COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP431 **Cir. Ct. No. 2003CV4956**

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

MILWAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

RONALD L. COLLISON AND SHARON J. COLLISON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Ronald L. Collison and Sharon J. Collison (the Collisons) appeal, *pro se*, from the trial court's grant of summary judgment in favor of Milwaukee County, on grounds that, as a result of their failure to timely exercise available administrative remedies, to challenge delinquent property taxes for 1992-1997, the Collisons waived their right to challenge a policy requiring an environmental assessment before the value of a contaminated property may be

reassessed. They also appeal the order denying their motion to reconsider. The Collisons contend that the trial court erred in concluding that they waived their right to challenge the policy, which resulted in an allegedly excessive property tax assessment, because the administrative remedies that they failed to exhaust did not provide an adequate forum to challenge the policy. They also contend that the trial court erred in concluding that mitigation of damages was not a material issue. Because we conclude that the trial court correctly determined that the Collisons' failure to exhaust the available administrative remedies in a timely manner bars them from challenging the legality of the policy used to assess the value of their property, we affirm.

I. BACKGROUND.

¶2 In 1974, the Collisons purchased a property located at 2578 Wauwatosa Avenue, in the City of Wauwatosa, in Milwaukee County. The property had been used as a dry cleaning establishment for approximately thirty years prior to 1974, and the Collisons continued to operate the dry cleaner until 1993, when all dry cleaning operations ceased and the property became a dry cleaning drop-off store. During the time the dry cleaner was operating, contaminants from the dry cleaning operation spilled onto the property.

¶3 In 1978, new environmental laws, called Spill Laws, came into effect in Wisconsin, requiring the owner of a contaminated property to clean up any contaminants on his or her property. *See* WIS. STAT. § 292.11 (2003-04).[1] Without a cleanup, the effect of the Spill Laws on a contaminated property is that

[1] All references to the Wisconsin Statutes are to the 2003-04 version, unless otherwise noted.

the value of that property is reduced from what it would be if the property were uncontaminated. In this case, it appears undisputed that the cost of the removal of the contaminants from the Collison property would exceed the potential sale price, making the property essentially worthless and unmarketable.

¶4 A lower property value, however, also results in a decrease in the property taxes owed for such a property. Following the passage of the Spill Laws, the City of Wauwatosa, which assessed the value of the Collison property for taxation purposes, instituted a policy requiring that a Phase II Environmental Site Assessment (Phase II ESA) be completed before the fair market value, and therefore taxes, of a contaminated property could be reassessed. It appears clear that the completion of a Phase II ESA on the Collison property would have resulted in a referral to the Wisconsin Department of Natural Resources (WDNR) and a consequent cleanup demand, the cost of which the Collisons, as the current owners, would have been held responsible for, and which likely would be so costly as to force the Collisons out of business.

¶5 The Collisons did not complete a Phase II ESA. The City thus did not alter the fair market value of the property, and instead, taxed the property according to its recorded value each year from 1992 through 1997; that is, as though the property were not contaminated. The Collisons did not pay the property taxes for the years 1992 through 1997.

¶6 Milwaukee County subsequently purchased the delinquent tax bill from the City of Wauwatosa for the purpose of collecting the taxes. Prior to 1998, out of fear of being referred to the WDNR, the Collisons apparently did not inform the City of Wauwatosa that their property was contaminated. In 1998, they requested a reassessment of their property and corresponded with the Milwaukee

County Treasurer in an attempt to solve the dispute. In 1999, dissatisfied with the response, the Collisons requested that the County initiate a lawsuit against them.

¶7 Through a letter to the Milwaukee Country Treasurer dated May 8, 2001, the Collisons explained that their failure to pay the property taxes was due to their disagreement with the City of Wauwatosa's assessment of the value of their property, which should have taken into consideration the decrease in value caused by the contamination, and their disagreement with the policy requiring the completion of a Phase II ESA before reassessing their property. It does not appear as though any progress was made during the next two years.

¶8 On June 4, 2003, the County filed suit against the Collisons for failure to pay property taxes for the years 1992-1997, as well as interest and penalties, seeking a total of $85,127.26. The Collisons filed an answer and an amended answer, admitting nonpayment of taxes, but denying that the taxes were valid because the property was taxed "greatly above its fair market value," and setting forth three affirmative defenses: (1) the County purchased the delinquent tax bill knowing that the property was contaminated, and that the assessment by the City of Wauwatosa did not take into consideration the contamination, making the amount owed, as stated on the complaint, inaccurate; (2) the City of Wauwatosa did not perform the assessment of the property, in accordance with the United States Constitution and Wisconsin statutes; and (3) the County may not bring the case now because it failed to mitigate damages, despite the Collisons' attempts to do so for ten years, and the County prolonged the dispute solely to maximize the cost to the Collisons.

¶9 The County filed a motion for summary judgment on April 29, 2004, arguing that the Collisons' failure to dispute the City of Wauwatosa's property tax

assessment in a timely fashion bars them from trying to do so now. The County also responded to each of the Collisons' alleged affirmative defenses, maintaining that: (1) the first affirmative defense is inapplicable because the Collisons failed to file a timely objection to the valuation of their property at the Board of Review, and thus waived their right to appeal the City of Wauwatosa's assessment; (2) the second affirmative defense must be stricken because it fails to state a claim upon which relief may be granted; and (3) the third affirmative defense fails because the statute of limitations is eleven years under WIS. STAT. § 75.20(1), and because it was the Collisons who failed to resolve the dispute for ten years, the County's claim is thus timely.

¶10 The Collisons filed a brief and an amended brief in opposition to the County's motion for summary judgment. They argued essentially that there were no remedies available to them to contest the assessment of their property, and that they therefore did not waive their right to appeal by not contesting their taxes at the Board of Review. Their basis for the assertion was that an appeal from the Board of Review results in only a certiorari review, and a certiorari review is limited to the review of the board's records, and because the board does not have the authority to rule on matters of law and because they are making a legal argument, the record from the board would have been incomplete with regard to their argument. They also asserted that the requirement that a Phase II ESA be completed before a property may be reassessed is not legal and that their damages should have been mitigated.

¶11 The trial court conducted a hearing on the motions on December 16, 2004. Before ruling on the motions, the court made the following observations about the case:

> Mr. Collison believes he has construed a dilemma: I don't think the assessment of my property is fair because I think it's worthless, given the fact nobody will lend on it, and nobody will buy it, but I can't prove that to the satisfaction of the city of Wauwatosa because the assessor requires me to put together a phase 2 audit. And if I put together a phase 2 audit I might as well invite the WDNR to walk in my front door to tell me that I'm now required to remediate this worthless property, and that would cost thousands if not hundreds of thousands of dollars….
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> ….
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> The reason why Mr. Collison did not have his property re-assessed and the reason why a truthful, accurate, reliable assessment of his property has never been done is because the Collisons didn't pull the lever and ask for that to be done. Mr. Collison gives a business reason why he didn't want it to be done. But even if you look at this from a business point of view, rather than a legal point of view, it still turns out to be a less than wise move back in the 80's or 90's not having the property re-assessed.
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> Whether Mr. Collison pulled the lever back then and said okay, I'm going to do a phase 2, and I'm going to prove that my property is worth zero, and I'm going to be wiped out, or whether he waited until now where he can't run a dry cleaning business and he can't sell the property and he can't fix it, either, and he's wiped out, the fact is Mr. Collison is wiped out either way. The only difference is, and this is what makes a difference to the outcome of the lawsuit if Mr. Collison had been wiped out back in the 80's and pulled the lever, he wouldn't be facing all these delinquent taxes and all of the interest charges and all the penalties that go along with it. That all would have been resolved back then.

¶12 The court then explained why the Collisons' failure to timely exercise available administrative remedies to contest the legality of the taxes barred them from presenting a defense arguing that the methodology used to assess contaminated property is not legal:

> The Collisons have no standing to make this argument now because they didn't demand a review of their assessment to begin with.…

If the city's assessment policy was in error, … the Collisons should have brought that matter to the court … before the taxes were imposed, before these late charges were run up, before the interest ran as much as it did before the County got to a point where they wanted to begin the claim personally against the Collisons.

Mr. Collison says, I can't do that. I can't make a record in front of the Board of Review. They wouldn't listen to me. If I couldn't make a record in front of the Board of Review then I couldn't bring it in front of the circuit court because there wouldn't be a record for the circuit court to review in a certiorari proceeding.

In other words, the Collisons contend that their administrative review rights were inadequate and would have been futile, and, therefore, they get the right to bring this now. In fact Mr. Collison's whole litigation strategy has been: I can't get anywhere in front to the Board of Review; I want [the Milwaukee County Treasurer] to sue me so I can get my day in court and then I can make my argument.

….

One basis for a circuit court's administrative review of a municipal administrative decision is whether the administrative decision follows the law, whether the administrative body in the municipality had made an error of law.

Now, I don't know as a matter of fact that it's against the law for a municipality to insist on a phase 2 audit before reassessing a property. But if it sounds as stinky to you as it does, then maybe that would sound stinky to a court or Court of Appeals or the Supreme Court.… And you would have [had] the opportunity to raise that through certiorari, through a court…. And that could have taken place a decade ago or more.

In other words if the city's assessment was the product of an illegal policy, a policy that didn't take full account of what the law requires, that falls squarely within the Court's power of reviewing administrative decision of the municipal taxing decision.

The Collisons also invoke the uniformity clause of the State Constitution, and the 14th Amendment of the U.S. Constitution. These are powerful, powerful substantive rights that we pay tremendous regard to. But even these

> powerful constitutional rights and certainly the administrative remedies that I have been discussing before all rest on a procedural foundation we know throughout time that even people who have very sound constitutional arguments can lose the benefit of those arguments if they don't follow the procedures. And the procedures are designed so that we get these issues resolved at a time when it makes sense to get them resolved.
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> ….
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> [A]s much sympathy as I have for you I have no trouble at all saying that these claims that you make are claims which I can't recognize at this point because they weren't brought at the time that the assessment of your property was made.
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> And while you don't believe that the Board of Review would have heard you out, the fact of the matter is that if they refused to hear you out you would have had a remedy in the circuit court. You would have had a forum to raise these issues, and you didn't.…

¶13 On this basis, the court granted summary judgment in favor of Milwaukee County. The court also noted that it was rejecting the Collisons' argument that the County had an obligation to mitigate the Collisons' loss, and that by postponing the lawsuit, the County had failed to do so: "The county has no legal obligation that I'm aware of to bring this sooner rather than later, and no duty to mitigate your loss or their lost … time value and money by bringing the claim sooner. Their claim is timely."

¶14 The Collisons filed a motion for reconsideration, which the trial court denied in a written order on February 3, 2005. The Collisions now appeal.

II. ANALYSIS.

¶15 The Collisons contend that the trial court erred in concluding that they waived their right to challenge the policy requiring a Phase II ESA prior to allowing a reassessment of a contaminated property, by not exhausting their

administrative remedies in a timely fashion, because they assert that those remedies did not in fact provide them an adequate procedure to challenge the policy.

¶16 This court reviews a summary judgment *de novo*, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

¶17 The procedures through which property owners may challenge the valuation or the amount of property assessed for taxation, is set out in Chapter 70 of the Wisconsin Statutes. First, a person who wishes to challenge either the valuation or the amount of property assessed must file a claim with the clerk of the board of review prior to the adjournment of public hearings by the board. *See* WIS. STAT. § 70.47(7)(a). The board of review must then conduct a hearing, at which it hears testimony from all persons who appear before it in relation to the assessment. *See* sec. 70.47(8)(a), (c). If the evidence shows that the assessment is incorrect, the board must correct the assessment. Sec. 70.47(9)(a).

¶18 If the property owner thereafter disagrees with the board's determination, he or she has three options. One option is for the property owner to appeal the determination of the board by bringing a writ of certiorari, which must occur within 90 days of the date he or she receives notice of the board of review's decision, WIS. STAT. § 70.47(13).[2] A second option is for the property owner to

[2] WISCONSIN STAT. § 70.47(13) provides in pertinent part:

(continued)

file a written complaint with the Department of Revenue requesting that the Department revalue the property and adjust the assessment. WIS. STAT. § 70.85.[3] The complaint must be filed either within twenty days after the property owner receives the board's decision, or within thirty days of the date specified in the affidavit giving notice of the decision. Sec. 70.85(2). Finally, a property owner may also 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. WIS. STAT. § 74.37(2)(a).[4] Such a claim must be filed no later than January 31 of the year in which the tax is payable. Sec. 74.37(2)(b)5. Importantly, all three methods require that a claim is first filed before the Board of Review, pursuant to WIS. STAT. § 70.47(7). *See* WIS. STAT. §§ 70.47(13), 70.85(2), 74.37(4)(a); *see also* ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 381, 572 N.W.2d 855 (1998).

> CERTIORARI. Except as provided in s. 70.85, appeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after the taxpayer receives the notice.... If the court on the appeal finds any error in the proceedings of the board which renders the assessment or the proceedings void, it shall remand the assessment to the board for further proceedings in accordance with the court's determination and retain jurisdiction of the matter until the board has determined an assessment in accordance with the court's order.

[3] WISCONSIN STAT. § 70.85(1) provides:

> COMPLAINT. A taxpayer may file a written complaint with the department of revenue alleging that the assessment of one or more items or parcels of property in the taxation district the value of which ... is radically out of proportion to the general level of assessment of all other property in the district.

[4] WISCONSIN STAT. § 74.37(2)(a) provides: "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."

¶19 Although the Collisons concede that they did not utilize the Board of Review and thus did not appeal a decision using the procedures set forth in WIS. STAT. §§ 70.47(13), 70.85 and 74.37, they assert that their failure to do so is not prima facie evidence that they waived their right to now challenge the legality of the assessment policy. On appeal, in an apparent effort to respond to the trial court's conclusion that their claim is procedurally barred for failure to exhaust available administrative remedies, they note that a court may assume jurisdiction notwithstanding a party's failure to exhaust administrative remedies if the court finds that the reasons supporting exhaustion are lacking, and they claim that the reasons supporting exhaustion were lacking in this case.

¶20 Operating under the assumption that they are able to overcome the procedural bar, the Collisons re-raise the arguments they brought to the trial court, that the Board of Review and the three avenues through which to appeal a Board of Review determination—WIS. STAT. §§ 70.47(13), 70.85, and 74.37—do not provide an adequate remedy to challenge the policy requiring a Phase II ESA, because their argument challenged the "legality," rather than the "valuation."[5] The

[5] In 2001, the Wisconsin Supreme Court decided ***Nankin v. Village of Shorewood***, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141. The case involved the constitutionality of WIS. STAT. § 74.37(6), which stated property owners in counties with populations of less than 500,000 could challenge a property assessment with a trial in a circuit court, while property owners in counties with populations of more than 500,000 could not, and could request only certiorari review for decisions made by a municipal board of review. Nankin challenged the constitutionality of § 74.37(6) on equal protection grounds and the supreme court agreed. ***Id.***, ¶46. Despite the fact that the case was decided nearly a decade after the events that led to this lawsuit, the Collisons vehemently seek to rely on ***Nankin*** for support. As both the trial court and the County correctly note, ***Nankin*** does not apply retroactively, and therefore is irrelevant for purposes of this appeal. Even if the holding in ***Nankin*** were to have retroactive effect, it would have no bearing on our decision, however, because our decision is based on the Collisons' more than decade-long inaction and their consequent waiver of the claims they are now seeking to bring.

Collisons also contend that the trial court erred in concluding that mitigation of damages was not a material issue.

¶21 The County responds that the Collisons are mistaken in asserting that they have no remedy to challenge the assessment policy, because it is impossible to bring an argument challenging the legality of the policy as review is limited to the record made before the Board of Review. The County maintains that the Board of Review does provide the necessary forum, and should the Collisons disagree with the board's conclusions, WIS. STAT. §§ 70.47(13), 70.85 and 74.37, provide three appellate procedures from which they may choose. The County also notes that the circuit court has the authority to remand cases to the Board of Review for further proceedings. The County therefore contends that because the Collisons did nothing to challenge the assessment until the commencement of this lawsuit by the County, summary judgment in favor of the County should be affirmed. We agree.

¶22 It is undisputed that the Collisons were taxed for real property they owned in the City of Wauwatosa for the years 1992-1997, and that the Collisons found the tax assessment to be excessive for its failure to take into account the contamination of the property, and accordingly refused to pay the taxes. The Collisons then refused to complete a Phase II ESA, which would have allowed for a reassessment of the value of their property, and instead asserted that because the city knew that the property was worthless, there was no need to perform a Phase II ESA to reassess it, and that the policy requiring a Phase II ESA was illegal. It is likewise undisputed that despite their objections to the taxes, the Collisons never took their case to the Board of Review, and hence, also never used the three appellate options set forth in WIS. STAT. §§ 70.47(13), 70.85 and 74.37.

¶23 The Collisons undoubtedly find themselves in an unfortunate situation generated by the timing of two events: their purchase of contaminated real estate in 1974, and the passage of new environmental laws in 1978. Realizing that a reassessment requires a Phase II ESA, and that a Phase II ESA would result in referral to the WDNR, which in turn would result in cleanup costs of more than the property would be worth if uncontaminated, the Collisons sought to contest the policy that requires a Phase II ESA in an effort to get around the obligation of either paying property taxes for a worthless property or paying for its cleanup. The propriety of the City of Wauwatosa's decision to require a Phase II ESA before agreeing to reassess a contaminated property, however, is not the issue before this court; rather, it is the Collisons' nonpayment of delinquent property taxes for the years 1992-1997.

¶24 While the Collisons' briefs constitute an admirable effort by *pro se* litigants, nowhere do they provide any authority permitting a taxpayer to cease paying property taxes. It is not up to a property owner to decide when and how to challenge a property tax assessment or the policy requiring a Phase II ESA before a reassessment may be performed. If a property owner wishes to challenge the amount of property taxes he is expected to pay, the way to do so is *not* to stop paying the taxes, do nothing for years, then write an angry letter to the County, and ultimately demand that the County file suit, claiming the lack of a forum to present arguments was the reason for the refusal to pay taxes.

¶25 As the trial court indicated, if the policy of requiring a Phase II ESA was indeed as flawed as the Collisons insist, had the issue been properly before a court, a court might well have agreed with them. The issue would have been properly before a court had the Collisons followed the proper procedures and started by challenging the allegedly excessive taxes at the Board of Review, and

thereafter appealed via WIS. STAT. §§ 70.47(13), 70.85 or 74.37 at the time the taxes to which they are now objecting were levied against them. Sadly, the Collisons refused to follow these procedures. No amount of sympathy for the Collisons gives them a license to ignore the procedural laws in place. Consequently, there is no reason for this court to go beyond the issue of waiver. ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground"). This is a case that could and should have been resolved more than a decade ago. The Collisons failed to take the appropriate steps to challenge the assessment at the appropriate time, and thereby waived any further challenge to the issue. Given the circumstances of this case, this court, over a decade later, cannot reward their failure to do what they should have done a long time ago.

¶26 With regard to the issue of mitigation of damage, we similarly agree with the trial court that the County had no obligation to mitigate the Collisons' damages by bringing the suit sooner, rather than later. The trial court properly granted summary judgment to Milwaukee County. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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