COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0025

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

MARVIN POIRIER,

PLAINTIFF-RESPONDENT,

V.

TOWN OF HOWARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Town of Howard appeals a judgment setting the value of Marvin Poirier's 120 acres of land at $116,000 for purposes of his

1997 property tax assessment.[1] The Town argues that the trial court erroneously reduced the assessed value. We reject its arguments and affirm the judgment.

¶2 Poirier purchased 120 acres of agricultural land in 1939. In 1997, it was assessed at $135,350. Poirier challenged the assessment before the Town's board of review, which affirmed the assessment. Pursuant to WIS. STAT. § 74.37(2),[2] Poirier initiated this action claiming an excessive assessment. At the trial to the court, both parties agreed with the court's characterization of the issue, as follows:

> [I]t is the plaintiff's burden of moving forward to overcome, if he can, the presumption that the assessor's valuation is correct. This is a presumption that can be overcome by credible evidence, and that if it is so overcome, then the burden moves to the town to present credible evidence that the Board's determination is reasonable.

¶3 Each party presented expert testimony. Poirier's appraiser, Roy William Tice, testified that the land in question was worth $116,000. The Town presented the testimony of its assessor, who supported his $135,350 assessment. In a detailed memorandum opinion, the court found:

> Although [Poirier's] buildings were assessed for more than the buildings of most of his neighbors, the Poirier buildings are in poor shape. The barn is in need of paint, and its floors are cracked and heaved. The house that Mr. Poirier lives in is 39 years old; was constructed by him from home grown and hand sawn materials; and in many respects does not meet present building codes. Another house on the property provides a home to one of Mr. Poirier's sons and

[1] The judgment also reclassified the property as residential rather than agricultural. The Town does not challenge this ruling on appeal.

[2] All references to the Wisconsin Statutes are to the 1997-98 version.

> is 25 years old. It too was constructed by the plaintiff from home grown and hand sawn materials. Both houses are serviced by pit wells that are nonconforming uses under present codes, and the septic systems and drainfields serving the houses were homemade too and are 39 and 25 years old, respectively.

¶4 The court also found that Poirier's house was in poor condition, needed paint and, when it was inspected in 1995, its fieldstone basement had water seepage. No improvements had been made since that time. The house had sixty amp electrical service and its floor stringers were twenty-four, rather than the standard sixteen, inches on center. The house occupied by Poirier's son had 100 amp electrical service, but its floor stringers were also twenty-four inches on center. It was in average condition, but lacked interior doors and trim. The plumbing was plastic. Because the land has poor drainage, mound or "at grade" septic systems would be required, decreasing the land's value for residential development.

¶5 Poirier's appraiser expert testified that Poirier's land had not been farmed in over twenty years, was rocky and infertile, and its highest and best use was residential. He determined that property as undeveloped residential land was worth $105,000. He testified that as it sits, it was worth $116,000.

¶6 The trial court concluded that the testimony of the Town's only witness, its assessor, lacked credibility. The assessor testified that he had attempted to assess Poirier's home based upon a recent sale of a similarly sized home in town that sold for $44,700. From the exhibits and the assessor's testimony, "it became evident to the court that this was not truly a reasonably comparable piece of property, and that its sale added credibility to [Poirier's expert's] appraisal."

¶7 The court observed that it was "obvious" that the home used as a comparable property by the assessor was better maintained than the Poirier property. The court also noted that the Town's assessor agreed that although Poirier's land was "essentially worthless for agricultural production purposes," it was assessed higher than neighboring properties. The record indicates that the neighboring properties were producing farms. The trial court determined that Poirier's appraiser's testimony was entitled to greater weight and credibility. It ruled that the Town's assessment was excessive and that Poirier's land should be valued at $116,000.

¶8 The Town argues that the trial court erroneously reduced the assessed value of Poirier's property.[3] It contends that the assessment should have been upheld because Poirier failed to meet his burden of proof. It claims that it presented substantial evidence demonstrating that its assessment is correct. We are not persuaded.

¶9 "A property owner who files an objection with the board of review under WIS. STAT. § 70.47(7) and who disagrees with the board's determination has three options for appeal." ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 379-80, 572 N.W.2d 855 (1998). First, the property owner may appeal the determination of the board by an action for certiorari. *See* WIS. STAT. § 70.47(13). Second, the property owner may file a written complaint with the department of revenue requesting that the department revalue the property and adjust the

[3] The Town argues that "[t]he trial court abused its discretion in reducing the 1997 assessment from $135,350.00 to $116,000.00." Although the Town spends a number of pages discussing the standard of review, the substance of its argument does not address a discretionary standard. Therefore, we interpret its argument to mean that the court erred by reducing the assessment.

assessment thereof. *See* WIS. STAT. § 70.85. Third, the property owner may file a claim against the taxation district for an excessive assessment to recover any amount of property tax imposed as a result of the excessive assessment. *See* WIS. STAT. § 74.37(2)(a); *see also* ***Hermann***, 215 Wis. 2d at 379-80.

¶10 Poirier pursued the third procedure, a claim for the recovery of an excessive tax. This procedure, pursuant to WIS. STAT. § 74.37, "allows for a trial de novo as a means of judicial review when the taxpayer claims an excessive tax." *See* ***S.C. Johnson & Son, Inc. v. Town of Caledonia***, 206 Wis. 2d 292, 301, 557 N.W.2d 412 (Ct. App. 1996).[4] Under § 74.37, "the taxpayer need not comply with

[4] WISCONSIN STAT. § 74.37, entitled "**Claim on excessive assessment**," provides:

> **(1)** DEFINITION. In this section, a "claim for an excessive assessment" or an "action for an excessive assessment" means a claim or action, respectively, by an aggrieved person to recover that amount of general property tax imposed because the assessment of property was excessive.
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> **(2)** CLAIM. (a) A claim for an excessive assessment may be filed against the taxation district, or the county that has a county assessor system, which collected the tax.
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> (b) A claim filed under this section shall meet all of the following conditions:
>
> 1. Be in writing.
> 2. State the alleged circumstances giving rise to the claim.
> 3. State as accurately as possible the amount of the claim.
> 4. Be signed by the claimant or his or her agent.
> 5. Be served on the clerk of the taxation district, or the clerk of the county that has a county assessor system, in the manner prescribed in s. 801.11 (4) by January 31 of the year in which the tax based upon the contested assessment is payable.
>
> **(3)** ACTION ON CLAIM. (a) In this subsection, to "disallow" a claim means either to deny the claim in whole or in part or to fail to take final action on the claim within 90 days after the claim is filed.
>
> (b) The taxation district or county that has a county assessor system shall notify the claimant by certified or registered mail whether the claim is allowed or disallowed within 90 days after the claim is filed.
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> (c) If the governing body of the taxation district or county that has a county assessor system determines that a tax has been paid which was based on an excessive assessment, and that the claim for an excessive assessment has complied with all legal

(continued)

certiorari procedures set out in § 70.47(13)." ***S.C. Johnson & Son***, 206 Wis. 2d at 300-01. This is because § 74.37 creates "a separate and distinct method of judicial review." ***Id.*** To demonstrate an excessive assessment, the taxpayer must establish that the property was valued at more than its fair market value. *See* ***State ex rel. Wis. Edison Corp. v. Robertson***, 99 Wis. 2d 561, 568-69, 299 N.W.2d 626 (Ct. App. 1980).

¶11 When reviewing the trial court's determinations as fact finder, we defer to its obligation to evaluate the credibility of the witnesses and weigh the evidence. *See* ***Micro Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434

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requirements, the governing body shall allow the claim. The taxation district or county treasurer shall pay the claim not later than 90 days after the claim is allowed.

(d) If the taxation district or county disallows the claim, the claimant may commence an action in circuit court to recover the amount of the claim not allowed. The action shall be commenced within 90 days after the claimant receives notice by registered or certified mail that the claim is disallowed.

(4) CONDITIONS. (a) No claim or action for an excessive assessment may be brought under this section unless the procedures for objecting to assessments under s. 70.47, except under s. 70.47 (13), have been complied with. This paragraph does not apply if notice under s. 70.365 was not given.

(b) No claim or action for an excessive assessment may be brought or maintained under this section unless the tax for which the claim is filed, or any authorized instalment of the tax, is timely paid under s. 74.11 or 74.12.

(c) No claim or action for an excessive assessment may be brought or maintained under this section if the assessment of the property for the same year is contested under s. 70.47 (13) or 70.85. No assessment may be contested under s. 70.47 (13) or 70.85 if a claim is brought and maintained under this section based on the same assessment.

(5) INTEREST. The amount of a claim filed under sub. (2) or an action commenced under sub. (3) may include interest computed from the date of filing the claim against the taxation district, at the rate of 0.8% per month.

(6) EXCEPTION. This section does not apply in counties with a population of 500,000 or more.

(7) COMPENSATION. If taxes are refunded under sub. (3), the governing body of the taxation district or county that has a county assessor system may proceed under s. 74.41.

N.W.2d 97 (Ct. App. 1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id.***

¶12 Here, the trial court found that Poirier's expert's testimony was entitled to greater weight and credibility than that of the Town's assessor and, in effect, rebutted the presumption of correctness accorded to the Town's assessment. The Town contends that its assessor was the more credible witness. It argues that it presented substantial evidence to support the assessment. The Town's argument fails. The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. *See* WIS. STAT. § 805.17(2). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. *See* ***id.*** at 151-52. Because the record supports the trial court's finding that the land's value equals $116,000, it will not be overturned on appeal.

¶13 Next, the Town argues that Poirier is precluded from relitigating the 1995 farmland assessment in this action because it has been previously challenged. This argument operates from an erroneous premise. The record reveals that Poirier did not attempt to relitigate his 1995 assessed valuation. Rather, the 1995 valuation was merely a factor Tice considered in reaching his opinion concerning the 1997 valuation. The Town's argument essentially challenges the weight to be accorded Tice's expert opinion testimony. This is a trial court, not appellate court, function, *see* WIS. STAT. § 805.17(2) and, therefore, does not provide a basis for reversal.

¶14 The Town complains, however, that the trial court committed error by failing to apply the certiorari standard of review. It contends that the parties stipulated that the certiorari standard was the correct standard and, therefore, the trial court was required to apply it even though Poirier had proceeded under WIS. STAT. § 74.37. We conclude that the alleged error, if any, is harmless. *See* WIS. STAT. § 805.18. Under a certiorari standard, "failure to make an assessment on the statutory basis is an error of law," ***State ex rel. Markarian v. City of Cudahy***, 45 Wis. 2d 683, 686-87, 173 N.W.2d 627 (1970), and valuation that exceeds fair market value violates WIS. STAT. § 70.32(1). *See* ***Metropolitan Holding Co. v. Milwaukee Review Bd.***, 173 Wis. 2d 626, 631, 495 N.W.2d 314 (1993). The trial court found that the Town assessor's sales comparable method failed to use a true comparable method and his valuation exceeded fair market value. This finding amounts to a determination that the Town's assessment did not comply with the statutory standard, resulting in an error of law. Consequently, the court's finding would have supported its judgment under a certiorari standard as well as under § 74.37. Because the record supports the trial court's determination, the judgment is affirmed.

By the Court.—Judgment affirmed.

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