COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP785 **Cir. Ct. No. 2013CV468**

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

KOHLER COMPANY,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF KOHLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. The Village of Kohler (Village) appeals from the trial court's decision awarding Kohler Company (Kohler) a refund of $605,908.51 plus interest for overpayment of property taxes. On appeal, the Village argues that

the trial court erred in excluding its expert's amended reports and by prohibiting its expert from testifying about the impact one of the reports had on his valuation of Kohler's property. The Village also argues that the trial court's valuation of one of the properties at issue—Blackwolf Run—was erroneous. For the reasons that follow, we affirm.

BACKGROUND

¶2 Pursuant to WIS. STAT. § 74.37(3)(d) (2013-14),[1] Kohler sued the Village, demanding a partial refund of its 2012 real estate taxes. Kohler alleged excessive assessment regarding numerous parcels of land. For ease of reference, we, like the trial court, divide the parcels into four separate entities: (1) The American Club, a "5-star 5-diamond hotel," which includes the Carriage House and Kohler Waters Spa; (2) the Inn on Woodlake, another lodging property; (3) Riverbend, a third lodging property that, unlike the first two, is a private club; and (4) Blackwolf Run, a golf course.

¶3 The facts below pertain to the two issues the Village appeals: the admissibility of amended expert reports and opinions submitted after the close of discovery, and the trial court's valuation of Blackwolf Run.

(1) Expert testimony

¶4 The scheduling order initially required the Village to name its experts and file any corresponding reports by July 1, 2014. That deadline was

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

later extended to August 1, 2014. Discovery was set to close October 10, 2014, and trial was scheduled for November 4, 2014.

¶5 The Village hired Lawrence Nicholson as its appraiser to value the American Club, the Inn on Woodlake, and Riverbend. Nicholson asked Kohler to provide "[h]istorical financial statements and budgets" for the years 2009-13. While Nicholson's request does not appear to be dated, the record shows that Kohler responded to it in April 2014. In late June 2014, Nicholson requested additional information, including: (1) "detail[ed] numbers for … Selling, General & Administrative Expenses" for all three properties and (2) explanations for the yearly variances in "Selling, General & Administrative Expenses" for the American Club and Inn on Woodlake. In July, Kohler provided the requested additional information. Specifically, the materials provided included a breakdown of expenses for each of the properties pertaining to selling, general, and administrative expenses. In follow-up correspondence dated July 18, 2014, there was no indication that the information regarding selling, general, and administrative expenses was inadequate.

¶6 Nicholson issued his reports on July 31, 2014. When deposed on October 8, 2014, he indicated that his reports were reliable, and when his deposition resumed the following week, he testified that he did not plan to change his values or amend his reports, unless asked, and that his work was complete.

¶7 Nicholson's opinion changed, however, in late October, following additional discovery. On September 15, 2014, the Village issued its first formal

discovery request.[2] As noted, prior to this, the relevant requests had come from Nicholson. The parties initially disagreed about whether the September 15 requests were timely, but Kohler ultimately—following the Village's noticing depositions and issuing document subpoenas—did provide the requested information. Kohler provided this information on October 16, four days before the subpoena's requested return date.

¶8 Nicholson reviewed the new information and prepared addendum letters to his three appraisal reports on October 24, 2014. The amended reports were provided to Kohler and the trial court that same day. Prior to this, Kohler had not seen the amended reports, nor had the Village notified Kohler that its expert was revising his reports.

¶9 At a telephone hearing on October 27, 2014, the trial court determined that Nicholson's amended reports were too late and excluded them.

¶10 At trial, the subpoenaed document showing expense detail regarding Kohler's selling, general, and administrative expenses—Exhibit 210—was admitted into evidence, but, pursuant to the October 27 ruling, Nicholson was barred from testifying about whether and how the information in Exhibit 210 changed his initial opinion.

[2] The Village claims that "[d]uring a separate trial concerning the 2011 assessments of the Subject Properties … it became evident that the Kohler Company had not provided the basic details regarding its [selling, general, and administrative] Expenses because such expenses included inappropriate 'Project Expenses,' which are … already accounted for." The Village does not, however, provide a factual basis for this contention; instead it merely cites its offer of proof to the trial court, the particular portion of which does not cite any exhibit or other portion of the record that would allow this court to verify the Village's contention. We will therefore not consider this contention. *See* ***State v. Bean***, 2011 WI App 129, ¶24 n.5, 337 Wis. 2d 406, 804 N.W.2d 696 ("Trial court briefs are not evidence.").

(2) Valuation of Blackwolf Run

¶11 At trial, two experts testified regarding the valuation of Blackwolf Run, both of whom agreed that the "income approach" was the best way to value the property. *See, e.g.*, ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶62, 311 Wis. 2d 158, 752 N.W.2d 687 ("Wisconsin courts have held that under the income approach, a property's business value or income-producing capacity that is 'inextricably intertwined' with the property may be considered among those 'rights and privileges' appertaining to the property … and consequently assessed as part of its value." (citations omitted)). Laurence Hirsh, the Village's expert, testified that the fair market value was $18,454,910. Hirsh did not deduct any "business value" from this total, *see* ***id.***, opining that there was no business value to Blackwolf Run even though he had attributed a twenty-percent business value to the property in 2006. Patrick Kelly, Kohler's expert, valued the golf course at $14,400,000—a figure that included an approximate twenty-five percent deduction in business value.

¶12 The trial court agreed with Kohler's expert that Blackwolf Run did in fact have "business value" but determined that it amounted to only four percent of the course's total revenue. The trial court found the final value of Blackwolf Run to be $12,621,152—an amount lower than either expert had calculated.

¶13 The Village appeals.

ANALYSIS

¶14 On appeal, the Village argues that the trial court erred in excluding Nicholson's amended expert reports and by prohibiting Nicholson from testifying about Exhibit 210. The admission of evidence is a decision left to the trial court's

discretion. ***Weborg v. Jenny***, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. Decisions concerning scheduling orders are also within the trial court's discretion. ***Alexander v. Riegert***, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987). We uphold a trial court's exercise of discretion if the court relied on the facts in the record and applied the proper legal standard to reach a reasonable decision. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶15 Specifically, the Village argues that the amended reports and testimony should have been admitted primarily because they were "highly relevant," and would not have prejudiced Kohler. The Village also argues that it was not fair that other witnesses were allowed to testify regarding Exhibit 210 but Nicholson was not.

¶16 We discern no erroneous exercise of the trial court's discretion. The amended reports were submitted well after the discovery deadline had passed. *See* ***City of Sun Prairie v. Davis***, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999) (trial court has inherent authority to act in "ensuring that the court functions efficiently and effectively to provide the fair administration of justice"); *see also* ***Puchner v. Hepperla***, 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609 ("A court may exercise its inherent power ... to control its docket with economy of time and effort."). We do not agree with the Village's assertion that the court failed to weigh prejudice to the Village against the relevance of the proffered evidence; rather, the court reasonably limited the expert's testimony to issues discovered within the deadlines as dictated by its scheduling order. *See* ***Davis***, 226 Wis. 2d at 749-50; *see also* ***Puchner***, 241 Wis. 2d 545, ¶7. Therefore, the Village has not established that the court erroneously exercised its discretion in limiting the scope of trial to facts that were developed within the deadlines set by

the court or that it otherwise misused its discretion in excluding Nicholson's testimony regarding Exhibit 210.

¶17 The Village also argues that the trial court valuation of Blackwolf Run was erroneous. It contends that the trial court erred in deducting the golf course's business value from the total and that, in the alternative, the business value deducted lacks any basis in the record.

¶18 In assessing the valuation of Blackwolf Run, we apply the following standards:

> We review excessive tax assessment claims brought under WIS. STAT. § 74.37(3)(d) without regard to determinations made at earlier proceedings. In such cases, we review the circuit court record, not the record from the Board of Review.
>
> Although the general level of deference accorded to property assessments is that this court, like a circuit court, gives a city's assessment presumptive weight, "the assessment is presumed correct only if the challenging party does not present significant contrary evidence." Furthermore, "[n]o presumption of correctness may be accorded to an assessment that does not apply the principles in the *Property Assessment Manual*." Whether a city has erroneously failed to follow statutory requirements in making an assessment is a question of law that we review de novo.

Walgreen Co., 311 Wis. 2d 158, ¶¶16-17 (alteration in original; citations omitted).

¶19 We conclude that the trial court's valuation was proper; first, because deducting the golf course's business value from the total value of the property was consistent with the relevant law. "[I]nclusion of business value in a property assessment should be *the exception*, not the norm." ***Id.***, ¶63 (emphasis added). The general rule is that "real property assessments should not be based on business value." ***Id.***, ¶65. "[A]n assessor's task is to value the real estate, not the

business concern which may be using the property." ***Id.*** (alteration in original; citation omitted). As the supreme court illustrated in ***Walgreen Co.***, cases in which business value was not deducted—i.e., instances in which the business value was "inextricably intertwined" with the property—show that the income generated from the property derived primarily from the land itself, rather than the landowner's skill or business acumen:

> In ***ABKA*** [***Ltd. P'ship v. Board of Review of Village of Fontana***, 231 Wis. 2d 328, 603 N.W.2d 217 (1999)], ***Waste Management*** [***of Wis., Inc. v. Kenosha Cty. Bd. of Review***, 184 Wis. 2d 541, 516 N.W.2d 695 (1994)], and [***State ex rel.***] ***N/S Assocs.*** [***v. Village of Greendale***, 164 Wis. 2d 31, 473 N.W.2d 554 (Ct. App. 1991)], the courts confronted the question whether business value was attributable primarily to the underlying real estate or to the business skill and acumen of the property owner. In all three cases, the courts determined the value was attributable to the underlying real estate….
>
> Thus, in ***ABKA*** the management income derived from adjacent real estate could be included in the assessment because the physical proximity and interdependency of the real estate meant the income was a privilege appertaining to the subject real estate, rather than the product of the owner's skill and business acumen. Likewise, in ***Waste Management***, the right to generate income from the landfill appertained to the nature of the real estate rather than the labor and skill of the owner. Finally, in ***N/S Associates*** the right to receive rental income appertained to the nature and location of the mall rather than to the unique qualities of the mall's ownership.

See ***Walgreen Co.***, 311 Wis. 2d 158, ¶63 (citation omitted). Conversely, as the trial court found, Blackwolf Run derived its income partly from the very high level of skill required to keep up the appearance of a world-renowned golf course:

> I would agree that there is business value to the name recognition and the tournaments that have been played on this property. I would agree … that any operator of this course in the future would presumably have a high level of management skill and would work to maintain the course appearance and upkeep. Much of that course appearance

> and upkeep has been accounted for in the additional expenses related to maintenance of the property.

¶20 Moreover, the trial court found that "[t]he fact that each appraiser was able to isolate for the business value … demonstrates that the business value is *not* inextricably intertwined with the real estate, and must be deducted from any assessment." (Emphasis added.)

¶21 Second, the trial court properly excluded the "limited business value" that it found to account for the name recognition and tournaments that have been played on the property. The Village takes issue with the fact that the trial court apparently disregarded Hirsh's testimony and drew its own conclusions, but it is well known that a fact finder is not bound by an expert's opinion. *See, e.g.*, WIS JI—CIVIL 260 ("You are not bound by an expert's opinion."). In addition, the trial court adequately explained its reasons for rejecting Hirsh's numbers—determining that Hirsh's conclusion that there was no business value "contrary to the appraisal report he completed in 2006 for Blackwolf Run, when he deducted 20% for business value and his 2009 appraisal of [a similar golf course] in which he deducted a business value of over 25%." The trial court chose to reject Hirsh's testimony, chose to deduct business value based on the golf course's name recognition and tournaments, and there was nothing improper about this decision. In sum, it is clear that the trial court weighed the testimony and drew conclusions consistent with the presented evidence.

By the Court.—Judgment affirmed.

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