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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, et al.

*

*

APPELLANTS

*

*

v.

*

APPEAL CASE No.:

*

A08A2072

RICHARD R. THOMAS, et al.

*

*

APPELLEES

*

BRIEF OF APPELLEES'

The parties will be referred to as they appeared in the Court below, namely Appellants – Defendants and Appellees – Plaintiffs.

PART ONE

(a)

STATEMENT OF THE CASE¹

The Plaintiffs own real property in Dougherty County, Georgia, which was subject to a mass reevaluation in 2007, and seek relief from said reevaluation for reasons set forth herein. The Defendants are the Tax Director of Dougherty County and the Tax Assessors who are sued in their capacities as members of the Board of Tax Assessors for Dougherty County.

¹ The contents of the Statement of the Case and Statement of Facts are taken from the complaint as amended. (R5-19, 131-136)

The Plaintiffs' complaint filed on January 10, 2008, seeks equitable relief and a declaratory judgment embracing seventeen counts including the allegation that the 2007 reevaluation was unconstitutional, illegal, null and void. The Superior Court has exclusive jurisdiction over equity matters (Ga. Const. 1983, Art. I, § IV ¶ 1) and claims for declaratory judgment. (O.C.G.A. § 9-4-2.)

The plaintiffs further seek class certification, as the rights sought to be enforced by this action are of joint interest to all property owners in Dougherty County who pay ad valorem taxes. The persons constituting this class are so numerous as to make it impractical to bring them all before the Court, there are questions of law and fact common to the plaintiffs and other similarly situated persons, and the plaintiffs will fairly and accurately protect the interests of the class. The requirements of O.C.G.A. § 9-11-23 are, therefore, satisfied.

Defendants filed a motion to dismiss Plaintiffs' Complaint. (R 46-47)

After reviewing the briefs and hearing oral argument, the trial court ruled that the Plaintiffs' Complaint, as amended, contains Counts which would entitle Plaintiffs to relief and denied Defendants' motion to dismiss. (R 175-176)

(b)

Statement of Facts

The complaint embraced seventeen counts, and counts five, six and seven can be summarized as follows:

The Dougherty County Board of Commissioners contracted with Tyler CLT Division of Dayton, Ohio to reevaluate all real property in Dougherty County.

This contract did not include business personal property or real estate of public utilities in Dougherty County. Additionally said contract failed to comply with O.C.G.A. § 48-5-298(a) and § 48-5-299(a).

Plaintiffs allege said contract should be declared null and void and constituted an ultra vires act.

Count eleven of the complaint alleged:

After Plaintiffs and a number of the said class were given notice by Defendant Assessors that their appeal of the increase of the value of their real estate had been denied, they notified the Defendant Assessors by a written notice that they appealed to arbitration, which is authorized in O.C.G.A. § 48-5-306-(b)(2). In the teeth of the said Code section, the Defendant's Assessors consistently denied all the said appeals the right to arbitration. Notwithstanding said taxpayers, described in paragraph 6 of this complaint, were denied a hearing before arbitrators said taxpayers' real estate was assessed for the year 2007 by Defendant Assessors, and Defendant Hooten mailed to said taxpayers a bill requiring said taxpayers to pay taxes based on said increased valuations.

Since said Plaintiffs and member of said class were denied their right to appeal to arbitration they have been illegally assessed for the 2007 reevaluation which is illegal and void as to said taxpayers. Thus their 2007 taxes must be based on the 2006 valuation of their property in the Digest.

Count thirteen alleged:

The plaintiffs show that the appointment of additional members to the board of equalization raises an appearance of impropriety, which will not be removed until such time as this issue is investigated.

The plaintiffs maintain that all decisions rendered by the board of equalization in which these members participated are, in the interim, suspect.

Said decisions must be vacated should discovery confirm that these members were improperly appointed and/or that their decisions were not completely impartial.

Any decisions rendered by the board of equalization must be vacated, if the additional member did not complete the mandatory “instruction in appraisal and equalization processes and procedures” prior to said hearing. O.C.G.A. § 48-5-311(b)(2)(B).

Count fifteen alleged:

Plaintiffs, who have appealed the valuation of their taxable property for the year 2007, have been billed by Defendants and required to pay the 2007 assessed reevaluation less 15%.

Public utilities who have taxable property in Dougherty County when appealing their 2007 assessed reevaluation are only required to pay their 2007 assessed valuation based on the 2006 digest for Dougherty County.

Many of the class Plaintiffs’ taxable property have been increased over 40 percent of their assessed value in the 2006 digest for Dougherty County.

The said acts of Defendant described above are clearly a violation of the uniformity and the Equal Protection Clauses of the Georgia Constitution and The Constitution of the United States.”

Count sixteen alleged:

“Defendants permit all owners of business personal property to value their property for ad valorem taxation purposes, which is accepted by Defendants for the year 2007. Conversely, Defendants rely on their appraisal to determine the fair market value of real estate.

Since business personal property and real estate are of the same class, said practice violated uniformity which nullifies the reevaluation of Plaintiffs’ real estate for the year 2007.”

Count nine alleged:

O.C.G.A. § 48-5-306(e) provides:

“Where the assessment of the value of the taxpayer’s real property subject to taxation exceeds the returned value of such property by 15 percent or more, the notice required by this section shall be accompanied by a simple, non-technical description of the basis for the new assessment.”

Significant number of plaintiffs and Dougherty County taxpayers received notices from Defendant’s reevaluation of their property greatly in excess of 15% without any realistic information to justify said increase.

Said failure by Defendants is a violation of said code section.

Count fourteen alleged:

Assessors have mailed a tax bill for 2007 to some of the plaintiffs and other members of the class of similarly situated persons who appealed the reevaluations of their real property, who have not yet received a decision from the Assessors on their challenges to the 2007 reevaluation.

Plaintiffs challenged as incorrect Defendants' statement on page 3 of their Brief that the "complaint sought to circumvent the statutory appeals process in that almost every Count alleges errors in the reevaluation process used by Defendants to arrive at tax assessments for the year 2007." Additionally, Plaintiffs challenge Defendants' paraphrasing Plaintiffs' dissatisfactions on page 2 of their Brief.

The plaintiffs and those members of the class similarly situated who have not yet received a response to their initial appeals cannot be compelled to pay ad valorem taxes predicated upon the 2007 reevaluation.

Count seventeen alleged:

"Defendants do not tax intellectual properties and intangible assets located in Dougherty County, and failed to do so for the year 2007.

The Taxation of real estate and business personal property without the taxation of intellectual properties and intangible assets is discriminatory and in violation of the equal protection clause of the Georgia and U.S. Constitution."

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

The law is clear that where a motion to dismiss is addressed to an entire pleading...the motion is properly overruled where a portion of the matter thus attacked is not subject to the objection argued. When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the complaint must be construed in the light most favorable to the Plaintiff with all doubts resolved in his favor. Goolsby v. Regent of University System, 141 Ga. App. 605, 234 SE² 165, Ace-Hi Electric, Inc. v. Steinberg, 133 Ga. App. 97, 213 SE² 71, Dillingham v. Doctors Clinic, P.A., 138 Ga.App. 41, 225 SE² 500.

a.

Defendants elected to file a broadside motion to dismiss the entire complaint, which requires Defendants to admit the allegations of each of the eighteen counts. Defendants did not include a motion to strike any individual count in the alternative.

At the outset as set forth in Count five, six and seven, the contract with Tyler to reevaluate all real estate in Dougherty County for the year 2007 was null and void for three independent legal reasons.

1. The said contract was between the Board of Commissioners of Dougherty County and Tyler and not the Board of Assessors and thus an ultra vires act.

The sole authority to enter into such a contract is O.C.G.A. § 48-5-298(a), the applicable portions of this statute provides:

“Each county board of tax assessors, subject to the approval of the county governing authority, may enter into employment contracts with persons to:

1. Assist the board in the mapping, platting, cataloging, indexing, and appraising of taxable properties in the county;
2. Make, subject to the approval of the board, reevaluations of taxable property in the county; and
3. Search out and appraise unreturned properties in the county.”

The Defendants, the Dougherty Board of Assessors were not a party to this contract as required by this statute.

Without a lawful contract, Tyler was not authorized to reevaluate real estate in Dougherty County since Defendants failed to follow subject statute.

Pursuant to Bagwell v. Cash, 207 Ga. 222, Defendant Assessors had no authority to delegate to Tyler Defendants’ mandated appraised duties. In Bagwell, supra, the Court held:

“The Board of Tax Assessors of Hall County can not delegate its duties pertaining to the equalization of property valuations for ad valorem taxation, nor can the board contract for services of the nature stipulated in the contract executed by the board.”

To the same effect see: Graves v. Wall, 210 Ga. 271 and Ezzard v. City of Lawrenceville, 207 Ga. 649.

2. Had said Defendant Assessors signed said contract it was void in violation of O.C.G.A. § 45-5-299 in that said contract did not require the business personal property to be revalued nor did it require the reevaluation of the real

estate or business personal property of public utilities. The omitted properties are of the same class as real estate.

3. Had said contract been signed by Defendant Assessors, the procedure and process followed by Tyler and said assessors amounted to an abdication by Defendant Assessors of the mandated duties of said assessors.

The said assessors allowed Tyler to make the valuation and the assessors simply sent the tax notices to Plaintiffs.

The assessors are required by O.C.G.A. § 48-5-306(a) which provides in part:

“The board shall see that all taxable property within the county is assessed and returned at its fair market value....”

This Court has condemned tax assessors’ delegating discretion to companies such as Tyler without proper oversight in evaluation of real estate. Parisian, Inc. v. Cobb County Board of Tax Assessors, 263 Ga. App. 332; Fulton County Bd. Of Tax Assessors v. Saks Fifth Ave. Inc., 248 Ga. App. 836.

Any substantial departures, therefore, in the collection of taxes, from the law, either as to the authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law. Parisian, supra – Saks Fifth Ave., supra.

The power of taxation is a peculiarly legislative function. Delegating to an administrative agency the power to fix the ratio of assessment, without formulating a definite and intelligible standard to guide the agency in making its determination, constitutes an unconstitutional delegation of legislative power.

This Court goes to the heart and core of whether subject reevaluation was legal from its beginning and necessitates a lawsuit for a judicial determination. It nullifies any act pursuant to said void contract. Again, Defendants' argument that Plaintiffs must exhaust their administrative remedies is without merit.

b.

Count eleven charges that Defendant Assessors completely shut down the right of Plaintiffs to appeal to arbitration after the said assessor turned down Plaintiffs' appeals.

This they did in the very teeth of 48-5-306(b)(2) which reads:

“The amount of your ad valorem tax bill for this year will be based on the appraised and assessed values specified in this notice. You have the right to appeal these values to the county board of tax assessors either followed by an appeal to the county board of equalization or to arbitration and in either case, to appeal to the superior court.”

Notwithstanding said Plaintiffs were denied a hearing before arbitrators, said taxpayers' real estate was assessed for the year 2007 by Defendant Assessors and Defendant Hooten mailed said taxpayers a bill requiring said taxpayers pay 2007 taxes based on said increased valuations.

The net effect of this Count is to demonstrate that Defendants have prevented these taxpayers from exercising their constitutional right to appeal to arbitration the excessive 2007 valuations of their property and to have a hearing before being assessed and billed by Defendants.

There is no statutory remedy which allows these taxpayers any appellate relief from said denial of arbitration, short of a separate action in the Superior Court. Clearly, there was no decision by the arbitrators to appeal. O.C.G.A. § 48-5-311(d) in part: “the decision of the arbitrator or arbitrators, may be appealed to the Superior Court in the same manner as a decision of the Board of Equalization.”

Without a decision from arbitration, Plaintiffs have no decision to appeal to the superior Court and thus without a remedy.

Thus, Defendants’ basic defense that “the dissatisfied taxpayer must exhaust the administration remedy” is unavailing and must go for naught. Callaway v. Carswell, 240 Ga. 579.

c.

Because of an excess of five thousand appeals, two new Board of Equalizations were appointed.

Count thirteen alleged that the appointment of said additional boards raises an appearance of impropriety, which will not be removed until investigated.

Thus all of their decisions are suspect and if confirmed upon discovery that they were improperly appointed, said decisions must be vacated.

Additionally a question is raised as to said members completing instructions to appraisal and equalization procedures pursuant to O.C.G.A. § 48-5-311(b)(2) (B).

The allegation of this Count taints all decisions of the two Boards of Equalizations which were recently appointed.

The challenge of the alleged questionable practice should be decided by a separation action filed in Superior Court.

d.

Count fifteen points out that Plaintiffs who have their 2007 valuation on appeals are required to pay the 2007 assessed reevaluation less fifteen percent.

However, public utilities, which have taxable property in Dougherty County when appealing their 2007 assessed valuation, are allowed to pay their taxes based on their 2006 valuation.

Many of the Plaintiffs and class taxpayers have been increased over forty percent of their assessed value in the 2006 Tax Digest for Dougherty County.

In Telecom USA, Inc. v. Collins, 260 Ga. 362, 393:

“The utilities’ motions to enjoin the counties from collecting any more than the undisputed amount of the tax: In the action below, the utilities sought to enjoin the counties from collecting more than the undisputed amount of the tax

during the pendency of the Fulton County appeal. We conclude that no injunction is necessary.

Section (c) of the statute states plainly that during the pendency of the Section (c) appeal, the county board of tax assessors may include in the county digest only the undisputed amount of the assessment.” This means public utilities are allowed to pay their 2007 tax based on the 2006 digest.

As noted utilities’ property and private taxpayers’ property are of the same class, but private taxpayers clearly are discriminated against disallowing them to use 2006 tax digest when paying their 2007 taxes when their appeal is unresolved.

The logic and fairness of allowing a taxpayer who is appealing his 2007 assessed valuation to pay based on his 2006 valuation during the appeal is shown in Callaway, supra.

Plaintiffs submit there is no statutory administrative procedure to raise an issue as to the payment of the 2007 tax bill based on the 2006 digest.

e.

Count sixteen allege that Defendants permit all owners of business personal property to value their property for ad valorem tax purposes, which was accepted by Defendants for the year 2007.

Conversely, Defendants rely on their appraisal to determine the fair market value of real estate, notwithstanding real estate and business property are of the same class.

In Colvard v. Ridley, 218 Ga. 490, taxpayers filed a class action against the Tax Commissioner and Tax Assessor alleging that real estate's value was determined by an appraisal, while personal property's value was determined by whatever value it was returned for by the owner without the assessors making any investigation whatsoever as to its fair market value.

The Court held:

“The petition sufficiently showed that assessments were void for want of uniformity in fixing taxable values as between different types of taxable property of the same class.”

In Lott Investment Corp. v. City of Waycross, 218 Ga. 805, the real estate taxpayer filed their action against City for Judgment declaring that policy of city in failing to require the return for taxation of tangible personal property was unconstitutional and prayed for injunction restraining collection from taxpayer of unpaid real estate taxes.

The Court held:

“A municipal tax ordinance imposing a tax ad valorem on real estate only was void by reason of conflict with the Constitution in not levying the tax ad valorem upon all property, real and personal, subject to be taxed within the territorial limits of the authority levying the tax.”

f.

With respect to **Count nine**, O.C.G.A. § 48-5-306(e) provides:

“Where the assessment of the value of the taxpayer's real property subject to taxation exceeds the returned value of such property by 15 percent or more, the notice required by this section shall be accompanied by a simple, non-technical description of the basis for the new assessment.”

Significant number of plaintiffs and Dougherty County taxpayers received notices from Defendant's a reevaluation of their property greatly in excess of 15% without any realistic information to justify said increase.

Said failure by Defendants is a violation of said code section.

g.

Count fourteen embraces a claim that Defendants are requiring Plaintiffs and class Plaintiffs to pay taxes less fifteen percent based on their 2007 reevaluation on January 20, 2008 without providing said taxpayers a hearing on their appeal.

In Central of Georgia Railway Co. v. Wright, 207 U.S. 127 (28 Sup.Ct.47, 52 L.ed 134), the railroad brought suit to enjoin the enforcement of taxes assessed against shares of their stock. The railroad contended that it was not allowed to be heard as to the basis of the valuation upon which the assessment was made amounted to a seizure of its property without due process of law.

“Former adjudication in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require.”

“Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion to the system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the 14th Amendment to protect against impairment by the state action.”

In Pullman Company v. Settles, 187 Ga. 217:

“The Pullman Company filed in Fulton superior court an equitable petition against the tax-collector, the tax-receiver, and the members of the board of tax-

assessors of Fulton County, to enjoin their threatened issuance, levy, and collection of tax fi. fas. And assessments, made by the county board of assessors in 1937 for the years 1930 to 1936, inclusive, on thirty-four Pullman sleeping – cars, assessed at the value of \$340,000 for each year.”

The Court’s opinion stated:

“Somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and.. this notice must be proved as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace. A denial of this right, as under former laws relating to assessments by the comptroller-general, prior to amendment now providing an opportunity to be heard, is a failure to afford due process of law within the intention of the 14th amendment of the Federal constitution, and of art. 1, par. 3, of the State constitution.”

As noted above the relief obtained by the taxpayer was through a lawsuit not through an appeal.

h.

Count eight contends Defendant Hooten improperly obtained approval of the 2007 Digest on November 1, 2007 in violation of the O.C.G.A. § 48-5-304 (a) which reads in part:

“In any year when a complete revaluation or reappraisal program is implemented, the commissioner shall not approve a digest when 5 percent or more of the property by assessed value in dispute is in arbitration or on appeal and 5 percent or more of the number of properties is in arbitration or on appeal.”

Plaintiffs contend the record shows more than 5% of the tax appeals were on the appeal process on November 1, 2007 which embraces more than 5% of the assessed value in dispute.

There is no administrative procedure in the appeal process to challenge said improper acts short of a separate action in Superior Court.

Count seventeen alleges the following::

“Defendants do not tax intellectual properties and intangible assets located in Dougherty County, and failed to do so for the year 2007.

The Taxation of real estate and business personal property without the taxation of intellectual properties and intangible assets is discriminatory and in violation of the equal protection clause of the Georgia and U.S. Constitution.”

The most telling statement on this allegation is found in the concurring opinion by Chief Justice Robert Jordan in McDaniel v. Thomas, 248 Ga. 632, wherein he stated:

“Ad valorem taxation is antiquated, outmoded, unfair and violates equal protection.”

This statement was said in comparing ad valorem taxes of real estate compared to intangible assets.

Following the above quotation, Justice Jordan said:

“It places an undue burden on the property owner as opposed to those who own intangible assets. As an example, one person owns \$100,000 in Georgia Power Company stock or some other domestic corporation. He pays no taxes on this capital. Another person has \$100,000 in cash in a bank. He pays intangible tax of \$10.00. Another person owns a house or farmland worth \$100,000. He pays several thousand dollars or more per year in ad valorem taxes, depending upon the county in which he lives. Yet each of these persons owns property of equal value and each has the same “net worth” on a financial statement. The unfairness is apparent.”

The net effect is that O.C.G.A. § 48-5-1 et seq. is unconstitutional in that the ad valorem taxation of Property applies solely to real estate and business personal property and violates the below referenced U.S. and Georgia

Constitutional provisions in that it exempts intangible properties including intellectual properties.

Thus, Plaintiffs have been deprived of their property without due process of law and denied the equal protection of the laws in violation of U.S. Constitution Amendment XIV, § 1 and Article 1, § 1, ¶ 2 and Article 7, § 2, ¶ 1 of the Georgia Constitution.

The settled law recognizes that intangibles constitute property.

While the following decision is hoary with age, it is instructive as to how our ad valorem system evolved.

In Atlanta National Assoc. v. Stewart, 109 Ga. 80, the Court held in headnote 2 the following:

“The constitution of 1877 provides that ‘all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.’ Under this constitution the General Assembly can not lawfully either expressly exempt from taxation, or accomplish this result by a failure to tax, any property except that which in the constitution itself the General Assembly is expressly authorized to exempt.”

It is patently unconstitutional for one segment of property to be forced to pay the majority of a county’s expenses and another segment to benefit from these services without paying property taxes.

Our Constitution cannot countenance taxing a persons roof over their head (a house, which is non-income producing) and exempting an investor’s income producing intangible properties.

“If property is taxed, all of it must be taxed except that exempt in the constitution. The legislature or municipal authorities can make no exception as to property; it must be taxed and taxed according to its value. Though property is a subject of taxation, the constitution treats it as but one subject and prescribes the rule of uniformity as to it by saying that all of it subject to be taxed shall be taxed ad valorem

Each must bear the same burden in support of the government which protects the owner and his property.” (Emphasis implied) -Mayor v. Weed, 84 Ga. 683.

It should be noted that the statute requires franchises of public utilities are subject to taxation. O.C.G.A. sec. 48-5-405 (a) states:

“All real and personal property including, but not limited to, franchises belonging to a public utility which is required to make its returns to the commissioner, when the property is within the taxable limits of any school district, shall be subject to taxation by the school district as fully and completely as is the property of other persons within the taxable limits of the school district.”

Intellectual properties and other intangible properties are clearly valuable assets and as such should not be exempted from taxation.

i.

Count eighteen alleged:

“Defendants’ policy of authorizing members of the Board of Equalization to decide constitutional issues, which were raised by some of Plaintiffs and other taxpayers, is unconstitutional as authorizing a lay body to render a judicial decision which is a violation of the Georgia Constitution.”

O.C.G.A. § 48-5-311 (6)(D)(i) provides for the decision of the board of equalization in decision shall specify reasons.

... “as to specific issues of taxability, uniformity of assessments, value, or denial of homestead exemptions...”

In Fulton County Bd. of Tax Assessors v. Boyajian, 271 Ga. 881, (2000) the Court held:

“Because whether an appeal is procedurally defective is a judicial decision, not a clerical determination, we conclude that the trial court correctly ruled that the board should have certified the taxpayer’s appeal to the superior court. If we were to adopt the board’s position that the statute does not give it authority to certify untimely appeals, then the board would act in the dual role of party and judge. This inherent conflict would be unfair to other parties in the dispute and would deprive taxpayers of the right to appeal when, as here, the board concluded that the notice of appeal was defective.”

No where in the Georgia Code is the Board of Equalization authorized to decide constitutional issues.

It should also be noted that uniformity of assessments refers to value.

Said members are lay persons, untrained in the law and totally unqualified to decide constitutional issues.

k.

Counts I, II, III, IV embrace a common allegation that Tyler’s 2007 appraisals of real estate utilized a radically different methodology, which was different from appraisals by Defendants for the year 2006, and which were designed to escalate the appraised values of most real estate. Many of said 2007 appraisals increased the 2006 appraisals from 10 to 150 percent.

A Georgia Decision of the U.S. Supreme Court rendered on December 4, 2007 treats and disapproves of the practices of assessors using a different methodology to determine the market value of taxpayer’s property.

In CSX Transp. Inc. v. Georgia State Bd. of Equalization 552 U.S. (No. 06-1287), Chief Justice Roberts delivered the opinion of the Court.

The opinion states the following:

“Petitioner CXS Transportation, Inc., is a freight rail carrier with multiple routes across the State of Georgia. As a consequence, it is subject to Georgia’s ad valorem tax on real property. Under Georgia Law, most commercial and industrial property is valued locally by county boards. Public utilities such as railroads, however, and initially valued by the State, which then certifies the proposed valuations to the county boards for adoption or alteration. In 2001, Georgia’s State Board of Equalization, a respondent here, put CSX’s ad valorem tax liability at \$4.6 million. A year later, the State’s appraiser used a different combination of methodologies to determine the market value of CSX’s in-state property. The result was a significantly higher tax levy. The State estimated the railroad’s 2002 market value at approximately \$7.8 billion, 472 F. 3d 1281, 1285 (CA11 2006), a 47 percent increase over the previous year. That brought the assessed value of CSX’s Georgia property to \$514.9 million, for a final property tax bill of \$6.5 million. Brief for Petitioner 15.

CSX filed suit in the United States District Court for the Northern District of Georgia, contending that the State’s 2002 tax assessment violated the 4-R Act.² The railroad alleged that Georgia had grossly overestimated the market value of its in-state property while accurately valuing other commercial and industrial property in the State. The result, according to CSX, was that its rail property was taxed at a ratio of assessed-to-market value considerably more than 5 percent greater than the same ratio for the other property in the State.”

Additionally the Court said:

“Given the extent to which the chosen methods can affect the determination of value, preventing courts from scrutinizing state valuation methodologies would render § 11501 a largely empty command. It would force district courts to accept as “true” the market value estimated by the State, one of the parties to litigation. States, in turn, would be freely to employ appraisal techniques that routinely overestimate the market worth of railroad assets. By then levying taxes based on those overestimates, States could implement the very

² The 4-R Act prohibits four separate forms of discriminatory state taxation of railroads. Only the first is at issue here: States, the Act provides, may not assess rail transportation property at a value that has a higher ratio to the property’s true market value...than the ratio between the assessed and true market values of other commercial and industrial property in the same taxing jurisdiction. 49 U.S.C. § 11501(b)(1).

discriminatory taxation Congress sought to eradicate. On Georgia's reading of the statute, courts would be powerless to stop them, and the Act would ultimately guarantee railroads nothing more than mathematically accurate discriminatory taxation. We do not find this interpretation compelling."

Tyler was the low bidder on the reevaluation and they were paid approximately \$25.00 per appraisal, which necessitated assessing taxpayers' property on a mass basis. Thus, taxpayers are compelled to pay significantly increased taxes when their property was not individually appraised. This is unconscionable and should be nullified.

Right to Declaratory Judgment

With respect to the purpose and construction of a declaratory judgment action, O.C.G.A. § 9-4-1 states:

"The purpose of this chapter is to settle and afford relief from uncertainty and insecurity with respect to right, status and other legal relations; and this chapter is to be liberally construed and administered."

O.C.G.A. § 9-4-2(c) states:

"(c) Relief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies."

The facts of subject case authorize Plaintiffs to file this declaratory judgment action and Defendant's defense to the contrary is without merit.

In Rolleston v. Glynn County Board to Tax Assessors, 228 Ga. App. 37,³ the assessors did not respond to appellant's (taxpayer) notice of appeal. The Court stated the following:

³ Same case, See 230 Ga. App. 539..

“Appellant filed a complaint asking the trial court for declaratory relief, i.e., to find that the reassessments by the Assessors for the years 1995 and 1996 were invalid for failure to follow OCGA 48-5-311 (e) (2), (3), and 6 (A) and (B). While the complaint does not specifically invoke OCGA 9-4-1 et seq., the complaint sets forth a case of uncertainty, where declaratory judgment is sought to declare the assessments for 1995 and 1996 invalid, because the Assessors have failed or refused to act under a statutory mandate that would otherwise give appellant the right to appeal to superior court.”

In authorizing this complaint for declaratory relief, the Court held:

“In the case sub judice, appellant is uncertain as to whether he must continue to follow the statutory appeal procedure under OCGA. 48-5-311 (e) in order to contest the reassessment of his property, or whether such reassessment is void and can be ignored, because the Assessors failed or refused to act under the statutory mandate.”

See Rolleston Living Trust v. Glynn County Bd., 240 Ga. App. 409.

In Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312,

the Court held that a Superior Court has power to:

“Determine and settle by declaration any justiciable controversy of a civil nature where it appears to the court that the ends of justice require that such should be made for the guidance and protection of the petitioner, and when such a declaration will relieve that petitioner from uncertainty and insecurity with respect to his rights, status, and legal relations.”

In Enron Capital & Trade Resources Corp. v. Pokalsky, 227 Ga. App. 727

the Court held:

“Moreover, while OCGA § 9-4-2(9-4-2(a)) is limited to ‘actual controversies.’ OCGA § 9-4-2(b) additionally authorizes superior courts to entertain declaratory actions where it appears that the ends of justice require that such a declaration be made. Courts merely require the presence in the declaratory action of a party with an interest in the controversy adverse to that of the petitioner, which Enron has had. See

Famble v. State Farm Ins. Co., 204 Ga. App. 332, 333-334(2), 419 S.E.2d 143 (1992).”

“Prior to 1951, the Supreme Court had consistently held that an actual controversy between the parties was jurisdictionally necessary in all cases under the Act. These decisions were overruled in Calvary Independent Baptist Church v. City of Rome. The court held that these earlier decisions gave effect only to Section 1(a) of the Act and fell into error by failing to give effect to the meaning and purpose of Section 1(b). The latter Section does not require an actual controversy; it authorizes the superior courts ‘to determine and settle by declaration any justiciable controversy of a civil nature where it appears to the court that the ends of justice require that such should be made for the guidance and protection of the petitioner, and when such a declaration will relieve the petitioner from uncertainty and insecurity with respect to his rights, status, and legal relations” (Page 565, Davis and Shulman’s Georgia Practice and Procedure, 4th Edition)

“In addition, the Georgia statutes make declaratory judgment relief available prior to payment of disputed taxes “to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations...” (O.C.G.A. 9-4-4, and such relief is available even if the party has other adequate legal or equitable remedies. O.C.G.A. 9-4-2(c). James B. Beam Distilling Co. v. State, 263 Ga. 609 437 SE² 782.

See also Lomax v. Lee, 261 Ga. 788

Class Action

Plaintiffs submit that the facts in this case uniquely meet the requirements of O.C.G.A. § 9-11-23(a) for a class action.

In Anderson v. Blackmon, 232 Ga. 4, the headnote states:

“Taxpayers brought action individually and as a class in behalf of all persons similarly situated to have county tax digest modified and declared unconstitutional. The Superior Court, Fannin County, Sam P. Burtz, J., entered judgment declaring assessment increases unconstitutional and further found that no proper class action was presented, and appeal was taken. The Supreme Court, Grice, P. J., held that where entire tax digest was void, it was improper to limit order in regard to improper tax assessments in county to only those named in

complaint, and that elements necessary to constitute a class and maintain an action in behalf of all those who has not paid their taxes were sufficiently met.”

Since a decision in this case affects all ad valorem taxpayers in Dougherty County class certification is a necessity and proper. Likewise it would save an enormous amount of time and expense to all parties.

Additional Arguments
Why Defendants’ Motion to Dismiss is Without Merit

Defendants’ motion and brief are riddled with unsupported facts which have no place in a motion to dismiss.

If Defendants’ arguments are accepted there could be no lawsuits in Superior Court challenging ad valorem taxation. Contrary to Defendants’ arguments our law books are chock full with appellate decisions authorizing such action. As an example see the following decisions:

Lott Investment Corporation, supra, Colvard, supra, Register, supra, James B. Beam Distilling Company, supra, Moreton Rolleston, Jr. Living Trust v. Glynn County Board of Tax Assessors, 228 Ga. App. 371, Hutchins, supra, Griggs, supra, Callaway, supra, Parisian, Inc., supra, Saks Fifth Ave., Inc., supra, Central of Georgia R. Company, supra, Pullman Company, supra, Boyajian, supra, Anderson, supra, Blackmon v. Ewing, 231 Ga. 239, Smith v. Day, 237 Ga. 48, CSX Transp. Inc. v. Georgia State Bd. of Equalization, 552 US (No. 061287), Green v. Calhoun, 50SE² 209, Whitehead v. Henson 223 Ga. 339, Champion Papers, Inc. v. Williams, 221 Ga. 345, Lomax v. Lee, supra; Cross v. Miller, 221 Ga. 579,

Undercofler v. Seaboard Airline Railroad Co., 222 Ga. 822, Thorpe v. Benham, 161 Ga. App. 116.

What are “administrative remedies”?

In an ad valorem tax case administrative remedies are the right of a taxpayer to appeal to the Board of Assessors and thereafter to the Board of Equalization or to Arbitration.

This obviously does not include an appeal to Superior Court as this is a judicial proceeding not administratively. Carter v. Fayette County, 287 Ga. 175, which is a decision cited by Defendants on page 6 of their brief.

The vast majority of the plaintiffs and class Plaintiffs have appealed to the Board of Equalization with no relief. This defense has no application to an appeal to the Superior Court, as obviously this Court is not an administrative body. Thus, the major defense of Defendant is without merit and must fail.

Additionally, Defendant’s are relying on decisions in which the taxpayer’s lawsuit is attempting to reduce the valuation on taxpayer’s property. The complaint, in the case at bar, cites no facts nor attempts to show that taxpayers’ property should be valued at a value less than the valuation of Tyler or the Defendant assessors.

Plaintiffs’ lawsuit basically attempts for various legal reasons, to void the Tyler’s contract and the reevaluation, the illegalities in the ad valorem tax system and constitutional issues.

Thus, Defendants cannot rely on these decisions or defense.

It is interesting to note that taxpayers are required to pay \$75.00 to the clerk of Court to file an appeal to Superior Court. Since Defendants are required to afford taxpayers a hearing before assessment, it is clear an appeal to Superior Court is not a prerequisite to exhaust administrative remedies. For all practical purposes a taxpayer will have to hire an attorney to understand the court rules to avoid dismissal of appeal (O.C.G.A. § 48-5-311) (g) (4A). Taxpayers should not be required to expend funds in order to challenge an increased assessment.

The primary decision relied on and cited repeatedly by the Defendants in their motion and cited to the Court in the recent hearing before the Court is: Chatham County Board of Assessors v. Jepson, 261 Ga. 771.

This case turned on whether the taxpayer would be allowed to file a lawsuit to challenge the failure of the Assessors to follow the statute requiring an increased value notice by 15% or more to give a “simple nontechnical description of the basis for the new assessment” (O.C.G.A. § 48-5-306(e) when the taxpayer failed to file an appeal within the time allowed by law. Thus after failing to meet the deadline for any appeal pursuant to the statute, the taxpayer in the Jepson case, supra, attempted to circumvent the statute by filing a lawsuit, which is impermissible.

This decision is clearly distinguishable as there is no attempt by any plaintiff or class action plaintiff who neglected to appeal and is requesting this Court to allow them to circumvent the appeal statute.

Defendants cite many statements by the Court in Jepson case, supra, which are obiter dictum as unnecessary to decide the case.

It should be noted that notwithstanding the taxpayer's failure to meet the statutory deadline, Judge Mikell filed an in-depth dissent citing numerous decisions in 22 footnotes criticizing the opinion.

It is interesting to note that the Court's majority opinion did not find that the assessors had complied with O.C.G.A. § 48-5-306 (e).

The Jepson case, supra, is no authority to sustain Defendants' motion nor is it applicable.

Our complaint alleges unlawful and illegal acts of Defendants and violation of the Constitution.

Plaintiffs' complaint is not an attempt to lower an increased valuation of any taxpayers. That is the primary basis for taxpayers who appeal their increased valuation.

The Georgia Supreme Court also distinguished the Jepson case, supra, in allowing an ad valorem tax case to be filed in Superior Court notwithstanding the assessors' argument that the action should have been dismissed for "failure to exhaust administrative remedies."

In Chatman County Board of Tax Assessors v. Emmoth, 278 Ga. 144, 598 SE²495, the Court held:

"1. The Board argues that Emmoth's claim should have been dismissed for failure to exhaust administrative remedies available to her in an appeal to the Board of Equalization pursuant to O.C.G.A. § 48-5-

311. O.C.G.A. § 48-5-7.2 (e) expressly required the Board, upon denying Emmoth's application for preferential assessment, to notify the applicant in the same manner that notices of assessments are given to Code Section 48-5-306. Appeals from the denial of an application for preferential assessment by the board of tax assessors shall be made in the same manner that other property tax appeals are made pursuant to Code Section 48-5-311. See also O.C.G.A. § 48-5-311 (e) (2) (A) (appeals predicated upon compliance with notice requirements of O.C.G.A. § 48-5-306.) The board failed to give the requisite notice and thus it cannot take advantage of irregularities for which it is responsible. Ledbetter Trucks v. Floyd County Bd. of Tax Assessors, 240 Ga. 791 (2) (242 S.E.2d 596) (1978). In light of the Board's failure to provide Emmoth with the proper statutory notice, the Board's reliance upon Chatham County Bd. of Assessors v. Jepson, 261 Ga. App. 771 (584 S.E.2d 22) (2003), is misplaced."⁴

Moreton Rolleston, Jr. Living Trust, supra, 240 Ga. App. 405, was the second appearance of this case and this case was focused on the time of notices to a taxpayer and the court ruled that it was directory only. The first appearance of this case, 228 Ga. App. 371, the court held:

“Declaratory judgments are used to ‘settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered.”

“appellant is uncertain as to whether he must continue to follow the statutory appeal procedure under OCGA 48-5-311 (e) in order to contest the reassessment of his property, or whether such reassessment is void and can be ignored, because the Assessors failed or refused to act under the statutory mandate.”

OTHER KEY DECISIONS OF DEFENDANTS⁵

Vann v. Dekalb City Bd. of Tax Assessors 186 App. 208.

⁴ Defendants do not raise the question of another Judge's Order in a different case which was in their trial brief. If this point comes up, please refer to pages 30-32 of Plaintiffs trial brief. (R-141-174). Additionally it should be noted that Defendants filed their motion to dismiss solely under O.C.G.A. sec. 9-11-12(b)(1a)

⁵ Most of these decisions were cited by Defendants in their Trial Brief, but omitted from their Appellate Brief.

Taxpayers had an appeal in Superior Court and decided to file a class action challenging in the board's method of property appraising under the Constitution and laws. Taxpayers relied on 42 U.S.C. 1983. Lawsuit based on value.

Challenge of Board's assessing property taxes based on change in sale price of property sold in neighborhood which could be raised in statutory appeal process.

Case strictly on valuation.

Tax Assessors of Gordon County v. Chitwood 235 Ga. 147.

Taxpayers action v. County Officials and Rev. Comm.

Claimed County assessors did not apply the same standards or methods of valuation to all property, resulting in lack of uniformity.

Held the Bd. of Equalization had full authority to fashion an adequate legal remedy to Plaintiff's of grievances regarding the valuation of individual parcels of land and the uniformity of the County Tax Assessors. Again valuation was the key point.

Glynn County Bd. of Tax Assessors, et al. v. Haller, 273 Ga. 649.

Property owners filed class action alleging spot appraisals violated their constitutional right and their rights pursuant 42 USC 1983.

In a short decision held, the Court should not grant an injunction in a tax case when state law provides an adequate remedy to challenges for spot reassessments.

Acree v. Walls, 240 Ga. 788.

Somewhat convoluted case on mountain land with jury trials. Plaintiffs attacked digest and other claims were moot. The attack on the digest contains sub classification of property. The value in digest were alleged to be arbitrary and not based on fair market value. Focused on value.

Note: Shepard shows this case never cited.

Wilkes v. Redding, 242 Ga. 78.

Taxpayer filed petition for mandamus and injunction.

His claim included complaint that Board of Equalization were not required to attend hearing and be subject to cross-examination. Walked out of hearing, alleged Board failed to answer questions.

Held in short decision – that his appeal before Board of Equalization was adequate remedy.

Carter v. Fayette County, 287 A 175.

Taxpayer filed complaint for denial of his homestead exemption.

Dismissed as he failed to apply for homestead exemption are failed to exhaust his administrative remedies under tax appeal process.

Casey v. Landrum, 238 Ga. 284.

Taxpayers alleged they had not received changes in their assessments.

Short decision that they had adequate remedy before Board of Equalization.

Butts County v. Briscoe, 236 Ga. 233.

Taxpayers sued officials of county and Revenue Commissioner based on lack of uniformity assessments between taxpayers.

Court held their rights had accrued and their legal questions could be made in their appeal. Uniformity of assessments refers to valuation.

Callaway v. Carswell, 240 Ga. 579.

Taxpayers brought action and assessors seeking a mandamus to require Board into class arbitration.

Held where only issue was non uniformity of reassessment, class arbitration was proper. Question of reassessment piecemeal was a legal question. Arbitration not designed to handle.

Held Boynton v. Carswell was decided in error. It was decided on valuation. The issue of whether the County could reassess property piecemeal. This is a legal question which statutory arbitration in not designed to handle and which arbitrators can not resolve.

Kelly v. City of Atlanta, et al, 217 Ga. App. 365.

The taxpayers in two count complaint sought a permanent injunction as to collection and distribution of the alleged illegal taxes, and an interlocutory injunction impounding tax amounts collected in excess of 20 mills. By the time a hearing was held, 88 percent of a projected collectible total of 91 percent had been levied, collected and disbursed. The Court held the taxes appellant seeks to enjoin Appellees are no longer under their control.

While the facts are different in the case at bar, Plaintiffs obtained an Order dated January 18, 2008, nunc pro tunc from the trial Judge with respect to paying the 2008 taxes on the date due, namely January 20, 2008 which stated in part:

“The Plaintiffs will not, in paying their ad valorem taxes based on the 2007 reevaluation, waive the claims and challenges asserted in this action.” (R 22-23)

As noted in Plaintiffs’ complaint, paragraph 59, Plaintiffs state they “have paid their 2006 ad valorem taxes and hereby agree to pay the 2007 ad valorem taxes due on their properties, based on the 2006 Digest.” (R 5-19)

Thus, the Kelly Case, supra, is distinguishable.

CONCLUSION

Plaintiffs submit that Defendants’ Motion failed to demonstrate that the allegations in Plaintiffs’ Complaint disclose with certainty that none of Plaintiffs’ counts entitles Plaintiffs to any relief under any state of provable facts asserted.

Thus, the Trial Court correctly overruled Defendants’ Motion to Dismiss.

This 4th day of August, 2008.

Respectfully submitted,

BURT & BURT, P.A.

By: 
Hilliard P. Burt
Attorney for Appellees
Georgia Bar. No 097700

P.O. Box 71925
Albany, Georgia 31708-1925
(229) 432-6205

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served the within and forgoing BRIEF OF APPELLEES upon all parties by depositing a true and correct copy in the United States mail, with sufficient postage affixed thereon to ensure delivery, and properly addressed to counsel of record as follows:

Julius M. Hulsey
Jane Range
Hulsey, Oliver, & Mahar, LLP
Post Office Box 1457
Gainesville, Georgia 30503

This 4th day of August, 2008.

Burt & Burt, P.A.


Hilliard P. Burt
Georgia Bar No. 097700
Attorney for Appellees

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Albany, GA 31708-1925
(229) 432-6205

**Court of Appeals
of the State of Georgia**

ATLANTA, AUGUST 1, 2008

The Court of Appeals hereby passes the following order:

A08A2072. DENVER C. HOOTEN ET AL v. RICHARD R. THOMAS ET AL

Upon consideration of the motion for permission to file briefs in excess of thirty (30) pages on behalf of the appellees in the above styled case, it is ordered that said motion be GRANTED. It is further ordered that appellee's briefs in the above styled case shall not exceed forty (40) pages.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

AUG -1 2008

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

Willi Z. Marti, Jr.

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IN THE COURT OF APPEALS
STATE OF GEORGIA

DENVER C. HOOTEN, individually and)
in her capacity as Tax Director of Dougherty)
County, Georgia, and WILLIAM)
ASHBERRY, J. DELL BUSH, DONALD)
BUTTS, BRUCE GUNNELS, and)
WILLIAM JOHNSON, in their capacities)
as members of the Board of Tax Assessors)
Dougherty County, Georgia,)

Appellants)

v.)

RICHARD R. THOMAS, FRED)
CARTER, LONNIE H. SMITH, DOTTIE)
SMITH, JUDY LEE, MICHAEL SMITH,)
C.W. HOPKINS, CURTIS H. SMITH,)
JOHN O'BRIEN, JERRY BROOKS,)
DOUGH MILLER, HILTON)
MERCHANT, TIM COLEY, and CECIL)
MUSGROVE)

Appellees.)

APPEAL CASE NO.:
A08A2072

FILED IN OFFICE 8/14/08
BY Fed Ex
JD
CLERK, COURT OF APPEALS OF GEORGIA

APPELLANTS' REPLY BRIEF

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Counsel for Appellants

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, individually and)	
in her capacity as Tax Director of Dougherty)	
County, Georgia, and WILLIAM)	
ASHBERRY, J. DELL BUSH, DONALD)	APPEAL CASE NO.:
BUTTS, BRUCE GUNNELS, and)	A08A2072
WILLIAM JOHNSON, in their capacities)	
as members of the Board of Tax Assessors)	
Dougherty County, Georgia,)	
)	
Appellants)	
v.)	
)	
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CARTER, LONNIE H. SMITH, DOTTIE)	
SMITH, JUDY LEE, MICHAEL SMITH,)	
C.W. HOPKINS, CURTIS H. SMITH,)	
JOHN O'BRIEN, JERRY BROOKS,)	
DOUGH MILLER, HILTON)	
MERCHANT, TIM COLEY, and CECIL)	
MUSGROVE)	
)	
Appellees.)	

APPELLANTS' REPLY BRIEF

COMES NOW Appellants and files this their Reply Brief.

I. ARGUMENT AND CITATION OF AUTHORITY

Appellants have never disputed that their motion to dismiss should be reviewed by the trial court drawing all inferences on the facts in favor of the

Appellees. Appellees' Brief has gone into significant factual arguments as to the validity of their claims. For the purposes of review in this case, Appellants have already conceded that the Court should assume every factual allegation of Appellees is true.

The real underlying question in this case is whether all of the claims having to do with the assessment of the taxes and whether they were properly assessed in a constitutional and legal manner can be addressed outside of the statutory appeals process of O.C.G.A. § 48-5-311. The Appellees imply that only valuation questions are required to go through that process and any other questions of constitutionality or methodology or legality of process can be addressed outside the statutory process. Appellees' contentions ignore the explicit language of the appeal statute itself and a long line of judicial authorities holding to the contrary.

The Georgia courts have a long line of precedence which acknowledges that the Superior Court is without jurisdiction to hear tax appeal claims which challenge the assessments of the tax assessors of a county without first going through the statutory tax appeal process. Only those cases which arise and goes through the administrative process, exhausting administrative remedies and reaching the superior court as de novo appeals confer on the superior court

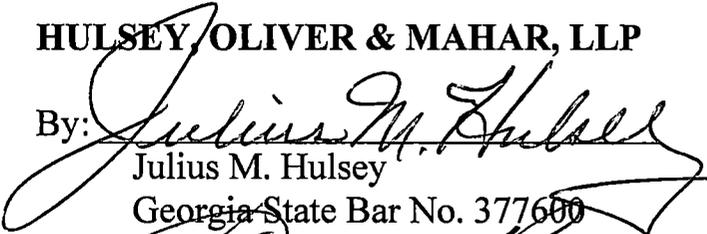
jurisdiction under the Georgia system. Moreton Rolleston, Jr. Living Trust v. Glynn County Board of Tax Assessors, 240 Ga. App. 405 (2000); Chatham County Board of Assessors v. Jepson, 261 Ga.App. 771, 772 (2003); see also Vann v. Dekalb County Board of Tax Assessors, 186 Ga. App. 208, 210 (1988); Glynn Co. Board of Tax Assessors v. Haller, 273 Ga. 649, 649 (2001); Rockdale County v. Finishline Industries, Inc. of Georgia, 238 Ga. App. 467, 469 (1999); Casey v. Landrum, 238 Ga. 284 (1977) Tax Assessors of Gordon County v. Chitwood, 235 Ga. 147, 154 (1975) (earlier code section).

Respectfully submitted this 14th day of August, 2008.

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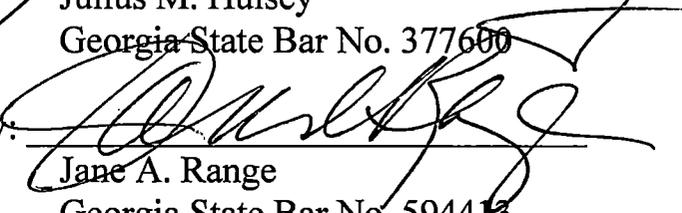
HULSEY, OLIVER & MAHAR, LLP

By:


Julius M. Hulsey

Georgia State Bar No. 377600

By:


Jane A. Range

Georgia State Bar No. 594413

ATTORNEYS FOR APPELLANTS

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, individually and)	
in her capacity as Tax Director of Dougherty)	
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MERCHANT, TIM COLEY, and CECIL)	
MUSGROVE)	
)	
Appellees.)	

CERTIFICATE OF SERVICE

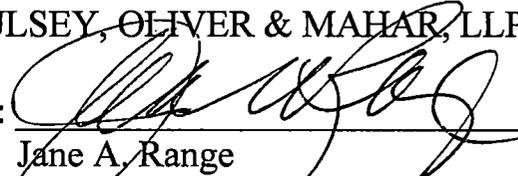
I hereby certify that I have this date served upon the Appellees in the above styled matter a copy of the within and foregoing **APPELLANTS' REPLY BRIEF**, by placing same in the U. S. mail properly addressed to:

Hilliard P. Burt
Burt & Burt, PA
Post Office Box 71925
Albany, GA 31708-1925

This 14th day of August, 2008.

HULSEY, OLIVER & MAHAR, LLP

By:


Jane A. Range

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SUPREME COURT OF GEORGIA

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, ET AL

APPELLANTS

v.

RICHARD R. THOMAS, ET AL

APPELLEES

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APPEAL CASE No.:
A08A2072

APPELLEES' SUPPLEMENTAL BRIEF

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, ET AL

*

APPELLANTS

*

*

v.

*

*

APPEAL CASE No.:

A08A2072

*

RICHARD R. THOMAS, ET AL

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APPELLEES

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APPELLEES' SUPPLEMENTAL BRIEF

I.

Argument and Citation of Authority

At the outset, Appellees (Plaintiffs) contend that Counts 16, 15, and 17 challenge as an illegal and unconstitutional certain portions of the ad valorem tax system, which have nothing to do with the 2007 reevaluation and thus Appellants' (Defendants) defenses are unavailing.

(a)

Count 16 alleges that Defendants permit all owners of business personal property to value their property which is accepted by Defendants.

Taxing realty by appraisal and accepting the value of tangible personal property at whatever value it was returned for by taxpayers cause the assessments to be null and void. Colvard v. Ridley, 218 Ga. 490.

In a declaratory action the Court held:

“A municipal tax ordinance imposing a tax ad valorem on real estate only was void by reason of conflict with the Constitution in not levying the tax ad valorem upon all property, real and personal, subject to be taxed within the territorial limits of the authority levying the tax.” Lott Investment Corp. v. City of Waycross, 218 Ga. 805.

In Declaratory action taxpayers received injunction relief as Assessors did not tax personal property of those who did not own real estate. Register v. Langdale, 226 Ga. 82.

(b)

Count 15 states: The statute 48-5-311 (c) requires all taxpayers who have appealed to pay the increased valuation less 15%. This is a heavy burden on taxpayer when the increased valuation is 50 – over 100%. Notwithstanding the length of time you have paid this high valuation during the appeal process, the

statute places a limit on the taxpayer interest claim of \$150 if the Assessors have made a gross mistake.

Conversely, a utility in Dougherty County or any County when appealing the increased value on their property is only required to pay taxes based on the assessed value the year before. See: Telecom USA, Inc. v. Collins, 260 Ga. 362.

This is a clear violation of equal protection.

No distinction is made between property owned by public-utility corporations and individuals. Oglethorpe v. Woodward, 150 Ga. 691. Mandated by 48-5-299(a).

It is interesting to note that in the late seventies, the Supreme Court allowed taxpayer, during appeals, to pay their taxes on assessed valuation of property determined for prior year. Callaway v. Carswell, 240 Ga. 579.

Additionally, Plaintiffs submit there is no statutory administrative procedure to raise issue as to payment of current tax bill based on the valuation of prior year.

(c)

Count 17 states: The ad valorem tax statute does not tax intellectual properties and intangible assets. The taxing of real estate and business personal property and

exempting intangible assets which are property is discriminatory and a violation of equal protection.

In comparing real estate to intangible assets Chief Justice Jordan said in a concurring opinion that our ad valorem taxation is unfair and violates equal protection. McDaniel v. Thomas, 248 Ga. 632.

Article 7, § 1, ¶ 3 (b) (1) states:

“Except as otherwise provided in this subparagraph (b), classes of subjects for taxation of property shall consist of tangible property and one or more classes of intangible personal property including money; provided, however, that any taxation of intangible personal property may be repealed by general law without approval in a referendum effective for all taxable years beginning on or after January 1, 1996.” (emphasis supplied)

Plaintiffs have been deprived of their property without due process of law and denied the equal protection of the laws in violation of U.S. Constitution Amendment XIV, § 1 and Article 1, § 1, ¶ 2 and Article 7, § 2, ¶ 1 of the Georgia Constitution.

The settled law recognizes that intangibles constitute property, including copyright, patents, etc. known as “intellectual properties”.

While the following decision is hoary with age, it is instructive as to how our ad valorem system evolved.

In Atlanta National Assoc. v. Stewart, 109 Ga. 80, the Court held in headnote 2 the following:

“Under this constitution the General Assembly can not lawfully either expressly exempt from taxation, or accomplish this result by a failure to tax, any property except that which in the constitution itself the General Assembly is expressly authorized to exempt.”

It is patently unconstitutional for one segment of property to be forced to pay the majority of a county’s expenses and another segment to benefit from these services without paying property taxes.

Our Constitution cannot countenance taxing a person’s roof over their head (a home, which is non-income producing) and exempting an investor’s income producing intangible properties, which are valuable assets.

Thus the implementation of the ad valorem taxation system is unconstitutional.

Plaintiffs submit the above three Counts are all acts of Defendants or alleged defects in the ad valorem tax system without regard to the 2007 re-evaluation.

The other 9 Counts stem from a contract between Dougherty County and Tyler, an appraisal company from Ohio, which was low bidder for the reappraisal.

(d)

Count 11 alleged: After Plaintiffs and a number of the said class were given notice by Defendant Assessors that the value of their real estate had been substantially increased, they duly notified the Defendant Assessors by a written notice that they appealed to arbitration, which is authorized by O.C.G.A. § 48-5-306 (b) (2) which reads:

“The amount of your ad valorem tax bill for this year will be based on the appraised and assessed values specified in this notice. You have the right to appeal these values to the county board of tax assessors either followed by an appeal to the county board of equalization or to arbitration and in either case, to appeal to the superior court.”

Notwithstanding said Plaintiffs were denied a hearing before arbitrators, said taxpayers’ real estate was assessed for the year 2007 by Defendant Assessors and Defendant Hooten mailed said taxpayers a bill requiring said taxpayers pay 2007 taxes based on said increased valuations.

The net effect of this Count is to demonstrate that Defendants have prevented these taxpayers from exercising their constitutional right to appeal to arbitration the excessive 2007 valuations of their property and to have a hearing before being assessed and billed by Defendants.

There is no statutory remedy which allows these taxpayers any appellate relief from said denial of arbitration, short of a separate action in the Superior Court. Clearly, there was no decision by the arbitrators to appeal. O.C.G.A. § 48-5-311 (d) in part: “the decision of the arbitrator or arbitrators may be appealed to the Superior Court in the same manner as a decision of the Board of Equalization.”

Without a decision from arbitration, Plaintiffs have no decision to appeal to the Superior Court and thus without a remedy.

Thus, Defendants’ basic defense that “the dissatisfied taxpayer must exhaust the administration remedy” is unavailing and must go for naught. Callaway v. Carswell, 240 Ga. 579.

Defendants have basically ignored this Count, as they have cited no defense. Only statement in Defendants’ Brief on this Count on page 15 is: “Count 11, as amended, alleges that the right to elect to arbitration was denied to some Plaintiffs.”

In Miller v. Mitchell, 226 Ga. 892, the Court held:

1. Taxation

“Where evidence showed that taxpayer demanded, in writing, arbitration with respect to taxes assessed in specified year and that tax assessors failed or refused to appoint their arbitrator, court did not err in

holding that when taxpayer paid amount he contended was due in taxes for such year, payment amounted to full payment.”

In the teeth of the said code section, the Defendant Assessors consistently denied all of said appeals the right to arbitration. Notwithstanding said taxpayers, were denied a hearing before arbitrators said taxpayers’ real estate was assessed for the year 2007 by Defendant Assessors and Defendant Hooten has mailed to said taxpayers a bill requiring said taxpayers to pay taxes based on said increased valuations.

(e)

As set forth in **Count five, six and seven**, the contract with Tyler to reevaluate all real estate in Dougherty County for the year 2007 was null and void for three independent legal reasons.

1. The said contract was between the Board of Commissioners of Dougherty County and Tyler and not the Board of Assessors and thus an ultra vires act.

The sole authority to enter into such a contract is O.C.G.A. § 48-5-298(a).

The Defendants, the Dougherty Board of Assessors, were not a party to this contract as required by this statute.

Without a lawful contract, Tyler was not authorized to reevaluate real estate in Dougherty County since Defendants failed to follow subject statute.

Pursuant to Bagwell v. Cash, 207 Ga. 222, Defendant Assessors had no authority to delegate to Tyler Defendants' mandated appraised duties. In Bagwell, supra, the Court held:

“The Board of Tax Assessors of Hall County can not delegate its duties pertaining to the equalization of property valuations for ad valorem taxation, nor can the board contract for services of the nature stipulated in the contract executed by the board.”

To the same effect see: Graves v. Wall, 210 Ga. 271 and Ezzard v. City of Lawrenceville, 207 Ga. 649.

2. Had said Defendant Assessors signed said contract it was void in violation of O.C.G.A. § 45-5-299 in that said contract did not require the business personal property to be revalued nor did it require the reevaluation of the real estate or business personal property of public utilities. The omitted properties are of the same class as real estate.

This amounts to piecemeal evaluation which is prohibited and has been held to be a legal question. Callaway v. Carswell, 240 Ga. 579. Thorpe v. Benhan, 161 Ga. App. 116.

3. Had said contract been signed by Defendant Assessors, the procedure and process followed by Tyler and said assessors amounted to an abdication by Defendant Assessors of the mandated duties of said assessors.

The said assessors allowed Tyler to make the valuation and the assessors simply sent the tax notices to Plaintiffs.

The assessors are required by O.C.G.A. § 48-5-306(a) which provides in part: “The board shall see that all taxable property within the county is assessed and returned at its fair market value....”

This Court has condemned tax assessors’ delegating discretion to companies such as Tyler without proper oversight in evaluation of real estate. Parisian, Inc. v. Cobb County Board of Tax Assessors, 263 Ga. App. 332; Fulton County Bd. Of Tax Assessors v. Saks Fifth Ave. Inc., 248 Ga. App. 836.

The power of taxation is a peculiarly legislative function. Delegating to an administrative agency the power to fix the ratio of assessment, without formulating a definite and intelligible standard to guide the agency in making its determination, constitutes an unconstitutional delegation of legislative power.

This Court goes to the heart and core of whether subject reevaluation was legal from its beginning and necessitates a lawsuit for a judicial determination. It

nullifies any act pursuant to said void contract. Again, Defendants' argument that Plaintiffs must exhaust their administrative remedies is without merit.

Construction of a contract is a legal question which arbitrators and Board of Equalization are not designed to handle. Callaway v. Carswell, 240 GA 579.

(f)

Plaintiffs withdraw Counts 1, 2, 3, 4, and 9 as these Counts basically raise the issue of market value.

Defendants misconstrues the basic thrust of Plaintiffs' Complaint.

On page 3 of Defendants' Brief states:

"The Complaint sought to circumvent the statutory appeals process in that almost every Count alleges errors in the revaluation process used by Defendants to arrive at tax assessments for the year 2007." – Not true.

None of the Counts relied on by Plaintiffs allege error in the valuation of the tax assessment.

On page 5 Defendants state Plaintiffs "are trying to circumvent the statutory appeals process."

Again, this is not true. Plaintiffs have utilized the appeal process and as a matter of fact have been denied one option of the appeal process, namely the right to arbitration.

On page 7, Defendants cite decisions where the taxpayer failed to “exhaust his or her administrative remedies.”

There is nothing in Plaintiffs complaint to indicate they failed to exhaust their administrative remedies.

48-5-311(e) Appeal to Board of Equalization as to “matters of taxability, uniformity of assessment and value. By referring to the work “uniformity”, this relates to Article 7, sec. 1, par.3 of our Constitution.

Uniformity of assessment refers to value

In an ad valorem tax case administrative remedies are the right of a taxpayer to appeal to the Board of Assessors and thereafter to the Board of Equalization or to Arbitration.

This obviously does not include an appeal to Superior Court as this is a judicial proceeding not administratively. Carter v. Fayette County, 287 Ga. 175, which is a decision cited by Defendants on page 6 of their brief.

The vast majority of the plaintiffs and class Plaintiffs have appealed to the Board of Equalization with no relief. This defense has no application to an appeal to the Superior Court, as obviously this Court is not an administrative body. Thus, the major defense of Defendant is without merit and must fail.

Additionally, Defendant's are relying on decisions in which the taxpayer's lawsuit is attempting to reduce the valuation on taxpayer's property. The complaint, in the case at bar, cites no facts nor attempts to show that taxpayers' property should be valued at a value less than the valuation of Tyler or the Defendant assessors.

In Smith v. Day, 237 Ga. 48, the Court held:

1. Taxation

“Where litigation involving county tax digest did not attack validity of digest itself nor claim that assessments were excessive but merely challenged procedure used by county tax officials in carrying forward 1973 assessments to 1974, there was no requirement for appeal to county board of equalization nor was there any need to tender amounts admittedly due.” (emphasis supplied)

Oddly on page 9, Defendants cite evidence which Plaintiffs refute and an unknown affidavit of Defendant Tax Director which have no place in a motion to dismiss.

(g)

Right to Declaratory Judgment

Plaintiffs' Complaint was filed before the 2007 taxes were due and the facts of subject case authorize Plaintiffs to file this declaratory judgment action.

Lott Investment Corp. Supra, Colvard, Supra, Register, supra.

In Rolleston v. Glynn County Board to Tax Assessors, 228 Ga. App. 37, the assessors did not respond to appellant's (taxpayer) notice of appeal. The Court stated the following:

“Appellant filed a complaint asking the trial court for declaratory relief, i.e., to find that the reassessments by the Assessors for the years 1995 and 1996 were invalid for failure to follow OCGA 48-5-311 (e) (2), (3), and 6 (A) and (B). While the complaint does not specifically invoke OCGA 9-4-1 et seq., the complaint sets forth a case of uncertainty, where declaratory judgment is sought to declare the assessments for 1995 and 1996 invalid, because the Assessors have failed or refused to act under a statutory mandate that would otherwise give appellant the right to appeal to superior court.” (emphasis supplied)

In authorizing this complaint for declaratory relief, the Court held:

“In the case sub judice, appellant is uncertain as to whether he must continue to follow the statutory appeal procedure under OCGA. 48-5-311(e) in order to contest the reassessment of his property, or whether such reassessment is void and can be ignored, because the Assessors failed or refused to act under the statutory mandate.” (emphasis supplies)

See: Calvary Independent Baptist Church v. City of Rome, 208 Ga. 312, Enron Capital & Trade Resources Corp. v. Pokalsky, 227 Ga. App. 727, James B. Beam Distilling Co. v. State, 263 Ga. 609.

Abstention doctrine for the exercise of equitable jurisdiction in tax appeals, which is not before the Court.

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

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individually and in her capacity)
as Tax Director of Dougherty)
County, Georgia, and **WILLIAM**)
ASHBERRY, J. DELL BUSH,)
DONALD BUTTS, BRUCE)
GUNNELS, and WILLIAM)
JOHNSON, in their capacities as)
members of the Board of Tax)
Assessors, Dougherty County,)
Georgia,)

Appellants

v.

RICHARD R. THOMAS, FRED)
CARTER, LONNIE H. SMITH,)
DOTTIE SMITH, JUDY LEE,)
MICHAEL SMITH, C.W.)
HOPKINS, CURTIS H. SMITH,)
JOHN O'BRIEN, JERRY)
BROOKS, DOUGH MILLER,)
HILTON MERCHANT, TIM)
COLEY, and CECIL MUSGROVE)

Appellees.

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APPEAL CASE NO.:
A08A2072

**BRIEF OF APPELLANTS, DENVER C. HOOTEN, WILLIAM
ASHBERRY, J. DELL BUSH, DONALD BUTTS, BRUCE GUNNELS, AND
WILLIAM JOHNSON**

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**IN THE COURT OF APPEALS
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Appellees.

APPEAL CASE NO.:
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BRIEF OF APPELLANTS

PART I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

Defendant, Dougherty County Board of Tax Assessors conducted a county wide revaluation of property for the tax year 2007. Tax assessment notices were mailed to county property owners, including the Plaintiffs. Plaintiffs were dissatisfied by the assessments, assessments notices, the methodology used in the valuation process, the use of an outside consultant to assist in the valuation process, the method by which utility properties were assessed and personal property was assessed. Georgia law provides the taxpayers with an administrative appeals process to resolve ad valorem tax issues. See O.C.G.A. § 48-5-311. Many of the plaintiffs filed statutory appeals under O.C.G.A § 48-5-311 and were further dissatisfied by procedural and notice issues in the appeals process. They were dissatisfied when the Department of Revenue approved the 2007 tax digest for collection. They were further dissatisfied with the computation of their tax bills.

(R8-11)

Plaintiffs then filed their Complaint for Declaratory Judgment, Injunctive Relief and Class Certification separate and apart from the statutory appeals process afforded them by O.C.G.A. § 48-5-311. (R5-16, R131-136) Defendants Ashberry, Bush, Butts, Gunnels and Johnson were named in their official capacity as

Members of the Board of Tax Assessors. Defendant Hooten was named individually and in her capacity as Tax Director of Dougherty County. The Complaint sought to circumvent the statutory appeals process in that almost every Count alleges errors in the revaluation process used by Defendants to arrive at tax assessments for the year 2007.

Defendants filed their Motion to Dismiss (R46-47, R48-52, R53-103) all counts of the complaint and an Answer (R117-126) in response to Plaintiffs' Complaint. Plaintiffs then filed an amendment to their Complaint and a legal memorandum in opposition to the Motion to Dismiss. The trial court heard oral argument on the Motion to Dismiss on April 3, 2008. It entered its order denying the Defendants' Motion to Dismiss on April 22, 2008. (R175-176)

Defendants petitioned the trial court for a Certificate of Immediate Review which was granted on April 23, 2008 and filed with the Clerk of the Superior Court on April 28, 2008. (R177-178)

PART II. ENUMERATION OF ERRORS

1. The trial Court erred in denying Defendants' Motion to Dismiss by holding that some Counts of the Complaint (although the Court did not specify which counts) contained claims for which relief could be granted (a) outside the statutory

appeal process of O.C.G.A. § 48-5-311; or (b) claims related to the approval of the tax digest and collection of taxes.

PART III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

The standard of review of a Motion to Dismiss by the trial court is whether the allegations of the Complaint when construed in the light most favorable to the Plaintiff with all doubts resolved in the Plaintiff's favor, disclose with certainty that the Plaintiff would not be entitled to any relief under any state of provable facts. Hartsfield v. Union City Chrysler-Plymouth, 218 Ga. App. 873 (1995). Since the Motion to Dismiss was decided on written submissions and all factual disputes were resolved in the favor of the Plaintiff, this case should be reviewed on a non-deferential standard in that the reviewing Court is in an equal position with the trial court to determine the facts and therefore, examine the facts under a non-deferential standard. Scovill Fasteners, Inc. v. Sure Snap Corp., 207 Ga. App. 539 (1993). As there is no consideration of evidence per se in a Motion to Dismiss as the facts are assumed to favor of Plaintiff, it is inappropriate to apply the any evidence standard. Carden v. Burckhalter, 214 Ga. App. 487 (1994).

B. Argument and Citation of Authority

The Plaintiffs' entire case, which is filed separate and apart from the statutory appeals process under O.C.G.A. § 48-5-311, consists of various objections arising out of the ad valorem tax reevaluation and collection of taxes for tax year 2007 in Dougherty County, Georgia. The Plaintiffs, in filing the declaratory judgment action, are trying to circumvent the statutory appeals process. They have failed to demonstrate any uncertainty that demands a declaratory judgment. O.C.G.A. § 48-5-311 is a statutory appeals process provided by the legislature to address any issues an aggrieved taxpayer has with respect to the assessment of his property for ad valorem tax purposes. It provides a multi-layered administrative appeal process through two administrative boards, the Board of Tax Assessors and the Board of Equalization, or through the Board of Tax Assessors and a panel of arbitrators, culminating in a de novo review in front of the Superior Court. Such an appeals process provides an adequate remedy at law. Furthermore, it removes any uncertainty as to the process a taxpayer should follow to obtain relief. Second, as to the collection of taxes, O.C.G.A. 48-5-311(g)(4)(B), provides the legislature's solution as to how taxes are to be collected pending appeals.

Defendants further demonstrated that the statutory appeals process is to be given great deference by the courts because the legislature has specifically designed a remedy, and as such, the courts should respect such a remedy under the separation of powers doctrine. The Courts have accordingly held over 30 years of precedent that following a statutory appeals process is a prerequisite of the courts having jurisdiction of the matter. Perkins, et al. v. Department of Medical Assistance, 252 Ga. App. 35 (2001). Valuation and assessment are executive branch functions and the Superior Court is limited to reviewing these functions to appeals arising under O.C.G.A. § 48-5-311. Moreton Rolleston, Jr. Living Trust v. Glynn County Board of Tax Assessors, 240 Ga. App. 405 (2000); Chatham County Board of Assessors v. Jepson, 261 Ga.App. 771, 772 (2003); see also Vann v. Dekalb County Board of Tax Assessors, 186 Ga. App. 208, 210 (1988); Glynn Co. Board of Tax Assessors v. Haller, 273 Ga. 649, 649 (2001); Rockdale County v. Finishline Industries, Inc. of Georgia, 238 Ga. App. 467, 469 (1999); Casey v. Landrum, 238 Ga. 284 (1977) Tax Assessors of Gordon County v. Chitwood, 235 Ga. 147, 154 (1975) (earlier code section). Under the statutory scheme of O.C.G.A. § 48-5-311, “[t]he taxpayer must first file an administrative appeal with the board of equalization or submit the appeal to arbitrators. An adverse decision

from either the board of equalization or arbitrators may then be appealed to the superior court.” Carter v. Fayette County, 287 Ga. App. 175, 175 (2007). The superior court’s standard of review on appeal from the board of equalization is de novo. O.C.G.A. § 48-5-311(g)(3); Acree v. Walls, 240 Ga. 778, 789 (1978). Where the taxpayer fails to “exhaust his or her administrative remedies” as provided by the statutory scheme, “the superior court is without subject matter jurisdiction.” Carter, at 175-76.

Georgia Courts have described the taxpayers’ questions that the board of equalization can properly entertain under the statutory appeals procedure: the questions include “not only questions of uniformity, valuation, and taxability, but also a taxpayer’s questions addressing constitutional and procedural issues.” Chatham County Board of Assessors v. Jepson, 261 Ga.App. at 771-72; see also Wilkes v. Redding, 242 Ga. 78, 79 (1978) (“The board of equalization is thus the appropriate forum for deciding the taxpayer’s constitutional and procedural issues as well as questions of uniformity, valuation and taxability”). The Court of Appeals has held that one such procedural issue that the board of equalization can properly hear is the “the issue of whether [taxpayers] received valid notice.” Id. at 772. The Supreme Court has held failure to receive any notice should still be

addressed through the county board of equalization. Casey v. Landrum, 238 Ga. 284, 285 (1977)

Further the Courts have routinely held that the statutory appeals process addresses all issues of uniformity, valuation, taxability and due process and procedural issues and constitutional challenges. The existence of the statutory remedy through administrative appeals means that the Plaintiffs would be required to exhaust their administrative remedies prior to instituting a suit in superior court.

As these statutory appeals culminate in a de novo appeal to Superior Court, where all legal or if necessary, equitable remedies, can be addressed to fashion complete relief, including ordering the BOTA to do a complete reevaluation of the 2007 digest again in a legal and constitutional manner, it becomes obvious that the declaratory judgment action filed by Plaintiffs can offer no greater relief, but does present risks of contradictory results between the statutory appeals and the instant case. Affirming a result that ignores the statutory appeal process undermines the abstention doctrine and the constitutional separation of powers. It encourages a multiplicity of suits and wastes judicial and government resources without adding to the remedies that a taxpayer can receive. A court is always required to inquire into its jurisdiction to hear a matter, before it ever reaches the merits of the matter.

For that reason, the trial court was without jurisdiction to hear any issue that could have been raised in the statutory appeals process, regardless of the merits or facts behind the claim. State v. Watson, 239 Ga. App. 482 (1999); First United Church, Inc. v. Udofia, 223 Ga. App. 849 (1996).

In addition, the counts dealing with the payment of taxes did not state a claim for which relief could be granted. The Plaintiffs' suit was filed well after tax bills were originally mailed. The uncontradicted affidavit of Defendant Hooten indicated that a substantial portion of the taxes were already paid. Once the taxes are substantially paid, injunctive relief and declaratory judgment are not available. Kelly v. City of Atlanta, 217 Ga. App. 365 (1995). Moreover, going to the heart of the factual allegations, Hooten did not approve the digest, the Commissioner of the Georgia Department of Revenue did pursuant to O.C.G.A. § 48-5-304. The Revenue Commissioner is not a party to the case and his approval of the digest and whether his actions were in accordance with the statute cannot be litigated in his absence.

As to the myriad allegations of denial of due process woven through the Plaintiffs' Complaint with respect to the payment of taxes, the Plaintiffs fail to show that they have been deprived of due process rights. The United States

Supreme Court has set the standard for minimal due process: the statute must give a clear and certain remedy. The remedy may be pre-deprivation or post deprivation. Reich v. Collins, 513 U.S. 106, 108 (1994). Georgia provides for both. There is the pre-deprivation hearing which is the statutory appeal process. There is a post deprivation remedy in that the law provides for refunds of over collection of taxes and interest. O.C.G.A. § 48-5-311. There is also a separate refund statute for taxes collected in error or illegally. The necessary element for determining the propriety of granting a party declaratory relief is uncertainty. However, there is absolutely no uncertainty for the taxpayers before this Court. It is often said that there are two things in life that are certain: death and taxes. In this case, there is no uncertainty that that Plaintiffs in this case have to pay ad valorem taxes on their properties. Plaintiffs may argue that the amount they pay remains uncertain, but the Legislature has provided certainty on this issue as well. As discussed above, the Legislature provides both predeprivation and postdeprivation remedies to taxpayers who dispute their tax assessments: before paying the tax assessed against their property, taxpayers have the opportunity to appeal the assessment under O.C.G.A. § 48-5-311, as previously discussed in Part 2, supra . If taxes become due while the appeal is ongoing, they are required to

only pay on a bill calculated at 85% of the new amount. If after trial, or any decision of the BOE not appealed from, the amount is reduced, they will receive a refund with interest. The legislature considered the supposed danger to the taxpayer of paying on amounts not finally determined and specifically fashioned a statutory remedy. O.C.G.A. Section 48-5-311 (g) (4) (B). In addition, if the value difference is significant after a trial in superior court, the appealing taxpayer will be awarded attorney's fees under the statute. This Court should not substitute its judgment for the legislature's judgment on the appropriate level of relief for tax payments due prior to final adjudication.

Moreover, declaratory relief is inappropriate where a plaintiff (1) does not risk taking future undirected action but (2) simply seeks a declaration that the actions of another were prohibited. Glynn-Brunswick Memorial Hospital Authority, 243 Ga. App. at 345. First, Plaintiffs here do not risk taking future undirected action because there is one clear path for the Plaintiffs to follow in this case: as illuminated by the long line of cases mentioned above, the Plaintiffs' one path is set out by the Legislature in the statutory appeals procedure of O.C.G.A. § 48-5-311. Secondly, in their Complaint, Plaintiffs state repeatedly that the 2007 reevaluation and the reevaluation process should be "declared illegal, null, and

void.” (Plaintiffs’ Complaint, ¶¶ 25, 29, 31, 37, 59(e) (R5-19): Plaintiffs simply seek a declaration that the actions of Tyler and the County were prohibited. Those actions have already been taken, and for better or worse, can not be taken back. Therefore, declaratory relief is not appropriate in this case. If Plaintiffs believe that the actions of the County were prohibited, the proper way to handle such complaints would be to take advantage of the statutory appeals procedure, their adequate remedy at law. This is not a case in which declaratory relief is either appropriately sought or granted.

The inverse condemnation claims must fail as well. The Plaintiffs have not alleged all of the necessary elements of the claim. An inverse condemnation exists if the county interferes with the use or enjoyment of property arising to the level of nuisance or trespass. Rabun County v. Mountain Creek Estates, LLC, 289 Ga 857 (2006). The taxes do not take a substantial portion of the economic value of the properties and are certainly not a trespass or nuisance.

If one reviews the substance of each count in the Plaintiffs' Complaint in view of the law, it is clear that each count fails to state a claim for relief. In reviewing the nature of the counts, it is clear that the allegations of excessive increase in value, failure to treat business personal property the same as real

property, the inappropriateness of appraisal methods related to utility property, issues related to the notices, the fairness of hearings, gross errors in methodology by Tyler/CLT, qualifications of the members appointed to the BOE, etc., are all issues relating to value, uniformity, taxability, illegality or constitutional issues. In reviewing these allegations, the trial court must decide that the allegations would fail to present a legally cognizable claim under any set of facts which might be proven. Defendants argue that they demonstrated that presuming for the sake of the motion (without admitting) that every factual allegation made by Plaintiffs was true and provable, the Plaintiffs still failed to state any claim for which relief could be granted. Specifically, Count I alleges an improper standard which resulted in inaccurate appraisals making the increase in valuation and resulting taxes an unlawful taking of property without due process. Count II can be summarized as claims that existing use was ignored and wrong methodology was employed resulting in too high assessments. Count III can be summarized as inaccurately appraising fair market value of commercial, agricultural, and rural properties. Count IV alleges Tyler failed to follow the procedural manual of the Department of Revenue so that the valuations were illegal. Each of those allegations sounds in

valuation or uniformity errors because of improper valuation which may be addressed in the statutory appeals process under O.C.G.A. § 48-5-311.

Count V, as amended, alleges that Tyler/CLT only reevaluated real estate even though business personal property and real estate, including properties of the utilities are of the same class, violating the uniformity clause of the Constitution. Count VI, as amended alleges that Tyler/CLT did not appraise tax exempt properties which may not have been tax exempt in actual fact, and failed to appraise utility properties, both real and personal. These allegations go to uniformity of the digest and taxability. Uniformity and taxability are explicitly covered by the statutory appeals process of O.C.G.A. § 48-5-311.

Count VII alleges improper manner of assessing property in that the BOTA did not assess the property because the Tyler/CLT contract was entered into by the BOC. That allegation is still an allegation that the BOTA improperly assessed the property, and does not become a claim in contract law, but remains a procedural issue that may be addressed in the statutory appeals process.

Count VIII alleges that Hooten improperly obtained approval of the digest for the collection of taxes. This is not a tax assessment claim per se, but it is clear from the face of the proceedings that the Commissioner of the Department of

Revenue, the official who actually has the power to approve a digest under O.C.G.A. § 48-5- 304 is not a party to the case. The lack of the real party who took the action complained of defeats the claim and to date Plaintiffs have failed to add the Commissioner of the Department of Revenue.

Count IX, as amended, alleges that the notices of assessment did not contain a simple, non-technical description of the basis for the new assessment, making the entire revaluation void. Failures of notices to meet statutory requirements have been specifically ruled to be among the types of issues the BOE may address in the statutory appeal process.

Count X alleges that the failure of the BOTA to provide explanations for changes or corrections to 2007 valuations deprived persons of an opportunity to prepare for BOE hearings. Count XI, as amended, alleges that the right to elect arbitration was denied to some Plaintiffs. Count XII, as amended, alleges that the hearing procedures of the BOE were fundamentally unfair and denied taxpayers a fair hearing, were not plain, speedy and efficient, and that the BOE heard evidence from the BOTA staff that was prohibited by statute. Again, these counts sound in due process claims that the courts have ruled should be brought up through the statutory appeals process.

Count XIII alleges that the method of appointment of additional members to panels of the BOE was tainted by an appearance of impropriety and therefore, suspect. The count did not actually allege a disqualification or fraud. As such it is not really an allegation. Cases and controversies are not tried on suspicion. Nevertheless, the law specifically provides for the BOE members to be challenged on their qualifications in the statutory appeals process. (O.C.G.A. § 48-5-311) This issue may also be resolved through the statutory appeal process.

Count XIV alleges that it is illegal to send tax bills to persons still having appeals pending in the statutory appeals process. This claim is without merit in that the appeals statute explicitly provides a remedy for persons whose tax bills come due while their appeal is pending and states the amount to be billed, and provides for refunds. O.C.G.A. § 48-5-311.

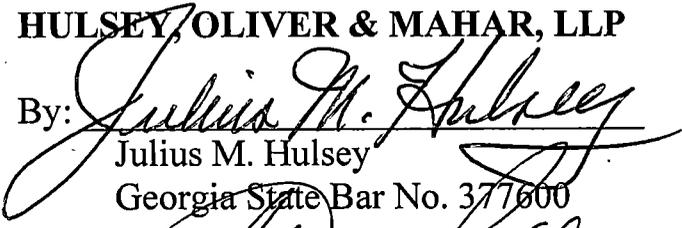
PART IV. CONCLUSION

This case may be disposed of in its entirety by a Motion to Dismiss. Many of the Plaintiffs filed statutory appeals, some are still in the process awaiting trial of their claims, others have settled after their administrative appeal. The current suit presents an attempt to obtain a "second bite at the apple." It is for this very reason that the Georgia Supreme Court created the abstention doctrine. (Carter v.

Fayette County, supra, Rolleston Jr. Living Trust v. Glynn County Board of Tax Assessors, supra). The trial court clearly committed reversible error by holding that some of the allegations could be brought outside the statutory appeal process. The lower Court's decision should be reversed accordingly and Appellants' Motion to Dismiss should be granted.

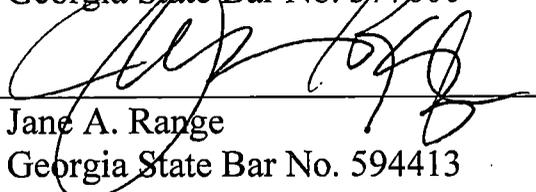
Respectfully submitted this 15th day of July, 2008.

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN,)
individually and in her capacity)
as Tax Director of Dougherty)
County, Georgia, and WILLIAM)
ASHBERRY, J. DELL BUSH,)
DONALD BUTTS, BRUCE)
GUNNELS, and WILLIAM)
JOHNSON, in their capacities as)
members of the Board of Tax)
Assessors, Dougherty County,)
Georgia,)

Appellants)

v.)

RICHARD R. THOMAS, FRED)
CARTER, LONNIE H. SMITH,)
DOTTIE SMITH, JUDY LEE,)
MICHAEL SMITH, C.W.)
HOPKINS, CURTIS H. SMITH,)
JOHN O'BRIEN, JERRY)
BROOKS, DOUGH MILLER,)
HILTON MERCHANT, TIM)
COLEY, and CECIL MUSGROVE)

Appellees.)

APPEAL CASE NO.:
A08A2072

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DENVER C. HOOTEN,)
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Appellants)

v.)

RICHARD R. THOMAS, FRED)
CARTER, LONNIE H. SMITH,)
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HOPKINS, CURTIS H. SMITH,)
JOHN O'BRIEN, JERRY)
BROOKS, DOUGH MILLER,)
HILTON MERCHANT, TIM)
COLEY, and CECIL MUSGROVE)

Appellees.)

APPEAL CASE NO.:
A08A2072

CERTIFICATE OF SERVICE

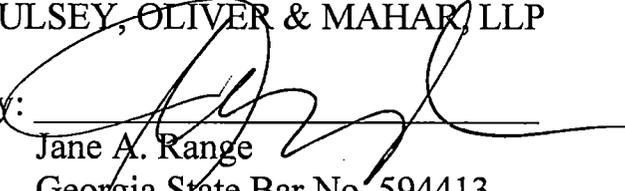
I hereby certify that I have this date served upon the Appellees in the above

styled matter a copy of the within and foregoing **BRIEF OF APPELLANTS, DENVER C. HOOTEN, WILLIAM ASHBERRY, J. DELL BUSH, DONALD BUTTS, BRUCE GUNNELS, AND WILLIAM JOHNSON**, by placing same in the U. S. mail properly addressed to:

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Albany, GA 31708-1925

This 14th day of July, 2008.

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Joni Little
SUPREME COURT OF GEORGIA

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Adnan P. Hwaj
SUPREME COURT OF GEORGIA

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, et al.

APPELLANTS

v.

RICHARD R. THOMAS, et al.

APPELLEES

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APPEAL CASE No.:
A08A2072

BRIEF OF APPELLEES'

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SUPREME COURT OF GEORGIA

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

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APPEALS OF GEORGIA

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APPELLANTS

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*

RICHARD R. THOMAS, et al.

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APPELLEES

*

APPELLEES' MOTION FOR RECONSIDERATION

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**IN THE COURT OF APPEALS
STATE OF GEORGIA**

DENVER C. HOOTEN, ET AL

*

*

APPELLANTS

*

*

v.

*

APPEAL CASE No.:

*

A08A2072

RICHARD R. THOMAS, ET AL

*

*

APPELLEES

*

APPELLEES' MOTION FOR RECONSIDERATION

COMES NOW APPELLEES and file this Motion for Reconsideration of the decision reached by this Court on March 26, 2009.

Since the Court has obviously devoted a significant amount of time in deciding this appeal, this Motion will be very brief.

a.

At the bottom of page **nine**, the decision states:

“Further, the Taxpayers’ contention that they have been prevented from exercising their right to appeal to arbitration can be

raised before the BOE prior to the filing of a claim in the superior court.”

On page four of the decision the decision acknowledges that the Taxpayer has a right to appeal to the BOE or submit the appeal to arbitrators citing OCGA § 48-5-311 (e) (f).

Thereafter the decision states:

“An adverse decision from either the BOE or arbitrators may then be appealed to the Superior Court. OCGA § 48-5-311 (g).”

When Appellants change the valuation of taxpayer’s property OCGA § 48-5-306 (b) (2) requires, inter alia, a notice stating:

“The amount of your ad valorem tax bill for this year will be based on the appraised and assessed values specified in this notice. You have the right to appeal these values to the county board of tax assessors either followed by an appeal to the county board of equalization or to arbitration and in either case, to appeal to the superior court.”

The conclusion is inescapable that the rights to appeal to arbitration or BOE are two separate and distinct rights and their decisions are of equal parity.

Clearly the decision of each is appealable to the Superior Court. The BOE does not and cannot legally decide whether a taxpayer has been denied the taxpayers' right to appeal to arbitration.

In Fulton County Bd. of Tax Assessors v. Boyajian, 271 Ga. 881, (2000) the Court held:

“Because whether an appeal is procedurally defective is a judicial decision, not a clerical determination, we conclude that the trial court correctly ruled that the board should have certified the taxpayer's appeal to the superior court. If we were to adopt the board's position that the statute does not give it authority to certify untimely appeals, then the board would act in the dual role of party and judge. This inherent conflict would be unfair to other parties in the dispute and would deprive taxpayers of the right to appeal when, as here, the board concluded that the notice of appeal was defective.”

Count **eleven** alleged that – a number of taxpayers were denied the right to exercise their statutory right to arbitration. Without a decision from the arbitrators, these taxpayers were denied their statutory right to appeal to the Superior Court.

Appellees submit that Count **eleven** alleged facts which would entitle Appellees to relief.

b.

Count **sixteen** alleged that Appellants appraise the real estate of Taxpayers however they accept the valuations of business personal property submitted by the owners.

The decisions in Colvard v. Ridley, 218 Ga. 490 and Lott Investment Corp. v. City of Waycross, 218 Ga. 805, clearly hold that such assessments described above were null and void. These decisions allowed the filing of an action in Superior Court to obtain redress without the necessity of submitting the claim to the BOE.

Said decisions are binding precedents and it is disconcerting to Appellees that they have been denied the right to rely on these precedents.

As to the scope of the powers of a BOE, OCGA § 48-5-311 (1) (A) states:

"Any resident or nonresident taxpayer may appeal from an assessment by the county board of tax assessors to the county board of equalization or to an arbitrator or arbitrators as to matters of taxability, uniformity of assessment, and value, and for residents, as to denials of homestead exemptions."

Since the Georgia Constitution provides for uniformity, it is clear that this is the sole source of a BOE's power to decide a constitutional issue. The BOE's authority of necessity must be found in the Georgia statute which is strictly construed in favor of taxpayers. Any statement in a decision authorizing the BOE to decide constitutional issues beyond uniformity, must be obiter dictum. Additionally, all tax statutes are interpreted in favor of the taxpayer.

Appellees submit that count **sixteen** allege facts which would entitle Appellees to relief.

c.

Counts **five**, **six** and **seven** alleged that the contract with Tyler to reevaluate all real estate in Dougherty County for the year 2007 was null and void for three independent legal grounds.

Ground **one** cited OCGA § 48-5-298 (a) as the sole authority for this contract and Appellants clearly failed to comply with this statute.

Ground two cited OCGA § 48-5-299 in that said contract did not require business personal property nor did it require the revaluation of the real estate or business personal property of public utilities.

Ground **three** was based on the process followed by Tyler and Appellants amounted to an abdication by Appellants of their mandated duties.

These counts go to the core of the legality of Tyler's contract yet they are given short shrift with the following sentence on page **eight** of the decision.

"However, the claims raised in the complaint only concerned the assessment of ad valorem taxes, and the uniformity of assessment, which must first be addressed in the statutory administrative appeals process."

If the contract was void ab initio, any act in furtherance of said contract has no legal force or effect. Thus no administrative process can follow or be triggered.

Counts **five**, **six** and **seven** alleged facts entitling Appellees to some relief.

d.

On page six of the decision, the Court uses count **two**, **three** and **four** to demonstrate that Appellees' complaint is based on excessive valuations for several reasons which lay the groundwork for the decision's arguments on page **eight** and nine which can be summarized by the following sentences beginning at the bottom of page **eight**:

"However, the claims raised in the complaint only concerned the assessment of ad valorem taxes, and the uniformity of assessments, which must first be addressed in the statutory appeals process."

First Appellees in their oral argument and on page eleven of their supplemental brief state:

“Plaintiffs withdraw Counts 1, 2, 3, 4, and 9 as these counts basically raise the issue of market value.”

Thus it is difficult for Appellees to understand why the decision would cite any of these counts to substantiate these counts as the foundation and tone of many of the reasons for the court’s decision on other counts.

A careful reading of the statutes and decision demonstrate that the BOE’s power extends to valuation and uniformity of assessments, which is valuation.

No where in Appellees’ counts relied upon do they complain of valuation or uniformity of assessment.

Notwithstanding this, the decision in effect ties each count to valuation or uniformity of valuation, which is patently inaccurate.

Before filing any briefs in this action, Appellees’ counsel made an in-depth study of the applicable statutes and studied an inordinate number of the decisions including all the decisions cited by the court. Such study made it crystal clear that any count based on valuation or uniformity of assessment would be subject to a motion to dismiss. (Ironically, Appellees’ counsel was counsel in one of the cases cited by the decision).

Appellees respectfully submit that able counsel for Appellants have skillfully convinced the Court that a critical analysis of each count results in a finding that Appellees' counts have a common thread which complains of a valuation or uniformity of assessment. By accepting Appellants' argument, each count falls victim to the mandated requirement of utilizing the appeal process.

As this Court knows, each count is separate and distinct from the other and must be construed in favor of the taxpayer.

Appellees' counsel was fully aware of the decisions cited by the decision and in filing the amendment and striking the five counts insulated the remaining counts from this argument advanced by Appellants.

At the top of page **eight**, the decision states:

"As stated previously, both this Court and the Supreme Court have found that the BOE is the appropriate forum for initially deciding constitutional and procedure issues that involve tax assessments."

(emphasis supplied)

Tax assessments clearly means valuation.

Again, how can it be argued, after construing all inferences in favor of Appellees, that the following counts "involve tax assessments"?

Counts **five, six, seven, eleven, fifteen sixteen, seventeen and eighteen.**

None of these counts complain that the valuation of Appellees' real estate is excessive, improperly appraised or involve tax assessments..

CONCLUSION

As stated in oral argument and in Appellees' Supplemental Brief, counts fifteen, sixteen and seventeen challenge as illegal and unconstitutional certain portions of the ad valorem tax system, which have nothing to do with the 2007 reevaluation and thus could not be authorized to file an appeal pursuant OCGA 48-5-311 (e).

Additionally, Appellees submit counts **five, six** and **seven** do not involve valuation or uniform assessment and thus are distinguishable from the decisions cited in the decision.

"When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the complaint must be construed in the light most favorable to the plaintiff with all doubts resolved in his favor." Goolsby v. Regents of University, 141 Ga. App. 605, 234 SE² 165.

Appellees' sole objective in their complaint is the pursuit of justice.

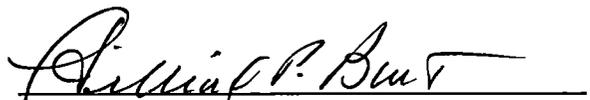
Appellees earnestly beseech this court to grant a reconsideration and conclude that Appellants have failed to carry the heavy burden to deny Appellees the right to any relief in any court.

This 2nd day of April, 2009.

Respectfully submitted,

BURT & BURT, P.A.

By:



Hilliard P. Burt

Attorney for Appellees

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this date served the within and forgoing APPELLEES' MOTION FOR RECONSIDERATION upon all parties by depositing a true and correct copy in the United States mail, with sufficient postage affixed thereon to ensure delivery, and properly addressed to counsel of record as follows:

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