

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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No. 00-1052

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DELLS BOAT CO., INC., A WISCONSIN CORPORATION,

**PLAINTIFF-RESPONDENT-CROSS-
APPELLANT,**

V.

**VILLAGE OF LAKE DELTON, A WISCONSIN
MUNICIPALITY,**

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. The Village of Lake Delton appeals a circuit court order reducing the assessed value of a parcel of land, owned by Dells Boat Company, from \$2,679,300 to \$1.2 million. The court granted Dells Boat's

request to recover the difference between the property tax paid pursuant to the Village's assessed value and the circuit court-determined value, plus interest, for the years of 1996, 1997, and 1998, but denied Dells Boat's request to add to the action a challenge to its 1999 assessment. The Village appealed and Dells Boat cross-appealed. For the following reasons, we affirm with respect to both the appeal and the cross-appeal.

I. Background

¶2 This action concerns the property tax assessment of parcel 0006, owned by Dells Boat, and located on the Wisconsin Dells Parkway.¹ The 37.5 acres of land comprising parcel 0006 is subject to a lease agreement between owner Dells Boat and renter Wisconsin Ducks, Inc. The full lease encompasses 214 acres. Wisconsin Ducks uses the land to provide tour rides in World War II vintage amphibious vehicles, called "Ducks."

¶3 Dells Boat owns one-third of the stock in Wisconsin Ducks. Wisconsin Ducks has three directors, one of whom is Richard Leazer. Leazer is also the president of Dells Boat.

¶4 The current lease between Dells Boat and Wisconsin Ducks runs from December 1, 1995, to December 1, 2000. Negotiations over the terms of the lease lasted nearly a year. As rent, Wisconsin Ducks must pay Dells Boat ten percent of the gross revenues derived from the transportation of passengers on the Ducks and from other business activities carried on directly by Wisconsin Ducks.

¹ Dells Boat is a subsidiary of the Wisconsin Alumni Research Foundation, a charitable corporation.

The calculation of rental payments excludes revenue Wisconsin Ducks derives from subleases in existence at the time the lease was entered into and future subleases for concession stands.

¶5 In 1995, the assessed value of parcel 0006 was \$850,100. In 1996, the Village entered into a contract with Cole-Layer-Trumble, an Ohio company, for the purpose of reassessing properties in the Village. Reid Terry was the individual responsible for the task. Cole-Layer-Trumble's contract with the Village stated that parcel 0006 was "unique" and indicated that Cole-Layer-Trumble should seek help from the Village's retained expert, Dr. Kerry Vandell, a professor at the University of Wisconsin-Madison, in valuing the property. The contract also indicated that the three methods of valuing property (cost, market, and income) should be considered when valuing parcel 0006.

¶6 Terry did not read the contract and did not attempt to value parcel 0006 using the income approach. Terry did not take into account the lease because he was unaware of its existence and he did not consult with Dr. Vandell. In utilizing the market approach to value parcel 0006, Terry relied upon what he considered comparable sales of various vacant properties in the Village of Lake Delton.

¶7 Relying on Terry's work, the Village's assessor, Marshall Knutson, provided Dells Boat with a notice of assessment, indicating that the assessed value of parcel 0006 would increase from \$850,100 to \$3,071,100. Following an informal meeting between a Dells Boat representative and Terry, the assessed value of parcel 0006 was reduced to \$2,679,300.

¶8 Dells Boat objected to the assessment pursuant to WIS. STAT. § 70.47 (1995-96),² and a hearing was held before the Village of Lake Delton Board of Review. Thereafter, the Board of Review issued a notice of determination, affirming the \$2,679,300 valuation. Dells Boat paid the full amount of the tax billed and submitted a claim to the Village for an excessive assessment pursuant to WIS. STAT. § 74.37. The Village denied the claim and Dells Boat filed a complaint in the circuit court pursuant to § 74.37(3)(d).³ While this action was pending, the Village sent Dells Boat the assessments for 1997 and 1998 that continued to value the property at \$2,679,300. Dells Boat paid the tax bills based on those assessments and added claims for those years to this action. Prior to the circuit court's final order, the Village issued an assessment and tax bill for 1999, again based on the \$2,679,300 valuation. Dells Boat also paid this tax bill.

¶9 At trial, Dells Boat presented the testimony of expert witnesses Sherman Geib, by direct testimony, and Lawrence Nicholson, by deposition testimony. Geib concluded that there were no comparable sales of other properties sufficient to utilize the market approach in valuing parcel 0006. Nicholson agreed that there were no comparable sales as to the whole 37.5 acres, but used comparable sales to value the front four acres of the property. Both experts

² All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

³ WISCONSIN STAT. § 74.37(3)(d) provides as follows:

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.

utilized the income approach to value the property, which consists of dividing income by capitalization rate to determine the value. Both experts also relied upon the lease between Dells Boat and Wisconsin Ducks in determining the value of the property. Geib set the value of the property at \$739,500, while Nicholson set the value of the property at \$1.2 million.

¶10 The Village presented the testimony of expert witness Reid Terry through his deposition testimony. Terry's deposition testimony concerned his method of valuing the property for Cole-Layer-Trumble. The Village also presented the direct testimony of Karen Scott, a real estate appraiser. At the time of her testimony, Scott had not done an appraisal of the property. Scott testified to her belief that the lease at issue was not an arm's-length transaction because the parties to it were related. Scott also testified that, in her opinion, the value conclusion arrived at in Geib's assessment of parcel 0006 was both unsupported and unreliable. Finally, Scott stated that Nicholson's assessment was not in compliance with the Uniform Standards of Professional Appraisal Practice.

¶11 The court initially denied Dells Boat's claim of excessive tax. In doing so, the court placed greater weight upon the valuation done by Terry, concluding that sufficient comparable sales existed to utilize the market approach. The court also noted that Dells Boat's reliance upon the income approach was entirely dependent upon the assumption that the lease was an arm's-length transaction, which the court had trouble concluding in light of the fact that the parties to the lease were related.

¶12 Dells Boat filed a motion for reconsideration. In that motion, Dells Boat argued that, pursuant to WIS. STAT. § 70.32(1), property is to be valued in the manner specified in the Wisconsin Property Assessment Manual, which indicates

that any sale requiring an adjustment exceeding fifteen to twenty percent of the total sale price “may not be in the same market” as the subject property, and should not be relied upon in estimating the value of the subject property. Dells Boat then asserted that Terry’s adjustments ranged from 98% to 26,693%. Dells Boat also argued that the court incorrectly concluded that the lease was not an arm’s-length transaction.

¶13 After a hearing in January of 1999, the court ordered the subject property to be reassessed by the Village no later than May 29, 1999, pursuant to WIS. STAT. § 74.39(1). The court retained jurisdiction for “further proceedings as may be necessary.” The Village reassessed the property at \$2.7 million based on an appraisal by Karen Scott. Dells Boat again sought review before the Board of Review. At a June 1999 hearing, the Board of Review reduced the assessment to \$2 million. Dells Boat sought further proceedings before the circuit court.

¶14 The circuit court held a hearing on November 8, 1999. At that hearing, Nicholson testified to his use of the income approach. He rejected the sole use of the market approach because of a lack of comparable sales in the area. Nicholson again valued the property at \$1.2 million. Nicholson also had several criticisms of Scott’s use of the market approach. Scott then testified to her valuation of the property at approximately \$2.7 million. Scott rejected the income approach as the best valuation method based on her belief that the lease between Dells Boat and Wisconsin Ducks was not an arm’s-length transaction. Finally, Dr. Vandell testified on behalf of Dells Boat. Like Nicholson, he had various criticisms of Scott’s use of the market approach. Dr. Vandell testified that, although he did not value the property, had he done so he would have used the approach taken by Nicholson. Dr. Vandell believed that Nicholson’s valuation of \$1.2 million was an appropriate figure.

¶15 In a memorandum decision dated November 15, 1999, the circuit court stated a concern regarding the relationship of the parties to the lease, but nonetheless found the lease rent of ten percent of gross revenues to be representative of the market for that geographic area. The court also cited Dr. Vandell's criticisms of Scott's approach, including her use of comparable sales occurring after January 1, 1996, in finding that the original comparable sales were not effective in establishing the value of the property. Ultimately, the court decided that the income approach was the proper method of valuation and it set the assessed value of the property at \$1.2 million.

¶16 Dells Boat filed a motion for entry of judgment, including a request for an award of excessive tax paid for tax years 1996, 1997, 1998, and 1999. The court granted the motion for an award of excessive tax as to 1996 and, because the court had already granted Dells Boat's request to amend its complaint to include tax years 1997 and 1998, the court stated that the \$1.2 million valuation would extend to those years as well. The court denied the motion with respect to 1999. The Village appealed, and Dells Boat cross-appealed as to the court's decision to deny an award for excessive tax paid in 1999.

¶17 Additional facts will be set forth below when they become pertinent to the analysis.

II. Discussion

A. Valuation of the Property at \$1.2 Million

¶18 The first issue on appeal is whether the circuit court erred when it rejected the Village's 1996 assessment of parcel 0006 and adopted the assessment presented by Dells Boat.

Standard of Review

¶19 This action was filed in the circuit court by Dells Boat pursuant to WIS. STAT. §74.37(3)(d). In *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141, the supreme court explained the nature of this proceeding and contrasted it with certiorari review:

[Section] 74.37(3)(d) actions allow property owners to again fully contest their case in a court trial despite having contested it before the board of review.

The differences between such court actions and certiorari review are considerable. To begin with, as mentioned above, certiorari review is limited to a review of the record. In comparison, during a court action, if the action proceeds to trial, the court may make its determination without regard to any determination made at any earlier proceeding. Instead, new evidence may be introduced, and the court may examine this evidence in making its determination. In addition, unlike certiorari review, during a court trial, the court may make its determination without giving deference to any determination made at a previous proceeding. The court must only give presumptive weight to the assessor's assessment. Wis. Stat. § 70.49(2). Finally, unlike a certiorari review, in a trial, the court, upon making its determination, is not required to remand to the board for an assessment. It may make its determination based on the evidence.

Id. at ¶¶24-25.

¶20 While court actions under WIS. STAT. § 74.37(3)(d) allow property owners to again fully contest assessments, the assessor's assessment is "presumptive evidence" that the property has been "justly and equitably assessed" in relation to other properties. See WIS. STAT. § 70.49(2); see also *Nankin*, 2001 WI 92 at ¶25. However, this only means that the assessor's assessment is presumed correct if the challenging party does not present significant contrary evidence. See generally *City of Superior v. DILHR*, 84 Wis. 2d 663, 669, 267

N.W.2d 637 (1978); *Conradt v. Mt. Carmel Sch.*, 197 Wis. 2d 60, 69, 539 N.W.2d 713 (Ct. App. 1995).

¶21 We will not overturn the trial court’s findings of fact unless they are clearly erroneous. *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 511, 434 N.W.2d 97 (Ct. App. 1988). Where, as here, there is conflicting testimony, the fact finder is the ultimate arbiter of credibility. When more than one reasonable inference can be drawn, “the reviewing court must accept the inference drawn by the trier of fact.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). The weight and credibility to be given to the opinions of expert witnesses is “uniquely within the province of the fact finder.” *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993).

The Circuit Court Properly Assessed the Value of the Property at \$1.2 Million

¶22 The statutory basis for real estate assessments is found in WIS. STAT. § 70.32, which provides in part:

(1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale.

This statute has consistently been construed to mean that real property must be assessed on the basis of its “fair market value.” A property’s fair market value is the “amount it will sell for upon negotiations in the open market between an owner willing but not obliged to sell and a buyer willing but not obliged to buy.” *State ex rel. Wisconsin Edison Corp. v. Robertson*, 99 Wis. 2d 561, 566, 299 N.W.2d 626 (Ct. App. 1980).

¶23 The “best information” of a property’s value is a recent sale of the property in an arm’s-length transaction. If no such sales have occurred, then an assessor should look to sales of reasonably comparable properties. See *Waste Mgmt. of Wisconsin, Inc. v. Kenosha County Bd. of Review*, 184 Wis. 2d 541, 556, 516 N.W.2d 695 (1994); *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 686, 173 N.W.2d 627 (1970). In the absence of such sales, the assessor may consider “all the factors collectively which have a bearing on value of the property in order to determine its fair market value.” *Markarian*, 45 Wis. 2d at 686. Such elements include, among other things: cost, depreciation, replacement value, income, industrial conditions, location and occupancy, and book value. *Waste Mgmt.*, 184 Wis. 2d at 557.

¶24 After hearing expert testimony presented by both Dells Boat and the Village, the court found that the income approach used by Dells Boat’s expert, Nicholson, was the best valuation method under the circumstances and adopted Nicholson’s \$1.2 million valuation of parcel 0006. After carefully reviewing the record, we affirm the circuit court’s decision.

¶25 The facts and reasonable inferences supporting the court’s decision are as follows.

¶26 Scott, testifying for the Village, stated that she assessed parcel 0006 at approximately \$2.7 million using a comparable sales approach and four comparable properties, some of which had recently sold. Scott also testified to her use of the income approach. She stated that she did not do a traditional income approach because she did not believe the lease encumbering the property represented the land’s highest and best use and did not believe the lease represented an arm’s-length transaction because it was between related parties.

Finally, Scott stated that she attributed eighty percent of the leased income to parcel 0006, and twenty percent to the rest of the leased property in using the income approach.

¶27 Nicholson, testifying for Dells Boat, stated that because there were no sales of property comparable to the whole 37.5 acres at issue here, sole use of the market approach was inappropriate. Instead, Nicholson relied on a hybrid approach that placed emphasis on income, but also factored in a comparable sale relating to a portion of parcel 0006. Nicholson stated that the lease, which he concluded was an arm's-length transaction, had to be considered in assessing the property. Nicholson also testified that even if the lease were not an arm's-length transaction, use of the income approach was still appropriate because market rent of the property could be estimated. Based on his investigations, Nicholson concluded that the lease rent provision of ten percent of gross revenues was the market rate in the relevant area.

¶28 Nicholson had several criticisms of Scott's use of the market approach. He noted that he found no sales of property comparable to the whole of parcel 0006 and that none of the sales used by Scott were of comparable size or proximity and none were encumbered by a lease. Nicholson testified that Scott improperly used three property sales as comparable that occurred after the valuation date of January 1, 1996, leaving only one of her comparable sales occurring prior to the valuation date. Nicholson also criticized Scott's use of the income approach. He testified that Scott made a mathematical error in her income approach analysis in that she properly assumed a capitalization rate of ten to eleven percent, but incorrectly applied her analysis yielding an actual capitalization rate of seven and a half percent. Finally, Nicholson criticized Scott's conclusion that eighty percent of revenue from the Wisconsin Ducks

operation is generated by the 37.5 acres comprising parcel 0006, while the remaining twenty percent of revenue is generated by the remaining 176.5 acres. He believed the eighty percent figure was too high.

¶29 Dr. Vandell also testified as an expert witness for Dells Boat and agreed with many of the criticisms leveled by Nicholson against Scott's analysis. Dr. Vandell testified that he would give very little weight to a comparable sales approach because of the lack of comparable property available. Dr. Vandell criticized Scott's assessment because that assessment relied in part on three sales that occurred after the valuation date, which Dr. Vandell stated was "inappropriate to do." Dr. Vandell further testified that comparable sales for residential property should not be adjusted more than fifteen to twenty percent to account for differences in character, location, size, and time of sale between the subject property and the comparable property, and that he would expect to see a similar range for commercial property, though maybe a bit higher. He then noted that Scott's comparables were adjusted in excess of forty percent, resulting in substantial adjustments in some cases.

¶30 Dr. Vandell agreed with Nicholson that Scott made a mathematical error in the use of the income approach. Dr. Vandell also testified that Scott improperly used the conclusion of her comparable sales approach in her income approach, in that the numbers used should have come from independent sources. Dr. Vandell criticized Scott's conclusion that eighty percent of revenue from the Wisconsin Ducks operation is generated by parcel 0006.

¶31 In contrast with his criticism of Scott's method, Dr. Vandell testified that Nicholson's appraisal was the most appropriate. Vandell gave several reasons for that opinion.

¶32 We acknowledge that the \$2,679,300 assessment is presumptive evidence, *see* WIS. STAT. § 70.49(2), and that Scott’s testimony supported that assessment. Nevertheless, Dells Boat presented testimony showing a different value and the circuit court was free to conclude that this contrary expert testimony was more credible. *Schorer*, 177 Wis. 2d at 396-97. We conclude that the record amply supports the circuit court’s adoption of Nicholson’s assessed value of \$1.2 million.

¶33 The Village argues that it was improper for the circuit court to rely on the income method without making a determination that the lease was an arm’s-length transaction. We disagree. While the court expressed some concern about the relationship of the parties to the lease, it found that the lease rate of ten percent of gross revenues was representative of the market rate in that geographical region. Thus, the court implicitly found that the lease rate was the same rate that would have resulted from arm’s-length negotiations.⁴

B. Extension of the 1996 Valuation to Tax Years 1997 and 1998

¶34 The next issue we consider on appeal is whether the circuit court erred when it extended its 1996 valuation of \$1.2 million to tax years 1997 and 1998.

⁴ We note that both Nicholson and Dr. Vandell testified that the lease was an arm’s-length transaction. This is a reasonable conclusion in light of the protracted lease negotiations and the portion of Wisconsin Ducks owned by Dells Boat. Dells Boat owned one-third of Wisconsin Ducks, but received the entire amount of rent paid by Wisconsin Ducks. Thus, higher rent benefited Dells Boat more than lower rent, providing Dells Boat with a strong incentive to negotiate for higher rent.

¶35 The Village argues that there is “no evidence at all to support a finding that the Tax Parcel 0006 was excessively assessed in the years 1997 or 1998.” The Village says it is “axiomatic that each tax year stands on its own” and asserts that Dells Boat was required to present evidence specifically directed at value in 1997 and 1998 in order to meet its burden of showing both the invalidity of the assessed value in those years and the correct value. The flaw in the Village’s reasoning is two-fold.

¶36 First, Dells Boat met its burden of showing that the Village assessments in 1997 and 1998 were incorrect by showing that the 1996 assessment was incorrect. Because it is undisputed that the valuation amounts of the Village’s 1997 and 1998 assessments were simply carried over from the invalid 1996 valuation, it follows that these later assessments were also invalid.

¶37 Second, the Village wrongly assumes that it would not have been required to carry forward the corrected 1996 assessment to tax years 1997 and 1998. To repeat, the 1997 and 1998 assessments of parcel 0006 were simply a carry forward of the \$2,679,300 1996 assessment. Thus, it is readily apparent that the Village did not engage in a reassessment process for parcel 0006 or, presumably, any other properties in the class, but instead simply carried forward the 1996 assessment for all of these properties. The Village has presented no reason why it could have singled out parcel 0006 for reassessment in 1997 and 1998. As exemplified in *Noah’s Ark Family Park v. Bd. of Review of Village of Lake Delton*, 210 Wis. 2d 301, 318-21, 565 N.W.2d 230 (Ct. App. 1997), *aff’d*, 216 Wis. 2d 387, 573 N.W.2d 852 (1998), an assessor may not single out a property for different treatment. In *Noah’s Ark*, this court held that the assessor improperly singled out the Noah’s Ark property because he reassessed the

property based on a recent sale but did not reassess other commercial properties subject to recent sales using the same method. *Noah's Ark*, 210 Wis. 2d at 321.

¶38 Accordingly, the circuit court did not err when it granted Dells Boat a tax refund for excessive taxes paid in 1997 and 1998 based on the court's 1996 valuation.

C. The Circuit Court Properly Declined to Extend its 1996 Valuation of Parcel 0006 to Tax Year 1999

¶39 After the circuit court issued a memorandum decision in favor of Dells Boat, but before the court's final judgment on the matter, Dells Boat filed a motion for an order determining that the 1999 assessment of parcel 0006 should also be based upon the \$1.2 million valuation. In that motion, Dells Boat alleged that the Village had sent it a tax bill for 1999 based on the Village's \$2,679,300 1996 assessment of parcel 0006, despite the court's reduction of that assessed value to \$1.2 million. Dells Boat filed a claim for excessive assessment with the Village.

¶40 At a hearing on Dells Boat's motion, the Village argued, as it does on appeal, that the court should not extend the 1996 assessment to tax year 1999 because Dells Boat did not satisfy the procedural requirements of WIS. STAT. § 74.37. Under § 74.37(3)(a)-(b), the jurisdiction of the trial court cannot be invoked until either the Board of Review has denied the claim for excessive tax or ninety days has lapsed. As of the date of the hearing on Dells Boat's request to include tax year 1999, the Board of Review had not denied the claim, nor had the time period for review lapsed.

¶41 Dells Boat argues that the circuit court was entitled to ignore Dells Boat's failure to meet statutory criteria for filing a suit. Dells Boat points to *Hermann v. Town of Delavan*, 215 Wis. 2d 370, 572 N.W.2d 855 (1998), in which the supreme court explained that although courts generally lack jurisdiction when a plaintiff fails to follow the required statutory procedure, this rule is one of "policy, convenience and discretion" and "[t]here are some situations in which a court may entertain a petition seeking judicial relief by a method other than that prescribed by statute." *Id.* at 383 (citations omitted). The court explained that one of these situations is where the proscribed procedure would not provide an adequate resolution of the issue. *Id.* at 383-84. Dells Boat has not, however, presented a compelling reason to ignore the statutory procedure in this case.

¶42 We agree with Dells Boat that it appeared at that time highly likely that the Board of Review would deny Dells Boat's claim. However, it is often the case that a party can persuasively argue that a reviewing authority is highly likely to reject a claim. This high probability is not, however, sufficient reason to ignore statutory procedural mandates. Consequently, we conclude that the circuit court properly decided that the Board of Review should be permitted an opportunity to rule on Dells Boat's claim for excessive tax paid and, therefore, properly denied the requested amendment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

