

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DEC 16 2011

Mountain America, LLC; Feroz Alloo; Robert and Beverly Amico; Ron Andrews; William Andrews; Reed Atkins; William and Nancy Atkins; Sergio and Cheryl Baez; Thanos Basdekis; Edward and Tracy Bober; Peter Calderon; Jimmy Carroll; Chris and Dina Cashwell; Bob and Linda Chamberland (Artha, LLC) ; Wayne Clibum; Justin and Mary Daly; Peter and Sherry DelCloppo; John Eagle; Dale and Michelle Enzor; Charles and Cynthia Evans; William Farley; Lon Fountain; Fernando Garcia; Jonathan Halperin; Esther Halperin; Mike and Vivian Hollandsworth; Jan Jerge; Judy Leon; Freda Livesay; Victor Long; Jean Jacques Millard; Jonathan and Erin Panks; Stephen and Lauren Rice; Michael Robey; Hee Soo Roh; George Ross; Robert Schlossberg; Neil Patrick Welsh; Teddy Kim; Obie Woods, Jr.; Gulam Younossi, WBMA LLC; Walnut Ridge LLC; Sugar Tree, LLC; JF Investment Holdings; and Greentree LLC,

Appellants,

Case No. 11-1057

v.

The Honorable Donna Huffman, Assessor
of Monroe County, West Virginia, Et al.

Appellees.

APPELLANTS' REPLY BRIEF

Respectfully presented

by

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ARGUMENT

I. RES JUDICATA IS INAPPLICABLE TO THE 2008 CLAIM.

As the parties have stated in their briefs¹, at issue here is whether the Circuit Court erred in holding that the 2008 Claim was *res judicata*. As this Court has repeatedly held, there are three elements to *res judicata*:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution on the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Beahm v. 7-Eleven, Inc., 223 W. Va. 269, 672 S.E.2d 598, Syl. Pt. 3 (2008) (*per curiam*) (quoting Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 298 S.E.2d 41, Syl Pt. 4 (1997)).

i. Final Adjudication on the Merits

All parties agree that the Order was a final adjudication on the merits of the 2007 Claim.

ii. The 2008 Claim does not involve the same parties as the parties in the 2007 Claim and the parties in the 2008 Claim are not in privity with the parties in the 2007 Claim.

Despite this Court's prior ruling in Mountain America, LLC, et al. v. Huffman, 224 W. Va. 669, 687 S.E.2d 788 (2009), the Appellees insist on arguing that the Appellants here were parties to the 2007 Claim or in privity with parties to the 2007 Claim.

The Appellants do not contest that Mountain America, LLC was a party to the 2007 Claim. Rather, as argued below, the Appellants argue that the 2008 Claim with respect to

¹ This Appellants' Reply Brief is in response to the Response Brief filed by Counsel for Appellee, Donna Huffman, Assessor of Monroe County. Counsel for the Monroe County Commission filed a one-page response with the Court, stating that the Commission concurred with the arguments set forth in the Assessor's Response. Nevertheless, since this Brief is a reply to both the Assessor and the Commission, the Appellants will refer in this brief to the Assessor and the Commission collectively as the "Appellees" and the Appellants herein respectfully request that the Court consider this Reply Brief to the Assessor as the Reply Brief to the Commission.

Mountain America (and all other Appellants) is not and cannot be identical to the 2007 Claim because the parties are different, the tax years are different and the valuation issues are entirely different.

Regarding the privity argument posed by Appellees in the Response Brief, the Assessor makes much of the concept of “virtual representation,” arguing essentially that since Mountain America litigated the 2007 Claim, the Appellants in the 2008 Claim had their respective bites at the apple.

In support of this proposition, the Appellees point out that the interests of the Appellants other than Mountain America were adequately protected because the parties to the 2007 Claim and the 2008 Claim shared common counsel, relied upon the same expert witness and asserted substantially similar allegations.

First, this Court considered the 2007 Claim only of Mountain America and not the other parties in the prior proceedings below. Mountain America, LLC was the only entity having the benefit of the 2007 Claim. Mountain America, LLC, et al. v. Huffman, 224 W. Va. 669, 681, 687 S.E.2d 768, 780 (2009). Secondly, the 2008 Claim includes parties who had made no challenge to their property tax assessments, until the 2008 Claim. Finally, the valuations analyzed by Mr. Goldman with respect to the 2008 Claim involved different tax years and of course different assessments and different pieces of property. Virtual representation is simply not applicable here.

Explaining the concept of “virtual representation,” this Court said that this variety of privity “precludes relitigation of any issue that [has] once been adequately tried by a person sharing a substantial identity of interests with a nonparty.” Beahm v. 7-Eleven, Inc.,

223 W. Va. 269, 672 S.E.2d 598, Syl. Pt. 3 (2008) (*per curiam*) (*quoting Galanos v. National Steel Corp.*, 178 W. Va. 193, 195, 358 S.E.2d 453, 454 (1987)).

In Galanous, this Court offered circumstances in which the doctrine of virtual representation would be appropriate, for example, “when a party’s actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment” *Id.* at 196, 455. None of these circumstances exist here. The parties to the 2008 Claim are not in privity with the parties to the 2007 Claim.

iii. The cause of action in the 2008 Claim is substantially dissimilar to the cause of action in the 2007 Claim.

As stated in the Appellant’s Initial Brief, the cause of action for the 2008 Claim could not have been resolved in 2007 because the 2008 Claim had not yet occurred, the 2007 Claim and the 2008 Claim have substantially different parties, and the 2007 Claim and 2008 Claim present different facts, different pieces of land and different valuations. Further, the Circuit Court fails to take into account that the fair market value of the subject properties is different each year and that the Assessor must assess property as of July 1 for each year. Thus, the principles of equal protection and uniform and equal taxation are violated by holding that the claims in the instant year are identical to the 2007 Claim.

A. To be valid, *ad valorem* property tax assessments of particular properties must be equal and uniform and in the same proportion to their value as all other properties.

It is a fundamental constitutional right and principle of law in the State of West Virginia that comparable properties should be taxed equally and uniformly. This equal treatment is guaranteed by both the West Virginia Constitution and the United States Constitution. The West Virginia Constitution mandates that, with certain express exceptions not applicable here, “taxation shall be equal and uniform throughout the State, and all property, both real and

personal, shall be taxed in proportion to its value” Art. X, Sec. 1 (Emphasis added). Moreover, “no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.” Id.

Simply put, *ad valorem* property tax assessments in West Virginia cannot be valid if they are shown to be not equal and uniform or not in proportion to the assessments of other taxpayers’ property. Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336 (1989); In re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E. 2d 649 (1959).

However much as the Appellees would apparently prefer that this principle – of “equal and uniform” taxation of property “in proportion to its value” – would not apply, as demonstrated by the attempts in their respective briefs to avoid it, that essential foundation of *ad valorem* taxation of property in West Virginia must be honored by this Court. Thus, in asserting the Appellants’ failure to show that the assessments of their properties, as determined by the Assessor and upheld by the Commission, are not clearly erroneous, the Appellees fail to directly and effectively address, much less rebut, the overwhelming proof presented by the Appellants that the Assessments are not equal and uniform, and not in proportion, with the values reflected in the assessments of other property in Monroe County.

B. The Assessor did not assess the subject property at “true and actual value”.

Just as she did in the 2007 Claim, to justify her failure to equalize the Assessments of the Appellants’ properties in the Walnut Springs Mountain Reserve area (Walnut Springs) with other assessments in Monroe County for the 2008 Claim, the Assessor designated the former as a separate and distinct neighborhood.

Implicit in the determination, of which properties to include in a particular neighborhood, is the conclusion that the properties included in that neighborhood are more similar to each other

with respect to the listed characteristics than they are to other properties in the same vicinity. Importantly, while the listed characteristics are for the ultimate purpose of “land pricing,” the characteristics themselves – to be considered in distinguishing the included properties from others not included – refer to parcel size, roads and topography, to the costs, type and quality of improvements and to the homogeneity of residential amenities, land use, economic and social trends and housing characteristics. Thus, in determining what properties are in a neighborhood, the Assessor should look to common features of the subject land such as the size of lots, its topography and vehicular access, and to the features of the improvements and amenities on it. The Assessor’s determination, that the Appellants’ properties should be separated from all others in Monroe County, violates those requirements of the neighborhood determination process in a number of ways which are set forth in Appellants Initial Brief (referencing Todd Goldman’s testimony and exhibits).

The only rationale the Assessor offered, for designating the Appellants’ properties as a separate neighborhood, were the relatively higher prices for which they had been recently transferred – the classic “welcome stranger” approach that the United States Supreme Court *unanimously* rejected in Allegheny Pittsburgh Coal Co., supra. Thus, instead of properly applying the neighborhood determination procedures requiring the use of the various land and improvements factors, all as directed by the Tax Department in Administrative Notice 2006-16 for the purpose of land pricing, the Assessor used nothing but land prices to determine the new neighborhood.

- C. The Assessor’s abysmal failure to meet mandatory State equalization standards belies her purported compliance with State assessment practices.

At the time the Assessor was creating a new neighborhood for the Walnut Springs properties, and for at least ten years prior to that time, her office had been cited for many

deficiencies in its annual valuation and assessment work. Specifically, over that time, the Assessor's office regularly failed several appraisal tests conducted by the Tax Department pursuant to the latter's oversight responsibilities. Those tests were designed to reflect, in the aggregate, a general measure of compliance within permitted deviations between the Assessor's land book values and actual market values for the relevant periods.

At the 2008 Hearing, the Assessor testified that her failure to comply with the Tax Department tests was due to the recent sales of properties in Walnut Springs and that her actions for past few tax years would correct these deficiencies. However, Todd Goldman testified that it would take twenty years to correct these errors. ,

Indeed, the Assessor's testimony, about the methodologies she purportedly followed, shows that she clearly did not understand the nature of her statutorily imposed duties, or the standards applied to measure her performance of those duties, and, as a result, the Assessments were exposed as lacking the equality and uniformity required by the West Virginia Constitution. This Court has held that, central to a uniform and equal system of taxation is "uniformity in both methodology and result." Killen v. Logan County Comm., 170 W.Va. 602, 619, 295 S.E. 2d 689, 706 (1982) (*overruled in part on other grounds by In re: Tax Assessments of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E. 2d 150 (2008)). Here, the unrefuted evidence of the non-uniform and unequal results of the Assessor's determinations of the taxable values of properties in Monroe County, as manifested by the State test results, is immutable proof that her methods in making those determinations were neither equal nor uniform, nor in proportion to the values of those properties. The Circuit Court's rationale for sustaining the Assessments, on the basis of its finding that the Appellants failed to prove that the

Assessor was out of compliance with applicable State appraisal regulations, is sharply at odds with the record of this matter.

More importantly, such a holding is, itself, ill-conceived because the Assessor's first obligation is to assure the compliance of her Assessments with the equal and uniform requirements of the Constitution. Indeed, no purported degree of compliance with the essentially clerical functions of mechanically entering purely objective data, as required by the State's mandated procedures, can serve to excuse the Assessor's on-going failure to satisfy each and every appraisal accuracy and equalization standard applied by the Tax Department.

The following subsection of this brief explains, in detail, how the Appellants' evidence, showing the Assessor's intentional and systematic over-valuation of their property and her intentional and systematic under-valuation of other Monroe County properties, is compelling and essentially unrefuted.

- D. The proof of the Assessor's unequal assessments of the Appellants' properties, presented by their expert witness in the form of comparable sales statistics, was proper, relevant, compelling, un rebutted and conclusive as to the error of those assessment.

In its brief, the Assessor asserts that the Appellants' expert witness, Todd Goldman, failed to give an opinion on the value of their properties. Further, the Assessor argues in her brief that the Appellants failed to prove, through Mr. Goldman, or otherwise, what was the true and actual value of their respective properties.

Mr. Goldman, who is a certified appraiser, testified at length as to the fair market value for many parcels of the Appellants' properties in Walnut Springs and he did present, through the introduction of his exhibits, evidence of their value based upon an extensive recent sales analysis.

The Appellants' evidence then further shows that the values established by the Assessor for Walnut Springs property, in using her purported neighborhood methodology, created appraised values on a per acre basis at substantially higher amounts than the amounts for which the same land was purchased within a prior period of just a few years. Finally, as shown by the testimony of the Appellants' expert and the exhibits, it was these same values which the Assessor then used in her arbitrary neighborhood formula methodology to over value the Appellants' properties when compared to other similar property throughout the County.

More importantly, in asserting such factually erroneous allegations about the lack of proof in the record, Appellees cite no legal authority to support the underlying contention, that such evidence is all that can be presented to establish a violation of Article X, Section 1 of the West Virginia State Constitution mandating equal and uniform *ad valorem* property taxation. In fact, there is no authority that could be cited as even requiring evidence of that type in a case, the essence of which is an attack upon the underlying non-uniformity and non-equality of the assessments when compared to other properties in the County.

Rather, the case authority in West Virginia, as cited in the Appellants' Initial Brief, simply states that, in a matter such as this, a taxpayer must show, by clear and convincing evidence, that the Assessor's values are incorrect. Foster Foundation, *supra*. Clearly, values are incorrect if they are not equal and uniform. In re Kanawha Valley Bank, *supra*.

Indeed, noting that, while there may not have been sufficient evidence in the record to establish whether the value, set by the assessing authorities for property tax purposes, represented the fair market value of the subject property, the Supreme Court of Hawaii, in In the Matter of the Tax Appeal of County of Maui v. KM Hawaii Inc., 81 Hawaii 248, 256, 915 P.2d 1349, 1357 (1996), found that to be irrelevant because, when an assessment violates the equal

protection clauses of the state and federal constitutions, simply ensuring that the assessment is set at fair market value does not adequately address the allegation of a violation. Id. (citing, by example, Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 346, (1989); Hillsborough v. Cromwell, 326 U.S. 620, 623, (1946); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247, (1931); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446, (1923); cf. In re Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawaii 1, 8-9, 868 P.2d 419, 426-27 (1994) (involving tax assessment that violated the commerce clause of the United States Constitution); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39-41 (1990) (same)).

Thus, throughout his testimony and exhibits, Mr. Goldman also presented evidence which showed that the Assessor's valuations of properties in Walnut Springs, (including both the lots conveyed and the residue, all of which remains in dispute before this Court), are listed on her books at a percentage of fair market value far greater than the equivalent percentage used for the tax values of similar properties in other locations in Monroe County.

Finally, the Appellants challenge, as simply absurd, the Appellee's assertion that an appraiser's testimony in property tax appeals cannot be based upon the appraiser's statistical analysis. A number of professional fields and endeavors require, as part of their practices, extensive training in statistics. That is the case for not only appraisers, but for dozens of other professions. Indeed, such statistical analysis is at the heart of the State Tax Department's assessment equality and accuracy tests with which the Assessor had persistent difficulties.

Thus, understandably, the Appellees can cite no legal authority, whatsoever, for its contention that an appraiser's testimony cannot be based upon the appraiser's statistical analysis. In fact, the record in this matter clearly reflects that the sampling and number of properties

evaluated by Mr. Goldman, which were the basis of his testimony, relied upon an analysis of a broad sample of the Monroe County property records and a number of individual parcels which appeared to even exceed the number of parcels reviewed on an annual basis by the State Tax Department in its own, official testing of the equality and valuation accuracy of the Assessor's work.

Therefore, the Assessor based her segregation of the Appellants' properties, from all others in Monroe County, on distinctions about amenities, etc. that did not and do not currently exist. Likewise, in order to establish the new Walnut Springs neighborhood, she had to ignore their many proven similarities to other nearby properties with respect to both fundamental features of the land and the absence of improvements and amenities.

As a result, her unequal and non-uniform Assessments of the Appellants' properties, as demonstrated by the Appellants' evidence, and her underassessment of the other taxpayers' properties, as demonstrated by her chronic failure of State assessment accuracy testing, compel the conclusion that the Assessments were neither equal nor uniform as required by the West Virginia Constitution. Therefore, they were clearly erroneous and should not have been upheld by the County Commission or affirmed by the Circuit Court.

That the Assessor's practices, which led to such erroneous Assessments, were intentional and systematic also compels the conclusion that they violated the Appellants' rights to Equal Protection under the Constitution of the United States.

II. THE ASSESSOR'S DISCRIMINATORY ASSESSMENTS OF THE APPELLANTS' PROPERTIES VIOLATED THEIR RIGHTS TO EQUAL PROTECTION BECAUSE THOSE ASSESSMENTS WERE THE RESULT OF INTENTIONAL AND SYSTEMATIC PRACTICES THAT CANNOT BE EXCUSED AS MERELY "TRANSITIONAL."

The "welcome stranger" approach to property tax assessment administration – where, by having their properties taxed on the basis of their recent purchase prices, the newcomer owners

of recently transferred properties bear a disproportionate share of a jurisdiction's tax burden, while long-time owners of other, unsold properties experience no increases – was decisively struck down by the United States Supreme Court in the seminal case of Allegheny Pittsburgh Coal Company v. Webster County, *supra.* There, in reversing an earlier ruling of this Court to the contrary, the United States Supreme Court held, in an extraordinary 9-0 vote, that the intentional and systematic use of such practices by a West Virginia assessor violated the rights of the appealing taxpayers to Equal Protection as guaranteed by the United States Constitution. *Id.*

The Appellees would distinguish the Assessor's discriminatory treatment of the Appellants here, from the welcome stranger practices outlawed in Allegheny Pittsburgh Coal Company, by the contentions: (1) that the disparate treatment of the Appellants was neither intentional nor systematic; (2) that the Assessor's practices with regard to all property in Monroe County were designed to cure prior underassessments; and (3) that any current inequality among assessments (particularly between the Appellants' properties and all others) was merely transitional and temporary. Upon close examination, it is clear that such contentions are, at once, internally contradictory and sharply at odds with both logic and the proven facts.

First, the Appellees cannot realistically expect this Court to accept their mutually exclusive contentions that, at the same time, the Assessor's practices were not intentional and systematic, but that they were intentionally being pursued to remedy long-term underassessments in an orderly and systematic manner. More critically, the undisputed proof, that the Assessor's office's failure to satisfy State Tax Department assessment accuracy and equalization testing for the entire past decade, conclusively shows that such underassessment practices are intentional and systematic. Indeed, it was on the basis of the same span of years of his using the

“welcome stranger” practice which led the United Supreme Court to conclude that the assessor in the Allegheny Pittsburgh Coal Company case violated the taxpayers’ Equal Protection rights.

The Assessor’s disparate treatment of the Appellants’ properties having been exposed, in the preceding subdivision of this brief, as arbitrary and capricious, the Appellees are left to defend the Assessor’s practices on the grounds of their being, in due course, sufficiently timely and remedial to avoid violation of the Equal Protection standards described in Allegheny Pittsburgh Coal Company. Unfortunately, as the record demonstrates, they were neither.

Regarding the issue of timely future equalization of values, i.e. “we’re working on it,” the Appellees appear to argue perversely that, precisely because Walnut Springs was a new development and the Appellants were newcomers to Monroe County, the long-term, under assessments of other properties in the immediately preceding decade cannot be cited as proof of any unconstitutional discrimination against them. That is so, the Assessor contends, because her purported “across the board” increases in the assessed values of other properties in Monroe County will seasonably cure any temporary lack of equalization with the Assessments of the Appellants’ properties. Of course, as shown in the Appellants’ Initial Brief, such a contention fails the test of simple logic. Moreover also shown in the Appellants’ Initial Brief, even if the higher assessed values of the Walnut Springs properties were frozen while the alleged percentage increases in the assessed values of the other properties were increased as the Assessor claimed, it would take decades to achieve parity among them. Id.

Thus, the Assessor’s purported remedial actions cannot work to achieve equalization and, even if they could, her testimony about taking such actions is untrue. The Assessor also argues, on the one hand, that the proven decade-long underassessment of property in Monroe County by her office, prior to 2007, is not relevant to the Appellants’ complaint about the 2008

Assessments, and on the other hand, that the Appellants' proof of her perpetuation of such underassessment is merely "anecdotal." As to the former of the two points, the taxpayer's proof in Allegheny Pittsburgh Coal Company, of exactly the same decade-long pattern of employing his "welcome stranger" method, was at the heart of the high Court's ruling.

Here, we do not know if the Assessor or her predecessors have previously engaged in the "welcome stranger" practice, but we do know that they have for at least a decade abjectly failed to assess property accurately and in a equal and uniform fashion. We also know, beyond a shadow of doubt, that the same "welcome stranger" violation of their Equal Protection rights is exactly what is going on with her Assessments of the Appellants' properties.

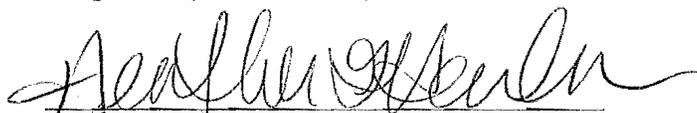
As to the "merely 'anecdotal'" contention about the Appellants' proof of discrimination, one need only consider the extensive body of the proof of pervasive current inequality, both as offered through Mr. Goldman and through the reports of the State's tests of the decades of under assessments by the Assessor's office, to conclude otherwise.

Thus, despite the Appellees' efforts to separate the fact of persistent, long-term underassessment of property in Monroe County from the issue of their discriminatory overassessment of the Appellants' properties, those points are the two complimentary sides of the same unconstitutional coin. It was precisely because of the assessor's multi-year pattern in Allegheny Pittsburgh Coal Company – of not adjusting property values which had not recently sold – that made his prejudicial recent sales-price-based adjustment, of the complaining taxpayer's assessments, unconstitutional violations of their Equal Protection rights.

CONCLUSION

Wherefore for the reasons set forth in this Appellants' Reply Brief, the Appellants respectfully request that the Order be reversed and overruled in its entirety and that judgment be entered for Appellants.

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Appellants,

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v.

The Honorable Donna Huffman, Assessor
of Monroe County, West Virginia, Et al.

Appellees.

CERTIFICATE OF SERVICE

I, Heather G. Harlan, counsel for Appellants, do hereby certify that I have served the foregoing "*Appellant's Reply Brief*," by mailing a true and exact copy thereof by first class United States mail, postage prepaid, upon the following:

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4104472.1