Public and Environmental Affairs at Indiana University is available at: http://stormwaterfinance.urbancenter.iupui.edu/home.htm. Cited to us in the amicus curiae brief, filed in support of MSD, by National Association of Clean Water Agencies, The National Association of Flood and Stormwater Management Agencies, and The American Public Works Association.