STATE OF MICHIGAN

COURT OF APPEALS

SHELDON COHN,

Petitioner-Appellant,

v

TOWNSHIP OF WEST BLOOMFIELD,

Respondent-Appellee.

UNPUBLISHED
November 22, 2002

No. 232917
Tax Tribunal
LC No. 00-246692

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Petitioner Sheldon Cohn appeals as of right from the Michigan Tax Tribunal's (the Tribunal) opinion and judgment affirming respondent West Bloomfield Township's reassessed true cash, assessed, and taxable values for petitioner's property for the years in question in this property tax action. We affirm.

I.

Petitioner owns residential property located at 5750 Bloomfield Glens in West Bloomfield (the property). Respondent reassessed and increased the taxable value of petitioner's property to include a basketball court enclosure that had been omitted from the previous assessment record cards. Petitioner filed a petition with the Tribunal challenging respondent's reassessment arguing that the increase in the 1997 taxable value was improper because the property's taxable value as assessed exceeded the lawful limit. Petitioner also contended that his property was the subject of a previous action before the Tribunal where the hearing referee was aware of the indoor basketball court and the fact that it was enclosed. Petitioner argued that the decision regarding the true cash value in the previous case included the enclosed basketball court, and therefore, respondent was precluded from increasing the property's taxable value to include the basketball court enclosure under the doctrines of collateral estoppel and res judicata.[1]

[1] In its original opinion and judgment, the Tribunal found that respondent's assessments of the true cash value of the property required no revision. In its findings of fact section, the Tribunal stated that the property "consists of a 6,172 square foot home with 5 bedrooms, 4 full and 3 half bathrooms, 2 fireplaces, basement, indoor basketball court and garage." The Tribunal also noted that respondent stated that "the court is being assessed but the inclosure [sic] is not being assessed." After reviewing the evidence, the Tribunal found that respondent's cost-less-

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Respondent argued that the taxable values of the property were correctly calculated for the years at issue. Respondent stated that for the 1997 tax year the taxable value was uncapped due to the discovery that several items of the property had been previously omitted from the valuation records, and therefore, excluded from previous assessments. Respondent claimed that because the enclosed basketball court was omitted from the previous assessment, the issue of the enclosure was not litigated in the prior action before the Tribunal. Respondent concluded that because the enclosed basketball court qualified as "omitted real property" under MCL 211.34d(1)(b)(i), it was an "addition," which, pursuant to MCL 211.27a(2)(a), allowed the property's 1997 taxable value to be increased by an amount exceeding the statutory limit.

After a hearing was held, the Tribunal Small Claims Division issued its opinion and judgment. The Tribunal recognized that the assessments at issue were for tax years 1997, 1998, 1999, and 2000, and stated that the property at issue included "a 5.19 acre residential parcel improved with a contemporary style home built in 1992. The home has 5,933 square feet, 4 full bathrooms, 3 half bathrooms, 2 fireplaces, a 4 car garage, a full basement, and an enclosed basketball court." The Tribunal concluded that the true cash value, assessed, and taxable values of the property should not be revised. In its opinion, the Tribunal found:

> Respondent is not barred by the doctrines of collateral estoppel and res judicata. The Tribunal finds that the previous Tribunal decision affirmed the property's assessment for the tax years in question established by the Respondent's cost-less-depreciation methodology as reflected on the valuation records. The valuation records reflect a "basketball court." The Tribunal decision reflects that the enclosure is not being assessed. As such the matter of the enclosure was not decided on the merits and the current matter is properly before the Tribunal.

The Tribunal further found that the basketball court was omitted property under MCL 211.34d. The Tribunal stated that it had reviewed the valuation records for the property both before and after the valuation increase. The valuation records prior to the increase reflected "basketball court" and valued the cost at $23,000. After the increase, the valuation records still reflected "basketball court." However, the value increased to $68,620. The Tribunal recognized that the file maintenance record for the property stated that the value was changed "to reflect an enclosed facility, rather than a 'sports court.'" As a result, the Tribunal upheld respondent's reassessment of the taxable values of petitioner's property.

II.

On appeal, petitioner raises several challenges to the Tribunal's opinion and judgment. Appellate review of the Tribunal's decisions is limited to whether its factual findings are supported by competent, material, and substantial evidence on the record. *Professional Plaza, LLC, v City of Detroit*, 250 Mich App 473, 474; 647 NW2d 529 (2002). Substantial evidence is that which a reasonable mind would accept as reasonable to support a conclusion and is more than a mere scintilla of evidence but less than a preponderance. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). When there is sufficient evidence, a reviewing court must not substitute

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depreciation approach was the best estimate of true cash value.

its discretion for that of the administrative tribunal even if the court might have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). It does not matter that alternative findings also could have been supported by substantial evidence on the record. *In re Payne, supra*. In the absence of an allegation of fraud, this Court reviews the Tribunal's decisions to determine whether it committed an error of law or adopted the wrong legal principle. *Michigan Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 490; 618 NW2d 917 (2000).

III.

Petitioner first argues that the Tribunal erred when it held that the doctrines of collateral estoppel and res judicata did not apply in this action because all the requirements of both collateral estoppel and res judicata have been met due to the fact that the basketball court was the subject of the prior litigation between the parties. We disagree. The applicability of collateral estoppel and res judicata are questions of law, which we review de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). It only applies when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained. *Id.* at 578. For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be the same as that involved in the first action. *Bd of Co Road Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The issues must be identical, and must have been both actually and necessarily litigated. *Id.* at 376-377. To be necessarily determined, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel. *Id.* at 377.

Collateral estoppel does not preclude litigation of this issue. Although it is a subsequent, different cause of action between the same parties, the issue regarding the valuation of the enclosed basketball court was not "actually and necessarily determined" in the previous case before the Tribunal. *Id.* at 376-377. The basis of the previous judgment can be clearly, definitely, and unequivocally ascertained. *Ditmore, supra*. In the earlier litigation, the Tribunal affirmed respondent's valuation of the property using the cost-less-depreciation approach. Our review of the previous opinion and judgment reveals that the Tax Tribunal did not specifically make a finding regarding the basketball court enclosure; indeed, it clearly stated in the opinion that it recognized that "the court is being assessed but the inclosure [sic] is not being assessed." Thus, a review of the record reveals that the basketball enclosure was not included in the earlier assessment. Because the basketball court enclosure was not included in the previous valuation of the property, its inclusion in the current valuation does not amount to relitigation of a settled

matter.[2] As such, collateral estoppel does not apply because the issues in the previous case and the instant are not identical, and have not been actually and necessarily litigated. *Schultz, supra.*

Res judicata prohibits a subsequent action between the same parties when the essential facts or evidence are identical. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001) (citations omitted). Res judicata requires that: (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Sewell, supra*. Res judicata likewise does not prohibit this action. Although the action is between the same parties, the facts or evidence essential to the action are not the same as those in the prior action because the valuation of the basketball court enclosure was not at issue in the previous case. In other words, the basketball court enclosure was not part of the prior assessment, and thus, no issues could have been raised in the previous action regarding the valuation of the enclosure even though it physically existed at the time of the earlier assessment. Therefore, because the basketball court enclosure was not included in the earlier assessment, the matter contested in the instant case could not have been resolved in the prior case, and thus, we find that res judicata does not preclude litigation of this issue. See *id.*

IV.

Next, petitioner argues that the Tribunal made an error of law when it decided the case because it did not consider all of the evidence from the previous case. Petitioner also asserts that the Tribunal did not state whether respondent, as the assessing jurisdiction, met its burden of proof in establishing whether the omitted real property was included in the assessment. Pursuant to MCL 211.27a(2)(a), taxable value may only be increased by five percent of the previous year's taxable value or the inflation rate, plus "all additions." As relevant to this case, MCL 211.34d(1)(b)(i) states that the definition of "additions" includes "omitted real property," meaning:

> previously existing tangible real property not included in the assessment. Omitted real property shall not increase taxable value as an addition unless the assessing jurisdiction has a property record card or other documentation showing that the omitted real property was not previously included in the assessment. The assessing jurisdiction has the burden of proof in establishing whether the omitted real property is included in the assessment.

In the instant case, the Tribunal found that the basketball court enclosure was in existence at the time of the previous case, but that respondent did not value it for property tax purposes. Concluding that respondent was authorized to consider the enclosure as an addition to taxable value for purposes of the 1997 tax year and beyond, the Tribunal upheld the 1997 taxable value increase. On appeal, petitioner argues that this ruling was in error because respondent did not meet its burden of showing that the claimed omitted property had not been included in the earlier taxable value of the property.

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[2] See *infra*, for a full discussion of "omitted property."

Our review of the record in this case shows that the Tribunal's finding that the basketball court enclosure was not included in the earlier taxable value, and hence was "omitted real property" for purposes of the 1997 taxable value, is supported by competent evidence. See *Michigan Milk Producers Ass'n, supra* at 490-491. The file maintenance record for the property reveals the following handwritten entry dated August 2, 1996:

> Basketball court was picked up under "sports courts, tennis courts" and flatted out as $23,000 . . . corrected to "recreational enclosures" – average $36.50 . . . . The flat value of $23,000 was not picking up for enclosure. Corrected to "recreational enclosures" – average $36.50 . . . . [Emphasis in original.]

Valuation records for the property list the basketball court as a "basketball court" both prior to and after the change in the valuation of the basketball court. For tax year 1996, the cost of the basketball court shows $23,300. After the revaluation, the basketball court was assigned a unit rate of $36.50 and cost of $68,620. The resulting increase in the cost of the basketball court was $45,320. We find that this was substantial evidence from which the Tribunal could find that the basketball court enclosure had been omitted from the previous assessment. *In re Payne, supra*. Hence, the Tribunal correctly classified the enclosure, which had been excluded from the previous assessment, as "omitted property" under MCL 211.34d(1)(b)(i).

Furthermore, there is nothing in the record suggesting, as petitioner argues, that the Tribunal did not consider the evidence and issues raised in the previous action regarding the basketball court enclosure. On the contrary, the Tribunal's opinion and judgment specifically discusses petitioner's contentions that the enclosure was actually included in the previous valuation. The Tribunal stated that the prior valuation showed that the basketball court was classified and valued as a "sports court" and not a "recreational enclosure," as it was after the later valuation. The Tribunal, after reviewing the earlier opinion and judgment, found that the earlier "decision reflects that the enclosure is not being assessed." Given the limited scope of this Court's review, this Court upholds the Tribunal's finding on this issue. *Michigan Milk Producers Ass'n, supra* at 490. Accordingly, the Tribunal made a proper determination as to the taxable value of petitioner's property for the 1997-2000 tax years.[3]

V.

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[3] In his supplemental authority and at oral argument, petitioner argued that under *WPW Acquisition Co v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002), the definition of "omitted real property" found in MCL 211.34d(1)(b)(i) "may be" unconstitutional. However, this issue is not properly preserved or presented for appeal, as it was not included in petitioner's statement of questions presented. *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 228 n 1; 362 NW2d 618 (1984); *Caldwell v Chapman*, 240 Mich App 125, 132; 610 NW2d 264 (2000). Indeed, despite the fact that the constitutionality of MCL 211.34d(1)(b)(vii) had been litigated and decided in this Court before the briefs were even filed in this case, petitioner never raised the issue until after all the briefs were filed and the Supreme Court issued its opinion in *WPW Acquisition*. We will not consider a constitutional issue when raised as a mere afterthought. Nevertheless, we find that the holding in *WPW Acquisition Co, supra,* does not apply to or impact the facts of this case.

Lastly, petitioner argues that the Tribunal erred when it failed to make an independent determination regarding the true cash value of the property. In order to preserve an issue for appeal, it must be raised before and addressed by the Tribunal. *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 228 n 1; 362 NW2d 618 (1984). However, petitioner did not raise the issue of true cash value before the Tribunal and specifically stated in a letter submitted to the Tribunal that "[t]his is a taxable value appeal only!" Because petitioner did not raise true cash value as an issue before the Tribunal, this issue is not properly preserved for this Court's review. *Id*. Issues raised for the first time on appeal need not be addressed by this Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Thus, we decline to review this issue.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra