COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-2754

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

VIOLA G. BODACH, ROBERTA BODACH LARSON, MARY ALICE BROWN, ARTHUR M. KURZAWA AND NELL R. KURZAWA, AND DONALD TOEPPEN AND JOAN TOEPPEN,

PLAINTIFFS-RESPONDENTS,

V.

VILLAGE OF FONTANA-ON-GENEVA LAKE, A WISCONSIN MUNICIPAL CORPORATION,

DEFENDANT-APPELLANT.

GLORIA VAUGHAN, SIDNEY H. BLISS, JR., MR. & MRS. RAYMOND BROSIO, DR. CHARLES H. EKSTROM, MR. & MRS. THEODORE FRANCIS, MR. & MRS. CLAYTON GAYLORD, LYNN GUSTAFSON, TRUSTEE, ELLIS AND ALTHEA KENDALL, JAMES AND ANN KNIGHT, GREGORY AND GAIL LIEBOVICH, MR. & MRS. THOMAS MCCRACKEN, MR. & MRS. RANDALL MCNALLY, MR. & MRS. HARRY C. MELGES, MR. JEFF NEAL, MS. SUSAN CELLMER, TIMOTHY AND DIANE SCHAEFER, MR. & MRS. CLARENCE SCHAWK, MR. & MRS. ROGER STEDRONSKY, MR. & MRS. PIERCE TYRRELL, MR. & MRS.

WILLIAM VAN SLYCK, MR. & MRS. RICHARD WALSH, AND ALICE MARLENE YARMO,

PLAINTIFFS-RESPONDENTS,

MARTHA V. ATKINSON, AND GEORGE AND SIGRID SOLA,

PLAINTIFFS,

V.

VILLAGE OF FONTANA-ON-GENEVA LAKE, A WISCONSIN CORPORATION,

DEFENDANT-APPELLANT.

GLORIA VAUGHAN, JOAN S. BARRY, SIDNEY H. BLISS, JR., MR. & MRS. RAYMOND BROSIO, DR. CHARLES H. EKSTROM, THEODORE AND PANSY FRANCIS, MR. & MRS. CLAYTON GAYLORD, MARILYN J. GOSS, LYNN GUSTAFSON, TRUSTEE, WILLIAM HANLEY, ELLIS AND ALTHEA KENDALL, JAMES AND ANN KNIGHT, GREGORY AND GAIL LIEBOVICH, MR. & MRS. THOMAS MCCRACKEN, MR. & MRS. RANDALL MCNALLY, MR. & MRS. HARRY C. MELGES, MR. JEFF NEAL, MS. SUSAN CELLMER, TIMOTHY AND DIANE SCHAEFER, CLARENCE AND MARILYN SCHAWK, MR. & MRS. ROGER STEDRONSKY, PIERCE AND MARCIA TYRRELL, WILLIAM AND MARY VAN SLYCK, RICHARD AND PATRICIA WALSH, AND ALICE MARLENE YARMO,

PLAINTIFFS-RESPONDENTS,

MARTHA V. ATKINSON,

PLAINTIFF,

V.

VILLAGE OF FONTANA-ON-GENEVA LAKE, A WISCONSIN MUNICIPAL CORPORATION,

DEFENDANT-APPELLANT,

ASSOCIATED APPRAISAL CONSULTANTS, INC., AND BERNARD J. LAIRD, ASSESSOR,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. The Village of Fontana-on-Geneva Lake (Fontana) appeals from a judgment granting refunds for overpaid taxes to lakefront property owners (the taxpayers) who objected to their 1992 and 1993 real estate tax assessments on uniformity grounds. Because the taxpayers employed an appropriate means to challenge their assessments and because the trial court's findings of fact regarding the lack of uniformity are not clearly erroneous, we affirm.

The taxpayers, who owned lakefront property in Fontana, objected to their real estate assessments for the 1991 tax year. The Board of Review for Fontana reduced their assessments for 1991; however, assessments of lakefront property owned by parties who did not object to the 1991 assessments were not reduced. Fontana reassessed all lakefront property in 1992 and the taxpayers' assessments increased again. The taxpayers in this action challenged the 1992 assessments on uniformity grounds.[1] The taxpayers other than the "Bodach

[1] In 1994, Fontana reassessed all property at the presumed 100% fair market value and the discrimination among properties ended.

group" of taxpayers also challenged their 1993 assessments on uniformity grounds. The taxpayers objected to their assessments before the Board under § 70.47, STATS. The Board denied their objections and the taxpayers presented excessive assessment claims under § 74.37, STATS.,[2] to Fontana. When Fontana denied those claims, the taxpayers commenced a § 74.37 action by summons and complaint in the circuit court. After taking evidence, the circuit court found that the 1992 and 1993 assessments violated the uniformity clause and awarded refunds to the taxpayers for those years.

Fontana first argues that the taxpayers did not employ the proper procedure to challenge the Board's denial of their objections to the 1992 and 1993 assessments. We disagree. Section 74.37, STATS.,[3] provides a method for challenging an excessive assessment. *See* ***Hermann v. Town of Delavan,*** 215 Wis.2d 369, 379, 572 N.W.2d 855, 858 (1998). Contrary to Fontana's arguments, we conclude that the type of uniformity claim made by the taxpayers in this case is cognizable under § 74.37. In proceedings before the Board, some of the taxpayers complained pro se of an excessive assessment, while others complained by counsel that properties within Fontana were not assessed at a uniform percentage of fair market value, although they did not contend that their individual assessments were excessive. It is undisputed that the off-lake properties were assessed at a lesser percentage of fair market value than the lakefront properties.

[2] The Bodach plaintiffs also claimed that they were due refunds for the 1992 assessment because the assessor used multiple depth charts to assess the lakefront properties. Because we affirm the trial court's refund order for 1992 on other grounds, we do not address this additional basis for a refund.

[3] Section 74.37(2)(a), STATS., permits a taxpayer to file a claim for an excessive assessment against the taxation district. If the taxation district denies the claim, the taxpayer may commence an action in the circuit court to recover the disallowed claim. *See* § 74.37(3)(d).

In their circuit court complaints, the taxpayers, by counsel, alleged excessive assessments and argued that their properties were not taxed uniformly vis-à-vis other properties in Fontana.

> Article VIII, sec. 1, of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district. Under this principle known as the rule of uniformity, taxpayers may demonstrate that although their properties were assessed at fair market value, other comparable properties were assessed significantly below fair market value, thus amounting to a discriminatory assessment of their property.

State ex rel. Levine v. Board of Review, 191 Wis.2d 363, 371-72, 528 N.W.2d 424, 427 (1995) (footnote omitted; citations omitted). Here, the taxpayers did not contend that their properties were not assessed at fair market value. Rather, they claimed that their properties bore a disproportionate amount of tax (i.e., an excessive assessment) because they were assessed at a higher percentage of fair market value than Fontana's off-lake properties. Because the uniformity claim in this case is the corollary of the excessive assessment claim, we conclude that the taxpayers' uniformity claim was properly brought as an excessive assessment claim under § 74.37.

We reject Fontana's suggestion that § 74.37, STATS., claims are restricted to taxpayers who claim that their assessments are too high based on the true or intrinsic value of the property. An excessive assessment can occur even if properties are valued at fair market value if the assessment is discriminatory in another respect. *See* ***Levine,*** 191 Wis.2d at 372, 528 N.W.2d at 427. This case is such an example: the manner of assessing properties was not uniform and one property was taxed at a higher effective rate than another similarly situated parcel because assessments were based on different percentages of fair market value. *See*

State ex rel. N/S Assocs. v. Board of Review, 164 Wis.2d 31, 60, 473 N.W.2d 554, 565 (Ct. App. 1991).

We decline Fontana's invitation to reconsider our previous decision that a taxpayer is entitled to a de novo proceeding in the circuit court on a § 74.37, STATS., claim. *See* ***S.C. Johnson & Son, Inc. v. Town of Caledonia,*** 206 Wis.2d 292, 301, 557 N.W.2d 412, 416 (Ct. App. 1996). We reject Fontana's related claim that a constitutional claim of lack of uniformity may only be brought by certiorari review.

We further reject Fontana's claim that the Bodach group confined its refund claim in the trial court to an argument that the discriminatory assessments arose out of the assessor's use of different depth charts. The Bodach group's suit was consolidated with two other taxpayers' suits seeking refunds on excessive assessments. The taxpayers' posttrial brief acknowledges that the Bodach group had an additional basis for its 1992 claim of discriminatory assessment but argued that as to all of the taxpayers, discriminatory assessments occurred because the lakefront property was assessed at a higher percentage of fair market value than off-lake property. Because this argument was made in the circuit court on behalf of the Bodach group and because the Bodach group owned lakefront property which was not assessed at the same ratio to fair market value as off-lake property, we conclude that the proof adduced at trial regarding discriminatory assessments in 1992 and 1993 applies equally to the Bodach group.

We turn to the trial court's finding that properties in Fontana were not uniformly assessed. As the finder of fact, it was within the trial court's province to evaluate the credibility of the witnesses and weigh the evidence. *See* ***Micro Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App.

1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id.***

The trial court found a disparity in assessments based upon the following evidence presented by the taxpayers: an expert testified and tax bills demonstrated that the assessment ratio for lakefront property in 1992 was 100% of fair market value while off-lake property was assessed at 83% of fair market value. The taxpayers also presented evidence that the assessment ratio for lakefront property in 1993 was 92% of fair market value while off-lake property was assessed at 76% of fair market value. This type of disparity may be addressed in a uniformity claim. *See* ***Rite-Hite Corp. v. Board of Review***, No. 96-3178 slip op. at 3-4 (Wis. Ct. App. Dec. 9, 1997, ordered published Feb. 25, 1998). As a result, the lakefront properties bore more than their fair share of Fontana's tax burden in 1992 and 1993. *See* ***id.*** at 4. Although Fontana also presented expert testimony regarding the assessments, the trial court was free to weigh all of the testimony to reach its findings. On this record, the trial court's findings are not clearly erroneous. *See* § 805.17(2), STATS.

Finally, Fontana claims that the refunds awarded to the Bodach group exceeded the claims made at trial by their representative, Michael Kurzawa. The refund figures offered by Kurzawa were based on his contention that the assessor erroneously used multiple depth charts. Using the correct depth chart, Kurzawa calculated the refunds due. However, the Bodach group also claimed that their properties were not uniformly assessed vis-à-vis off-lake properties. The refunds due those property owners are set forth in Second Amended Exhibits A and B to the First Amended Order for Judgment and Judgment. The calculations therein merely applied the lower average assessment ratio for off-lake properties in 1992 and 1993 to the lakefront property. Because this was an aspect of the Bodach group's claim,

Fontana's objection to awarding these lakefront property owners refunds consistent with the refunds awarded to other objecting lakefront property owners is unavailing.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.