

**Supreme Court No. A05-0590**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

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**Kmart Corporation,**

*Relator,*

vs.

**County of Clay,**

*Respondent.*

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**RELATOR'S BRIEF**

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## LEGAL ISSUES

- I. Did the Tax Court err in holding that Relator Kmart Corporation (“Kmart”), by personally serving the Clay County Auditor, and by serving the Clay County Attorney, Clay County Assessor, and Clay County Treasurer by facsimile on April 30, 2003, failed to meet the service requirements of Minn. Stat. § 278.01?**

The Tax Court dismissed Kmart’s 2003 property tax petition, notwithstanding Rule 3.01 of the Minnesota Rules of Civil Procedure, which provides that an action is commenced by personally serving a party, Rule 4.02(e) of the Minnesota Rules of Civil Procedure which provides that personal service against a public corporation is accomplished by serving the county auditor, and Rule 5.02 of the Minnesota Rules of Civil Procedure, which permits service upon a party by facsimile once an action has been commenced.

Minn. Stat. § 278.01

Rule 3.01 of the Minnesota Rules of Civil Procedure

Rule 4.02(e) of the Minnesota Rules of Civil Procedure

Rules 5.01 and 5.02 of the Minnesota Rules of Civil Procedure

- II. Did the Tax Court err in concluding that Kmart was required by Minn. Stat. § 278.01 to serve the Clay County Attorney and the Clay County Assessor personally, and that Kmart failed to do so?**

The Tax Court held that Kmart was required to personally serve each public official listed in Minn. Stat. § 278.01. The Tax Court further held that Kmart’s effort to serve the Clay County officials did not constitute personal service.

*Nielson v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963)

*Carlson v. Cohen*, 302 Minn. 531, 223 N.W.2d 810 (Minn. 1974)

**III. Did the Tax Court err in concluding that the Clay County officials did not hinder Kmart's effort to comply with the technical requirements of Minn. Stat. § 278.01?**

The Tax Court dismissed Kmart's 2003 petition. By doing so, the Tax Court implicitly held that the conduct of the Clay County officials did not hinder Kmart's ability to comply with the requirements of Minn. Stat. § 278.01

*Hechter Gateway Ltd. P'Ship v. County of Scott*, File No. 94-05536 (Minn. Tax Ct. Oct. 24, 1994)

*Puri v. County of Stearns*, File No. C7-94-4349-S (Minn. Tax Ct. May 18, 1995)

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

In April 2003, Kmart contracted with Metro Legal Services (“Metro Legal”) for the purpose of serving and filing a property tax petition (the “Petition”) in Clay County. Metro Legal contracted with John Clark, a process server in the Moorhead area, to serve and file Kmart’s Petition. (Tr. 10). On April 30, 2003, Mr. Clark gave the Petition to his agent, Brenda Byram, for service and filing in Clay County. (Tr. 33).

Prior to arriving in Clay County, Ms. Byram served and filed property tax petitions in Becker and Norman Counties without incident. (Tr. 33). In fact, each county official that accepted service of property tax petitions in Becker and Norman County did so professionally, politely, and efficiently. (Tr. 33-34). Not a single county official in Becker County or Norman County took longer than one minute to sign a property tax petition presented to them by Ms. Byram on April 30, 2003. (Tr. 34).

### **A. Ms. Byram Served the Clay County Auditor L.J. Johnson Without Incident.**

Ms. Byram arrived at the Clay County Family Service Center (adjacent to the Clay County Courthouse in Moorhead) on April 30, 2003, shortly after 4:00 p.m. Ms. Byram first went to serve the Clay County Auditor. (Tr. 35). Ms. Byram served the Kmart Petition, as well as two others,<sup>2</sup> on the Clay County Auditor without incident. (Tr. 35).

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<sup>1</sup> The facts set forth herein are almost identical to the facts underlying the related Appeal of *American Crystal Sugar v. County of Clay*, Case No. A05-591.

<sup>2</sup> One of the other petitions was that of American Crystal Sugar.

**B. Although She Had Been Holding The Kmart Petition in her Hand Since Approximately 4:15, at 4:33 Treasurer Swetland Refused to Accept Service.**

Ms. Byram next went to the Clay County Treasurer's office, also located in the Clay County Family Service Center. (Tr. 35). Ms. Byram handed the three Petitions to the Treasurer, Betty J. Swetland, shortly after 4:15 p.m. (Tr. 36, 54). Rather than simply signing the acknowledgement of service on each of the petitions, which Ms. Byram estimates would have taken less than a minute, the Clay County Treasurer looked at each petition, page by page, without any explanation. (Tr. 36). Eventually, the Clay County Treasurer signed two of the petitions. (Tr. 36). Incredibly, although she had been holding the Kmart Petition in her hand since approximately 4:15, the Treasurer refused to sign the Kmart Petition. Instead, she stated she would not sign the third petition because it was 4:33 and they were closed for the day. (Tr. 36). The Treasurer then handed the Kmart Petition back to Ms. Byram without her signature. (Tr. 37).

Ms. Byram was stunned by the Treasurer's refusal to accept the Kmart Petition and asked the Treasurer if she was kidding. (Tr. 37). The Treasurer again stated that she would not accept service and that Ms. Byram would have to come back tomorrow. (Tr. 37).

**C. As a Result of Ms. Swetland's Conduct, Ms. Byram Arrived at the Courthouse After the Doors Were Locked.**

After being delayed by Ms. Swetland, Ms. Byram then crossed the parking lot to the Clay County Courthouse to serve the County Attorney and Assessor, and to file the petitions with the Court Administrator. She found the doors to the Clay County

Courthouse locked. (Tr. 38). At that point, she called Mr. Clark for instruction. (Tr. 38). Mr. Clark in turn contacted Scott Gray, a vice president at Metro Legal Services in Minneapolis. (Tr. 39).

**D. Mr. Gray and Mr. Clark Decided to Take a Professional Approach to Serving the Clay County Attorney and the Clay County Assessor.**

Mr. Gray and Mr. Clark discussed the situation during their telephone call. Mr. Gray decided that rather than showing up unannounced at the homes of the Clay County Attorney and the Clay County Assessor, Mr. Clark should telephone the Clay County Attorney and the Clay County Assessor in an effort to make the service in as convenient and professional a manner as possible. (Tr. 16).

**E. The County Assessor Told Mr. Clark that He Would Not Accept Service.**

Mr. Clark first telephoned the Assessor's office, but did not reach anyone. (Tr. 71). He then called the Assessor's residence and spoke directly with the Assessor, Loren Johnson. (Tr. 71). Mr. Clark explained that he had to serve documents on the Assessor that day and tried to arrange a convenient time for service. (Tr. 71). Assessor Johnson stated that he would not accept service because the petitions should have been served by 4:30 p.m. (Tr. 72). As it was after 4:30, the Assessor said that he was not required to accept service. (Tr. 72). Assessor Johnson told Mr. Clark that he should not bother coming to his home. (Tr. 72).

At the hearing on the County's motion to dismiss the Petition, the Clay County Assessor described the events as follows:

Q. You remember getting a call from someone who identified themselves as a process server that day [April 30, 2003], don't you?

A. Correct.

Q. That happened somewhere between 5:00, 5:15?

A. In that area as near as I could recall.

\* \* \*

Q. The process server told you he had something he needed to serve you with, right?

A. Yes.

Q. Did he say he had a tax petition right away?

A. No, he did not.

Q. Did you ask?

A. Yes.

\*\*\*

Q. You learned that there were three tax petitions?

A. Yes.

Q. Did you ask who the Petitioners were?

A. Yes.

\* \* \*

Q. Now, after you learned that there were three tax petitions and that a process server wanted to serve you

A. Uh-huh.

Q. What did you tell the process server?

A. I told him that I did not want to be — I could be served tomorrow and I wanted to be served tomorrow, I wasn't going to be served that night.

(Tr. 99-101).

**F. The Assistant Clay County Attorney Did Not Instruct the Clay County Assessor to Accept Service of the Petitions.**

After Mr. Johnson spoke with the process server, he called Michelle Winkis, an Assistant Clay County Attorney, for legal advice about his refusal to accept service. (Tr. 102). Mr. Johnson described his conversation with Ms. Winkis as follows:

Q: You called an assistant county attorney?

A: Yes.

Q: And you called the assistant county attorney who handles tax petitions?

A: Yes.

Q: And that's Michelle Winkis?

A: Yes.

\*\*\*

Q. You informed Ms. Winkis that there was a process server looking to serve you with tax petitions?

A. Yes.

Q. Did you ask her if the process server came to your door if you should open it?

A. No, no. In fact, I didn't ask any questions. It was just a statement of fact as to what had happened.

Q. Now, Ms. Winkis left you with the impression that it was okay to say, "Serve me tomorrow"?

A. Yes.

Q. She could have said, "Open your door if he comes," right?

A. She did not state that.

(Tr. 102-03).

**G. The Clay County Assessor Refused to Answer His Door.**

On her last attempt to serve Mr. Johnson, Ms. Byram drove to Mr. Johnson's residence at about 9:30 p.m. (Tr. 40). When she arrived, she could see lights on in the Assessor's residence. (Tr. 41). Ms. Byram rang the front doorbell and she could hear it ring inside the house. (Tr. 41). As she rang the doorbell, she saw the lights inside Mr. Johnson's house go off, first on one side of the house and then on the other side. (Tr. 41). Ms. Byram continued to ring the doorbell several more times and knocked on the door. She knew someone was home and she waited several minutes at the front door. (Tr. 42). No one came to the door. Ms. Byram finally left three copies of the three petitions between the storm door and the front door of Mr. Johnson's residence. (Tr. 42).

Directly confirming Ms. Byram's description of the events, Mr. Johnson testified at his deposition that shortly before 10:00 p.m., he heard someone knocking at his door. (Tr. 104). Nonetheless, he refused to go to the door. (Tr. 105). Instead, he turned the lights off and went downstairs. (Tr. 104).

**H. The County Attorney Refused to Accept the Reasonable Request for Service.**

Earlier in the evening, Mr. Clark telephoned the County Attorney, Lisa Borgen, to arrange a convenient time for service. (Tr. 73). Mr. Clark was unable to reach anyone at the County Attorney's office, so he called her home. (Tr. 73). He left a message for Ms. Borgen at her home. (Tr. 73). She returned his call within a half an hour. (Tr. 73). When Mr. Clark explained that he needed to serve her with papers that day, Ms. Borgen indicated that he had until 4:30 to serve the papers. (Tr. 74). She then informed Mr. Clark that he was out of luck. (Tr. 74).

As with the Assessor, Mr. Clark and Ms. Byram nevertheless attempted to serve the County Attorney at her home. (Tr. 77). When they arrived at the County Attorney's home, her husband told them that she had gone back to the office and would be home later that night. (Tr. 77). Mr. Clark and Ms. Byram then drove to the courthouse and called the County Attorney's office, but no one answered. (Tr. 77-78).

At approximately 10:00 p.m. that evening, Ms. Byram drove back to the County Attorney's home. (Tr. 43). While pulling up to the house, Ms. Byram called the County Attorney's home telephone number and left a message in which she stated she was required to serve the petitions that day. (Tr. 43-44). Ms. Byram apologized in her message for any inconvenience and explained that she would leave the petitions on the front porch. (Tr. 43-44). When Ms. Byram arrived at the County Attorney's home, the lights were off and she saw no signs of activity. There was, however, a dog on the front

porch who barked loudly at her arrival. (Tr. 44). As she stated in her telephone message, Ms. Byram left the three petitions on the County Attorney's front porch. (Tr. 44).

**I. John Clark Served and Filed the Kmart Petition by Facsimile on April 30th.**

While Ms. Byram was continuing the evening-long effort to personally serve the Assessor and County Attorney, Mr. Clark served the Kmart Petition by facsimile on the County Attorney, and County Assessor, and County Treasurer at their offices. Mr. Clark also filed the Kmart Petition with the Court Administrator by facsimile that evening before midnight. (Tr. 83).

The next day, Ms. Byram went to the Court Administrator's office at the Clay County Courthouse and filed the original Petition with affidavits of service. (Tr. 46-47). The Administrator's office provided a notice of case filing, a receipt for the filing fee, an activity summary showing that the Kmart petition was filed on April 30, 2003, and a receipt for the "faxing fee" for the fax filing of the Kmart Petition on April 30, 2003. (Tr. 48).

**J. The Tax Court Dismissed Kmart's 2003 Petition.**

The Clay County District Court transferred Kmart's Petition to the Minnesota Tax Court. Clay County then made a motion to dismiss on grounds that no service of the Petition was made on the County Assessor or the County Attorney by April 30. Clay County also argued in its motion that Kmart did not file the required proofs of service. Kmart opposed the motion. The parties submitted affidavits to the Tax Court, and Kmart offered the live testimony of witnesses at the hearing.

By order dated January 27, 2005, the Minnesota Tax Court, the Honorable George W. Perez, Chief Judge presiding, granted Clay County's motion to dismiss Kmart's Petition. (App. at A1). The Tax Court held that for purposes of Minn. Stat. § 278.01, subd. 1(a), no personal service was made on the County Assessor and the County Attorney on April 30. (App. at A5). Furthermore, the Tax Court held that service by facsimile, under Minn. R. Civ. § 3.01, on the County Assessor and the County Attorney on April 30 did not satisfy the statutory service requirement. (App. at A 4-5). The Tax Court, therefore, concluded that it did not have jurisdiction over Kmart's Petition.

#### **STANDARD OF REVIEW**

This Court is not bound by decisions of the Tax Court. *Bond v. Commissioner of Revenue*, 691 N.W.2d 831, 835 (Minn. 2005). This Court may overrule the Tax Court if the Tax Court's decision is clearly erroneous because the evidence as a whole does not reasonably support the decision. *Id.* at 836. The Tax Court's conclusions of law, interpretation of statutes and application of the law are reviewed *de novo*. *Id.* See also *ILHC of Eagan v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005).

#### **SUMMARY OF ARGUMENT**

Kmart commenced its 2003 tax appeal by personally serving the Clay County Auditor on April 30, 2003. Once the action was commenced, Kmart was permitted by Rule 5 of the Minnesota Rules of Civil Procedure to serve the other county officials by facsimile. It did so. Accordingly, Kmart complied with the requirements of Minn. Stat.

§ 278.01. The Tax Court's decision, which dismisses Kmart's Petition for failing to comply with the requirements of Minn. Stat. § 278.01, must be reversed.

Further, the undisputed facts demonstrate that the efforts by Kmart's service agent to serve the County Attorney and County Assessor, and the corresponding effort by the County Attorney and the County Assessor to avoid service, effectively constitute personal service under Minnesota law.

Moreover, the undisputed facts indicate that Clay County officials hindered Kmart's effort to comply with the requirements of Minn. Stat. § 278.01. As is noted below, the Tax Court has held that when a County plays a role (even a benign one) in a petitioner's failure to meet the technical requirements of § 278.01, the requirements will not be applied strictly to deprive the petitioner of the opportunity to present its case. Here, it cannot be disputed that the County Treasurer hindered the Petitioner's ability to meet the technical requirements of Minn. Stat. § 278.01. The County Treasurer's conduct was compounded by the actions of the County Attorney and County Assessor, both of whom refused to accept service from Kmart's service agent. Given the circumstances, equitable considerations preclude rigid application of the technical requirements of Minn. Stat. § 278.01.

Next, public policy supports reversing the Tax Court's decision. Clay County has not, because it cannot, show that it will suffer any prejudice. The County itself had notice of the Petition on April 30. More importantly, by reversing the Tax Court's decision, this Court will send a clear message to County officials throughout the state – interference with a taxpayer's effort to file a property tax petition will not be rewarded.

Finally, the Tax Court did not address whether Kmart's filing of the proof of service satisfied Section 278.01. It is the actual service, not the filing of the proof, that provides jurisdiction. Given the circumstances, Clay County's argument, if addressed, should be rejected.

## **ARGUMENT**

### **I. KMART COMPLIED WITH THE REQUIREMENTS OF MINN. STAT. § 278.01.**

The service and filing requirements for a property tax petition are set forth in Minn. Stat. § 278.01, which provides in relevant part:

Subdivision 1. Determination of validity.

(a) Any person having personal property, or any estate, right, title, or interest in or lien upon any parcel of land, who claims that such property has been partially, unfairly, or unequally assessed . . . may have the validity of the claim, defense, or objection determined by the district court of the county in which the tax is levied or by the tax court by serving one copy of a petition for such determination upon the county auditor, one copy on the county attorney, one copy on the county treasurer, and three copies on the county assessor.

\* \* \*

(c) For all counties, the petitioner must file the copies with proof of service, in the office of the court administrator of the district court on or before April 30 of the year in which the tax becomes payable.

In this case, notwithstanding Clay County's efforts to thwart service, Kmart complied in all meaningful respects with the statute.

**A. Kmart Filed its Petition With the Clay County Court Administrator on April 30, 2003.**

It is not disputed that Kmart filed its Petition with the Clay County Court Administrator on April 30, 2003, as required by Minn. Stat. § 278.01, subd. 1(c). John Clark filed the Petition by facsimile on April 30, 2003 and the Court Administrator stamped the Kmart petition as filed on April 30, 2003. In its motion to dismiss, Clay County did not contest that Kmart's Petition was filed in a timely manner.

**B. Kmart Commenced this Action by Personally Serving the Clay County Auditor on April 30, 2003.**

Kmart's service agent, Brenda Byram, personally served Kmart's Petition on the Clay County Auditor on April 30, 2003. This undisputed fact is critical to the Court's analysis of this appeal.

Under Rule 3.01 of the Minnesota Rules of Civil Procedure, an action is commenced when the summons is personally served upon the defendant. In a property tax proceeding under Chapter 278 of the Minnesota Statutes, the defendant/respondent is a county.

Clay County, like all Minnesota counties, is a public corporation. Rule 4.03(e) of the Minnesota Rules of Civil Procedure provides that personal service of a summons upon a public corporation may be accomplished by delivering a copy to "the chair of the county board or to the auditor of a defendant county." Minn. R. Civ. P. 4.03. On April 30, 2003, Brenda Byram personally served the Clay County Auditor. When she did so, the action was commenced for the purposes of Rule 3.01 of the Minnesota Rules of Civil Procedure.

**C. After the Action was Commenced, Kmart Complied with the Requirements of Minn. Stat. § 278.01 by Serving the County Assessor, County Attorney, and County Treasurer by Facsimile.**

Once the action was commenced and Clay County became a party to the suit, Rules 5.01 and 5.02 of the Minnesota Rules of Civil Procedure provide the basis for service by facsimile. Rule 5.01 of the Minnesota Rules of Civil Procedure provides in part:

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court orders otherwise because of numerous defendants . . . and similar paper shall be served on each of the parties.

Rule 5.02 provides in part:

Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party; transmitting a copy by facsimile machine to the attorney or party's office; or by mailing a copy to the attorney or party at the attorney's or party's last known address . . .

In short, under the language of Rules 5.01 and 5.02, once the original complaint was served on the County Auditor, the action was commenced. Kmart was then authorized to accomplish subsequent services by facsimile. It is undisputed that Kmart served the County Attorney and the County Assessor by facsimile. By doing so, Kmart complied with the requirements of Minn. Stat. § 278.01.

**D. Section 278.01 Does Not Require Each County Official to be Personally Served.**

As noted above, Section 278.01 required that Kmart serve the County Attorney, the County Treasurer, the County Auditor, and the County Assessor. It provides:

(a) Any person . . . may have the validity of the claim, defense, or objection determined by the district court of the county in which the tax is levied or

by the tax court *by serving* one copy of a petition for such determination upon the county auditor, one copy on the county attorney, one copy on the county treasurer, and three copies on the county assessor.

(Emphasis added).

Nowhere does Section 278.01 indicate that the petition must be served on each county official in the manner of a summons in a civil lawsuit. In many other statutes, when the legislature has required notice to be served personally, it has included specific language requiring the service to be made in the manner of the service of a summons in a civil lawsuit. *See, e.g.,* Minn. Stat. §§ 17A.04, 93.55, 97A.225, 103E.041, 168.27, 169A.63, 176.451, 209.021, 238.25, 240.02, 259.49, 259.52, 281.173, 281.174, 349.34, 463.17, 488A.09, 504B.331, 508.16, 508.671, 550.19, 551.042, 559.24. The Legislature chose not to use such language in Section 278.01. The absence of that language is compelling evidence regarding the service required by Section 278.01.

Moreover, in this case all four officials work for the same entity, Clay County. Common sense suggests that a petitioner need not personally serve four separate officers of a single entity to commence a suit. Again, if the legislature had intended that each of the four officers be served personally, it would have so stated.

## **II. UNDER MINNESOTA LAW, KMART PERSONALLY SERVED THE COUNTY ATTORNEY AND THE COUNTY ASSESSOR.**

Minnesota law clearly holds that a defendant cannot refuse to accept service of a summons. On the contrary, this Court has rejected defendants' assertions that personal service on them was ineffective when the purported failure of service was caused by the defendant's own acts. Personal service will be deemed complete if the defendant and the

process server are within speaking distance of each other and the defendant reasonably knows that service is being attempted but refuses to accept it. *Nielson v. Braland*, 264 Minn. 481, 484, 119 N.W.2d 737, 739 (1963). See also 1 Minn. Practice, Civil Rules Annotated (4<sup>th</sup> ed.) § 4.9.

Thus, for example, in *Nielson*, the process server attempted to serve an out-of-state defendant who was in Minnesota by touching him with a summons and laying it on the fender of a nearby car. *Nielson*, 264 Minn. at 482, 119 N.W.2d at 738. The defendant claimed that he had not been personally served. This Court disagreed, and, in fact, found his argument “frivolous,” saying:

The only question involved here is whether a copy of the summons was delivered to Braland. We have not had occasion to consider the question whether service is made when the defendant refuses to accept it, but it is generally held that if the process server and the defendant are within speaking distance of each other, and such action is taken as to convince a reasonable person that personal service is being attempted, service cannot be avoided by physically refusing to accept the summons . . . .

Here, the defendant and the process server were in close proximity to each other. Defendant was touched with the summons, and it was laid in a place where it was easily accessible to him. His refusal to pick it up or to accept it did not prevent the service from being completed. We think, under the circumstances, that it must be held the defendant was adequately served.

264 Minn. at 484, 119 N.W.2d at 739 (internal citations omitted).

The Court applied the same rule in *Carlson v. Cohen*, 302 Minn. 531, 223 N.W.2d 810, 811 (1974). There, after the defendant refused to accept service, the process server served her by tucking the summons under the defendant’s windshield wiper as she drove

away. *Id.* This Court held that, while the service was “unique,” it was still valid. *Id.* at 812.

The Minnesota Court of Appeals has followed this rule to find service valid despite a defendant’s refusal to accept it. In *Ochs v. Kimball*, No. C5-02-1766, 2003 WL21524857 (Minn. App. 2003) (unpublished) (App. at 109), the process server rang the doorbell of the defendant’s home. The defendant opened the inner front door and saw paperwork in the process server’s hands. She refused to open the outer door, told the process server she was not accepting any papers, and then slammed the door. The process server went to a side door and the defendant refused to answer it. The process server finally left the summons and complaint inside the screen door. The Court of Appeals, applying *Nielson*, agreed that the service was proper. The process server and the defendant actually spoke to one another; and the defendant’s statement that she was not accepting any papers implied that she understood that papers were being served on her.

The policy behind the rule is straightforward: A defendant cannot avoid the jurisdiction of a Minnesota court by refusing to accept reasonably tendered service. This policy should apply even more strongly to public officials, who occupy positions of public trust, and whose official obligations do not end at the end of the business day. See *Commissioners of Hennepin County v. Dicky*, 86 Minn. 340, 341 90 N.W. 775, 779 (1902) (“it is unquestionably expected of a [public servant], in the dual relations of master and servant in the public employment, that he should realize all the

responsibilities of both . . . [i]t must not be forgotten that he is at all times a public servant . . .”) (emphasis added).

The Clay County officials’ alleged reason for refusing service – that the workday ended at 4:30 p.m. – is not acceptable.<sup>3</sup> (Tr. 72, 74). Minn. Stat. § 278.01, Subd. 1 on its face does not require service by any certain time of day on April 30. Therefore, service may be made at any time on that day. A day is “the time from midnight to the next midnight.” Minn. Stat. § 645.45(9). Thus, service of a property tax petition at any time before midnight on April 30 is valid even if the office of the official being served is “closed.” *Homart Development Company v. County of Hennepin*, 538 N.W.2d 907, 911-912 (Minn. 1995) (fax sent after 5:00 p.m. but before midnight to closed office of county attorney is “furnished” on the day of transmission, not the next business day).

**A. Service on the Assessor Was Complete When He Refused to Open the Door for the Process Server.**

Minnesota law is clear -- service of process cannot be avoided by refusing to open the door. *Ochs*, No. C5-02-1776. Here, one of the process servers (Clark) called the Assessor’s home at about 5:00 p.m. and told him he had documents to serve that day and offered to arrange a convenient time to “drop by and leave them with [the Assessor].” (Tr. 71). The Assessor asked specifically what the documents were and who the taxpayers were. (Tr. 72). Mr. Clark told him the names of [Kmart and the two other

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<sup>3</sup> Note that the County Attorney did not, in fact, cease work at 4:30 p.m., but worked at the office that evening. (Tr. 77). In fact, it is common for the County Attorney to work evenings and weekends. Public Policy considerations and fundamental fairness require that the County Attorney is not entitled to choose to act as County Attorney for some issues, and not for others, at the same time.

companies] — all very large taxpayers in Clay County. (Tr. 72). After being told who the taxpayers were, the Assessor refused to allow the process server to stop by that night. (Tr. 100). Immediately following Clark's call, the Assessor telephoned the Assistant County Attorney regarding his decision not to accept service. (Tr. 102).

At approximately 9:30 p.m. on April 30, 2003, the other process server (Byram) arrived at the Assessor's home to find the lights on and a truck in the driveway. (Tr. 40-41). Ms. Byram testified that she knocked on the door and rang the doorbell (which she could hear ringing inside) and then the lights were turned off inside the house. (Tr. 41). The Assessor corroborated this testimony in his deposition, admitting that he turned the lights off after ten minutes of knocking at the door and ringing of the doorbell. (Tr. 104). The process server left the Petition inside his outer door. (Tr. 42).

As under *Nielson* and *Carlson*, the Assessor was served when the process server left the Petition in the door. While the process server and the Assessor did not speak face-to-face, the Assessor had spoken to a process server about the Petition that night and the Assessor was undoubtedly aware that service was being attempted on him. Instead of looking out to see who was at the door and then answering it when he saw that service was being attempted, the Assessor turned off the lights and tried to hide from what any reasonable person would have known was service of the Petition. The process server left the Petition in as close proximity to the Assessor as she could and in a place where he was sure to, and in fact did, find it. These acts were sufficient under *Nielson* and *Carlson* to complete personal service on the Assessor.

**B. Since She Refused to Accept Service at the Office, Service on the County Attorney was Complete When the Process Server Left the Papers at Her Home.**

The rules of *Nielson* and *Carlson* also establish that the County Attorney was effectively served. Mr. Clark and the County Attorney spoke on April 30, 2003, he told her that he had papers to serve her in her capacity as County Attorney. (Tr. 73). The County Attorney informed him that the office closed at 4:30 p.m., and that he would have to serve her the next day. *Id.* Even though she said the office was closed, she then returned to the office to work that night. (Tr. 131). Ms. Byram finally went to the County Attorney's home [for the second time that evening], called from outside, and left a message describing where the Petition would be. She tucked the Petition under the front mat right in front of the County Attorney's front door. (Tr. 43-44).

While the process server did not speak to the County Attorney while she was placing the Petition under the mat, they had spoken earlier in the evening and the County Attorney clearly knew that service was being attempted and explicitly refused to accept it because she considered herself "off the clock." Although the County Attorney intended to return to her office to work, she did not tell the process server that – instead claiming that her work for the day was done. The Court should apply *Nielson* and *Carlson* and find that service upon the County Attorney was complete.

**III. THE COUNTY OFFICIALS HINDERED THE PROCESS SERVER'S EFFORT TO COMPLY WITH SECTION 278.01.**

Even if this Court were to conclude that service upon Clay County was technically deficient under the statute, jurisdiction still exists because any such deficiencies were

caused directly by Clay County's obstructive conduct.<sup>4</sup> Under such circumstances, the Tax Court has recognized that a county is estopped from arguing that technical statutory requirements have not been met.

On at least two occasions, the Tax Court has denied motions to dismiss when deficiencies with respect to service were caused, in whole or in part, by the county. In *Puri v. County of Stearns*, File No. C7-94-4349-S (Minn. Tax Ct. May 18, 1995), the court administrator advised the petitioner that he needed to serve copies of the petition on the assessor, the county attorney, the auditor, and the treasurer. The petitioner brought the original petition to each of the offices and asked that an admission of service be signed. Each official signed an acknowledgement. The county moved to dismiss the petition on the ground that only one copy of the petition was served on the assessor, rather than the three copies required by statute. The Tax Court held that because the Assessor acknowledged service, service within the meaning of the statute had occurred.

In *Hechter Gateway Ltd. P'Ship v. County of Scott*, File No. 94-05536 (Minn. Tax Ct. Oct. 24, 1994), the county officials gave the petitioner an outdated form with incorrect service instructions, *i.e.*, did not indicate that the assessor needed to be served. The petitioner followed the instructions correctly (and did not serve the assessor), although the assessor had actual knowledge of the petition. Given the facts, the Tax Court held that the case could proceed: "We prefer to hear cases on the merits where

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<sup>4</sup> This assumes, for the purposes of argument only, that the service by facsimile on the County Attorney and the County Assessor was insufficient. For the reasons stated above, Kmart contends that personal service on the County Auditor, followed by facsimile service on the County Attorney, County Assessor and County Treasurer, was sufficient under the statute.

there has been no prejudice to the other party and are therefore denying Respondent's motion to dismiss."

The *Puri* and *Hechter* cases make clear that when the County plays a role – even an unintentional role – in the failure of a petitioner to comply with the technical requirements of the statute, and there is no prejudice, the Court will hear the case on the merits. In this case, Clay County's conduct is far more egregious than the counties' conduct in *Puri* and *Hechter*. Here, as described below, Clay County took a number of intentional steps to interfere with the Petitioners' ability to meet the technical requirements of the statute.

Moreover, Clay County has not, nor can it, claim any conceivable prejudice in this case because all four County officials received Kmart's Petition, by delivery and/or facsimile. According to the Minnesota Court of Appeals, even when personal service is required and not performed, service is effective as long as the party actually receives the documents. Specifically, in *Maki v. Hansen*, 694 N.W.2d 78, 82 (Minn. Ct. App. 2005), the Court of Appeals held:

Parties are expected to follow the requirements for service of process and failure to do so can result in dismissal of a claim. *See Nieszner v. St. Paul Sch. Dist. No. 625*, 643 N.W.2d 645, 648, 650 (Minn. Ct. App. 2002). However, the rules of service are not always strictly construed. The Minnesota Supreme Court has stated that where personal service is required but service is made by mail and the party actually receives the documents, service is effective. *State v. Pierce*, 257 Minn. 114, 115-16, 100 N.W.2d 137, 138-39 (1959).

*Id.*

If the *Puri*, *Hechter* and *Maki* cases were permitted to proceed, this case must as well. To hold otherwise would be to reward and encourage the *intentional* efforts by Clay County to preclude taxpayers from exercising their right to seek judicial review of their property tax assessments.

**A. The Clay County Treasurer Interfered with Kmart's Ability to Serve and File the Petition.**

First, Treasurer Swetland refused to promptly sign the acknowledgment of service when handed to her. Rather, she slowly paged through each of the three petitions, page by page. Ironically, once the clock had passed 4:30 p.m., she handed Kmart's Petition back to Brenda Byram, and stated that she would not accept service of that Petition. If Treasurer Swetland had simply signed the petitions, something that could have taken as little as a minute for each one, Ms. Byram would have been able to enter the main courthouse and serve the County Assessor and the County Attorney. Ms. Swetland did not do so, but instead actively and intentionally interfered with Kmart's ability to meet the statutory requirements. Ms. Swetland's conduct alone justifies reversing the Tax Court's decision.

**B. The Clay County Assessor Avoided, and Otherwise Refused to Accept, Service of Kmart's Petition.**

The conduct of Assessor Johnson also contributed to the problem. First, he received a call at his home from a process server. In spite of the fact that the process server politely and reasonably asked to serve Assessor Johnson at his home, and in spite of the fact that Assessor Johnson knew that the documents were property tax petitions, Assessor Johnson refused to accept service. Assessor Johnson told the process server not

to bother coming to his home, and then refused to answer his door. Simply stated, Assessor Johnson evaded service.

To make matters worse, after receiving the call from Mr. Clark, Assessor Johnson called an assistant Clay County Attorney for legal guidance. Because Assessor Johnson was understandably nervous about whether his conduct had been improper, he explained what had occurred to the Assistant County Attorney. The Assistant Clay County Attorney had the opportunity to instruct Assessor Johnson regarding his legal obligations to accept a reasonable request for service, such as opening his door and accepting service. She did not take that opportunity during Assessor Johnson's call for her legal opinion, however, and instead, she left Assessor Johnson with the impression that his conduct had been legally appropriate.

**C. The County Attorney Hindered Kmart's Effort to Comply with the Requirements of Minn. Stat. § 278.01.**

On April 30, the Clay County Attorney spoke on the telephone with a process server. The process server indicated that he needed to serve her with a document that day. She refused, stating that her office closed at 4:30. After indicating that the office was closed, the County Attorney then proceeded to her office to do some work.

The County Attorney could have informed the process server that she was returning to work that evening. She could have offered to meet the process server at the Sheriff's office. Instead, she stated that the process server was too late. Then, the County Attorney's office filed a motion to dismiss. The conduct of the Clay County Attorney effectively hindered Kmart's efforts to serve its Petition.

**D. Clay County Suffered No Prejudice.**

The County Auditor received Kmart's Petition on April 30. The County Treasurer received Kmart's Petition on April 30. The County Attorney and the County Assessor received Kmart's Petition by facsimile on April 30, and had a copy of Kmart's Petition delivered to their homes on April 30. Given the circumstances, Clay County did not suffer any prejudice.

**IV. PUBLIC POLICY SUPPORTS REVERSING THE TAX COURT'S DECISION.**

The policy issue facing the Court is narrowly framed. By affirming the Tax Court's decision, this Court will send a clear message -- County officials have free reign to interfere with a taxpayer's right to contest its taxes. Rather than being discouraged, inefficient and unprofessional conduct of county officials may be rewarded.

The message sent by reversing the Tax Court's decision would be equally powerful. Conduct that is unprofessional will not be rewarded. In fact, it will not be tolerated. Public officials, who are placed in a position of public trust, must act accordingly. By reversing the Tax Court's decision, this Court will encourage professional behavior.

**V. THE FAILURE TO FILE THE PROOF OF SERVICE ON APRIL 30, 2003 DOES NOT DEPRIVE THE COURT OF JURISDICTION.**

In its motion to dismiss, Clay County argued that Kmart's Petition should be dismissed because Kmart's affidavit of service was not filed on April 30, 2003. Because Judge Perez dismissed the Petition on other grounds, this issue was not addressed by the Tax Court. Clay County's argument, if considered by this Court, should be rejected.

**A. Minnesota Law Permits Proofs of Service to be Filed Within a Reasonable Time After Service.**

It is well-established Minnesota law that the “fact of service, not the proof thereof, gives a court jurisdiction.” *Leland v. Heiberg*, 194 N.W. 93, 95 (Minn. 1923). Courts have routinely held that failing to satisfy purely technical requirements, such as filing proof of service where service was timely, will not divest the court of jurisdiction. For instance, in *Goodman v. Ancient Order of United Workmen*, 300 N.W. 624, 625 (Minn. 1941), the appellant argued that because no affidavit of service had been filed to prove service, the service itself was defective. The Minnesota Supreme Court summarily rejected the argument, stating:

Of course, the fact of service is the important thing in determining jurisdiction. Thus it has often happened that proof of service may be defective or even lacking, but if the fact of service is established jurisdiction cannot be questioned.

*Id*; see also *Lovin v. Hicks*, 133 N.W. 575, 576 (Minn. 1911) (“It is the fact of service that controls on the question of whether the court has acquired jurisdiction and not the proof of such fact as made or filed.”); *Murray v. Murray*, 198 N.W. 307, 308 (Minn. 1924) (“The absence of proof of service from the record does not show want of jurisdiction subjecting the judgment to collateral attack; but when the return of the officer is in the record no service other than to which he certifies is presumed. It is the fact of service which gives jurisdiction, and the filing of proof, which does not show service, does not divest it.”). This legal principle is codified in Rule 4.06 of the Minnesota Rules of Civil Procedure which states simply that “Failure to make proof of service shall not affect the validity of the service.”

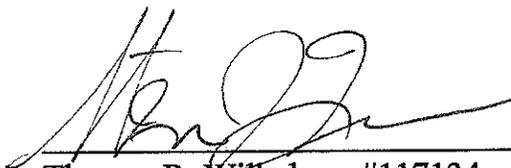
Further, to the extent that there is any question regarding why the proofs of service were filed on May 1, 2003, the Court need only look to the events that occurred on April 30, 2003. The proofs of service were not filed on April 30 because the County first interfered with service (Treasurer Swetland), then refused to accept service (County Attorney Borgen and Assessor Johnson), and finally avoided service (Assessor Johnson). If the County officials had acted in a reasonable and professional manner, the proofs of service would have been filed on April 30th. However, given the misconduct of the County officials, Petitioners were not able to file the proofs of service until the next day.

As discussed above, the Tax Court has not allowed counties to argue a property tax petition should be dismissed due to procedural defects when the county caused the defects. *See Puri* File No. 7-94-43495; *Hechter Gateway*, 94-05 536. Thus, Clay County should not now be able to claim that procedural deficiencies related to Kmart's service, *i.e.*, late filing of the proofs of service, mandate dismissal when the delay was due to the misconduct of County officials.

**CONCLUSION**

For the foregoing reasons, Kmart respectfully requests that the Tax Court's decision dismissing Kmart's 2003 Tax Petition be reversed and that the matter be remanded to the Tax Court with instructions to consider the Petition on its merits.

**FREDRIKSON & BYRON, P.A.**



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Dated: May 11, 2005

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**CERTIFICATE OF COMPLIANCE**  
**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 7,243 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance of Microsoft Office Word 2000, the word processing system used to prepare this Brief.

  
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Steven J. Quam