COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1546

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

---

98 CV 373
STATE OF WISCONSIN EX REL HEARTLAND-BELOIT WATERTOWER, LLC,

PETITIONER-RESPONDENT,

V.

BOARD OF REVIEW OF THE CITY OF BELOIT, CITY OF BELOIT, AND ERWIN ZUEHLKE, E. WILLIAM KALT, FRED WOODARD, THOMAS JESSEN AND MILTON BROWN, IN THEIR REPRESENTATIVE CAPACITIES,

RESPONDENTS-APPELLANTS.

98CV 738
STATE OF WISCONSIN EX REL. HEARTLAND-BELOIT BURTON, LLC,

PETITIONER-RESPONDENT,

V.

BOARD OF REVIEW OF THE CITY OF BELOIT, CITY OF BELOIT, AND ERWIN ZUEHLKE, E. WILLIAM

KALT, FRED WOODARD, THOMAS JESSEN AND MILTON BROWN, IN THEIR REPRESENTATIVE CAPACITIES,

RESPONDENTS-APPELLANTS.

APPEAL from orders of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed in part and reversed in part*.

Before Vergeront, Roggensack and Deininger, JJ.

¶1 VERGERONT, J. This appeal concerns a challenge to the 1998 assessments of two low-income apartment projects in the City of Beloit—the Hillcrest Apartments, owned by Heartland–Beloit Burton, LLC, and Watertower Place, owned by Heartland–Beloit Watertower, LLC.[1] On the taxpayers' petition for certiorari review of the decisions of the Board of Review of the City of Beloit, the circuit court concluded the assessments were arrived at in a manner contrary to the circuit court's decision concerning the 1996 assessments of the same properties, because the value of income tax credits under section 42 of the Internal Revenue Code was included in valuing the properties. The court held the City was precluded from relitigating the proper treatment of the tax credits, and also concluded the City's opposition to the petition was frivolous, awarding attorney fees and costs to the taxpayers. The City appeals, contending the decision of the circuit court in the prior action was erroneous, and neither claim preclusion nor issue preclusion prevent it from relitigating the proper treatment of the tax credits for the 1998 assessments. The City also appeals the award of attorney fees.

[1] The proceedings concerning the two properties were consolidated before the circuit court by stipulation of the parties.

¶2 We conclude claim preclusion does not apply because different tax years are involved, but it is not fundamentally unfair to apply issue preclusion—because of the factors relied on by the circuit court and the additional fact that recent legislation has resolved, beginning with the year 2000, the issue the City seeks to relitigate. We therefore affirm the court's memorandum decision and its order for remand. However, we reverse the order awarding costs and attorney fees because we conclude the City's positions had a reasonable basis in law and equity.

BACKGROUND

¶3 Hillcrest and Watertower Place were built in 1995, and the owner of each received allocations of income tax credits under the federal low-income housing tax credit program, I.R.C. § 42 (1999).[2] Under the program, investors in low-income rental housing projects may receive a dollar-for-dollar credit against federal income taxes due. The tax credit is allowed over a ten-year period, as long as the owner observes the restrictions on the rent that may be charged and the income of the residents as specified in I.R.C. § 42.[3]

[2] All references to the Internal Revenue Code are to the 1999 version unless otherwise noted.

[3] In Wisconsin, the Wisconsin Housing and Economic Development Authority (WHEDA) allocates the tax credits apportioned to Wisconsin among applicants, based on information they supply about the proposed projects. Typically, as is the case here, the tax credits are marketed by selling interests in the limited partnerships or limited liability companies that own the projects; the owners then make use of the credits on their own individual tax returns. The project owner is required to maintain the required number of low-income units for a period of thirty years, *see* I.R.C. §§ 42(h)(6) and 42(i)(1), and, if the owner fails to do so, the amount of the current-year credit is reduced and a prescribed fraction of the credits previously claimed are recaptured. *See* I.R.C. § 42(j). The tax credits may also be recaptured upon sale of the project by the owner, or upon the taxpayer's disposal of its interest in the project, unless the seller posts a bond with the IRS and the IRS is satisfied that the purchaser will maintain the proper number of low-income units. *See* I.R.C. § 42(j)(6).

¶4 The owners of Hillcrest and Watertower Place challenged the 1996 assessments for the properties before the Board of Review, contending the assessor had erred in using a cost approach that included the value of the income tax credits and had erred in using a cost approach without at least considering an income approach. The Board adopted the assessor's valuations and the taxpayers petitioned to the circuit court for review by writ of certiorari. The taxpayers made the same two arguments before the circuit court, but their primary point was that, whether the cost approach or the income approach was used, it was inconsistent with case law, the Wisconsin Assessment Manual, and the standard practice of appraisers to value the section 42 tax credits when assessing real estate.

¶5 In a written decision entered April 24, 1997, the circuit court concluded the Board's assessments were erroneous because the cost approach used did not take into account the rent and income restrictions as factors of "economic obsolescence" as provided in the Manual. The court pointed out that the Manual indicated that the best approach for assessing subsidized housing was the income method and stated that any method used must take into account the income and rent restrictions placed on the property, relying on ***Metropolitan Holding Co. v. Board of Review***, 173 Wis. 2d 626, 495 N.W.2d 314 (1993).[4] The court rejected

[4] The circuit court relied on ***Waste Management v. Kenosha County Bd. of Review***, 184 Wis. 2d 541, 516 N.W.2d 695 (1994), to establish the basic framework for determining fair market value. In ***Waste Management***, the court held that a recent arms-length sale of the subject property or a sale of reasonably comparable property is the best information to determine fair market value; when those don't exist, assessors are to determine fair market value from the best information practicably obtainable, considering all elements that bear on property value. These elements include:

> cost, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus, and appraisals procured by the owner.

Id. at 557.

(continued)

the Board's argument that the tax credits constitute income and can be utilized in assessing fair market value, stating that ***State ex rel. Algoma Housing Co. v. Board of Review***, 166 Wis. 2d 675, 480 N.W.2d 786 (Ct. App. 1991), prohibited this.

¶6 The judgment of the court, entered on May 20, 1997, remanded the matter to the Board with instructions to assess the properties in accordance with the holding of ***Metropolitan***; to consider the income approach, basing it on the actual rents and expenses of the property or on the rents and expenses of comparable property with comparable federal restrictions, without regard to the

---

The specific provisions of the Manual the circuit court relied on were:

> The effect of federally subsidized housing restrictions would most likely be considered as economic obsolescence when using the cost approach. Also, be aware that construction costs for subsidized housing tend to be higher because of overhead costs.
>
> ….
>
> The income approach is often the most useful and often the only method for valuing subsidized housing because of the conditions of the agreement and the limited availability of data. Several methods of valuation can be used including mortgage-equity capitalization and discounted cash flow.
>
> If the mortgage-equity method is used in assessing, construct the capitalization rate from the mortgage terms and conditions, the rents, and the expenses of the project.
>
> If the discounted cash flow method is used, consider the following:
>
> (1) The present worth of the mortgage
> (2) The present value of the income stream
> (3) The present worth of the reversion
>
> NOTE: The following should be included despite the method used: project rents and expenses, mortgage terms and conditions, and expected yield rates.

Wisconsin Assessment Manual at pp. 9-27 thru 9-28 (12/94).

low-income housing tax credits; and, if the assessor chose to use the cost approach, to take into account the economic obsolescence of the properties resulting from the federally subsidized housing restrictions.

¶7 Upon remand, the Board decided to assess the properties using an income approach that did not include the value of the tax credits. The City then filed a motion asking for reconsideration of the memorandum decision and judgment, review of the Board's decision after remand, and entry of a final judgment. The circuit court orally denied the motion, and the City filed an appeal in this court. We dismissed the appeal for lack of jurisdiction, because the appeal was untimely with respect to the May 20, 1997 judgment, and the Board could not appeal the later denial of its motion since no written order had been entered.[5]

¶8 The parties agreed that the methods the Board ultimately decided upon for the 1996 assessments would be used for the 1997 assessments of the two properties. However, for 1998, the assessor for the City submitted an appraisal for each property that considered both a cost approach and an income approach and concluded that the cost approach was the more reliable indicator of value. The cost approach the assessor used deducted certain costs related to federally subsidized housing but included the value of the tax credits; the income approach also took into account the value of the tax credits. The taxpayers challenged the assessor's appraisals before the Board, contending that under the prior circuit court decision and judgment, the Board could not value the tax credits under either the income or the cost approach. They also presented their own appraisals.

[5] *See* ***State ex rel. Heartland-Beloit Watertower, L.L.C. v. Board of Review***, No. 97-3649, unpublished order (Wis. Ct. App. Jan. 21, 1998).

¶9 After the parties had presented evidence and argument to the Board, they entered into a stipulation for each property that there were no comparable sales to serve as a basis for valuation, and asked the Board to select one of four alternative stipulated values, each arrived at by a different method: income method including tax credits; income method excluding tax credits; cost method without deduction for tax credits; cost method with deduction for tax credits.[6]

¶10 In its deliberations, the Board first took up Hillcrest and decided by a three-to-one vote to select the value the assessor arrived at using the income method including the tax credits. The discussion indicates that the three members were persuaded by the arguments of the assessor and the city attorney that the value of the tax credits should be included, and the income approach was selected because the resulting value was less than that resulting from the cost approach.[7] In its deliberations on Watertower Place, the chairman began by stating that the value arrived at by the assessor was $4,505,300, and the value proposed by the taxpayer was $2,391,113 according to one of its exhibits. The first figure was the assessor's value based on the cost method, which was the same as the stipulated value for the cost method without deduction for tax credits; the second figure was

[6] The stipulation states that the parties do not disagree over actual or projected net operating income, capitalization rate or replacement cost; and sets out the parties' disagreement over whether the value of the tax credits should be included in both the income and the cost method. The stipulated values are:

	Water Tower	**Hillcrest**
Income method including tax credits:	$4,328,254	$3,565,910
Income method excluding tax credits:	$2,417,500	$1,578,283
Cost method without deduction for tax credits:	$4,505,300	$3,154,800
Cost method with deduction for tax credits:	$2,762,648	$1,420,350

[7] The assessor's values for the income and cost approaches, which the Board relied on, were $3,036,600 and $3,154,800, respectively.

from an exhibit of the taxpayer and was based on the income method. After some discussion, the Board voted three-to-one to adopt the assessor's value. However, it appears the Board may not have realized that the value it adopted for Watertower Place was based on the cost method: the discussion leading up to the vote concerned whether it was proper to add the tax credits to the income when using the income method, and there was no discussion on the cost method.

¶11 The taxpayers petitioned for certiorari review of the Board's decision. They contended the City was barred by the doctrines of claim preclusion and issue preclusion from relitigating whether the value of the tax credits should be included in the assessments, and the issue was correctly decided by the circuit court in its April, 1997 decision. The taxpayers also requested an award of attorney fees under WIS. STAT. §§ 892.05 and 814.025, on the ground that the Board's actions and the City's opposition to the petition for review were frivolous and without reasonable basis in the law. The City responded that neither claim nor issue preclusion applied because there was evidence before the Board for the 1998 assessments that had not been presented in 1996. The City also contended the circuit court's interpretation of ***Algoma Housing*** was not correct, an appellate decision on the correct method of assessing section 42 properties was needed, and it objected to an award of attorney fees.

¶12 The circuit court, with a different judge presiding, concluded the legal issue involved in the 1998 assessment was the same as that decided by the circuit court in April 1997: "whether ***Algoma Housing*** and ***Waste Management***[8]

[8] The court's discussion prior to this statement of the issue indicates that it may have meant to refer to ***Metropolitan Holding Co. v. Board of Review***, 173 Wis. 2d 626, 495 N.W.2d 314 (1993), rather than ***Waste Management v. Kenosha County Bd. of Review***, 184 Wis. 2d 541, 516 N.W.2d 695 (1994) (see footnote 3 for holding of ***Waste Management)***, but this does not affect our analysis.

require the assessor to ignore federal tax credits for purposes of assessment or whether those credits can be added to the income of the property for purposes of assessment." The court reasoned that Wisconsin law had not changed since April 1997, and, although there might be additional evidence, that affected the ultimate assessments, but not the legal issues concerning methodology that were already decided. The court stated its agreement with the prior circuit court decision. It noted the City's disagreement, but added that the proper course to correct error in the prior decision was by appeal. The court decided it was unfair to the taxpayers to require them to come back to circuit court to appeal the use of a method that the court had already determined was an error and which the City had not appealed.

¶13 In a separate order, the court determined that the City's actions in fixing the 1998 assessments and in opposing the petition for a writ of certiorari were frivolous and without a reasonable basis in law.

DISCUSSION

Claim Preclusion

¶14 Under the doctrine of claim preclusion, formerly known as res judicata, a final judgment is conclusive in any subsequent action on the parties (or their privies) as to any claim or cause of action that was litigated or could have been litigated in the first action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Under the doctrine of issue preclusion, formerly known as collateral estoppel, courts may preclude relitigation of an issue of law or fact that has been actually litigated in a previous action. *See* ***id.*** In order to apply issue preclusion, a court must first determine whether the party against whom issue preclusion is asserted was a party in the prior action, or in privity with or had sufficient identity of interest with a party in the prior action, and then

decide if the application of issue preclusion comports with fundamental fairness. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224-25, 594 N.W.2d 370 (1999).

¶15 The City and the Amicus Curiae, the League of Wisconsin Municipalities,[9] contend the doctrine of claim preclusion does not apply because the prior action in this case concerned a different tax year. They reason that each tax year is the origin of a separate cause of action, relying on ***Commissioner of Internal Revenue v. Sunnen***, 333 U.S. 591, 598 (1948); therefore, they contend, a judgment in a tax dispute for one year is not conclusive under the doctrine of claim preclusion with respect to subsequent years, although the doctrine of issue preclusion may be. The taxpayers respond that, while this may be true under federal law, the Wisconsin Supreme Court applied claim preclusion to preclude litigation in subsequent tax years in ***State ex rel. Mitchell Aero, Inc. v. Board of Review***, 74 Wis. 2d 268, 246 N.W.2d 521 (1976). Whether the doctrine of claim preclusion may apply at all to bar litigation over real estate tax for one year because of a judgment rendered in an action between the same parties concerning the real estate tax for the same property in a prior year presents a question of law, which we review de novo. *See* ***Northern States Power***, 189 Wis. 2d at 551.

¶16 In ***Mitchell Aero***, the court held that the issue of ownership of two buildings for purposes of determining the personal property tax of the City of Milwaukee for the year 1972 was already decided in a prior case that concerned Milwaukee's personal property for the years 1966 and 1967,[10] and the court

[9] The Amicus Curiae and the City present essentially the same arguments on appeal, so we will not separately refer to the Amicus again.

[10] The prior case was ***Mitchell Aero, Inc. v. Milwaukee***, 42 Wis. 2d 656, 663-64, 168 N.W.2d 183 (1969).

therefore did not permit relitigation of that issue. *See* ***Mitchell***, 74 Wis. 2d at 271, 274. It is true that the court referred to the applicable preclusion rule as "res judicata." However, the court's analysis turned on whether "the issue" of ownership had already actually been litigated, rather than whether any claim or cause of action being asserted was or could have been raised in the prior case. *See* ***id.*** at 274. The term "res judicata" has sometimes been used to "reference and incorporate the concept of collateral estoppel." ***Northern States Power***, 189 Wis. 2d at 549. We are persuaded that the court in ***Mitchell*** did just that, and applied the doctrine of issue preclusion, not claim preclusion. For this reason, we do not read ***Mitchell*** as establishing that under Wisconsin law, claim preclusion applies to bar litigation in a subsequent tax year.

¶17 We find the reasoning of the federal courts and authorities on federal law to be sound and applicable to local real estate taxes. The doctrine of claim preclusion does not fit easily when continuing conduct and recurring liability is involved. *See, e.g.*, 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4415 (1981). For example, applying the doctrine of claim preclusion to successive tax years would deny to a particular taxpayer the benefits of later court decisions involving other taxpayers, even if the particular taxpayer had not previously litigated that issue. The doctrine of issue preclusion, applying as it does to issues actually litigated and based on principles of fundamental fairness, is better suited to limit unjustified relitigation of issues in local property tax matters and is sufficient to accomplish that purpose. We therefore conclude that a judgment concerning tax liability for one tax year is not conclusive with respect to a subsequent tax year under the doctrine of claim preclusion, but the doctrine of issue preclusion may apply.

Issue Preclusion

¶18 We first address whether the issues the City seeks to litigate concerning the 1998 assessments are the same as those actually litigated and decided with respect to the 1996 assessments, because the doctrine of issue preclusion may apply only if the issues are the same. Since this inquiry in this case involves the application of a legal standard to undisputed facts, we review it as a question of law. *See* ***Butzlaff v. DHFS***, 223 Wis. 2d 673, 679, 590 N.W.2d 9 (Ct. App. 1998). The City frames the issues it seeks to litigate with respect to the 1998 assessments in this way: whether the value of section 42 tax credits must be deducted when assessing these properties using the cost method and whether the value of the tax credits must be ignored when using the income method. We accept this statement of the issues.

¶19 We conclude that both these issues were actually litigated and decided with respect to the 1996 assessments.[11] The briefs of the taxpayers in the prior action before the circuit court show that the taxpayers presented both these issues to the circuit court for resolution. The April 24, 1997 decision shows the circuit court decided both. The court expressly considered and rejected the City's argument that the tax credits constitute income to the property and can be used in assessing fair market value. In the judgment, in directing the City to consider an income approach, the court ordered that actual rents and expenses (or rents and expenses of comparable property with comparable federal restrictions) be used "without regard to low-income housing tax credits."

[11] The additional issue decided in the prior action—whether the Board could adopt a value based on a cost approach and did not even consider an income approach—is not involved in this action.

¶20 With respect to the cost method actually used by the assessor, the court noted that this method "did not deduct any portion of the value of the Federal Housing Tax Credit," and that the taxpayers' experts had testified that the "cost approach is an unreliable indicator of the value of the projects unless subtractions from value were made to take into account the portion of the project cost funded by the Federal Housing [T]ax [C]redit." The court viewed the tax credits as federal subsidies, costs which the federal government intended to absorb to promote low-income housing, and it decided that the assessor's cost of construction approach was erroneous because it did not take this into account. It read ***Algoma Housing*** to prohibit considering the tax credits in determining fair market value of the property. Finally, the City's brief filed with this court on the attempted appeal, which the City filed with the Board at the hearing on the 1998 assessments, shows that the City understood the court had decided these two issues.[12] The City's argument that the tax credits are not properly considered economic obsolescence goes to the correctness of the court's decision, not to whether the court decided that issue.

¶21 The City also argues the Board's final determination after remand in 1996 for both properties was based on the income approach, whereas the valuation method adopted by the Board for the 1998 assessment of Watertower Place was the cost method, and thus the issues are different. However, the proper comparison for purposes of issue preclusion is between the issues actually decided in the first action and the issues decided in the second action, and the only decision

[12] The City's appellate brief argued the court made two errors in its April 1997 decision: it erroneously held that case law "outlawed the consideration of Section 42 tax credits in determining the assessed value of a Section 42 property by the income approach," and "that all or part of the value of Section 42 tax credits should be deducted from the assessed value determined by the cost approach."

we have from the circuit court in the first action is that of April 1997. Therefore, on this point it is not relevant what method the Board adopted after remand in the first action.

¶22 Since the issues are the same, and since the City was a party to the prior action, we next decide whether application of issue preclusion comports with principles of fundamental fairness. Courts may consider some or all of these factors in answering this question:

> (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 collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Paige, 226 Wis. 2d at 220-21 (citing ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993)). The question whether the application of issue preclusion in a particular case comports with principles of fundamental fairness is within the circuit court's discretion, ***Paige***, 226 Wis. 2d at 225. We affirm discretionary determinations if the court applied the correct legal standard to the relevant facts of record, and, using a rational process, reached a reasonable result. ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 350, 560 N.W.2d 309 (Ct. App. 1997). However, certain of the factors present questions of law, and we review the court's application of these factors de novo. See ***Paige***, 226 Wis. 2d at 225.

¶23 In this case, the availability of an appeal in the prior action, and the fact that the prior action was the same type of proceeding, with the same burden of proof and full presentation of the relevant arguments by the same counsel, are all factors that favor the application of issue preclusion, as the circuit court recognized. Even so, the City argues, it is fundamentally unfair and poor public policy to preclude relitigation, since the decision in the prior action incorrectly interpreted Wisconsin case law, and unless the City has the opportunity for appellate review, other taxpayers in the City of Beloit will bear an unfair share of the tax burden on a permanent basis.[13]

¶24 In support of its argument that the prior decision was in error, the City points to evidence presented to the Board in the 1998 proceeding that shows the section 42 properties are desirable investments because the tax credits and the rent restrictions do not diminish their value.[14] The city also relies on recent cases

[13] The City also argues that the circuit court in this action "seems to have overlooked the fact that the 1998 assessed value of Watertower Place was based on the cost approach." We agree it is not clear from the circuit court's decision whether it understood that the value the Board adopted for Watertower Place was based on the cost approach rather than the income approach. (As we have indicated above it is not clear the Board intended this.) However, the City does not develop an argument that links this to the court's analysis of issue preclusion, and it does not ask for a remand so the court can determine whether issue preclusion should apply to a cost approach that did not deduct the value of the tax credits. Since we have already held that the prior action decided that the value of the tax credits could not be included in the cost approach, and without further explanation from the City, we do not see how this misunderstanding of the circuit court, if that is what it was, would warrant the relief the City requests—reversing the circuit court's decision on issue preclusion and deciding the merits ourselves. The most this would entitle the City to is a remand to permit the circuit court to determine whether issue preclusion should also apply to the cost method, and the City does not request this relief.

[14] The City points to evidence that the restricted rents are, on average, above the rents being charged at comparable apartments and the rents actually being charged are near market rates; and to the taxpayers' Moegenburg appraisal, which stated that the section 42 program provides "a positive external economic impact … [and, therefore,] no deduction for economic obsolescence is taken…." The circuit court apparently viewed this new evidence as going to the value of the appraisals, not to the legal issues decided in the prior action, and emphasized that a change in the values because of new evidence did not support relitigation of the legal issues. We agree this is true in certain respects. For example, the rents actually received for these properties (continued)

in other jurisdictions holding that the value of section 42 tax credits are properly considered in assessing the fair market value of the properties.[15]

¶25 We agree with the City that the circuit court's interpretation of Wisconsin case law in the prior action was in error. Neither ***Algoma Housing*** nor ***Metropolitan***, nor any other Wisconsin case, nor the Manual, resolves the issue of the proper treatment of section 42 tax credits for either the income or the cost

---

are reflected in the income approach as ordered in the prior action and therefore are not a basis for relitigating whether I.R.C. § 42 credits may be added to rental and other income. However, we understand the City to be arguing that this new evidence shows that I.R.C. § 42 properties are more desirable as investments than other apartments, and that this undermines the entire basis for the prior decision.

The City also lists the development agreement between the City and the owners of Watertower Place as new evidence that weighs against issue preclusion. That agreement did not apply to the tax year 1996. The relevant portion of the agreement is: "[i]t is the intent of the parties that the Development be constructed in such a manner that the Development will have an assessed (full value) valuation of not less than $2,835,000 (taking only real property into account) on or before January 1, 1997." Other than list this agreement as new evidence, the City does not develop any argument that relates this to the fairness or unfairness of preventing relitigation of the issues whether the value of I.R.C. § 42 credits must be excluded when using the income method and deducted when using the cost method. We therefore do not consider this point further.

[15] At the time of the decision in the prior case, the court in ***Bayridge Assocs. Ltd. Partnership v. Department of Revenue***, 892 P.2d 1002, 1007 (Or. 1995), had held that section 42 property was subject to "governmental restriction as to use" within the meaning of an Oregon statute, and therefore the tax credits could not be considered as additional income that increased the value of the property. There were a number of other decisions holding that the federal subsidies received by the property owners under other programs should be included in valuing the properties. *See, e.g.,* ***Rebelwood, Ltd. v. Hinds County***, 544 So.2d 1356 (Miss. 1989) (rent subsidy); ***Glenridge Dev. Co. v. City of Augusta***, 662 A.2d 928 (Me. 1995) (interest rate subsidies). But apparently no case other than ***Bayridge*** had addressed section 42 tax credits. However, since the date of the prior decision, the court in ***Deerfield 95 Investor Associates v. Town of East Lyme***, 25 Conn. L. Rptr. 51 (Conn. Super. Ct. 1999), held that the government subsidies in the form of section 42 tax credits were a benefit to the owners of the properties rather than a government restriction and should be added to the net operating income after it is divided by the capitalization rate; and the court in ***Parkside Townhomes Assocs. v. Board of Assessment Appeals***, 711 A.2d 607, 611 (Pa. Commw. Ct. 1998), affirmed an assessment of section 42 property that took into account the value of the tax credits, because these affected the value of the property. (In ***Greenfield Village Apartments, L.P. v. Ada County***, 938 P.2d 1245, 1248 (Idaho 1997), the majority explicitly did *not* address the proper treatment of the tax credits, although the concurrence, cited by the City, opined it was essential to take the tax credits into consideration.)

method. In ***Algoma Housing***, we rejected the taxpayer's argument that in arriving at the fair market value of section 8[16] federally subsidized low-income housing property, the actual purchase price for the real estate should be reduced because of the rental restrictions. We concluded the rental restrictions were already reflected in the purchase price in the arms-length sale and that was the best indicator of fair market value. ***Algoma Housing***, 166 Wis. 2d at 679-681. Although tax credits were involved in that property, there was one purchase price for them and a separate purchase price for the real estate, *see* ***id***. at 678, and it was the purchase price for the real estate that the taxpayer sought to have reduced. There was no argument that the value of the tax credits should be included in assessing the real estate, and that issue was never addressed.

¶26 In ***Metropolitan***, the issue was whether the actual rents and expenses of federally financed housing must be considered when using the income method, rather than hypothetical rents and expenses of comparable apartments not subject to federal restrictions. The court held they must be. ***Metropolitan***, 173 Wis. 2d at 631. The court's reasoning is based on the principle that rent restrictions on federally subsidized property that negatively impact value must be taken into account in arriving at the fair market value of the property. However, nothing in either the court's holding or the underlying principles of the decision suggest that the federal subsidy given in exchange for the restrictions on rent or income of residents—in this case, in the form of income tax credits—should not be considered in arriving at a fair market value.

[16] "Section 8" refers to Section 8 of the United States Housing Act of 1937.

¶27 Thus, the City is correct that the question of the proper treatment of section 42 tax credits was an open one under Wisconsin law at the time of the prior circuit court decision. But it no longer is. While this appeal has been pending, the legislature amended WIS. STAT. § 70.32 (1g) to provide: "Beginning with the property tax assessments as of January 1, 2000, the assessor may not consider the effect on the value of the property of any federal income tax credit that is extended to the property owner under section 42 of the Internal Revenue Code." 1999 Wis. Act 9, § 1655m. At the time of the parties' briefing on appeal, this legislation had been introduced but not yet enacted, and the City expressed its disagreement with it. However, the legislature has now acted, and has answered the question for the tax years 2000 and after.

¶28 The City's argument that fairness demands another, and fuller, consideration of the issues by the court is therefore seriously undermined. If issue preclusion is applied, the City will be bound by the decision in the prior action as to these taxpayers for the 1998 assessment, and, presumably, the 1999 assessment, but after that the new legislation will govern for these taxpayers and all other section 42 taxpayers. Although we have concluded that the prior decision mistakenly read prior Wisconsin case law to resolve the issues, the result of that decision is consistent with the new legislation. Therefore, the argument that these taxpayers are bearing less than their fair share of the tax burden for 1998 and 1999 is not a strong one: the legislature has determined that it is good public policy that the value of the section 42 properties not be increased because of the tax credits.

¶29 Because of the recent legislation, the focus of the fundamental fairness inquiry is a narrow one—concerning these two taxpayers for two years. Viewing the circuit court's decision to apply issue preclusion with this focus, we are not persuaded that the court erroneously exercised its discretion. There were

recent and extensive proceedings before the Board and in the circuit court on the same issues, and the City could have filed a timely appeal to challenge the result. While another court might have weighed the equities differently, we cannot say that it is unreasonable to conclude, as did the circuit court, that the taxpayers should not have to go through the same process again because the City failed to file a timely appeal.[17] If the legislation had not been enacted, then the error in interpreting Wisconsin case law in the prior action together with the continuing impact on these and other taxpayers if issue preclusion were to apply, might have required a different analysis of the circuit court's exercise of discretion. However, in light of the legislation, we are satisfied that it is not fundamentally unfair to apply issue preclusion, as the circuit court did.

Attorney Fees

¶30 The circuit court concluded that the City's' "actions and defenses … in fixing the 1998 property tax assessments for [the two properties] and in opposing [the] Petition for Writ of Certiorari" were without a reasonable basis in law. It did not discuss this issue further or make any findings. Although the court's order refers both to WIS. STAT. §§ 802.05 and 814.025,[18] neither its order

[17] Although the circuit court stated that it agreed with the prior circuit court decision, we do not understand it to base the exercise of discretion on that agreement, but, rather, on the other factors we mention above.

[18] WISCONSIN STAT. § 802.05 provides in relevant part:

> (1)(a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name ... of the attorney ... and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name.... The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in

(continued)

nor the taxpayers' brief on appeal indicate that the application of the two statues differ with respect to the ground on which the court relied. We therefore apply the analysis developed in the case law under § 814.025.

¶31 A claim or defense is frivolous when a litigant or attorney knew or should have known that the claim or defense lacked any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. WIS. STAT. § 814.025(3)(b). The standard is an objective one—whether the litigant or attorney knew or should have known that the position was frivolous as determined by what a reasonable litigant or attorney would have known or should have known under the same or similar circumstances. *See* ***Juneau County v. Courthouse Employees***, 221 Wis. 2d 630, 639, 585 N.W. 2d 587 (1998). When the circuit court makes factual findings on what a party or attorney knew or should have known, we accept those unless they

---

> fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law....

WISCONSIN STAT. § 814.025 provides in relevant part:

> **Costs upon frivolous claims and counterclaims**. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ....
>
> (3) In order to find an action ... to be frivolous under sub. (1), the court must find one or more of the following:
>
> ....
>
> (b) The party or the party's attorney knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

are clearly erroneous, but the ultimate conclusion of whether the position taken by the party or attorney is frivolous is a question of law, which we review de novo. *See* ***id.*** We are to resolve any doubts about whether a position is frivolous in favor of the litigant or attorney. ***Id.*** at 650-51.

¶32 The City first contends that neither WIS. STAT. § 814.025 nor WIS. STAT. § 802.05 applies to proceedings before the Board of Review, and the taxpayers do not argue otherwise. We therefore confine our analysis to the City's defense of the certiorari petition in the circuit court. We conclude the City did have a reasonable basis in law and equity for its positions that claim preclusion and issue preclusion did not or should not apply, and for its position that the city assessor could properly include the value of the tax credits in the income method and did not have to deduct them when using the cost method.

¶33 First, we have held that claim preclusion does not apply. Second, although we have decided that the circuit court did not erroneously exercise its discretion in applying issue preclusion, we conclude the taxpayers' arguments that issue preclusion should not apply have a reasonable basis in law and equity for the following reasons. The City did not completely ignore its opportunity to appeal in the prior action but, rather, was mistaken on what constituted a final judgment for purposes of appeal. As we have already stated, the City is correct that the circuit court erred in the prior action in deciding that existing Wisconsin case law resolved the issue of the proper treatment of section 42 tax credits. In addition, cases from other jurisdictions decided since April 1997 supported the City's position on how the tax credits should be treated, as does some evidence presented to the Board in 1998 that was not presented in 1996.[19] Also, the potentially long-

[19] See footnotes 14 and 15.

term effect on the obligations of these taxpayers or other taxpayers, and thus on the City, are factors based in equity that favored another opportunity to litigate the issue.

¶34 Third, and following from what we have already said, the City's position in defending the assessor's methodology had a reasonable basis in the law or an extension or modification of the law: it was not inconsistent with Wisconsin appellate decisions or the Manual and it was supported by recent case law from other jurisdictions.

¶35 We do not agree with the taxpayers' characterization of the stipulation the City and the taxpayers entered into before the Board—that it was a "[concession] that the relevant legal issues were fully briefed in the prior proceeding, meaning no new legal arguments would be made." (Emphasis omitted.) The precise wording of that paragraph of the stipulation was: "The opposing legal and analytical arguments relating to the treatment of the Tax Credit for real property assessment purposes are set forth in the legal briefs of the Taxpayer and the City submitted to the Board as exhibits, and were presented to the Board at the hearing on May 29, 1998." This language plainly does not preclude the City from opposing the application of claim or issue preclusion or from presenting additional legal argument and authority to support the Board's decision when the taxpayers challenged it in circuit court.

¶36 The taxpayers have moved for attorney fees and costs on appeal under WIS. STAT. § 809.25(3), contending the City's position on appeal is frivolous. They rely on the arguments they have presented in defense of the circuit court's award of attorney fees. For the reasons we just explained, we conclude the appeal is not frivolous and deny the motion.

By the Court.—Orders affirmed in part and reversed in part.

Not recommended for publication in the official reports.