

A07-0003

STATE OF MINNESOTA  
SUPREME COURT

## CASE TITLE:

Afton Historical Society Press

Relator,

vs.

County of Washington,

Respondent.

## RELATOR'S REPLY BRIEF

## TAX COURT NUMBERS:

C5-04-2979, C4-05-3521 &  
C8-06-1961

## SUPREME COURT NUMBER:

A07-0003

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TABLE OF CONTENTS

Cases:	<u>Page(S):</u>
<u>Care Institute, Inc.—Maplewood v. County of Ramsey</u> , 576 N.W.2d 734, 739 (Minn. 1998) .....	6
<u>Croixdale, Inc. v. County of Washington</u> , #A06-153 (January 25, 2007).....	5, 6, 7, 10
<u>North Star Research Ins. v. County of Hennepin</u> , 306 Minn. 1, 6, 236 N.W.2d 754, 757 (1975) .....	2, 5, 9
<u>Skyline Pres. Foundation v. County of Polk</u> , 621 N.W.2d 727, 732 (Minn. 2001) ...	5, 6
Statutes:	
Minn. Stat. § 271.10	2
Minn. Stat. Chapter 138	10
Minn. Stat. § 542.16	2
Minnesota Constitution Art. X, § 1	1, 2

ARGUMENT

Relator Afton Historical Society Press (hereinafter sometimes the “Press,” sometimes “relator”) respectfully submits this reply to Respondent’s Brief served on relator by mail on March 5, 2007 (hereinafter “Resp. Brief”). Most of the points covered herein have already been discussed in Relator’s Brief filed in February 2007 and its briefs filed below that are included in its Supplemental Record, so this brief will not recite its full arguments on those points nor cite the support in the record in every respect.

*Respondent’s Statement of the Case*

Respondent mistakenly asserts, “The sole issue before this Court is whether sufficient evidence exists to support the Tax Court’s ruling [denying exemption] ....” (Resp. Brief at 2) The exemption issue, including the issues whether the Press satisfies the second, third and fifth factors

under North Star Research Ins. v. County of Hennepin, 306 Minn. 1, 6, 236 N.W.2d 754, 757 (1975), are mixed issues of law and fact. As such, those issues should be reviewed by this Court *de novo*.

The issues of burden of proof, sufficiency of evidence, and bias are likewise mixed and intertwined.

The stringency of such proof requirements below and the large number of factual errors in the Tax Court's findings, as argued in relator's motion for rehearing (App. p. 40 and Supplemental Record p. 148) are the basis for relator's claim of bias. Likewise, that was the basis for relator's motion for rehearing (new trial, etc.) under Minn. Stat. 271.10 and Rule 59 of the Rules of Civil Procedure, along with removal of Tax Court Judge Sheryl Ramstad under Minn. Stat. § 542.16. Those requests are not bizarre, as respondent seems to argue, though rarely granted by a trial court after a bench trial.

*Respondent's Statement of the Facts*

Respondent devotes the first page and a half of its "Facts" to the financial support and other assistance the Press has received from the Duncan MacMillan family. The main thrust is revealed in one sentence: "That family is a wealthy family and heirs to the Cargill grain fortune." Resp. Brief at 3. The theme that a wealthy capitalist family has been vital to the Press's initial formation and early nurturing pervades respondent's arguments and the Tax Court's decision. Both erroneously advance the proposition that such a family cannot be the source of altruistic donations to a charitable institution and, moreover, taint everything relator does. Neither cites authority for that novel and strange proposition.

Respondent embellishes that theme with statements such as “a close and nearly exclusive sponsorship” and “a main and primary contributor,” even while indirectly acknowledging that nearly two-thirds of the donations to relator in 2003 and 2004 came from others. Resp. Brief at 3.

The fundamental flaw in respondent’s heavy reliance on the role of the MacMillan family is that there is no evidence of any benefit flowing back to that family after the publication of Exhibit 31 in 1998. The record is also devoid of evidence that the family ever influenced the Press to stray from its charitable purposes and stated mission.

Respondent devotes half of the second page of its “Facts” to the proposition that relator is fraught with nepotism that flows from publisher Patricia McDonald. Again respondent exaggerates: “In addition to Ms. McDonald acting as publisher, several of the primary staff and employees of the organization are members of her family.” Resp. Brief at 4. Those “several” people are Ms. McDonald’s son Chuck Johnston, who is the full-time director of operations, and her daughter Mary Sue Oleson, who works part-time from Nashville doing design work on relator’s books. *Id.* & *see*, Appendix p. 22. The financial exhibits and testimony demonstrate that Mr. Johnston holds his job based on merit and is paid much less than at his previous job which he left voluntarily. The books themselves demonstrate that Mary Sue Oleson holds her design job based on the merits of her performance. *See*, Ex. 6, 8, 9, 10, 12, 15-20, 24, 26, 27, 30-33, 36-40, 48, 76-79. She does excellent work, as Ms. McDonald testified.

The conceptual flaw in respondent’s nepotism theme is that Ms. McDonald is not in a position to employ two children who cannot perform well for relator. She does not supply the money, and she does not own or control the enterprise. The money comes from donors who would not give and buyers who would not buy if the books were not so excellent. Moreover, without the constant fund-raising activities of Ms. McDonald and Chuck Johnston the donors would not give

enough to sustain relator regardless how good the books are. The board of directors, which includes Ms. McDonald, surely would not tolerate incompetent performance by her two adult children in such a small organization with such tangible and observable results. Ex. 52-58.

The next recurrent theme of respondent's brief, beginning in its "Facts" and repeated in the Tax Court's decision, is that relator sells its books just like any commercial enterprise. Resp. Brief at 5-6. Again, respondent exaggerates: "In terms of revenue Relator has two primary funding streams. A major funding stream is wholesale and retail sales of its publications and books." Resp. Brief at 5. Since one of those "two primary funding streams" is donations, which supply nearly two-thirds of the Press's annual revenue, the word "major" should be used for the donations. The term "minor" is more suitable for sales, since sales supply only a third of the Press's revenue. The distinction is important, because no commercial enterprise gets two thirds of its revenue from donations.

Respondent mistakenly describes that other "primary revenue stream" in two respects. First it says the money comes "from third parties, particularly foundations and other non-profit organizations." Resp. Brief at 6. That statement ignores the long list of individuals and some for-profit corporations who have given to relator, both for initial production of books—many of whom are named on the copyright pages of those books (e.g. Supplemental Record pages 174-84)—and to support *Books for Schools* donations to schools. Ex. 56.

Second, respondent says, "Relator asserts these 'donations' are of two primary types." Resp. Brief at 6. No, relator asserts there are three categories of donations: 1) general operating, 2) initial production of specific books, and 3) *Books for Schools*.

Respondent emphasizes that donors who give money to relator for its *Books for Schools* can designate the specific school or schools that receive the books. Resp. Brief at 7. As shown in

relator's initial appeal brief, those donors rarely do so. Only two have been so specific as to name a single school. Even if donors did regularly designate a specific school, respondent does not explain nor cite authority why that would disqualify their money as a donation to relator. A donor to United Way can designate one of its recipient organizations. A donor to the Red Cross could designate victims of 9/11 or Hurricane Katrina. Many charitable organizations serve as conduits, making it possible for donor funds to flow to worthy causes with varying degrees of oversight regarding the use of those funds. The *North Star* factors contemplate that very thing, with donations coming into the organization under factor two and charity going out under factors three and five. Respondent's argument that the *Books for Schools* program must be collapsed into a single direct donation ignores the critical roles that the Press plays along the way: 1) solicit the donations to create (publish) the book initially, 2) create the book, 3) find recipient schools who can and will use the book in their classrooms, 4) solicit the donations to cover the costs of printing and delivery of the books for those schools; 5) print and deliver those books to the schools; and 6) send thank you letters and acknowledgement letters to the donors for their income tax purposes. Without the Press that book donation to the school would not and could not be made. This Court's description of the purpose of the charitable institution exemption is perfectly apt: "to foster and facilitate delivery of charitable services." Croixdale, Inc. v. County of Washington, #A06-153 (January 25, 2007), slip. op. at 7, citing Skyline Pres. Foundation v. County of Polk, 621 N.W.2d 727, 732 (Minn. 2001).

Respondent's attempt to equate the Press with an ordinary commercial book publisher or vendor in its "Facts" (Resp. Brief at 5-7) and its "Argument" must fail for three fundamental reasons. First, such entities are not nonprofits. Second, they do not publish and sell their books with the expectation and result that they recover only a third of the costs of their sales. Third, they

do not get more than half of their revenue from donations. They are in business to make a profit. The Press is not.

*Respondent's Argument*

*A. Standard of Review*

Relator claims that the Tax Court's decision was not in conformity with law and that the Tax Court committed errors of law, not just that the court's decision was not supported by the evidence. Resp. Brief at 8.

*B. North Star Factors*

The Press's case is not based on "a worthwhile objective," though it certainly has several as stated in its Mission Statement. Its case is based on tangible, measurable, and excellent results. It has received millions of dollars in donations, produced approximately fifty excellent books, and donated thousands of books worth hundreds of thousands of dollars to Minnesota schools. The Press is not asking to be judged on the basis of its plans and intentions.

*1. Support by donations and gifts in whole or in part.*

Respondent cites Skyline Preservation Foundation v. County of Polk, 621 N.W.2d 727, 733 (Minn. 2001), for the proposition that a charity must receive an adequate percentage of its revenue from "altruistic" supporters. Resp. Brief at 10. Skyline does not explain what is meant by "altruistic," merely citing Care Institute, Inc.—Maplewood v. County of Ramsey, 576 N.W.2d 734, 739 (Minn. 1998). Care Institute, Inc. does not elaborate on what is meant by "altruistic," simply saying that there was adequate support for the Tax Court's negative findings and that the claimed donations would be insufficient even if deemed true donations. *Id.* The donations to the Press are vastly different in character and amounts from those in Care Institute, Inc.

The ordinary meaning of “altruistic,” as the opposite of “egoistic,” is to have regard for the well-being or best interests of others. *American College Dictionary* (Random House 1963). The evidence is not sufficient to support the Tax Court’s decision that the claimed donations to the Press are not donations for lack of that quality. Respondent, like the Tax Court, would support that decision in three respects:

First, referring to the MacMillan family role discussed *supra*, respondent says, “While ‘philanthropy’ is a good thing ... it is not truly ‘altruistic’ as required by law.” Resp. Brief at 11. Respondent cites no authority nor rational explanation for that statement. It is counter-intuitive. People who have enough wealth to engage in “philanthropy” presumably have little need to focus on their own well-being and best interests and can instead try to help others. That is what the Duncan MacMillan family has done. If the public policy behind these exemptions is to “foster and facilitate delivery of charitable services,” as this Court said in Croixdale, Inc. v. County of Washington, #A06-153 (January 25, 2007), slip. op. at 7, then it makes no sense to disqualify participation by “rich” people. It is equally nonsensical to impugn their motives or character because they are “rich.” Class warfare should be waged elsewhere.

Second, respondent cites a variety of benefits coming back to donors for their money. It says that in the *Books for Schools* program the donor benefits by designation of the recipient (schools or school districts), by having a letter sent by the Press (to the school), or getting a book plate (pasted inside a book cover) to “acknowledge” the donor for its gift. Resp. Brief at 11; App. p. 88). Respondent also says, “‘Contributors’ are normally acknowledged on the copyright page of the book.” Resp. Brief at 11. In fact, only significant contributions are acknowledged that way. See Supplemental Record 174-184. Regardless, if those small and obscure acknowledgements disqualify those donations as not altruistic or disinterested, then the same must be true for the bricks

and brass plates with inscribed names on the walkways, patios, floors and walls of institutions like the Ordway in St. Paul, Orchestra Hall in Minneapolis, the Minnesota Landscape Arboretum, and countless others throughout the state. The main difference is that people will actually read the names on those bricks and plates. One similarity is that the donors' names in the Press's books are largely the same as those that appear on those bricks and plates.

The Tax Court also discusses the \$6,000 donation by the Vedeen Foundation—the only donor that wrote a letter saying it was purchasing *Books for Schools* books—in the same vein, that the state senator who delivered the books to the recipient schools received a benefit himself. App. p. 89. However, he did not make the donation; the Vedeen Foundation did. *Id.* Tax Court also says that same senator signed and delivered a letter to his senate colleagues suggesting that they contribute campaign money to the program, as if that revealed a wrongful intent. App. p. 88. However, there is no evidence that any politician did so, and it is hard to believe that it would be illegal to donate excess campaign money to a 501(c)(3) organization.

Third, respondent recites the Tax Court's finding that "'donations' received by Relator to publish books are, in fact, 'fees paid to Petitioner by a third party for costs associated with publishing a particular book.'" Resp. Brief at 12, citing App. p. 90. Respondent then discusses the Brown University book and *Pride of the Inland Seas* (Ex. 40), which are valid donations as discussed in relator's initial brief (at 12-13). Resp. Brief at 12. Respondent also emphasizes the Presbyterian Homes book *Fifty Years of Faithful Service* and the \$100,000 received for *Ol' Man River* in its discussion of such "fees" paid, not true donations. However, as shown on page 3 of Exhibit 56, relator booked the \$100,000 from "Riverboat Captain" as a sale, none of it as a donation. "Presbyterian Homes" is likewise booked there as a sale for \$72,800, none as donations. Respondent cites Exhibit 58 for *Fifty Years of Faithful Service* in that regard, but nothing in that

voluminous exhibit supports a claim that anyone treated the Presbyterian Homes money as a donation. In the list of donors on the four pages entitled “Donation Detail” that begin eleven pages from the end of Exhibit 58, those two books are not listed, nor are donations from Captain Bill Boles or Presbyterian. Homes. Hopefully that clears up the “blurred distinction” problem that respondent quotes from the Tax Court’s decision. Resp. Brief at 13.

No evidence whatsoever supports the proposition that donations to produce any other books are tainted by anything resembling fees for services. That suspicion can and should be easily dispelled by comparing the donors, book by book, especially those named on the title page of the book (*e.g.*, Supplemental Record pp. 174-184), with the contents of the book. It is a hard negative for relator to prove, and an unreasonable burden of proof to impose on it, especially given the flimsy basis for such suspicions. The Tax Court’s decision in this regard reflects the “beyond a reasonable doubt” burden of proof that relator contends is erroneous as a matter of law.

Still with respect to North Star factor two, respondent devotes a full page to the commercial sales transactions that the Press does, concluding with the description “a thriving commercial enterprise.” Resp. Brief at 14-15. That discussion might belong under factor four, which the Tax Court held was satisfied (Appendix p. 91), but it should include the fact that the Press normally covers only a third of its costs from sales and needs donations to cover the other two-thirds and break even. Respondent’s description is mistaken.

*2. Whether the recipients are required to pay*

Respondent admits that the recipients of the *Books for Schools* program do not pay for the books they receive, but qualifies the admission by saying, “neither does Relator.” Resp. Brief at 15 The Tax Court recites that claim, declining to attribute any benefit to relator. App. p. 92. No authority is cited for reliance on that sort of analysis under factor three. Again, the money comes as

donations to the Press. Again, the Press functions as a conduit, doing a lot to “foster and facilitate” the flow of charitable benefits to the recipients. Without it, these books do not exist. Without it, no donations are solicited to cover the costs of the books to be distributed. Without it, the schools receive no free books.

Respondent gives lip service to the “below cost” alternative to “below market rate” element under factor three. Resp. Brief at 15-16. It says, “Both the production costs and distribution costs for the books distributed are funded prior to disbursement of the books.” Resp. Brief at 15. Two points, however, mar that claim: One, it has no application to the *Books for Schools* “disbursement,” because those books are free. Second, the costs are covered in large measure by donations, so people who pay for the books—even the suggested retail price on the cover—are paying considerably less than cost; collectively they pay about one-third of production costs. Appendix p. 91.

Respondent’s arguments do not compensate for the Tax Court’s failure to consider distribution below cost as an alternative to below market sales under factor three. See Appendix pp. 22-24. See, Croixdale.

### *3. Restricted beneficiaries and burdens of government*

Respondent is right that it is unclear in relator’s initial brief what is “the first group of recipients of Press charity ... who benefit simply from the production of the books ....” That group is described in relator’s pre-trial brief and other briefs below as “all Minnesotans, present and future, as well as students of Minnesota history everywhere ....” Supplemental Record p. 10. They would be the same folks who benefit from the work done and money spent pursuant to Minnesota Statutes Chapter 138. History has to be recorded and made available in a legible or tangible form before it

can be studied. The Press does that. The legislature has recognized that to be a general “societal benefit” by enactment of Chapter 138 and large appropriations for the Minnesota Historical Society.

Once a Press book has been produced and placed in libraries throughout the state—free or for a price—any person anywhere in the state can read that book. Many people can read that same book. If they read it on the library premises, they do not need a library card. They do not have to buy anything. If they are illiterate, someone can read the book to them. They face no restriction.

If the Press could obtain limitless donations, its *Books for Schools* books would be given to every school in the state, as it did in 2006 with *Minnesota’s Capitol—a Centennial Story* (Ex. 26). That is not a restriction that the Press set nor favors. Until that day of limitless donations, the Press has channeled the books that it can afford to distribute to the schools with the students who have the greatest need or potential benefit. Testimony of Patricia McDonald and Chuck Johnston generally. Until then, it would be folly to “advise” all schools of the “availability of ‘free’ books (Resp. Brief at 18), because Ms. McDonald and Mr. Johnston obviously would not have the time to solicit the additional donations required as well as do their publishing and financial work respectively.

## *II. Preponderance of Evidence standard of proof*

Throughout the Tax Court’s decision the court recited claim after claim that respondent made and then found accordingly without supporting evidence. Often a mere suspicion was enough to sway the court. That is especially true as to the “altruism” of the Press’s donors. Relator was found not to have enough donations under factor two because it did not present evidence for each of its dozens of donors that they were truly altruistic and not just desirous of seeing their names on the copyright page of the book or a sticker inside the cover. Relator was thus required to prove that element beyond a doubt. That doubt was really no more than a suspicion based in part on a

mistaken belief that two sales were booked as donations, though the evidence shows that they were booked as sales.

The Tax Court describes relator's failure to carry that burden of proof as a failure to distinguish the donations by "disinterested" people and those who are not disinterested. Appendix p. 90. There is no such distinction to be made, because there is no credible evidence that any of the Press's donors are too "interested" to count. Carried to its logical but absurd conclusion, the Tax Court's standard of proof would require relator to have every donor testify at trial to dispel any suspicion. Nothing in this Court's decisions warrants such an impossible requirement.

Respectfully submitted,

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