COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1185 **Cir. Ct. No. 2009CV108**

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

LANDS' END, INC.,

PLAINTIFF-APPELLANT,

V.

CITY OF DODGEVILLE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Reversed and cause remanded with directions*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This appeal involves a 2008 property tax assessment by the City of Dodgeville of property owned by Lands' End. Lands' End appeals a circuit court order denying Lands' End's motion for summary judgment and affirming the 2008 assessment determination by the Board of

Review for the City of Dodgeville. The Board determined that Lands' End had not rebutted the presumption of correctness afforded to the City assessor's 2008 assessment and, adopting the assessor's valuation of the property, found that the 2008 tax assessment of Lands' End's property was $54,000,000.

¶2 Pertinent to this case, in a prior court action concerning the assessor's 2006 assessment of Lands' End property, a circuit court concluded that Lands' End had rebutted the presumption of correctness afforded to the assessor's 2006 assessment and, adopting Lands' End's valuation of the property, found that the 2006 tax assessment of Lands' End's property was $25,000,000.

¶3 On appeal, we understand Lands' End to be arguing that it is entitled to summary judgment regarding the 2008 assessment based on issue preclusion, coupled with the undisputed fact in the current case that Lands' End's property did not materially increase in value between 2006 and 2008.[1] We agree and reverse. Because the City does not contest Lands' End's computation as to the amount of the excessive assessment paid in 2008 based on a $25,000,000 valuation of the property, we remand to the circuit court for entry of judgment in favor of Lands' End in the amount of $724,292.68, plus statutory interest and any other interest or costs to which Lands' End may be entitled.

[1] In an alternative argument, Lands' End argues that we must reverse based on the Wisconsin Supreme Court's holding in ***Metropolitan Assocs. v. City of Milwaukee***, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, that the assessment review procedure in effect at the time the circuit court conducted certiorari review in this case unconstitutionally denied Lands' End the right to obtain de novo review of the Board's 2008 assessment determination in the circuit court. In a separate argument made only in a footnote in its brief-in-chief, Lands' End argues that it was denied its due process rights during the 2008 Board hearings because of "the composition of the Board of Review and the role played by the City Attorney and counsel for the City in litigation with Lands' End." Because Lands' End prevails on summary judgment, we do not address Lands' End's alternative arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 299-300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

BACKGROUND

¶4 Lands' End owns property located in the City. In 2008, the City assessed Lands' End's property in the amount of $56,423,100, which is essentially the same amount that the property was assessed in 2006.[2] Lands' End objected to the 2008 property tax assessment.

¶5 The Board conducted hearings on the 2008 property tax assessment beginning in November 2008. Pertinent here, the assessor testified at the hearing that he did not conduct a new assessment of Lands' End's property because a review of data released by the Wisconsin Department of Revenue (DOR) showed that the increase in property values in the City since 2006 was less than 5% and industry standards do not require a new assessment when there is less than a 5% change in property values over the relevant period. At the close of deliberations in February 2009, the Board concluded that Lands' End failed to rebut the presumption of correctness afforded to the assessor's 2008 property tax assessment.[3] Accordingly, the Board found that the 2008 property tax assessment was $54,000,000.[4] In May 2009, Lands' End filed a petition in the circuit court,

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[2] The City's 2006 appraisal of the property valued the property at $56,420,000.

[3] When a taxpayer challenges a tax assessment, the assessor's assessment is presumed to be correct. *See* WIS. STAT. §70.49(2) (2011-12). However, the taxpayer may rebut the presumption by presenting significant contrary evidence. *See* ***Adams Outdoor Adver., Ltd. v. City of Madison***, 2006 WI 104, ¶25, 294 Wis. 2d 441, 717 N.W.2d 803.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[4] It appears that the City made corrections to minor errors in the 2006 appraisal before the 2008 Board hearings and that, based on those changes, the City determined, and the Board agreed, that the 2008 property tax assessment should be reduced from $56,423,100 to $54,000,000.

the Honorable William D. Dyke presiding, seeking enhanced certiorari review of the Board's 2008 assessment determination.[5]

¶6 As we have explained, Lands' End challenged the assessor's 2006 property tax assessment in a prior action.[6] In that prior action, the circuit court, the Honorable Edward E. Leineweber presiding, conducting a de novo review of the property tax assessment, held a trial that ended in December 2008. Judge Leineweber rendered a decision in May 2009, more than three months after the Board made its 2008 property tax assessment determination at issue in the instant appeal. Judge Leineweber concluded that Lands' End rebutted the presumption that the assessor's 2006 assessment was correct because the assessment was based on an appraisal of the property that contained numerous errors. Judge Leineweber credited evidence Lands' End introduced concerning the assessed value of the property and agreed with Lands' End that the proper tax assessment for 2006 was $25,000,000. The City appealed, and we affirmed. *See* ***Lands' End, Inc. v. City of Dodgeville***, No. 2009AP2627, unpublished slip op. ¶1 (WI App May 28, 2010).

¶7 In light of Judge Leineweber's decision regarding the 2006 assessment, Lands' End moved for summary judgment in this case. Lands' End essentially argued that the value of the property in 2008 was $25,000,000 because Judge Leineweber found that the value of the property in 2006 was $25,000,000,

[5] Lands' End also filed a complaint for a declaratory judgment seeking a declaration that the assessment review procedure in effect at the time unconstitutionally denied Lands' End the right to obtain de novo review of the Board's tax assessment determination.

[6] For ease of discussion in this opinion, we will refer to the prior proceeding as if it involved only the 2006 assessment. In fact, it involved both the 2005 and 2006 assessments. So far as we can tell, both of those assessments were essentially in the same amount and the fact that the prior action also involved the 2005 assessment has no effect on the disputes before us.

and it is undisputed that the value of Lands' End's property did not change between 2006 and 2008.

¶8 In April 2010, Judge Dyke denied Lands' End's motion for summary judgment. Judge Dyke reasoned that issue preclusion did not apply because Lands' End, in arguing that the 2008 value of the property was $25,000,000, relied on new evidence not considered in the prior action. Judge Dyke affirmed the Board's 2008 property tax assessment determination under certiorari review. Lands' End appeals.

DISCUSSION

¶9 On appeal, Lands' End contends that the circuit court erred in denying its motion for summary judgment. Lands' End contends that it was and is entitled to summary judgment based on a combination of the following: (1) issue preclusion prevents the parties from relitigating Judge Leineweber's finding that the 2006 tax assessed value of the property was $25,000,000; and (2) it is an undisputed fact in the current case that the value of Lands' End's property did not materially change between 2006 and 2008. It follows, according to Lands' End, that the circuit court should have changed the 2008 assessment from $56,423,100 to $25,000,000.

¶10 In response, the City argues that issue preclusion does not apply in this case for reasons we will discuss later in this opinion. As will become apparent, the flaw in the City's issue preclusion argument is that the City miscasts the "issue" to which issue preclusion applies. The "issue" is not the proper 2008 assessed value of Lands' End's property. Rather, we determine here that issue preclusion applied only to the "issue" of the correct 2006 assessment. The resolution of that issue through the application of issue preclusion does not, by

itself, establish the proper 2008 assessed value. Rather, it is the combination of issue preclusion and a new undisputed fact in the present case that persuades us that Lands' End is entitled to summary judgment. The new undisputed fact is that the value of the subject property did not materially change between 2006 and 2008.

¶11 We review a grant or denial of summary judgment as a question of law subject to de novo review. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The burden is on the moving party, here Lands' End, to establish the absence of a genuine disputed issue as to any material fact. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). The purpose of summary judgment is to avoid a trial "where there is nothing to try." ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102 (quoting other sources).

I. Issue Preclusion

¶12 "The doctrine of issue preclusion forecloses relitigation of an issue that was litigated in a previous proceeding involving the same parties or their privies." ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. More specifically, issue preclusion prevents relitigation of an issue of law or fact that was actually litigated in the prior proceeding and was necessary to the prior judgment. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. Once the initial requirement for the application of issue preclusion is met, then the circuit court must determine whether the application of the doctrine under the particular circumstances of the case would be consistent

with fundamental fairness. ***Masko***, 265 Wis. 2d 442, ¶4. In applying the fairness analysis, courts may consider a number of factors, including the following:

> (1) Could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
>
> (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
>
> (3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
>
> (4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
>
> (5) Are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Town of Delafield v. Winkelman, 2004 WI 17, ¶34 n.6, 269 Wis. 2d 109, 675 N.W.2d 470; ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993).

¶13 Whether issue preclusion is a potential limit on litigation in a particular case is a question of law that we review de novo. ***Mrozek***, 281 Wis. 2d 448, ¶15. "However, whether the circuit court properly applied, or refused to apply, issue preclusion in an individual case is a discretionary decision." ***Id.*** We review a court's discretionary decision under the clearly erroneous standard. *See* ***Sentry Ins. v. Royal Ins. Co. of America***, 196 Wis. 2d 907, 916-17, 539 N.W.2d 911 (Ct. App. 1995). The party asserting issue preclusion has the burden of showing that the doctrine applies. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999).

A. Application of Issue Preclusion to Judge Leineweber's Finding that the 2006 Fair Market Value of the Property was $25,000,000

¶14 To establish the first requirement for the application of issue preclusion, Lands' End must show that the parties fully litigated the 2006 fair market value of the property and that the court's finding as to the 2006 fair market value of the property was necessary to the prior judgment.

¶15 It is undisputed that the two primary issues in the prior action were: (1) did Lands' End rebut the presumption of correctness afforded to the assessor's 2006 tax assessment, and if so; (2) what was the value of the property on January 1, 2006. As we have explained, Judge Leineweber conducted a de novo review of the 2006 property tax assessment under the assessment review scheme in effect at the time. During the proceedings in that case, both parties presented extensive evidence as to the 2006 fair market value of Lands' End's property. After considering the evidence and argument by counsel, Judge Leineweber concluded that Lands' End rebutted the presumption of correctness afforded to the assessor's 2006 assessment, and found that the 2006 fair market value of Lands' End's property was $25,000,000.[7] Based on the above, we are satisfied that the issue of fact concerning the 2006 fair market value of the property was fully

[7] Although not dispositive of the case, we note that Judge Dyke improperly concluded that Lands' End failed to rebut the presumption of correctness afforded to the assessor's 2008 assessment. As we have stated, the City assessor relied on the same appraisal of the property to make the 2008 assessment that the assessor relied on to make the 2006 assessment. At the time the City assessor did so, Judge Leineweber had not yet rendered a decision in the prior action. However, in May 2009, Judge Leineweber concluded that Lands' End rebutted the presumption of correctness afforded to the assessor's 2006 assessment because it was based on the City's appraisal of the property, which contained numerous errors. Because the assessor's 2008 assessment was based on the same appraisal of the property that Judge Leineweber explicitly rejected in the prior action, Judge Dyke should have concluded that Lands' End rebutted the presumption that the assessor's 2008 assessment was correct.

litigated and that Judge Leineweber's finding on that issue was necessary to the prior judgment. We therefore conclude that the first requirement for the application of issue preclusion has been met.

¶16 We now turn to the City's two contentions as to why the first requirement for the application of issue preclusion has not been met. The City contends that the property tax statutes prohibit the application of issue preclusion and that the facts in this case are significantly different from the facts in the 2006 case. We address and reject each argument in turn.

1. Property Tax Statutes

¶17 The City argues that Lands' End has not met the first requirement of issue preclusion because the property tax statutes, WIS. STAT. §§ 70.10 and 70.32(1), require that the value of property be determined as "of January 1 of each year" based on the "best information" available and therefore Lands' End's property cannot be valued by "looking back at an earlier assessment and asking whether there has been a change in value." Based on the above statutes, the City maintains that property cannot be assessed in the same amount that it was assessed in a prior year on the basis that there has been no change in the value of the property in the intervening years.

¶18 We find no support in any of the tax statutes the City relies on for the proposition that property cannot be assessed at the same value as it was assessed in a prior year when the evidence shows that the value of the property has not changed during the intervening period, as in this case. We agree with the City that, by their language, WIS. STATS. §§ 70.10, 70.32(1) require that property be valued as "of January 1 of each year" based on the "best information" available. However, the statute does not suggest that the "best information" available cannot

include evidence that there was no material change in the property's value since the time of a prior assessment. Indeed, the City's own assessor considered this information when he assessed Lands' End's property in 2008 at essentially the same amount that he assessed the property in 2006 based on evidence that the value of the property did not change between 2006 and 2008.

¶19 The City further asserts that issue preclusion does not apply because "nothing in the statutes allows a court-determined assessment for one tax year to be binding on another court for another tax year." In other words, the City argues, "[w]hat was done in a prior assessment year is irrelevant under the statutes" because a prior property tax assessment does not bind a court in an action regarding a subsequent tax assessment of the property.

¶20 The City's argument fails to appreciate the limited "issue" at hand. The "issue" subject to issue preclusion is not the 2008 tax assessed value of the property. Rather, the "issue" that has already been litigated is only the 2006 assessed value. When we focus our attention on the narrow question of the correct 2006 tax assessed value of the property, it is readily apparent that the City was afforded a full opportunity to litigate that assessment.

2. Additional Evidence

¶21 The City next argues that issue preclusion does not apply because Lands' End relied on a new appraisal in this case and because many of the facts Lands' End relied on to determine the 2008 value of the property "were not even uncovered" until after Judge Leineweber found that the 2006 value of the property was $25,000,000. We are not persuaded.

¶22 The City provides no persuasive argument as to why Lands' End's introduction of new evidence regarding the 2008 fair market value of the property prevents Lands' End from prevailing on summary judgment. At the time of the 2008 Board hearings, Judge Leineweber had not issued his decision and therefore Lands' End did not yet know whether it would prevail in that action. Lands' End prudently presented to the Board what Lands' End considered to be its best evidence of the property's fair market value as of January 1, 2008. After Judge Leineweber rendered a decision in favor of Lands' End, Lands' End sought summary judgment based not on the new evidence the City points to, but rather on the very different issue preclusion theory. The City does not explain why Lands' End was bound by the new evidence it presented to the Board and could not seek summary judgment on alternative grounds that became available after Judge Leineweber rendered his decision.

¶23 In sum, we conclude that Lands' End has shown that the first requirement for the application of issue preclusion is met because the critical factual issue in the prior action—the fair market value of Lands' End's property in 2006—was fully litigated by the parties before Judge Leineweber and was necessary to the prior judgment.

B. Principles of Fundamental Fairness

¶24 Having concluded that the first requirement for issue preclusion has been met, we next must determine whether applying issue preclusion to preclude the parties from relitigating the issues presented in the prior action comports with principles of fundamental fairness. *See* ***Paige K.B.***, 226 Wis. 2d at 225. As we have explained, this inquiry entails the consideration of numerous factors, five of which are specifically enumerated. *See* ***Winkelman***, 269 Wis. 2d 109, ¶34 n.6; *see*

also supra at ¶12. Although Lands' End addressed each of these factors in its brief-in-chief on appeal, the City has inexplicably not addressed any of these factors, except for the second factor: "[i]s the question one of law that involves two distinct claims or intervening contextual shifts in the law." ***Winkelman***, 269 Wis. 2d 109, ¶34 n.6. Accordingly, we assume that the City concedes that four of the five enumerated factors weigh in favor of the application of issue preclusion. We therefore limit our discussion to whether the application of issue preclusion would be fundamentally unfair based on the second factor.

¶25 The City contends that it would be fundamentally unfair to apply issue preclusion because there has been a shift in the law since the time of the prior action. According to the City, our supreme court held for the first time in ***Nestlé USA, Inc. v. DOR***, 2011 WI 4, ¶32, 331 Wis. 2d 256, 795 N.W.2d 46, that reasonable comparable properties may be considered for valuation purposes only if they have the same highest and best use as the subject property. It is the City's position that, based on the supreme court's holding in ***Nestlé***, Lands' End is now required to use reasonable comparable properties that have the same highest and best use as Lands' End's property, whereas Lands' End was not required to do so in the prior action.

¶26 The City misreads ***Nestlé***. The supreme court in ***Nestlé*** did not create a new requirement regarding the valuation of property that did not previously exist. The passage that the City focuses on is nothing more than a statement of well-established law regarding the comparable sales approach to property valuation. The passage in its entirety reads as follows:

> The first step in determining whether the [Tax Appeals] Commission erred in not using the comparable sales approach is to consider whether the Commission properly concluded the Gateway Plant's highest and best

> use is as a powdered infant formula production facility. *This is a threshold issue because the properties an assessor identifies as 'reasonably comparable' to the subject property for assessment purposes must be reasonably comparable to the subject property's highest and best use.* ***Forest Cnty. Potawatomi Cmty. v. Twp. of Lincoln***, 2008 WI App 156, ¶10, 314 Wis. 2d 363, 761 N.W.2d 31 (citing *Property Assessment Manual*, at 7-9 to 7-10). Therefore, a property's highest and best use is often a determinative factor in the assessor's decision on which assessment approach to rely on in appraising the subject property.

Id. (emphasis added). It is plain from the above passage that the court did not purport to establish new law or change the legal landscape regarding the valuation of property. Rather, the court stated a general principle of law for the purpose of explaining how the supreme court determined what the threshold issue was in that case. *See* ***id.*** Accordingly, because we reject the City's argument on the only fundamental fairness factor that the City addresses, we conclude that none of the fairness factors prevent us from concluding that Judge Leineweber's essential finding in the prior action has a preclusive effect.

¶27 In sum, we are satisfied that Lands' End has established that it is fundamentally fair to apply issue preclusion in this case. Thus, both requirements for issue preclusion to apply in this case have been met. Consequently, we conclude that issue preclusion prevents the parties from relitigating Judge Leineweber's finding that the 2006 fair market value of Lands' End's property was $25,000,000.

II. No Change in Property Value Between 2006 and 2008

¶28 Our conclusion that Judge Leineweber's finding of fact has a preclusive effect is significant because it is undisputed that the value of the property essentially stayed the same between 2006 and 2008. As we have already explained, the City assessor testified at the 2008 Board hearings that, in

determining the value of the property in 2008, he used the same value placed on the property in the 2006 assessment because, based on DOR data, there was less than a 5% change in value of the property between the time of the 2006 assessment and the 2008 assessment, and industry standards do not require a new assessment when the change in value of the property over the relevant period is less than 5%. Lands' End agrees that the market for extraordinarily large buildings such as Lands' End did not increase in value over the relevant two-year period and that the value of the property in 2008 is the same as it was in 2006. Accordingly, the parties do not dispute the proposition that the value of the property in 2008 was essentially the same as it was in 2006.

III. The 2008 Fair Market Value of Lands' End's Property is $25,000,000

¶29 Giving preclusive effect to Judge Leineweber's finding that the 2006 value of the property was $25,000,000, and combining that finding with the undisputed fact in this case that the value of the property essentially stayed the same, leads us to conclude that the value of the property in 2008 must be $25,000,000. Because there is no genuine dispute that the 2008 value of the property is $25,000,000, we conclude that Lands' End is entitled to judgment as a matter of law. We therefore reverse the order of the circuit court denying Lands' End's motion for summary judgment and remand to the circuit court.

¶30 The question becomes how the circuit court should proceed on remand. Lands' End argues that we should remand to the circuit court for entry of judgment in the amount of $724,292.68, which, according to Lands' End, represents the amount of the excessive tax that it paid in 2008 based on a $25,000,000 valuation of the property. The City does not develop any argument as to how we should proceed on remand in the event that we grant summary

judgment to Lands' End. Because the City does not contest Lands' End's computation as to the amount of the excessive tax paid, we remand to the circuit court with directions to enter judgment in favor of Lands' End in the amount of $724,292.68, plus statutory interest and any other interest or costs to which Lands' End may be entitled.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.