

No. A11-0138

STATE OF MINNESOTA

IN SUPREME COURT

Marlow Timberland, LLC,

Relator,

vs.

County of Lake,

Respondent.

RELATOR'S REPLY BRIEF

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ARGUMENT

Respondent relies upon the tax court's reasoning to oppose Marlow Timberland's request to continue its 2008 petition and reinstate its 2009 and 2010 petitions. However, that reasoning is limited in scope and fails to acknowledge the inaccessibility of statutory remedies or consider alternative viable, equitable solutions to reach the merits of this property tax assessment issue.

I. Relator's 2008 petition should be reinstated because relator's request to amend the petition was sufficient to bring it into compliance with the statutory "one township" requirement.

Respondent sought the dismissal of the 2008 petition based on Marlow Timberland's inclusion of multiple parcels from more than one township, which was a violation of Minn. Stat. § 278.02. Marlow Timberland requested the tax court permit it to proceed with the 2008 petition solely for the properties in Stony River Township.

(AD009.)¹ Had the petition originally been filed only on these properties, it would have been in compliance with the statute. The tax court dismissed the petition, stating that, "[w]hile Petitioner requests that it be allowed to proceed with respect to one of the townships included in the 2008 Petition – namely, the several parcels included in Stony River Township – it cites no authority supporting its position" that it should be permitted to amend the petition to satisfy the "one township" restriction of Minn. Stat. § 278.02.

Although respondent asserts that Marlow Timberland failed to actually make such a request, this is clearly contradicted by the record. The transcript from the October 12, 2010, hearing includes the words of then-Lake County Attorney Russ Conrow, who

noted, “[n]ow, [Marlow Timberland’s counsel] brings up a novel argument that ‘Well, don’t dismiss the whole petition. Just dismiss – let us save one jurisdiction.’” (A168.) Subsequent to the hearing, Marlow Timberland’s responsive memo, dated October 25, 2010, states, “[p]etitioner has requested that the Court allow it to proceed to hearing with respect to one of the townships included in that petition – namely, the several parcels included in Stony River Township.” (A155.) Additionally, Marlow Timberland’s proposed order, submitted to the tax court as an attachment to the aforementioned responsive memo, included the proposal that the 2008 petition continue with respect to the Stony River Parcels. (A158.) Finally, as noted above, the tax court’s order clearly indicated Marlow Timberland made such a request. (AD009.) Thus, it is apparent that Marlow Timberland repeatedly communicated to the tax court a request to limit the 2008 petition to a single township.

Next, respondent asserts that, because it did not file a formal written motion to amend its petition, Marlow Timberland is prohibited from requesting permission to amend the 2008 petition to bring it into compliance with the statutory “one township” filing requirement. Respondent’s strict interpretation of tax court motion procedure and Minn. R. Civ. P. 15.01 is unfounded. Granted, in most published cases dealing with amendments to tax petitions, such amendments originated in formal motions. *See Poss, Inc. v. County of Washington*, No. CV-09-2808 (Minn. Tax Ct. Nov. 22, 2010) (granting motion to amend to add a classification challenge); *Am. Crystal Sugar Co. v. County of*

¹ “AD” reference’s relator’s Addendum, “A” references relator’s Appendix, and “APP” reference’s respondent’s Appendix.

Polk, No. C1-05-574 et. al. (Minn. Tax Ct. Nov. 28, 2007) (granting a motion for leave to amend to add claims). Respondent relies upon an earlier American Crystal Sugar case, in which the court denied petitioner's motion to amend to comply with the one township rule. *Am. Crystal Sugar v. County of Polk*, Nos. C5-03-1769 et. al. (Minn. Tax Ct. Dec. 2, 2004). However, the taxpayer in that case apparently sought to comply with the one township rule by including additional parcels or possibly additional petitions. *Id.* at *4. Here, Marlow Timberland seeks the exact opposite – to eliminate all but a few parcels to bring the petition in compliance with § 278.02.

Respondent cites no law or rule for its absolutist argument that an amendment to a tax petition *must* be forwarded in a formal motion. Instead of a formal motion, a request for leave of the court to amend or a notice to voluntarily dismiss is procedurally sufficient. Minn. R. Civ. P. 15.01 states that “a party may amend a pleading only by leave of court or by written consent of the adverse party.” No formal requirement for a motion exists in the rule. Here, Marlow Timberland requested leave of the court to amend its petition. Leave to amend is to be freely given when justice so requires. *Id.* Further, Marlow Timberland's requested amendment is nothing more than a partial voluntary dismissal of a substantial portion of its petition. Voluntary dismissal is governed by Minn. R. Civ. P. 41.01. Again, voluntary dismissal does not explicitly require a formal motion – the language of the rule refers to “plaintiff's insistence”. *Id.*

In addition, as respondent notes, a court's consideration of a request to amend the petition depends upon the stage of the action. Here, Marlow Timberland made the request to modify its petition in the course of other motion practice. (A162.) No trial date had

been set on the matter, and this was clearly a preliminary stage of the proceedings. It was an appropriate time to forward such a request and therefore the tax court should have permitted the amendment.

Since Marlow Timberland discussed this modification with respondent ahead of the hearing, the modification clearly advantages respondent by reducing the number of parcels at issue, and the amendment was posited well before a trial on the matter was to be scheduled, it was clearly in the interests of justice to permit Marlow Timberland to shrink its 2008 petition down to one township. Because the tax court denied this request without justification, this denial of Marlow Timberland's request to amend was an abuse of discretion and should be reversed. At a minimum, the court should remand to permit relator to file a formal motion and be heard on this partial dismissal issue.

II. The 2009 and 2010 petitions should be reinstated because the Chapter 278 remedy is unavailable and relator has satisfied the requirements for equitable relief under Minn. R. Civ. P. 60.02.

Respondent asserts that Chapter 278 is the exclusive remedy to challenge a real property assessment, and Marlow Timberland was required to either pay the full assessment or pay a lesser amount by satisfying § 278.03 in order to maintain the prosecution of its petitions. However, respondent fails to acknowledge that the remedy of § 278.03 was unavailable to Marlow Timberland under the facts here and that the lack of relief in such a situation calls for an equitable remedy.

A. WHEN CHAPTER 278 DOES NOT PROVIDE A REMEDY, IT CANNOT BE THE EXCLUSIVE REMEDY FOR TAX PETITIONS.

Minnesota law is clear that when statutory remedies are available to provide relief, they are, if applicable, a taxpayer's exclusive remedies. *Programmed Land Inc. v. O'Connor*, 633 N.W.2d 517, 522 (Minn. 2001) (stating that when statutory mechanisms for relief exist, equitable remedies are unavailable). The issue here is whether Chapter 278 provides an available remedy to Marlow Timberland.

The tax court has expressly recognized that some petitioners do not qualify to utilize the relief provided in Minn. Stat. § 278.03. In *Minn. Timberwolves Basketball Ltd. Part. v. County of Hennepin*, Hennepin County argued that the taxpayer, instead of paying the excess tax amount incorrectly assessed and demanding a refund, should have followed the provisions of § 278.03 and paid only 50% of the assessment. No. TC-26856 (Minn. Tax Ct. Mar. 11, 1999). But the court rejected the county's argument, agreeing with the taxpayer's assertion that "it is not entitled to use the Hardship Provision as a matter of right" and noting that the taxpayer did not qualify for the Hardship Provision. *Id.* The court granted the taxpayer its requested relief. *Id.*

While *Minnesota Timberwolves* addressed personal property, rather than real property, it is clearly applicable here given the tax court's recognition that the statutory relief provision – which provides a mechanism for taxpayers to challenge assessments without paying the full assessed amount – *does not always fit*. There are taxpayers, such as the Timberwolves and Marlow Timberland, who do not qualify for the hardship provisions of 278.03. This circumstance – the inability to qualify for relief under the statutory hardship provision – is what makes the situation Marlow Timberland presents to this court unique.

Under respondent's logic, if § 278.03 is unavailable, a taxpayer may pursue its petition only if it pays the full assessment amount. However, this is illogical. In § 278.03, the legislature created an outlet for taxpayers with meritorious petitions to prosecute those petitions without having to pay the entire inflated tax amount. *See Husby-Thompson Co. v. County of Freeborn*, 435 N.W.2d 814, 815 (Minn. 1989) (stating that, "it is also clear that the legislature, by providing for a waiver, has recognized there may be situations where relief from dismissal is appropriate"). This intention to provide taxpayers a means to pursue their actions without incurring financial hardship is undeniable. Here, where that § 278.03 outlet is unavailable, another remedy must be permitted.

Because § 278.03 does not provide relief in every case, equitable remedies must be available when § 278.03 is unavailable. While respondent cites *Programmed Land* for the statement that Chapter 278 is *the exclusive* remedy to challenge an assessment, this is an incomplete reading of the case.² *Programmed Land* instead provides that that when statutory mechanisms for relief exist, equitable remedies are unavailable, *but when statutory mechanisms are nonexistent or insufficient constitutionally, equitable remedies are available*. 633 N.W.2d 517, 522 (Minn. 2001). The tax court erred in determining that Chapter 278 was the exclusive remedy in this case because it failed to acknowledge the remedy of Chapter 278 is unavailable to this taxpayer. Where the statutory remedy is

² Respondent also relies upon *Elam* for this argument. *State v. Elam*, 250 Minn. 274, 84 N.W.2d 227 (1957). However, *Elam* is distinguishable from the present case in significant ways. First, the taxpayer, Ms. Elam, did not file a challenge to her assessment, but simply asserted an unfair assessment defense in her answer to the county's delinquent tax list. Ms. Elam also did not claim the assessed tax was a hardship or that she was unable to pay it. Additionally, this 1957 case preceded the developments in statutory and case law surrounding Chapter 278 which are the basis for Marlow Timberland's argument herein.

unavailable, an equitable remedy must be available. Here, that equitable remedy exists in Minn. R. Civ. P. 60.02.

B. MARLOW TIMBERLAND ESTABLISHED ITS RIGHT TO RELIEF UNDER MINN. R. CIV. P. 60.02.

Minnesota Rule of Civil Procedure 60.02 provides relief where the failure to make the required tax payments 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). Here Marlow Timberland claims its failure to make the tax payments due was caused by excusable neglect, based on the financial hardship of the company. Alternatively, Marlow Timberland asserts that its unique situation – a combination of financial hardship and lack of remedy under Chapter 278 – constitutes “any other reason justifying relief” pursuant to 60.02(f).

Relief is appropriate when four criteria are met: (1) the taxpayer has a reasonable claim on the merits, (2) the taxpayer has a reasonable excuse for failing to act in a timely manner, (3) the taxpayer acted with due diligence after notice of dismissal, and (4) there is no showing of substantial prejudice to the county. *Kosloski* at 179, 203 N.W.2d at 403. A court should allow Rule 60 relief “in furtherance of justice[] and pursuant to a liberal policy conducive to the trial of causes on their merits.” *Id.* These four criteria are clearly present here.

1. MARLOW TIMBERLAND HAS ESTABLISHED A REASONABLE CLAIM ON THE MERITS.

This claim revolves around the proper market value of the parcels at issue. While Marlow Timberland has posited several possible methods by which to establish the actual market value of the parcels, respondent objects to what it terms the “bulk discount” theory. The county does not explain how it reaches its value for the purposes of assessment, other than to note that the assessor is to consider the property in comparison to adjacent parcels and the location of the property.

However, this court has defined the basic approaches to establishing the actual market value of a property for the purposes of assessment. An assessor may employ the market approach, the cost approach, or the income approach. *S. Minn. Beet Sugar Coop v. County of Renville*, 737 N.W.2d 545, 555 (Minn. 2007).

Marlow Timberland has provided evidence that the arms-length purchase price it paid for the properties is significantly less than the assessment amounts. (A097.) This information supports a market comparison approach valuation well under the current assessments. Marlow Timberland has also provided an independent appraisal of the properties. (A109.) That appraisal takes into account both the market comparison approach and the income approach. (A109–111.)

While respondent focuses on Marlow Timberland’s resale of certain parcels for the price of \$2,500 per acre, this reliance is entirely misplaced. Roy Marlow’s affidavit expressly states that the few sales of parcels at \$2,500 per acre were conveyances of prime portions of acreage “not in dispute.” (A097.) Thus, the property sales which Marlow Timberland has achieved have been of properties not contained in the tax petitions and not at issue before this court. Marlow Timberland acknowledges that there

are a few select parcels with values above the valuation assessment, and that these parcels have not been included in this tax protest.

On average, the value of Marlow Timberland's 38,000 acres is substantially less than the existing valuation set by the county assessor. Marlow Timberland has supplied rational evidence of an average actual market value for the properties between \$380 and 744 per acre. (A097, A110.) This actual market value of 38-74% of the current assessment value is clearly a basis for a reasonable claim on the merits.

2. MARLOW TIMBERLAND'S EXCUSE FOR FAILING TO COMPLY WITH CHAPTER 278 IS REASONABLE.

Respondent asserts that Marlow Timberland does not have a reasonable excuse for its failure to comply with Chapter 278. However, respondent mischaracterizes Marlow Timberland's rationale under this prong of the *Kosloski* test. While respondent asserts that "the intentional failure to pay the taxes is not excusable neglect," this is a mischaracterization of the facts, too simplistic a conclusion and not supported by *Husby-Thompson*.

In *Husby-Thompson*, this court again took the tax court to task for its strict interpretation of the Rule 60 *Kosloski* test. 435 N.W.2d at 815. The court determined that, in cases where a genuine misunderstanding arises, such misunderstandings constitute excusable neglect. The court did not determine that no other set of facts might constitute excusable neglect, but simply noted that the discretion to vacate tax dismissal via Rule 60.02 "should be more circumscribed than for other civil actions." *Id.* at 816.

Here, Marlow Timberland's circumstances rise to that level of excusable neglect which indicates relief is appropriate under Rule 60. Marlow Timberland has a significant financial hardship that prevents it from being able to pay the taxes assessed. (A097.) This is a very different situation from that implied by the county, where a taxpayer has the ability to pay the tax but simply fails to do so.

While respondent asserts there is no authority for Marlow Timberland's position that extreme financial hardship equates to excusable neglect, there was similarly no authority equating genuine misunderstanding as to who is responsible for a tax payment with excusable neglect prior to the *Husby-Thompson* case. The *Kosloski* test does not provide relief only in the case of a set of facts which have been the basis for relief in prior cases. Instead, it is the duty of the examining tribunal to make an independent assessment of the facts supporting the excusable neglect assertion to see whether they meet the "more circumscribed" standard for Rule 60 relief.

Here, Marlow Timberland's position of economic hardship results from factors beyond its control. The real estate market crashed as a result of financial issues which related to the worldwide recession. (A111, A097.) This has harmed Marlow Timberland's ability to meet the assessed tax burden in several ways. First, Marlow Timberland has been unable to sell the amount of property necessary to raise the funds it counted on for financial stability. (A097.) Second, the current assessments, which fail to reflect the decline in the market, stand as a barrier to further sale of the parcels. Third, the decline in the fiber industry has made harvesting the property significantly less profitable than it was several years ago. *Id.* This lack of income from timber harvest and property sales has

led to further difficulty in obtaining financing which previously would have been available to aid Marlow Timberland in paying assessments. In sum, it is these factors, beyond the control of Marlow Timberland, which constitute the extraordinary grounds for excusable neglect which prohibited the company from being able to pay the taxes as assessed to keep its tax petitions alive.

In combination with the inability of Marlow Timberland to qualify for the relief usually available under § 278.03, this financial hardship bound Marlow Timberland's hands and prevented it from being able to pursue its meritorious claim through any method available under Chapter 278.

3. MARLOW TIMBERLAND ACTED WITH DUE DILIGENCE AFTER THE ENTRY OF THE JUDGMENT

Respondent first argues that Marlow Timberland has done nothing but perfect this appeal after the tax court judgment was entered. Respondent implies this act of filing an appeal is insufficient by itself to constitute due diligence.

However, given its position of financial hardship and the lack of statutory relief available under Chapter 278 as described above, relator had no alternative but to seek an appeal under Rule 60 or stand by as the county took its property by forfeiture. Marlow Timberland could take no other legal action to obtain relief except to seek appellate permission for the opportunity to pursue an equitable remedy.

Second, respondent argues that relator's earlier motions to reinstate the petitions were tardy. However, Marlow Timberland was engaged in negotiations with the county throughout this time in repeated attempts to settle this matter without the need for further

litigation. (A097.) Respondent also focuses on Marlow Timberland's failure to comply with the Chapter 278 requirements. Again, the county implies Marlow Timberland could not be entitled to relief unless it paid the assessed taxes in full or met the hardship exception in § 278.03. But as Roy Marlow's affidavit makes clear, Marlow Timberland was patently unable to pay the assessed taxes. Marlow Timberland has also established that it cannot satisfy the hardship exception. While respondent continues to bang the drum of Chapter 278, it fails to acknowledge the need for an equitable remedy when Chapter 278 fails.

4. LAKE COUNTY WOULD NOT BE PREJUDICED BY THE REINSTATEMENT OF THE TAX PETITIONS.

Respondent asserts that it is substantially prejudiced by the overdue taxes. However, this prejudice, presuming it exists, is not related to the *Kosloski* test of whether the county will be prejudiced if the court provides Marlow Timberland the opportunity to reinstate its petitions.³

Instead the court must consider whether granting Marlow Timberland the ability to have its petitions determined on the merits, rather than mechanically dismissed, would cause substantial prejudice to the county. As § 278.03 provides a mechanism for parties to continue their petitions without payment of any tax, the county's argument that it is substantially prejudiced by Marlow Timberland's non-payment during the pursuit of the petition is irrational. Additionally, as previously noted, the establishment of the correct value for the purposes of assessment will benefit the county by putting Marlow

Timberland in a better position to actually pay the taxes. And Marlow Timberland's ultimate tax debt to the county will continue to accrue interest while the case moves forward. Minn. Stat. § 272.08. Accordingly, when the petitions are determined on their merits, the county will not be prejudiced by the outcome. Therefore, Marlow Timberland should be permitted to proceed under the equitable remedy of Rule 60.02.

Marlow Timberland has established that it is reasonably likely to be successful on the merits of its petitions, its financial hardship is a reasonable excuse for its inability to utilize Chapter 278 remedies, it acted with due diligence following the tax court judgment in appealing the issue of its sole potential remedy, Rule 60.02, and the county will not be prejudiced by the reinstatement of these petitions and a hearing on the petitions' merits.

5. MARLOW TIMBERLAND IS ENTITLED TO RULE 60 EQUITABLE RELIEF BECAUSE NO OTHER RELIEF IS AVAILABLE.

Respondent argues Marlow Timberland is not entitled to relief under the Rule 60.02(f) remainder provision, which provides equitable relief when so required to avoid an unjust result. Respondent again focuses on Marlow Timberland's failure to comply Chapter 278 requirements. However, as has been shown again and again, Marlow Timberland was unable to comply with the Chapter 278 requirements and therefore the Chapter 278 remedy was inaccessible. This failure of remedy is the reason reinstatement of the petitions under Rule 60.02 is necessary to avoid an unjust result.

³ Respondent also references a lack of discovery which would cause it prejudice. However, this lack of discovery is a mutual circumstance, and gives Marlow Timberland no advantage over the county should the petitions be reinstated and set for a hearing in short order.

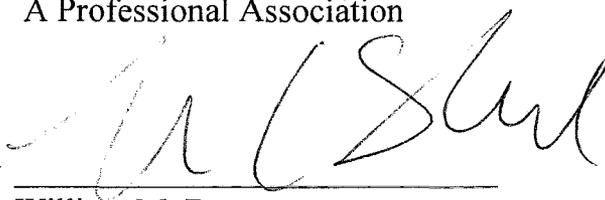
CONCLUSION

Relator has fallen through the cracks of Chapter 278 and cannot obtain relief from an unjustifiably excessive tax assessment outside of the equitable solution offered in Rule 60.02. Therefore, relator respectfully requests this 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. Any other result would deprive this taxpayer, whose ability to maintain its protest of an excessive assessment was lost as a result of an extraordinary worldwide recession, of its essential right to challenge such an unfair assessment.

Dated: April 4, 2011.

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CERTIFICATION OF BRIEF LENGTH

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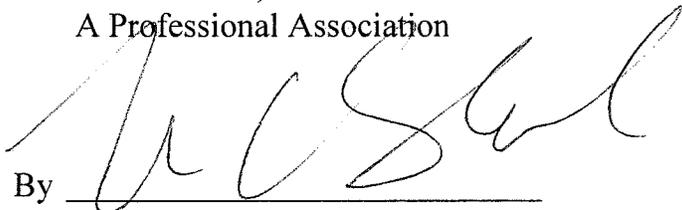
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**APPELLATE COURT CASE NUMBER:
A11-0138**

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 3,528 words. This brief was prepared using Microsoft Word 2003.

Dated: April 4, 2011.

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