

No. 34276 - In re: Tax Assessment Against Purple Turtle, LLC, *et al.*, v. Gooden

**FILED**

**July 27, 2009**

Benjamin, Chief Justice, concurring:

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I agree with the majority *per curiam* opinion of the Court and its resolution of this matter based upon the methodology established by statute and solidified by *Rawl Sales and Processing Co. v. County Comm'n.*, 191 W.Va. 127, 443 S.E.2d 595 (1994) and *In re Stonestreet*, 147 W.Va. 719, 131 S.E.2d 52 (1963). I write separately, however, to again underscore my disagreement with the continuing disparity which currently exists regarding the proof burdens of the State and of its citizens in property tax assessment cases in West Virginia.<sup>1</sup> Absent reliance on some vague statist doctrine of a superceding governmental entitlement to the fruits of one's labors, there is no compelling or even rational basis to permit the State a lesser burden of proof in the taking of a citizen's property (in the form of tax payments) than there is for the citizen in keeping his or her property. The resolution of this matter turning not on proof burdens, but rather on procedural methodology, I concur in the majority opinion.

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<sup>1</sup> Pursuant to this Court's decision in *In re Tax Assessment of Foster Foundation's Woodlands Retirement*, 223 W.Va. 14, 672 S.E.2d 150 (2008), the State need only meet a *preponderancy* burden of proof in tax assessment cases, whereas a citizen seeking to keep his property (in the form of tax payments) must meet a higher *clear and convincing* burden of proof. *Foster Foundation's Woodlands*, at Syl. Pt. 5. As set forth in my dissenting opinion therein, I believe such a disparity is constitutionally impermissible. *In re Tax Assessment of Foster Foundation's Woodlands Retirement*, *supra* (J. Benjamin, dissenting).