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No. A11-0138

STATE OF MINNESOTA
IN SUPREME COURT

Marlow Timberland, LLC,

Relator,

vs.

County of Lake,

Respondent.

BRIEF AND ADDENDUM OF RELATOR
MARLOW TIMBERLAND, LLC

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. WHERE MARLOW TIMBERLAND REQUESTED THE 2008 PETITION BE LIMITED TO THE STONY RIVER TOWNSHIP PROPERTIES, DID THE TAX COURT ERR IN FAILING TO ALLOW RELATOR TO AMEND THE PETITION TO INCLUDE ONLY THE PARCELS IN STONEY RIVER TOWNSHIP TO COMPLY WITH MINN. STAT. § 278.02?

Held:

The tax court did not permit relator to amend its petition, ruled that the 2008 petition violates Minn. Stat. § 278.02, is invalid, and dismissed the petition.

Apposite Authority:

Poss, Inc. v. County of Washington, No. CV-09-2808 (Minn. Tax Ct. Nov. 22, 2010)

American Crystal Sugar Co. v. County of Polk, Nos. C1-05-574, et al. (Minn. Tax Ct. Jan. 1, 2007)

- II. WHERE MARLOW TIMBERLAND HAS A REASONABLE CLAIM ON THE MERITS, A REASONABLE EXCUSE FOR FAILING TO ACT, ACTED WITH DUE DILIGENCE AFTER NOTICE OF DISMISSAL AND THERE IS NO SHOWING OF SUBSTANTIAL PREJUDICE TO LAKE COUNTY, DID THE TAX COURT ERR IN CONCLUDING THAT MARLOW TIMBERLAND DID NOT QUALIFY FOR RELIEF UNDER RULE 60.02?

Held:

The tax court ruled that Minn. Stat. § 278.03 affords the only remedy following automatic dismissal of a tax petition and, alternatively, that relator could not show inadvertence, surprise or excusable neglect to satisfy Rule 60.02.

Apposite Authority:

Husby-Thompson Co. v. County of Freeborn, 435 N.W.2d 814 (Minn. 1989)

Kosloski v. Jones, 295 Minn. 177, 203 N.W.2d 401 (1973)

Thunderbird Motel Corp. v. County of Hennepin, 289 Minn. 239, 183 N.W.2d 569 (1971)

Bloomington Hotel Investors v. County of Hennepin, No. TC-8428 (Minn. Tax Ct. Oct. 25, 1990)

- III. DID THE TAX COURT ERR IN CONCLUDING THAT MINN. STAT. § 278.03 PROVIDES THE EXCLUSIVE REMEDY FOR AUTOMATICALLY DISMISSED PROPERTY TAX PETITIONS TO THE EXCLUSION OF AN EQUITABLE REMEDY?

Held:

The tax court concluded that permitting the petitions to proceed without satisfying section 278.03 would be contrary to statute and case law.

Apposite Authority:

Minn. R. Civ. P. 60.02

Programmed Land, Inc. v. O'Connor, 633 N.W.2d 517 (Minn. 2001)

Adelman v. Onischuk, 271 Minn. 216, 135 N.W.2d 670 (1965)

Zimmerman v. Lasky, 374 N.W.2d 212 (Minn. App. 1985), review denied (Minn. Nov. 26, 1985)

STATEMENT OF THE CASE

These proceedings were brought before the Lake County Court by relator taxpayer seeking a review under Minnesota Statutes Chapter 278 of property taxes due in the years 2008, 2009 and 2010, on the grounds that the properties were unfairly assessed at greater than their full and true value and were unequally assessed when compared with other property. The Lake County Court Administrator forwarded the questions to the Minnesota Tax Court for disposition. Because relator's petition for 2008 included non-contiguous parcels of land in more than one jurisdiction, the petition was dismissed under Minn. Stat. § 278.02. Because relator failed to pay the taxes levied for 2009 and 2010, the proceedings were automatically dismissed pursuant to Minn. Stat. § 278.03. Relator appeals from the Order of the Honorable Sheryl A. Ramstad of the Minnesota Tax Court dismissing the 2008 petition and denying relator's request to reinstate the 2009 and 2010 petitions.

STATEMENT OF THE FACTS

Relator, Marlow Timberland, LLC, (hereinafter “Marlow Timberland” or “relator”) is a Minnesota limited liability company solely owned and managed by Roy Marlow. Marlow Timberland was formed for purposes of acquiring Potlatch Corporation lands, largely within respondent, Lake County (hereinafter “the county” or “respondent”). (Affidavit of Roy Marlow “Marlow Affidavit” at ¶¶ 2–3.) Marlow Timberland acquired nearly 40,000 acres of property from Potlatch Corporation. (*Id.* at ¶ 3.) The land is vacant land, and has historically been used as timberland for harvesting and sale of timber. (Affidavit of Gregory V. Perrella, Exhibit A Appraisal “Appraisal” at pp. 2–3.) The properties, consisting of over 1,000 separate parcels, were purchased at an average price of \$385 per acre. (Marlow Affidavit at ¶ 4.) This was an arm’s-length purchase, which was negotiated for over a year by Roy Marlow for Marlow Timberland. (*Id.* at ¶ 3.) An appraisal conducted by Greg Perrella for Marlow Timberland and prospective lenders to Marlow Timberland estimated the value of the property at \$744 an acre at the time of purchase. (Perrella Affidavit at ¶ 5.)

Marlow Timberland’s business plan anticipated that it could carry the costs and real estate taxes of this acquisition of debt through sales of property and timber. (Marlow Affidavit at ¶ 4.) Unfortunately, the fiber value of the properties has plummeted during the recession and the costs of fiber harvesting are such that this has not been a source of revenue. (Marlow Affidavit at ¶ 5, Perrella Affidavit at ¶ 6.) Additionally, Marlow Timberland has managed to sell only a limited number of properties to generate

supplemental revenue. (Marlow Affidavit at ¶ 4.) This situation is a direct impact of the recession and the inflated property tax assessment. (Marlow Affidavit at ¶¶ 4–5.)

Respondent has established the value of these properties for real estate taxation well above the purchase price. (Marlow Affidavit at ¶¶ 4, 10.) It has assessed these properties at an average of \$1,000 an acre, which is close to 300% of the actual market value of the parcels based on the purchase from Potlatch in 2008 for an average cost of \$385 per acre. (Marlow Affidavit at ¶ 10.)

Appraiser Perrella completed and updated a professional opinion of the value of the property in the context of the original facts and then in light of with the limited market, the recession, and the status of the fiber industry. (Appraisal at p. 2; Perrella Affidavit at ¶¶ 6, 9.) Other comparable properties in Lake County have been assessed at 80% to 90% of market value. (Perrella Affidavit at ¶ 8.) Mr. Perrella concluded that the February 2008 appraised value of \$744 per acre and resulting average fair value for real estate tax assessment purposes of no more than \$670 per acre has likely declined due to market forces over the past several years. (Perrella Affidavit at ¶¶ 6, 8.)

The existing assessment rate of more than \$1,000 per acre creates a tax burden on Marlow Timberland which is unsustainable. Marlow Timberland's dilemma is that it purchased the property at an average price of \$385 an acre and now carries the property during a timeframe of very limited marketability for properties of this type. Marlow Timberland is facing extreme financial difficulties as a result of the economy, the resultant lack of availability of financing for raw land, and the tax valuation which may be as much as 300% of the actual market value. (Marlow Affidavit at ¶¶ 4–6.) Marlow

Timberland does not have the resources to pay the property taxes at the present inflated assessed rate. (Marlow Affidavit at ¶ 5.)

A tax petition was filed in 2008 under Minnesota Statute section 278.01 on 744 parcels located in several townships in Lake County. (2008 Petition.) The petition alleged (1) the estimated market value is greater than the property's actual market value and (2) the subject property is unequally assessed when compared with other property. (*Id.*) The petition included parcels from more than one jurisdiction. (*Id.*) Marlow Timberland paid the property taxes due in 2008, keeping its petition viable. (Transcript of Motion Hearing October 12, 2010, "Transcript" at p. 4.) The county filed a motion to dismiss the petition based on its inclusion of parcels from multiple jurisdictions. Marlow Timberland requested the tax court to allow it to proceed with the parcels in a single jurisdiction. (November 23, 2010, Tax Court Order "Order" at p. 9.) The county did not agree to this request for modification of the 2008 petition. The tax court dismissed the 2008 petition based on its inclusion of non-contiguous parcels in multiple jurisdictions, refusing to allow the voluntary partial dismissal to cure the petition's deficiency. (*Id.*)

Marlow Timberland filed separate tax petitions by township in 2009 and 2010 under Minnesota Statute section 278.01. The petitions alleged (1) the estimated market value is greater than the property's actual market value; (2) the subject property is unequally assessed when compared with other property; and (3) the property classification is incorrect. (2009 and 2010 Tax Petitions.)

Due to significant financial hardships, particularly as a consequence of the county's high assessment and the resulting high property taxes, Marlow Timberland was

financially unable to pay the second half of the 2009 or any of the 2010 taxes. (Marlow Affidavit at ¶ 5.) As a result, the 2009 and 2010 petitions were automatically dismissed per section 278.03. The tax court denied relator's motion to reinstate the 2009 and 2010 petitions. (Order at p. 9).

This appeal of the tax court's actions with respect to the 2008, 2009 and 2010 petitions followed.

ARGUMENT

I. STANDARD OF REVIEW

Supreme court review of a final order of the tax court is limited to determining whether the tax court's order is supported by the evidence, is in conformity with the law, and whether the tax court committed any other error of law. The tax court's legal determinations are review de novo. *S. Minn. Beet Sugar Coop v. County of Renville*, 737 N.W.2d 545, 551 (Minn. 2007) (citations omitted).

II. THE TAX COURT ERRED IN FAILING TO PERMIT RELATOR TO AMEND THE 2008 PETITION TO COMPLY WITH MINN. STAT. § 278.02.

The 2008 petition filed by relator concerned 744 parcels in six separate townships and unorganized territories. Relator ultimately conceded that the petition, as filed, violated Minn. Stat. § 278.02, which permits multiple parcels in a single petition only if the parcels are in the same city or town, unless the parcels are contiguous. The parcels included in the 2008 petition are in six different townships.

Prior to the motion hearing, relator requested it be allowed to proceed with the 2008 petition solely for the properties in a single township, Stony River Township, in compliance with section 278.02. (October 1, 2010 letter to Respondent, attached as Exhibit B to Petitioner's Response to Respondent's Response to Motion to Reinstate.) The county persisted with its motion to dismiss, but also agreed to reduce the petition to the parcels in Stony River Township if its motion was denied. (Transcript at pp. 9–10.) The tax court dismissed the petition, based on a determination that relator failed to cite

any authority for the position that it should be allowed to amend the petition to satisfy § 278.02.

The tax court has recently held that a party may amend its petition when such amendment will result in no substantial prejudice to the opposing party. *Poss, Inc. v. County of Washington*, No. CV-09-2808 (Minn. Tax Ct. Nov. 22, 2010). Minnesota Rule of Civil Procedure 15.01 states “a party may amend a pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” “The Tax Court has liberally construed this rule so long as granting the amendment does not unduly prejudice opposing party.” *Poss*, citing *American Crystal Sugar Co. v. County of Polk*, Nos. C1-05-574, et al. (Minn. Tax Ct. Jan. 1, 2007).

The tax court’s dismissal was in error here because relator requested leave of the court to modify the petition, justice requires the relator be permitted to reduce the petition from six townships to one, and the county will not be unduly prejudiced in any way by such an amendment. The county would not be prejudiced by relator’s continued prosecution of the 2008 petition for properties in the Stony River Township. The county was given notice of relator’s desire to limit the petition to the lone township in advance of the motion hearing. (October 1, 2010, letter attached as exhibit B to Petitioner’s Response to Respondent’s Response to Motion to Reinstate.) In fact, the county is not prejudiced by the continuation of any of these petitions, as a decision against relator may ultimately lead to relator’s tax forfeiture of property pursuant to Minn. Stat. Chapter 279. Given the situation at hand and this court’s equitable authority, Marlow Timberland requests the

court reverse the tax court's dismissal of its 2008 petition and remand that case for a trial on the merits of the petition as amended.

III. THE TAX COURT ERRED IN CONCLUDING THAT MARLOW TIMBERLAND COULD NOT QUALIFY FOR RELIEF UNDER RULE 60.02.

Marlow Timberland's 2009 and 2010 property tax petitions were automatically dismissed per Minn. Stat. § 271.03 following non-payment of the assessed taxes. (Order at p. 3.) Marlow Timberland filed a motion seeking reinstatement of the petitions pursuant to Minn. R. Civ. P. 60 and on general equitable grounds. (*Id.* at p. 5.) Marlow Timberland asserted that reinstatement was warranted where it has shown (1) it has a reasonable claim on the merits that the property has been over valued and unfairly taxed; (2) it has a reasonable excuse for failing to act in a timely manner because financial hardship made it impossible for it to pay the taxes; (3) it has acted with due diligence following the automatic dismissal in attempting to move toward increasing its financial resources, settlement with the county and challenging the dismissal; and (4) there is no showing of substantial prejudice to the county. (*Id.*)

The tax court decision rejected relator's Rule 60 argument in two ways. First, it precludes the application of Rule 60 for relief based on its assertion that Minn. Stat. § 278.03 replaced the remedy previously available under Rule 60. (*Id.* at p. 7.) The tax court cites to *Compass Management and Leasing, Inc. v. County of Ramsey*, Nos. C8-91-5342 and C1-92-1160 (Minn. Tax Ct. Oct. 27, 1993), to support its conclusion that section 278.03 is the exclusive remedy for reinstatement of a tax petition following an automatic dismissal. (*Id.*) Second, the tax court determined that even if relief was

available under Rule 60.02, Marlow Timberland has not qualified for Rule 60 relief. (*Id.*) The tax court supports this conclusion by attempting to distinguish the present case from the line of Minnesota Supreme Court and tax court cases which clearly permit equitable relief under Rule 60 when taxpayers did not satisfy the automatic reinstatement statute. (*Id.* at 6–7.) The tax court also determined that Marlow Timberland failed to satisfy Rule 60 by showing inadvertence, surprise or excusable neglect. (*Id.* at 7.)

A. THE TAX COURT ERRED IN CONCLUDING MINN. STAT. § 278.03 IS THE EXCLUSIVE REMEDY TO REINSTATE TAX PETITIONS.

The tax court erred in its conclusion that it may not reinstate a property tax petition unless the petitioner has complied with Minn. Stat. § 278.03. Instead, precedent supports the tax court’s ability to vacate automatic dismissals pursuant to Minn. R. Civ. P. 60.02 “even though the [property tax] statutes provided no specific authority to do so.” *T.S. Montgomery v. County of Hennepin*, No. TC-15110 at *4 (Minn. Tax Ct. May 28, 1993). The *Montgomery* court relied upon *Thunderbird Motel Corp. v. County of Hennepin*, 289 Minn. 239, 183 N.W.2d 569 (1971) and *Husby-Thompson Co. v. County of Freeborn*, 435 N.W.2d 814 (Minn. 1989). See also *Bloomington Hotel Investors v. County of Hennepin*, No. TC-8428 at *3 (Minn. Tax Ct. Oct. 25, 1990) (noting that Minn. R. Civ. P. 60 provides the tax court with authority to reinstate a tax petition on an equitable basis).

In *Thunderbird*, the petitioner failed to pay the second-half taxes due because of a misunderstanding between the taxpayer and its mortgagee. 289 Minn. at 240, 183 N.W.2d at 570. The petitioner’s case was automatically dismissed pursuant section

278.03. *Id.* at 239, 183 N.W.2d at 570. Less than two months later, the petitioner paid the taxes due and the penalty assessed. *Id.* at 240, 183 N.W.2d at 570. This court held that the district court properly invoked Rule 60.02 to reverse the dismissal and reinstate the tax petition. *Id.* In particular, the court distinguished *Thunderbird* from *Land O' Lakes Dairy Co. v. County of Douglas*, 225 Minn. 535, 31 N.W.2d 474 (1948). In *Land O' Lakes*, the taxpayer neither paid the taxes due nor intended to. *Id.* Here, as in *Thunderbird*, relator has a legitimate reason for its failure to pay the assessed taxes. When a taxpayer has an excuse for failure to pay taxes due that satisfies Rule 60.02, the petition should be reinstated as it was in *Thunderbird*.

In *Husby-Thompson*, the taxpayer missed the second-half tax payment because of confusion in responsibility following a conveyance of the taxed property. 435 N.W.2d at 815. The tax petition was automatically dismissed and the tax court denied reinstatement. *Id.* This court explicitly disagreed with the tax court's logic, determining that excusable fault is grounds for vacating a dismissal by application of Rule 60.02. *Id.* This court went on to reverse the tax court's order because of the tax court's "misconception of the scope of its discretion." *Id.* at 816. Here, the tax court has committed an identical misconception of its discretion by completely excluding Rule 60 as a vehicle for reinstatement of automatically dismissed petitions even when a taxpayer has shown reasonable excusable fault.

The tax court itself has declared that the statutory automatic reinstatement provisions "did not negate [the court's] authority to provide relief under Rule 60.02." *Bloomington Hotel Investors v. County of Hennepin*, No. TC-8428 at *5 (Minn. Tax Ct.

Oct. 25, 1990). In *Bloomington Hotel Investors*, a taxpayer failed to pay the taxes due until one year and 40 days after its petition was automatically dismissed. *Id.* at *3. The court reinstated the petition upon finding the petitioner had satisfied the criteria for relief under Rule 60. *Id.* at *7–8.

In light of the existing supreme court caselaw permitting reinstatement of tax petitions pursuant to Rule 60, the tax court’s total exclusion of the Rule 60 remedy based on its assertion that there have been no published cases applying Rule 60 since the tax court’s own *Compass Management* is a misconception of the law.

B. THE TAX COURT ERRED IN CONCLUDING THAT MARLOW TIMBERLAND
FAILED TO QUALIFY FOR RELIEF UNDER RULE 60.02.

Additionally, the tax court erred in concluding that none of the reasons for relief under Rule 60.02 apply to Marlow Timberland’s case.

Minnesota Rule of Civil Procedure 60.02 applies to relief from a final judgment, other than a divorce decree, order, or proceeding. Minn. R. Civ. P. 60.02 (2010). In the context of property tax challenges, relief is permitted under Rule 60.02 where the failure to make the required tax payment was caused by mistake, inadvertence, surprise or excusable neglect or “any other reason justifying relief from the operation of the judgment.” *Id.*; *Kosloski v. Jones*, 295 Minn. 177, 179, 203 N.W.2d 401, 402–3 (1973).

In furtherance of justice, and in pursuant of the liberal policy conducive to the trial of causes on their merits, relief from a default judgment is appropriate when four criteria are met. *Kosloski v. Jones*, 295 Minn. 177, 179–80, 203 N.W.2d 401, 403 (1973). This court established that a party is given relief from default judgment when: (1) it has a

reasonable claim on the merits; (2) it has a reasonable excuse for failing to act timely; (3) the taxpayer acted with due diligence after notice of dismissal; and (4) there is no showing of substantial prejudice to the other party. *Id.*

1. RELATOR HAS A REASONABLE CLAIM ON THE MERITS THAT IT WILL PREVAIL ON THE ISSUE OF UNFAIR ASSESSMENT OF ITS PROPERTIES.

First, Marlow Timberland has a reasonable claim on the merits that it will prevail on its petition for unfair assessment of property tax values. If a taxpayer has a reasonable claim on the merits that its petition was unfairly assessed, reinstatement is permissible. *Bloomington Hotel Invs.*, No. TC-8428, 1990 Minn. Tax LEXIS 209, at *3 (Minn. Tax Ct. Oct. 25, 1990) (citing *Kosloski*, 203 N.W.2d at 403).

The value of the property is clearly best measured by the arm's-length transaction with Potlatch Corporation. The fact of the matter is Marlow Timberland purchased the properties at issue for an average price of \$385 per acre. (Marlow Affidavit at ¶ 4.) Statute and case law clearly establish how property should be valued. Minn. Stat. § 273.11 (2010) provides that property should be valued at its market value. This court has stated,

There are three basic approaches to determining the value of real estate: (1) the market comparison approach, which is based on prices paid in actual market transactions involving comparable properties; (2) the cost approach, which is founded on the proposition that an informed buyer would pay no more for the property than the cost of constructing new property having the same utility as the subject property; and (3) the income approach, which is predicated on the capitalization of the income the property is expected to generate. We have said that “[w]henver possible, appraisers should apply at least two approaches to market value because

the alternative value indications derived can serve as useful checks on each other.”

S. Minn. Beet Sugar Coop v. County of Renville, 737 N.W.2d 545, 555 (Minn. 2007) (citing *Equitable Life Assurance Soc’y v. County of Ramsey*, 530 N.W.2d 544, 552 (Minn. 1995)). Marlow Timberland participated in an actual-market, arms-length transaction to purchase the properties at issue. The price paid per acre averaged \$385. (Marlow Affidavit at ¶¶ 3–4.)

However, Lake County’s average assessment per parcel is significantly in excess of the arms-length purchase price Marlow Timberland paid for the property. (Marlow Affidavit at ¶¶ 4, 10.) Despite the overall reduction in the price of real estate, the abject failure of the timber industry during this recession, and without regard to the actual price paid for the properties, the county’s valuation remains in excess of \$1,000 per acre. This valuation cannot be based on any of the aforementioned acceptable methods of valuation, and the county has made no explanation for the continued, inflated figure.

The assessed valuation is also much higher than Mr. Perrella’s independent appraisal which addressed the overall values of the parcels. Greg Perrella’s appraisal determined that the value these properties averaged \$744 per acre. (Appraisal p. 3.) Perrella later stated that figure would be discounted in the marketplace today due to the abject failure of the timber industry in this recent recession. (Perrella Affidavit at ¶ 6.) Perrella calculated that a reasonable value for the purposes of Lake County’s assessment would be 80-90% of the determined average value of per acre – between \$595 and \$670 per acre, based on the pre-recession figure of \$744 per acre. (Perrella Affidavit at ¶ 7.)

Additionally, while Minn. Stat. § 273.11 requires each property to be assessed by itself, given the quantity of parcels of land owned by Marlow Timberland in Lake County, the market value of the properties should take into consideration the price that would be expected if Marlow Timberland placed all its properties on the market. (Perrella Affidavit at ¶ 8.) This flood of parcels would drive the price well below the plausible \$595 to \$670 per acre assessed value calculated by Mr. Perrella. This is not in contradiction to the valuation statute, which only prohibits valuations “in the aggregate with *all the property in the town or district*”. Minn. Stat. § 273.11, subd. 1 (emphasis added).

Marlow Timberland has been able to bring the assessment rate of its properties in line with realistic market values in neighboring St. Louis County. (Marlow Affidavit at ¶¶ 8–9.) While negotiating a final agreement, the Assistant St. Louis County Attorney noted that “out of the 53 parcels we are dealing with, all but five parcel[‘s assessment values] were reduced significantly.” (Attachment to Marlow Affidavit.) St. Louis County acknowledged its efforts to “get the right numbers,” which resulted in a total net reduction in valuation for one year of over eight hundred thousand dollars. (*Id.*) This massive reduction was derived from Marlow Timberland’s total land holdings in St. Louis County – which are only one-tenth the size of its holdings in respondent Lake County.

St. Louis County acreage tends to be of higher value than Lake County property due to better accessibility and proximity to population centers. The value of Marlow Timberland’s St. Louis County holdings was adjusted to about \$250 to \$700 per acre.

(Marlow Affidavit at ¶ 9.) In comparison then, Lake County's \$1,000 per acre assessment is clearly inflated beyond a reasonable range. On the other hand, Marlow Timberland's asserted average value and purchase price of \$385 per acre for its Lake County holdings is right is supportable by the facts of this case.

The county's argument that the property should be valued at over \$1,000 per parcel is unsustainable. It is unreasonable and unfair in the context of: (1) the purchase price paid; (2) the current state of the economy (specifically, the absence of a viable market for the resources located on these properties, the dearth of raw land sales and the difficulty in obtaining financing); and (3) the reasonable assessed property values for raw land in the Northeast region of the state.

Based on the sale price of the properties, an independent appraisal and similar assessments in the region, Marlow Timberland has clearly shown it will prevail on the merits of these petitions. Therefore relator has satisfied the first provision of the *Kosloski* standard for reinstatement.

2. RELATOR HAS A REASONABLE EXCUSE TO NOT HAVE ACTED IN A TIMELY MANNER BECAUSE OF DIRE FINANCIAL HARDSHIP AND LACK OF STATUTORY RECOURSE.

Second, Marlow Timberland could not act in a timely manner to satisfy the statutory reinstatement requirements of Minn. Stat. § 278.03. Marlow Timberland was without resources to pay the taxes due. (Marlow Affidavit at ¶ 5.) Therefore it could not obtain reinstatement of the petitions by remitting the taxes due as assessed.

Roy Marlow, the sole owner of Marlow Timberland, made the unrebutted assertion that Marlow Timberland faced serious financial hardship which prevented it

from paying the assessed taxes. This declaration was summarily ignored by the tax court, who stated that relator “has not demonstrated that payment of the tax while the case is pending would work a ‘hardship.’”

The tax court’s failure to make any findings or offer any basis for its terse conclusion is not supported by the record and requires a remand for a thorough review of the evidence. *See S. Minn. Beet Sugar Coop v. County of Renville*, 737 N.W.2d 545, 556 (Minn. 2007) (concluding that the tax court’s failure to make findings or conclusions on a key question before the court violated the tax court’s duty to use independent judgment in evaluating all evidence and remanding with instructions to consider all proper evidence). Here, the tax court offers no support for its conclusion that relator failed to show hardship. Such an unsupported conclusion in direct contradiction to relator’s unchallenged affidavit violates the tax court’s duty to make an independent assessment of the evidence.

Marlow Timberland did demonstrate that payment of the levied tax during the pendency of the case would work a hardship. Relator’s Memorandum of Law described how Marlow Timberland purchased the properties with the intent to pay property taxes through sales of property and timber, as the properties were primed for timber harvesting and sales. However, the recent recession has caused the costs of timber harvesting to skyrocket while the value of timber fiber has dwindled. (Marlow Affidavit at ¶¶ 4–5, Perrella Affidavit at ¶ 9.) The economic impact of these effects of the recession precluded Marlow Timberland from securing funds with which to pay the levied taxes, creating a substantial hardship. (Marlow Affidavit at ¶ 5.)

Marlow Timberland has also encountered a lack of availability of borrowable funds for these 39,000 acres of raw land. (*Id.*) This is another unanticipated consequence of the recent recession, and has prevented relator from being able to borrow funds to carry it through this economic slump. (*Id.*)

Finally, the excessive tax valuation itself has worked a hardship on relator. While comparable Lake County properties are assessed at 80% to 90% of their market value, Marlow Timberland's properties are assessed at as much as 300% of their market values. (Perrella Affidavit at ¶ 8.) A property listed for sale with a tax valuation at 300% of the property value when comparable properties have a tax burden over two-thirds lower does not promote buyer interest. This increases the hardship on Marlow Timberland by frustrating its ability to sell property to generate funds to pay the property taxes. (Marlow Affidavit at ¶ 5.) Marlow Timberland has clearly demonstrated that payment of the assessed taxes would be a hardship for the taxpayer.

Marlow Timberland's financial hardship, in combination with the absence of a statutory solution, constitutes a reasonable excuse for its failure to act in a timely manner. Marlow Timberland could not satisfy the rules which would permit it to obtain reinstatement without payment, as discussed further in section IV, below. Marlow Timberland was without recourse to act in a timely manner prior to the dismissal of the petitions. It was not until the petitions were dismissed that relator's equitable argument ripened.

Prior to dismissal, relator was pursuing its petitions to the best of its ability. However, the dismissal deadline arrived and passed before a final hearing on the

valuation could take place. Additionally, Marlow Timberland and respondent were in ongoing negotiations and discussions in an attempt to resolve this matter without continuing the litigation. (Marlow Affidavit at ¶ 11.) This is another reasonable excuse not to have acted in a timely manner.

Marlow Timberland had multiple legitimate reasons for failing to prevent the dismissal of the petitions. Therefore, this second element of the *Kosloski* test is satisfied.

3. RELATOR ACTED WITH DUE DILIGENCE AFTER NOTICE OF DISMISSAL AS IT CONTINUED TO TRY TO OBTAIN ADDITIONAL FINANCES, NEGOTIATE FOR A REASONABLE TAX AMOUNT AND PURSUE AN EQUITABLE SOLUTION.

Third, where, as here, the taxpayer acts with due diligence after the notice of dismissal, reinstatement of its petitions is permissible. *Bloomington Hotel Invs.*, No. TC-8428, at *3 (Minn. Tax Ct. Oct. 25, 1990) (citing *Kosloski*, 203 N.W.2d at 403). This court stated that its discretion to reinstate tax petitions will be construed liberally when there are situations where relief from dismissal is appropriate. *Husby-Thompson Co. v. County of Freeborn*, 435 N.W.2d 814, 815 (Minn. 1989). Although Marlow Timberland was unable to pay the taxes due at the time of dismissal, it has continued to pursue revenue streams to satisfy those obligations. (Marlow Affidavit at ¶¶ 4-5.)

Not only is Marlow Timberland moving toward obtaining the financial resources needed to satisfy the payment of taxes due but Marlow Timberland and respondent were in serious settlement discussions regarding the assessment value of the properties. (Marlow Affidavit at ¶ 11.)

Additionally, Marlow Timberland filed a motion to reinstate the petitions. (Petitioner's Motion for Reinstatement.) Because of the unique nature of this situation, this act, bringing the question of the automatic dismissal before the courts, is further evidence of relator's due diligence. Marlow Timberland is unable to pay the taxes due, yet cannot meet the statutory standard for reinstatement which requires full payment or evidence of valuation at less than 50% of existing levels. *See* Minn. Stat. § 278.03.

This failure of remedy can only be cured by an equitable action of this court. Therefore, Marlow Timberland's pursuit of reinstatement is further evidence that it took the steps which it was able to in order to pursue this property tax valuation challenge. Given the reality of the situation and Marlow Timberland's limitations, it is apparent Marlow Timberland acted with due diligence after notice of dismissal to the best of its abilities under the circumstances. Therefore, Marlow Timberland has satisfied the third requirement of the *Kosloski* test.

4. RESPONDENT WILL NOT SUFFER ANY SUBSTANTIAL PREJUDICE AS A RESULT OF REINSTATEMENT OF RELATOR'S TAX PETITIONS.

Fourth, there is no substantial prejudice to respondent upon reinstatement of the tax petitions. Respondent has not even asserted it would suffer any prejudice as a result of reinstatement of the tax petitions. Should the petitions be reinstated and the court establish a fair valuation of the property, respondent actually stands to benefit because Marlow Timberland is in a much better financial situation to pay a reasonable valuation than it has been to pay the levied assessment. Additionally, should Marlow Timberland fail to bring the property taxes current, the county stands to gain an enormous amount of

property under the statutory tax forfeitures provisions in Minn. Stat. chapters 279–281. And any land sales Marlow Timberland is able to complete in the meantime will require payment of outstanding taxes before a deed can be recorded. Thus, the county will not suffer any substantial prejudice as a result of reinstatement of the tax petitions.

As Marlow Timberland has met all the criteria under the *Kosloski* rubric for relief from automatic dismissal, this court should reverse the tax court’s dismissal of the 2009 and 2010 tax petitions and permit relator to continue prosecution of these petitions without payment.

5. RELATOR IS ENTITLED TO REINSTATEMENT OF ITS TAX PETITIONS OF 2009 AND 2010 BECAUSE OF EXCUSABLE NEGLIGENCE.

In addition to having met the *Kosloski* criteria to overcome the automatic dismissal in the interests of justice, Marlow Timberland’s failure to pay property taxes constitutes reasonable and excusable neglect per the express language in Rule 60.02(a). In *Thunderbird Motel Corporation v. County of Hennepin*, this court held that property tax petitions may be reinstated if the requirements of Rule 60.02 are met, and in particular, upon a finding that reason for non-payment was due to “mistake, inadvertence, surprise, or excusable neglect.” 289 Minn. 239, 240, 183 N.W.2d 569, 570 (1971).

Financial hardship, in combination with an absence of relief under the reinstatement statute, constitutes excusable neglect. Normally, a taxpayer suffering financial hardship could apply to the court for permission to proceed with their tax petition without paying the taxes due, per section 278.03. However, in order to obtain the court’s permission to proceed without paying the taxes due, the petitioner must meet the

statutory guidelines. Here, as discussed in detail in section IV below, Marlow Timberland is patently unable to meet those guidelines. Yet Marlow Timberland suffers from the same financial hardship which is a basis for reinstatement of a petition under normal circumstances. Given the unique circumstances of this case, Marlow Timberland's financial hardship and inability to meet the requirements for statutory reinstatement constitutes excusable neglect.

6. RELATOR IS ENTITLED TO REINSTATEMENT OF ITS TAX PETITIONS OF 2009 AND 2010 FOR EQUITABLE REASONS.

Finally, Rule 60.02 permits reinstatement of a dismissed action for "any other reason justifying relief from the operation of the judgment." Here, as explained in depth below, Marlow Timberland has suffered an inequitable dismissal of its tax petitions because of the sheer volume of property it owns. Therefore, the decision of the tax court dismissing relator's 2009 and 2010 petitions should be reversed, and the petitions reinstated under Rule 60.02(f).

IV. THE TAX COURT ERRED IN FAILING TO REINSTATE THE 2009 AND 2010 PETITIONS ON AN EQUITABLE BASIS.

The tax court also erred in refusing to reinstate relator's 2009 and 2010 petitions on an equitable basis. Minnesota Statute provides a single remedy for challenging property valuations. A petition is filed requesting a change in valuation. However, if that petition proceeding has not been completed prior to the May 16 deadline, the petitioner is required to (a) pay 50% of the full tax (and the other 50% if the petition is not resolved by the October 16 deadline) or (b) obtain permission to continue prosecution without payment. Minn. Stat. § 278.03. To obtain permission to continue the prosecution of a

petition, the taxpayer must show that the petition is (1) taken in good faith, (2) there is probable cause to believe the property may be held exempt from the tax or that the tax may be determined to be less than 50 percent of the amount levied, and (3) it would work a hardship on the taxpayer to pay the taxes due. *Id.*

There is no statutory remedy for a taxpayer who cannot pay the full tax levied but also cannot establish probable cause that the tax may be determined to be less than 50 percent of the amount levied. For example, if the tax levied on a property is \$10,000, and it would work a hardship on the owner to pay that amount, to continue the prosecution of her petition the owner must establish probable cause that the amount levied should actually be less than \$5,000. However, if the amount levied should actually be \$5,500, there is no remedy available for the property owner under the statute without paying the full \$10,000 during the pendency of the petition, despite an assessment 45% above the proper value.

When no adequate statutory remedy is available to a taxpayer, the taxpayer may pursue common law or equitable remedies. *Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517, 522 (Minn. 2001) (discussing the availability of equitable remedies in the absence of a statutory mechanism for relief). This court has held that “a taxpayer may not maintain a suit in equity to enjoin the collection of a tax or an assessment when he has an adequate remedy at law available to contest the proceeding or the collection of the tax or the assessment.” *Adelman v. Onischuk*, 271 Minn. 216, 228, 135 N.W.2d 670, 678 (1965). “Equitable relief is granted only upon a showing of the inadequacy of any legal

remedy.” *Zimmerman v. Lasky*, 374 N.W.2d 212, 214 (Minn. App. 1985), review denied (Minn. Nov. 26, 1985).

Put in context, this case falls within just such a statutory donut hole. While Marlow Timberland brought an appropriate challenge under section 271.01, it hit a procedural dead end when its petitions were unresolved by the property tax payment date. While section 278.03 provides a remedy for many cases at that point, that remedy was unavailable to Marlow Timberland because of its unique situation.

Marlow Timberland owns 39,000 acres of land in Lake County. The taxes levied against Marlow Timberland were based on a total land valuation of over \$39,000,000.00, or approximately \$1,000 per acre. (Marlow Affidavit at ¶ 10.) Marlow Timberland has made a good faith challenge to that valuation. It would work a significant hardship on Marlow Timberland to pay the taxes levied. (Marlow Affidavit at ¶ 5.) However, Marlow Timberland could not show probable cause that the tax value of the property may be determined to be less than \$19,500,000 (50% less than the assessment). Because Marlow Timberland could not show probable cause to meet the requirements of section 278.03, it was prohibited from pursuing its petitions without full payment of the levied taxes in the absence of an equitable remedy.

Marlow Timberland was financially unable to make full payment of the taxes as levied. Credible tax value estimates fall in the range of \$15,015,000, about 39% of the current assessment (based on the market value of \$385), to \$26,130,000, about 67% of the current assessment (based on the highest independent appraisal assessment value). (Perrella Affidavit at ¶¶ 7, 9.) This is a valuation difference of 13 to 24 million dollars

less than the present assessment. At an effective property tax rate of 1%, that requires Marlow Timberland to come up with several hundred thousand dollars per year *over and above* what the tax should be in order to pursue its petitions. So, in order to challenge the valuation of its property, Marlow Timberland would need to pay the legitimate property taxes *due plus an additional \$130,000 to \$240,000*. This is a prohibitive figure, particularly in the cumulative, and it prevents Marlow Timberland from being able to prosecute a tax petition without the court providing equitable relief.

Given the circumstances of the case, there is no adequate remedy available for relator to challenge the property valuations when the valuations are inflated by significant amounts yet do not necessarily meet the 50% threshold required by statute. An equitable remedy is essential to permit a landowner to challenge property tax valuations that are unfairly inflated, burdensome and unreasonable yet not inflated by more than 100%. As discussed above, that equitable remedy is found in Minn. R. Civ. P. 60.02. As relator has satisfied the requirements of Rule 60.02, we respectfully request this court grant the relief requested.

CONCLUSION

This is a unique case which identifies a major hole in Chapter 278 and justifies equitable relief. It relates to the specific circumstances of the crash in market values and timber sales as a result of the recession yet is supported by prior case law. Given the financial impossibility of satisfying statutory remedies, relator respectfully requests this court take a big-picture view of this case in light of all the relevant facts and law. The big picture here clearly favors granting relator a hearing on the merits of its tax

petitions which will operate to protect relator's basic property rights and its livelihood and lead to fairness in treatment by the government.

As relator has shown hardship which entitles it to an equitable remedy, and as relator has satisfied the requirements of Minn. R. Civ. P. 60.02, we respectfully request the court REVERSE the tax court's dismissal of the 2008 petition, REVERSE the tax court's denial of relator's request for reinstatement of the 2009 and 2010 petitions and REMAND these petitions to the tax court for a full hearing on the merits of the valuation challenges.

Dated: February 23, 2011.

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STATE OF MINNESOTA
IN SUPREME COURT

Marlow Timberland, LLC,

Relator,

CERTIFICATION OF BRIEF LENGTH

vs.

County of Lake,

Respondent.

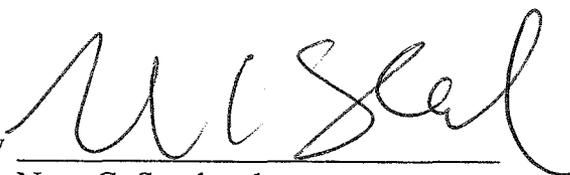
**APPELLATE COURT CASE NUMBER:
A11-0138**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 6,911 words. This brief was prepared using Microsoft Word 2003.

Dated: February 23, 2011.

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