COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1373

Cir. Ct. Nos. 2003CV777, 2004CV883, 2005CV795, 2007CV927

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ADAMS OUTDOOR ADVERTISING, LTD.
D/B/A ADAMS OUTDOOR ADVERTISING OF MADISON,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CITY OF MADISON,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. The City of Madison appeals a circuit court judgment that rejected the City's property tax assessments of billboards owned by Adams Outdoor Advertising. This appeal follows the supreme court's rejection, in

Adams Outdoor Advertising, Ltd. v. City of Madison, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803 (***Adams I***), of the City's previous attempt to assess Adams' billboards. After remand, the City reassessed Adams' billboards. The circuit court determined that the City's reassessments and other more recent assessments were improper under ***Adams I***. The City appeals. Adams not only responds to the City's arguments, but goes further and asks us to declare the City's appeal frivolous.[1]

¶2 We agree with the circuit court that the City's assessments were not proper under ***Adams I***. We also conclude that the City's appeal is not frivolous.

Background

¶3 This dispute concerns the City of Madison's assessments of billboards owned by Adams Outdoor Advertising. Adams leases property owned by others and erects and operates billboard structures on the leased land. As a prerequisite to erecting its billboards in the City, Adams must have a permit from the City. The availability of these permits is limited.[2]

¶4 The present dispute began when Adams challenged the City's 2002 and 2003 billboard assessments. The assessed values were $6,022,400 for 2002

[1] Although it need not have done so to make the argument, Adams filed a cross-appeal seeking to uphold the circuit court's decision on an alternative constitutional ground rejected by the circuit court. We need not resolve the cross-appeal because we decide this case in Adams' favor based on the appeal. Because it was unnecessary, Adams is not entitled to costs associated with its cross-appeal.

[2] According to statements in the City's 2008 reassessment report, billboard permits are limited in the City "due to a past ordinance change and lawsuit settlement," and all remaining permits had been issued as of the report date. The report also notes that "if a sign is removed or destroyed, the sign cannot be replaced and the permit is lost forever."

and $5,858,000 for 2003. Adams commenced an action in circuit court pursuant to WIS. STAT. § 74.37(3)(d), claiming that the assessments were excessive because the City used an improper assessment method.[3]

¶5 After the circuit court affirmed the City's 2002 and 2003 assessments, Adams appealed and, in ***Adams I***, the supreme court determined that the City's assessments were flawed. Relevant here, the court concluded that "the City's assessment is improper ... because it improperly included the value of billboard permits." ***Adams Outdoor Advertising***, 294 Wis. 2d 441, ¶3. Accordingly, the supreme court reversed and remanded the cause to the circuit court, directing the circuit court to stay further proceedings pending reassessment by the City consistent with ***Adams I***. ***Id.***, ¶4.

¶6 The City reassessed Adams' billboards, again including in the valuation of the billboards a portion of the value of the permits, resulting in similar assessments: $5,750,000 for 2002 and $5,750,000 for 2003. In the meantime, Adams had also brought challenges to similarly calculated 2004 and 2006 billboard assessments.

¶7 In a consolidated action addressing all of the assessments, the circuit court agreed with Adams that the City's assessments were improper under ***Adams I***. Thus, the circuit court rejected the City's assessments in favor of the values offered by Adams.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Discussion

A. Adams' Billboard Permits

¶8 The City purports to embrace ***Adams I*** and take advantage of its clear holding that the billboard permits owned by Adams are taxable real property. According to the City, because Adams' billboard permits are taxable real property, the City is obligated to assess and tax them. The City's argument, however, does not come to grips with the anomalous situation created by ***Adams I***, namely, that although Adams' permits fit the statutory definition of real property and although the permits have value, some portion of that value is apparently beyond the reach of the City's taxing authority. More to the point, if ***Adams I*** leaves open a route to taxing Adams for some portion of the value of the billboard permits, the City has not shown us the way.

¶9 In the following paragraphs, we detail the City's specific arguments and explain why we cannot reconcile them with ***Adams I***.

¶10 The City argues that ***Adams I*** contemplates that it may, for real-property-taxation purposes, allocate the value attributable to a billboard permit between the owner of the permit (here, Adams) and the owner of the land underlying the related billboard (here, entities other than Adams). As its starting point, the City quotes statements from ***Adams I*** saying that billboard permits are taxable interests in real property. A representative example is the City's reliance on the following quote from ***Adams I***:

> The City erred by including the value of billboard permits in the assessment of Adams' billboards. Billboard permits are not tangible personal property. For property tax purposes, billboard permits constitute an interest in real property, as defined by Wis. Stat. § 70.03.

Adams Outdoor Advertising, 294 Wis. 2d 441, ¶3. This particular quote references the definition of "real property" in WIS. STAT. § 70.03 that, in relevant part, defines real property as "not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto." WIS. STAT. § 70.03. The ***Adams I*** court reasons that the billboard permits are a right or privilege appertaining to the land under the billboards. ***Id.***, ¶64.

¶11 Next, the City seeks to establish a connection between the observation that billboard permits are taxable as real property and the City's particular contention—that it may tax Adams for a portion of the value of related permits. The City points to footnote 18 in ***Adams I***:

> Our conclusion does not mean that the City can include 100 percent of the income derived from Adams' billboards in the real property tax assessment of the land that is leased to Adams and upon which Adams places its billboards. The amount of rental income a property can generate is a proper factor to consider when assessing property under the income approach. *See* ***Darcel, Inc. v. City of Manitowoc Bd. of Review***, 137 Wis. 2d 623, 633 n.7, 405 N.W.2d 344 (1987). Because the rent the underlying landowner can charge Adams is but a fraction of Adams' income from the billboards, *our decision does not shift 100 percent of the tax burden from Adams to the landowner*.

Id., ¶84 n.18 (emphasis added). According to the City, the necessary implication of the statement that the ***Adams I*** decision "does not shift 100 percent of the [real property] tax burden [relating to the permits] from Adams to the landowner" is that some portion of the tax burden relating to the permits remains with Adams. Thus, the City contends, the only issue remaining is how much of the value of the permits to allocate to Adams.

¶12 We agree with the City to a certain extent—footnote 18 is worded in a manner suggesting that Adams' ownership of the permits imposes a real property tax burden on Adams that "does not shift 100 percent" to the landowner. This wording implies that Adams retains some portion of a tax burden relating to the permits. But a problem remains that is not solved by footnote 18 or by the City: How does the City go about actually taxing Adams for a portion of the value of the permits?

¶13 The City suggests, without an accompanying developed argument, that a portion of the permits is taxable as stand-alone real property, untethered to either the billboards or the land under them. This may or may not be a viable approach, but it is not an issue here because it is not what the City did.

¶14 The City's approach on remand fails because it is the same taxation mechanism rejected by ***Adams I***. That is, the City continues to insist that it may tax the value of the permits as a component of the value of the billboards, in essence asserting that the billboards are more valuable because of the value added by the permits. For example, the City, pointing to its assessor's report, asserts that "the permit itself, under existing Madison ordinances, has no value independent of the billboard structure." The City goes on to concede that its assessor "valued the billboard structures and billboard permits together, based upon an income approach reconciled with similar sales." Thus, the City continues to advance the proposition that the proper way to *value the billboards* is to recognize that the billboards are worth more because of the permits. This, of course, is the billboard-is-more-valuable-because-of-the-permit approach squarely rejected in ***Adams I***. *See* ***id***., ¶84 ("Any value attributable to the billboard permits is not inextricably intertwined with the structure of the billboards.").

¶15 The City asserts that it is obligated to tax all property that is not exempt from taxation and, when doing so, it is to tax "in the name of the owner" (citing WIS. STAT. §§ 70.01 and 70.17(1)). The City relies on a portion of § 70.17(1) that provides that improvements on leased land may be assessed either as real property or as personal property. Yet, in describing its use of § 70.17(1), the City states that "there is no question that a permit is a property interest that adds value to the billboard" and that this "value-added nature of the permit makes it appropriate to consider it as either an additional improvement or part of the improvement to leased land." The City—although it engages in some relabeling and now relies on certain statutes to support its methods—remains wedded to the rejected bundle of rights approach. This would have been a feasible method if the dissenting opinion in ***Adams I*** had captured a majority, but it did not. *See* ***id.***, ¶¶120-21 (Abrahamson, C.J., dissenting) ("Although the cases addressing the inextricably intertwined rule are real property cases, I agree with the circuit court that the same rationale applies to personal property taxation.... It is clear from the case law, from the record in the instant case, and from a commonsense perspective that the cash value (the fair market value) of a billboard is based on income, which is inextricably intertwined with the billboard permit.").

¶16 While there is reasoning in the decision of the ***Adams I*** majority that we find difficult to track, the majority states that the permits do not add value to the billboard structures, but, rather, add value to the real property under the billboards:

> We conclude that because billboard permits are real property, as defined in Wis. Stat. § 70.03, the income attributable to them is properly included in the real property tax assessment, not the personal property tax assessment.… *The primary value of the permits is unrelated to the structures; rather, the primary value of the permits appertains to the location of the underlying real estate.*

Id., ¶84 (emphasis added). We repeat, the City's approach is to place an assessed value on the billboard structures, treating the permits as though they add value to the structures. This is a means of taxing a portion of the value of the permits that is precluded by ***Adams I***.

¶17 We acknowledge that it appears that, under ***Adams I***, some portion of the fair market value of real property escapes taxation. Understandably, the City feels obligated to tax that value to more fairly spread the tax burden among entities that own interests in personal and real property. We conclude, however, that the City's reassessment does not tax the value of the permits in a manner consistent with ***Adams I***.

¶18 Having rejected the City's general approach to taxing a portion of the value of the billboard permits, we note that the City does not otherwise challenge the assessment values adopted by the circuit court. Accordingly, we affirm the circuit court's rejection of the City's assessments and the court's adoption of Adams' assessments.[4]

B. Frivolous Appeal

¶19 Adams argues that we should deem the City's appeal frivolous under WIS. STAT. RULE 809.25(3), which authorizes the award of costs and attorney fees when we determine that an appeal is frivolous. We have previously explained that

[4] We note that Adams continues to pursue the notion that the permits are intangible, nontaxable personal property. We need not resolve this issue because Adams prevails for other reasons, although we note that Adams' assertions may be based on certain portions of the ***Adams I*** majority opinion. *See* ***Adams Outdoor Advertising, Ltd. v. City of Madison***, 2006 WI 104, ¶¶65-66, 294 Wis. 2d 441, 717 N.W.2d 803; *see also* ***id.***, ¶¶118, 119 & n.34 (Abrahamson, C.J., dissenting) ("The majority opinion remarkably also explains that a billboard permit is both real property and intangible personal property.").

> an appeal is frivolous if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal 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." Sec. 809.25(3)(c)2. Whether an appeal is frivolous is a question of law. An appellate court considers "what a reasonable party or attorney knew or should have known under the same or similar circumstances."

Larson v. Burmaster, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134 (citations omitted). Applying this standard, we conclude that this appeal is not frivolous.

¶20 We disagree with Adams that ***Adams I*** so clearly prohibits the City's effort to impose a tax on Adams for a portion of the value of the billboard permits that the City's argument lacks good faith. As we have explained, on the one hand, ***Adams I*** says that the billboard permits are taxable real property; on the other, the decision is vague about how the City might go about actually taxing the value of that property. Although we do not ultimately find this to be a difficult case, we cannot say that the City's arguments are based on a patently unreasonable reading of ***Adams I***. We therefore deny Adams' motion for sanctions.

Conclusion

¶21 For the reasons stated above, we affirm the judgment of the circuit court and deny Adams' motion for sanctions.

By the Court.—Judgment affirmed.

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