STATE OF MICHIGAN

COURT OF APPEALS

CARL I. LINDSEY REVOCABLE TRUST, Petitioner-Appellant,	UNPUBLISHED November 29, 2007
v	No. 270528 Tax Tribunal
TOWNSHIP OF OTSEGO, Respondent-Appellee.	LC No. 00-298763

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Petitioner appeals as of right the opinions and judgments of the Michigan Tax Tribunal ("the tribunal"). We affirm in part, reverse in part, vacate in part, and remand for the limited purpose of correcting a mathematical error in the opinion and judgment in file no. 298761.

I. Basic Facts and Proceedings

Carl I. Lindsey created the Carl I. Lindsey Revocable Trust, the corpus of which included five parcels of property. Lindsey signed an amendment providing that, upon his death, the trustees should maintain the property as a farm for five years, and the trustees may continue to maintain it as a farm for an additional five years and one month "if the failure to do so would result in significant estate tax obligations or penalties." After Lindsey passed away, the trustees opted to treat the farm as a Qualified Family Owned Business Interest[1] for ten years and filed the appropriate schedule with the Internal Revenue Service.

Petitioner received the 2003 property tax assessments and appealed the assessed values (AVs) to respondent's Board of Review, which upheld the AV for parcel 0317-026-036-00 and reduced the AVs for parcels 0317-034-005-00, 0317-027-013-00, 0317-033-004-00, and 0317-034-008-00. Petitioner appealed these decisions to the small claims division of the tribunal.[2]

[1] See 26 USC 2057.

[2] The tribunal assigned docket numbers to the parcels as follows: file no. 298761 was assigned to parcel 0317-026-036-00, file no. 298762 was assigned to parcel 0317-027-013-00, file no. 298763 was assigned to 0317-033-004-00, and file no. 298627 was assigned to parcels 0317-
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Petitioner argued that, based on recent sales of comparable properties, the state equalized values (SEVs) (which are the same as the AVs) were higher than the true cash values (TCVs). Both parties presented evidence, and the tribunal conducted hearings.

With respect to file no. 298763, the tribunal, Judge Carole Engle presiding, issued an opinion and judgment reducing the SEV for 2003 and 2004 because petitioner's evidence was more persuasive. Respondent moved for rehearing, arguing that the tribunal had ignored respondent's sales studies, evidence of 17 sales, and the county vacant land grids, but the tribunal denied respondent's motion as untimely. Nearly three months later, the tribunal issued opinions and judgments pertaining to the remaining parcels, concluding that no revisions to the TCVs, AVs, or TVs for 2003 or 2004 were necessary because petitioner's evidence was not sufficiently credible to warrant a change.[3] Petitioner requested a rehearing in file nos. 298627, 298761, and 298762, arguing that the tribunal's failure to give any weight to petitioner's evidence, unlike the weight it had accorded such evidence in the opinion and judgment in file no. 298763, constituted an error of law and/or a mistake of fact. The tribunal, Judge Kimbal R. Smith III presiding, denied petitioner's requests for rehearing, concluding that petitioner's evidence had been given due consideration. The tribunal explained that the results were different from file no. 298763 because the persuasiveness of the evidence differed as it applied to the individual cases.

Petitioner sought relief from judgment, and the tribunal, Judge Patricia L. Halm presiding, granted respondent's request for rehearing in file no. 298763—despite the fact that respondent never requested relief from the order denying its request for rehearing—and petitioner's requests for rehearing in file nos. 298761, 298762, and 298627. The tribunal found that the same evidence had been submitted in all the cases and Judge Engle's decisions reflected the submission and consideration of the evidence, but Judge Engle had failed to explain why she found certain evidence persuasive. The tribunal concluded that it had erred in denying the requests for rehearing because the findings lacked sufficient information to give this Court an opportunity to conduct a meaningful review. The tribunal also consolidated the four file numbers into file no. 298763.

The tribunal scheduled the rehearing and notified the parties that they should submit their evidence to the tribunal and the opposing party more than 14 days before the rehearing. Both parties submitted evidence, and the tribunal conducted the rehearing. In spite of the consolidation order, the tribunal issued four opinions and judgments (one for each file number) regarding the assessments for 2003, 2004, and 2005.[4] The tribunal concluded that petitioner had failed to satisfy its burden of establishing the TCV of the parcels. The tribunal found that respondent's 2003 sales study was the most credible evidence of TCV and valued the parcels at $2,800 a tillable acre and $990 a non-tillable acre. Petitioner requested rehearing, arguing, in part, that the tribunal erred in relying on evidence that respondent had not submitted before the rehearing. The tribunal denied petitioner's request for rehearing. The tribunal stated that the

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034-005-00 and 0317-034-008-00.

[3] With respect to parcel 0317-027-013-00, the tribunal corrected a computational error in the 2004 TV.

[4] Petitioner had challenged the assessments for all three years.

only new evidence respondent submitted at the rehearing was the 2005 property record cards for the subject parcels and a breakdown of the parcels by tillable, non-tillable, and road right-of-way acres prepared by respondent, and it concluded that petitioner was not prejudiced by their admission.

II. Review of a Tax Tribunal Decision

Absent fraud, our review of a decision by the tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). We deem the tribunal's factual findings conclusive if supported by competent, material, and substantial evidence on the whole record. *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 19; 678 NW2d 619 (2004). Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion," but it may be "substantially less than a preponderance." *Inter Coop Council v Dep't of Treasury (On Remand)*, 257 Mich App 219, 221; 668 NW2d 181 (2003), quoting *In re Payne*, 444 Mich 679, 692, 698; 514 NW2d 121 (1994). The weight given to evidence is within the tribunal's discretion, and we will not assess issues of witness credibility. *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 404, 407; 576 NW2d 667 (1998).

III. Delayed Grant of Rehearing

A. Rehearing on File No. 298763

Petitioner claims that the tribunal erred when, upon ruling on its motion for relief from judgment in file nos. 298627, 298761, and 298762, it also ordered rehearing in file no. 298763. We agree. We review de novo questions involving the interpretation of court rules. *Knue v Smith*, 269 Mich App 217, 220; 711 NW2d 84 (2005).

Before the tribunal ordered rehearing on all the files, petitioner had only requested relief from the orders denying petitioner's requests for rehearing in file nos. 298627, 298761, and 298762. Petitioner did not request relief from any order in file no. 298763. The last order in that file was an order denying respondent's request for rehearing, and respondent never sought relief at any time from that order. Accordingly, there was no motion before the tribunal seeking relief from the order denying respondent's request for rehearing.

MCR 2.612(C), which governs motions for relief from judgment, applies to proceedings before the tribunal because there is no applicable tax tribunal rule. See 1999 AC, R 205.1111(4); *Signature Villas, LLC v Ann Arbor*, 269 Mich App 694, 705; 714 NW2d 392 (2006). MCR 2.612(C)(1) provides, in part, "[o]n motion *and* on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding[.]" (Emphasis added.) The rules of statutory construction apply to court rules. *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000). When interpreting a court rule, we examine the plain language of the court rule, and if that language is unambiguous, we give common words their everyday, plain meaning and enforce the rule as written, "without further judicial construction or interpretation." *Id.* at 194. *Random House Webster's College Dictionary* (1997) defines the term "and" as a conjunction, meaning "with; as well as; in addition to[.]" Thus, when given its everyday, plain meaning, the word "and" between two phrases requires that both

conditions be met. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007). When applied to MCR 2.612(C), the everyday, plain meaning of the word "and" requires that, before a court may grant a party relief from a final judgment, order, or proceeding, the relief must be requested in a motion and based on just terms.

In reaching our conclusion, we note that the popular use of the words "and" and "or," a choice or alternative between two or more things, is loose and frequently inaccurate. *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997); *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995). Nonetheless, the words are not interchangeable, *Auto-Owners Ins Co, supra* at 50, and should be given "their strict meaning when their accurate reading does not give the text a dubious meaning, and there is no clear contrary legislative intent." *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 319; 683 NW2d 148 (2004). Giving the word "and" in MCR 2.612(C) its strict meaning, a conjunction requiring that both elements be met, would not render the text of the rule dubious, and our Supreme Court has not expressed any intent that would be contravened by giving the word "and" its strict meaning. Therefore, MCR 2.612(C) requires that, before a court may grant a party relief from a final judgment, order, or proceeding, the relief must be requested in a motion and based on just terms. Accordingly, the tribunal erred in granting respondent relief from the order denying its request for rehearing in file no. 298763. We reverse the tribunal's September 2, 2005, order granting respondent's request for rehearing and vacate the tribunal's March 8, 2006, opinion and judgment in file no. 298763.[5]

B. Collateral Estoppel

Petitioner also claims that the doctrine of collateral estoppel required that the tribunal's opinions and judgments in file nos. 298627, 298761, and 298762 be identical to the tribunal's earlier opinion and judgment in file no. 298763. We disagree. The applicability of collateral estoppel is a question of law that this Court reviews de novo. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Barrow*, *supra* at 480. The doctrine of collateral estoppel did not require that opinions and judgments in file nos. 298627, 298761, and 298762 be identical to the opinion and judgment in file no. 298763 because, after the opinion was issued in file no 298763, there was no relitigation of any issue. All the opinions were based solely on the testimony given at the initial hearing and the evidence

[5] We agree with respondent that the tribunal, when it initially denied respondent's request for rehearing, relied on an incorrect deadline for filing a request for rehearing. Pursuant to 1999 AC, R 205.1348, a request for rehearing must be filed within 21 days of the entry of the opinion and judgment. However, respondent never sought relief from the tribunal's order. In addition, while 1999 AC, R 205.1288, permits the tribunal to order a rehearing or reconsideration of a decision or order on its own initiative, the rule does not apply to the present case because there is an applicable small claims rule. See 1999 AC, R 205.1111(2)-(3), 205.1348.

submitted before the hearing. Cf. *Lumley v Univ of Michigan Bd of Regents*, 215 Mich App 125, 132-133; 544 NW2d 692 (1996). Therefore, reversal is not required on this ground.

IV. Admission of Respondent's Evidence

Petitioner claims that the tribunal erred when, at the rehearing, it allowed respondent to submit documentary evidence that respondent had not previously submitted to the tribunal and petitioner. We disagree.

According to our review of the record, respondent submitted two pieces of documentary evidence at the rehearing that it had not previously submitted or that was not already in petitioner's possession: (1) 2005 property cards; and (2) its breakdown of the parcels into tillable acres, non-tillable acres, building site acres, and road right-of-ways. The applicable rule, 1999 AC, R 205.1342, provides that a party's failure to submit evidence to the tribunal and the opposing party more than 14 days before the hearing may result in the exclusion of the evidence. Unlike the word "shall," which designates a mandatory provision, the word "may" designates discretion. *Port Huron v Amoco Oil Co*, 229 Mich App 616, 631; 583 NW2d 215 (1998). Thus, the tribunal had the discretion and the authority to accept the 2005 property cards and respondent's breakdown of the parcels at the hearing. See *Kok v Cascade Charter Twp*, 255 Mich App 535, 544; 660 NW2d 389 (2003). Moreover, we fail to see how the tribunal's acceptance of this documentary evidence prejudiced petitioner. The tribunal accepted the 2005 property cards as evidence of the value of the parcels in 2005 after petitioner requested that the 2005 assessments be included in the tribunal's decision, and petitioner does not contend that the information contained in the property cards was inaccurate. The tribunal accepted respondent's breakdown of the parcels so that it would not have to rely on its note-taking ability to accurately record the testimony of respondent's assessor. Petitioner does not contend that respondent's assessor did not or would not have been able to testify about the breakdown, and we are not persuaded that petitioner was prejudiced by the admission of these items.[6]

V. Petitioner's Evidence

Petitioner contends that the tribunal erred by ignoring or discounting its timely submitted evidence. However, as already stated, we are required to affirm the factual findings of the tribunal if the findings are supported by competent, material, and substantial evidence. *Catalina Marketing Sales Corp, supra* at 19. Further, the weight given to evidence is within the tribunal's discretion, and we will not assess issues of witness credibility. *Great Lakes Div of Nat'l Steel Corp, supra* at 404, 407. The tribunal found that the parcel sizes were those submitted by respondent and calculated the TCVs of the parcels using a rate of $2,800 a tillable acre and $990 a non-tillable acre. The tribunal based these determinations on evidence presented by respondent, specifically its land sales study and a chart entitled, "2003 Agricultural Land Values

[6] Petitioner attached to its reply brief on appeal affidavits of its trustees. However, these documents are not contained in the tribunal record and constitute an improper expansion of the record on appeal. MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Therefore, we will not consider them.

Per Acre." Because the tribunal's factual findings were based on evidence in the record, we are unable to conclude that the findings were not supported by competent, material, and substantial evidence. *Catalina Marketing Sales Corp, supra* at 19.

VI. Highest And Best Use of The Parcels

Petitioner claims that the tribunal erred by concluding that the highest and best use of the parcels was residential, rather than agricultural, which is the current use. Petitioner's argument is misplaced because the tribunal did not conclude that the highest and best use of the parcels was residential. Rather, the tribunal concluded that the current highest and best use of the parcels was agricultural, and the values it placed on the parcels were based on its findings that the value of a tillable acre was $2,800 and the value of a non-tillable acre was $990. For example, the tribunal found that parcel 0317-034-005-00 consisted of 50.38 tillable acres, 4.40 nontillable acres, and 1.87 acres of road right-of-way, which had no value. When given values of $2,800 a tillable acre and $990 a non-tillable acre, the TCV of parcel 0317-034-005-00, as concluded by the tribunal, was $145,420.

We note that the tribunal erred in calculating the value of parcel 0317-026-036-00. Because the tribunal found that this parcel consisted of 30.37 tillable acres, 2.85 non-tillable acres, and 1.71 acres of road right-of-way, which had no value, the TCV of the parcel should be $87,858, making the SEV $43,929 for 2003, 2004, and 2005. The tribunal, by way of an apparent miscalculation, valued the TCV of parcel 0317-026-036-00 at $88,138 and the SEV at $44,069 for 2003, 2004, and 2005. Thus, we affirm the tribunal's values placed on parcels 0317-034-005-00 and 0317-034-008-00 in file no. 298627 and on parcel 0317-027-013-00 in file no. 298762, and we remand for the limited purpose of correcting the TCVs and SEVs of parcel 0317-026-036-00 in file no. 298761.

Affirmed in part, reversed in part, vacated in part, and remanded for the limited purpose of correcting the opinion and judgment in file no. 298761. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly