

COPY

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

PRESTON GOODEN,
ASSESSOR OF BERKELEY COUNTY,

Appellant

IN RE:

TAX ASSESSMENT AGAINST THE PURPLE
TURTLE, LLC, JOSEPH ATKINS AND DANA
GRABINER, MARY A. MELNYK, LINDA A.
LLOYD, RYAN MCCARTHY AND ERICA B.
PATTHOFF, DAVID SPRINGER AND JUDITH
LEITNER SPRINGER, JOSEPH L. McNAMARA
AND DONNA B. McNAMARA, GWENDA A.
GLESMAN AND PAUL R. SCHRIBNER,
WILLIAM W. DONAHOE AND WENDY JONES
DONAHOE, KENNETH R. REITZIG
AND ELIZABETH D. REITZIG, TIMOTHY
D. REITZIG, TIMOTHY ROBERT YATES AND
GENEVIEVE YATES

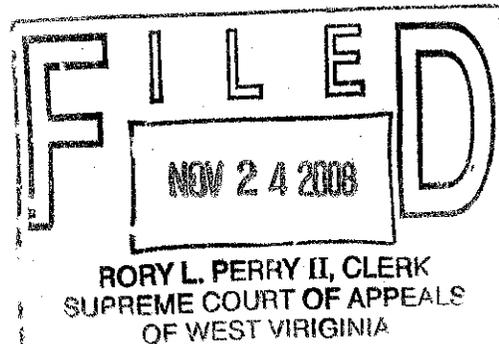
Appellees

Docket No. 34276

From The Circuit Court of
Berkeley County, West Virginia

Civil Action No. 06-C-198 and
07-C-247

The Honorable David Sanders, Judge



APPELLANT'S REPLY BRIEF

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II. POINTS AND AUTHORITIES

A. THE FAILURE OF THE PROPERTY OWNERS' TO PERFECT THEIR APPEAL IS NOT HARMLESS ERROR.

The Appellees request that this court ignore clear statutory language and well established judicial decisions in favor of a dissent filed in Rawl Sales and Processing Company v. County Commission, 191 W. Va. 127, 443 S.E.2d 595. Further, the Appellees claim that any board could thwart taxpayers efforts in seeking review of decisions by ultra vires actions. The Appellees have failed to present any evidence that the Berkeley County Commission acting as the Board of Equalization or the Assessor committed any acts or failed to perform any act that interfered with their ability to have the proposed assessment reviewed.

The Appellees stated it is unlikely that a court reporter would be present for a hearing before a Board of Equalization, however there are several property tax appeal cases pending in the fall term of this court and a review of these cases revealed the presence of a court reporters and each of the taxpayers except the Appellees were able to file the transcript and/or record within the statutorily required thirty days.

The Appellees concede that "when read alone, the decisions in Stonestreet and Rawl appear(s) fatal to Purple Turtle Group's cause, ..." The Appellant asserts that not only do these decisions support that it is a fatal error but that all of the statutory and binding case authority supports the finding that the failure to attach the record within thirty days is a fatal defect.

B. THE METHOD USED BY THE ASSESSOR IN DETERMINING THE FAIR AND ACTUAL VALUE OF THE PROPERTY AND THE PROCEDURE FOR REVIEW OF THE ASSESSMENT BY THE BOARD OF EQUALIZATION IS CONSTITUTIONAL.

This court has upheld validity of the assessment and that clear evidence is required to overcome the presumption.” Western Maryland Rg. Com. v. Board of Public Works 141 WV 413, 90 SE 2d 433. The court from prior rulings found it to be obvious that where a taxpayer protests its assessment before a board, the taxpayer bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.

During the pendency of this appeal the court has rendered two decisions concerning the process used in determining the value of property for purposes of taxation and the process upon which the review of the proposed assessment are made. *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, ___ W. Va. ___, ___ S.E.2d ___ (No. 33891 Nov. 5, 2008) and *Bayer Materialscience, LCC, v State Tax Commissioner* (Nos. 33378, 33880, and 33881 Nov. 19, 2008)

In both cases the court found that the Taxpayer had the burden of proof, *i.e.*, by clear and convincing evidence, and its burden of persuasion insofar as neither the Tax Commissioner nor the Assessor are required to prove the correctness of their assessments. The Court has recognized, that it is customary to require the party seeking relief to carry the burden of persuasion: “[i]t is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto.” *Boury v. Hamm*, 156 W. Va. 44, 52, 190 S.E.2d 13, 18 (1972).”

In both *Bayer Materialscience, LCC* and *Foster*, a constitutional challenge to the requirement that an appealing taxpayer to prove its claim for relief by clear and convincing evidence denies him/her due process. In both cases the court found that it was not a denial of due

process and concluded that requiring an appealing taxpayer to prove their entitlement to relief by clear and convincing evidence was constitutional.

The Appellees want the Assessor and the Board of Equalization to ignore the fact that these lots had access to a 304 acre which has been set aside for their use. The Appellees would require the Assessor to compare these lots to lots that do not have the same amenities. The prospect to having access to these amenities is what created the market for these lots.

The Appellees in their brief stated "the residents in Broomgrass may have access to a few amenities not presently available, such as a pool and an athletic field, but these amenities do not now exist and cannot begin to justify the difference in the assessment of Purple Turtle Group members' lots and similar properties in the Gerrardstown district, particularly since over half of the purchase price of the lots was allocated to be devoted to farmland not owned by Purple Turtle Group member" (p27).

When real estate is transferred in West Virginia there is a requirement upon the parties to complete a sales listing form pursuant to West Virginia Code §§ 11-22-6, 11A-3-2 and 11A-3-3. The required form was completed in each of these transactions and archived with the map cards maintained by the Assessor and presented as part of the Assessor's evidence to the Board of Equalization. In each of the sales listing forms it was disclosed that:

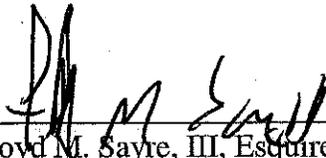
1. The transactions were on the open market,
2. The transaction did not include personal property, and
3. There were no other financing arrangements that materially affected the consideration.

The assertion by the Appellees that half of the purchase money was for the purchase of personal property or an interest in property not included in the transfer are not supported by the sale listing form signed by the agent for the Appellees.

III. CONCLUSION

WHEREFORE, based upon the evidence in the record and the authorities cited herein, the Appellant respectfully submit that the Final Order is in error, and as such, the Final Order should be reversed, and that an order entered granting the Appellant's Motion to Dismiss the Appeal.

Purple Turtle LLC
By Counsel



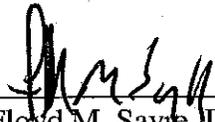
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CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing *APPELLANT'S REPLY BRIEF* has been served, by United States mail, postage prepaid, upon the following:

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Date: November 21, 2008



Floyd M. Sayre, III