2-25-2013

Wurzburg v. Kootenai County Appellant's Reply Brief Dckt. 40150

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 40150-2012

SID WURZBURG *et al*

Petitioners/Appellants

V.

KOOTENAI COUNTY

Respondent

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho

In and for Kootenai County

The Honorable Carl B. Kerrick, District Judge

Sid Wurzburg, *pro se*

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Spirit Lake, ID 83869

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

a. Idaho cases

b. Other cases

c. Statutes

d. Other Authorities

SUMMARY ANALYSIS AND COMMENT

Preparation of this reply has been difficult because the respondent/assessor continues to refuse to engage on the issues raised by taxpayer. Appellant/taxpayers focus, as they have throughout, on the failure of the assessor to produce any competent evidence relating to fair market value. Taxpayers presented substantial evidence of fair market value and citation to recognized appraisal authority showing the assessor's methods did not comply with those standards. The assessor never addressed those arguments. They didn't even argue that taxpayers misstated or misinterpreted those appraisal standards. They simply ignored taxpayers' case and presented their "that's the way we do it" defense and attempted to characterize taxpayers' argument that there was no competent evidence as an argument that the court improperly weighed the evidence.

In this section of the reply brief taxpayers will make the simple common sense, hornbook legal argument in an effort to put this appeal in perspective. The following sections will contain the legal authorities and references to the record needed in a traditional reply brief.

The issue before the County Commissioners, the Board of Tax Appeals and the District Court was fair market value of the non buildable waterfront lot. Only a comparable sales analysis was appropriate. Taxpayers used comparable sales from Spirit Lake, including one older sale the going back in time method. The assessor used sales from three other lakes in the county- the going out geographically approach. Both methods are approved by appraisal authorities in

appropriate circumstances, but the going back in time approach is preferred according to unrefuted evidence in the record.

If this were the end of the analysis, it would appear to be a weighing of evidence issue to be resolved in favor of the assessor. That is not this case however. The unchallenged evidence from a text cited by both the Board of Tax Appeals and taxpayers requires that location adjustments be made if going out geographically. This makes sense because comparisons must be of like items. Numerous exhibits, none challenged by the assessor, showed that the various markets differed in many respects, including the ratio of non buildable to buildable waterfront. The assessor argued and the court apparently found that the assessors used an approved method and that was all the law required. What neither the court nor the assessor addressed is the fact that a method must not only be approved, it must be properly applied to be valid. Undisputed evidence was that the assessor did not apply required location adjustments when the markets were very different. Therefore, no reasonable trier of fact could find the assessor followed generally accepted appraisal practices and taxpayers are entitled to reversal and entry of judgment in their favor.

A.(1) *Kimbrough v. Idaho Board of Tax Appeals,* 150 Idaho 417, 247 P.3d644 (2011), is good law and does not need to be overruled. The portions relied upon by the trial court and respondent do not apply to this case.

At pages 6 and 7 of respondent's brief Judge Kerrick is commended for following the direction of the Idaho Supreme Court in the *Kimbrough* case and it is suggested that I.C. § 63-511 may have a different standard than that case. Both Judge Kerrick and respondent don't understand either the *Kimbrough* case or Appellants' argument.

In the last sentence on page 6 of Respondent's brief the claim is made that "Judge Kerrick was bound by the edicts of stare decisis to follow ... the *Kimbrough* case...." Taxpayers do not question stare decisis, only its application to *Kimbrough* here. Any discussion of stare decisis in this case should start with *Merris v.Ada County,* 100 Idaho 59, 539 P.2d 394 (1979) and its holding that an assessor's valuation , even if arrived at using methods approved by the State Tax Commission, must be set aside if it does not reflect fair market value

Appellants do not want the law changed or *Kimbrough* overruled. They simply want it applied properly in this case. As explained in Appellants' brief (Argument in Support of Assignment of Error I, pp.8-10) the "manifestly excessive, fraudulent or oppressive; or arbitrary capricious and resulting in discrimination against the taxpayer" language establishes a standard for judicial review of district court decisions by appellate courts. It has no application to the burden of proof at trial in the district court. That burden of proof is established by I.C. §63-511 and §63-3812 as a simple preponderance of the evidence.

The heightened *Kimbrough* standard does not apply to trials in district court and its application here was clearly erroneous.

A.(2) In light of the trial court's improper use of the enhanced *Kimbrough* standard, it is impossible to determine whether the trial court found that taxpayers also failed to meet the I.C. §63-511 and §63-3812 burden.

Respondent argues that the trial court "also found that Petitioner did not shoulder his burden under Idaho Code § 63-511." (Resp.Brief p. 6, end of first complete paragraph) The very next paragraph of their brief shows the fatal flaw in their position. It quotes footnote 6 of judge Kerrick's opinion showing that he used the preponderance test to determine whether taxpayers met the enhanced *Kimbrough* standard. There are no clearly stated findings showing what standard was used. It is therefore not possible to call this harmless error. The improper use of the enhanced *Kimbrough* standard infected the entire process and reversal is required.

IRCP 52 A requires the trial court "find the facts specially and state separately its conclusions of law thereon." Many of the trial court's 15 so called findings of fact are mere recitations of testimony offered. In many cases the testimony was disputed or contested, but the court never indicates which facts it found persuasive or how it resolved the factual disputes..

The assessor's brief at page 6 refers to footnote 6 of the judge's decision requiring the taxpayers to prove by a preponderance that the assessor's action were manifestly excessive fraudulent etc. The judge clearly used that improper standard and his findings and conclusions are not specific enough to determine whether he ever applied the simple preponderance standard the law requires.

The trial Judge's amended findings and conclusions (first paragraph, p. 12, Am.R., p.359) simply misstate the record when addressing taxpayers contention that only Spirit Lake comparables should be relied upon, he concludes: "however, nothing in the record indicates that the assessor is limited in such a fashion for purposes of applying the sales comparison approach."

The record however contains the affidavit of Tony Higley (Pet. Ex.13) explaining that the lakes are so different that only Spirit Lake sales are appropriate. The record also contains portions of the text *Appraising the Tough Ones* explaining that location adjustments are required when going out geographically (App. Ex. 7-6) and that going back in time is a method preferred to going out geographically. (App. Brief, P. 24;Pet. Ex.7-4,4th paragraph) The record also contains substantial evidence discussed in the Argument in support of Assignment of Error VII. of Appellants' brief demonstrating that the lakes are very different and that the buildable to non buildable ratios vary greatly.

Judge Kerrick didn't make special findings on disputed facts. He didn't recognize that taxpayers had presented substantial evidence of a flawed application of the sales comparison approach. He held *Kimbrough* created a presumption that the assessor's valuation is correct.(Am. Find p.11 middle of page, Am. R. p.358) His findings and conclusions are not supported by the record or the law and must be set aside

B. The harmless error analysis is not applicable when the error results in an order which is contrary to law.

The harmless error test is applied when an error exists which does not change the result of a case. Mistakes of fact or law, improper admission or denial of evidence, or improper jury instructions which do not necessitate a change of a verdict, judgment or order are common examples. An error which results in an improper order is a different matter. The concern all lawyers and courts should have for the proper administration of justice require that orders be accurate and in proper form.

This Court discussed the harmless error rule as applied in criminal cases in *State v. Perry*,150 Idaho209, 245 P.3d 961 (2010). In that decision this Court cited with apparent approval *U.S.* v. *Olano*, 507 U.S.725, 113 S.Ct. 1770, 123 L.Ed2d, 508 (1993) to the effect that an appellate court "should still only reverse where the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " Any order which is plainly erroneous, whether because of clerical mistake or misapplication of law, does affect the integrity and public reputation of judicial proceedings and must not be allowed to stand.

C. (a.) The application of I.C. § 63-3813 was not appropriate.

Respondent's brief argues in the first part of section C at page 8 that the application of the statute was appropriate but never cites authority or does any analysis to support the argument. Respondent ignores Appellants' brief Argument in support of assignment error III (p.11) which clearly shows the statute inapplicable because the only Board of Tax Appeals decision at issue was appealed to the district court within the prescribed time.

Respondent then goes on to explain why the statute is not applicable. In the last paragraph of page 8 of the brief, Respondent highlights the word "increase". Respondent here raises a point completely overlooked by appellant. The statute applies only to increases. There was no increase here. Both sides have set forth valid reasons that the statute does not apply.

(b.)Taxpayers have not waived the right to object to the improper application of I.C. § 63-3813.

Respondent argues that the application of the statute was briefed and argued below. The only mention of the statute is in the final sentence of the Petitioners Response brief, which concludes "and order that the value remain at that value for the subsequent year in accordance with I.C. §63-3813."(Augmented record p. 13)

Appellants question whether this passing mention is briefing and arguing the issue, but it is true that it was never addressed below by them. They may be precluded from objecting to any order "in accordance with I.C. 63-3813" but this is not such an order. It sets a fixed dollar value and ignores the statutory proviso that annual trendings shall still apply.

Respondent cites *Smith v. Sterling,* 1 Idaho128, (1867) in explaining why a party should not be allowed to "slumber" then complain to the appellate court. This makes perfect sense in most cases, but not here. The assessor urged the application of I.C. §63-3813 and taxpayers remained silent. What was proposed however was entry of an order "in accordance with I.C.§63-3813." There was no reason to expect that the Judge would enter an order which ignored the

proviso on annual trendings. Parties cannot assume the judge will misapply the law. The judge did not enter an order in accordance with the law and the error was apparent only after the order was entered. This is the proper court in which to raise that issue.

(c.) The harmless error test is not appropriate in cases where a party is in direct violation of a court order.

Respondent's argument that taxpayers were not harmed by any of the judge's errors is true if the assessor's 50% ratio is upheld, but only because the assessor ignored the court's orders and used the proper values in its assessment notices. That is the problem here.

In *United States v. United Mineworkers of America*,330 U.S. 258 (294),67 S. CT.677, 91 L Ed. 884, (1947) the court stated :

> "we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

That language was cited with approval by this court in *In the matter of John Weick*, 142 Idaho 275, 127 P.3d 178 (2005)

In this case an elected official (the assessor) violates the terms of an order issued by a court which clearly had subject matter and personal jurisdiction. Then, an elected prosecutor supports that action. Ignoring a court order is prejudicial to the administration of justice in all cases and should be of special concern when elected officials are involved.

This Court rejected the "No harm, no foul " rule in cases involving the administration of justice in *Defendant A. V. Idaho State Bar Association*, 140Idaho800, (807) 102 P.3d 1119 (2004) The harmless error analysis is thus not applicable here.

E. (1.) Taxpayers are not asking this Court to weigh the evidence. They are asking the court to rule on the legal sufficiency of the evidence. They have consistently argued that market value, not value for assessment is the proper standard and that the assessor neither presented credible evidence of market value nor rebutted or refuted taxpayers' evidence of market value.

Section E. of Respondent's brief claims that taxpayers do not argue that Judge Kerrick's findings were not supported by substantial evidence. That is wrong! That is exactly the argument made in Appellants' assignment of error VIII.

Simply reading the first paragraph of the argument in support of assignment of error viii. (pp. 27-28 of appellants' brief) makes that clear. The remaining 5 pages summarize he evidence and establish that the assessor chose not to address the fair market value issue relying instead on the flawed assumption that compliance with mass appraisal standards was all that was required.

Merris v. Ada County 100 Idaho 59 (63), 593 P.2d 394 (398), in the quote cited in the last full paragraph of Appellants' brief, page 14, clearly establishes the rule that compliance with tax commission regulations is meaningless if that compliance does not result in a valuation which reflects fair market value. Appellant produced substantial evidence using approved fair

market value methodology and additional evidence that the assessor's methods did not comply with generally accepted fair market value standards. Respondent chose not to present fair market value evidence and not to rebut Appellants' evidence. There was no fair market value evidence in the entire record to support the Judges findings and conclusions.

E. (1) (b) Respondent's reliance on *City of McCall v. Seubert* is misplaced because in this case the Assessor's methodology was flawed, not just different.

Taxpayers are not asking this Court to weigh the evidence. They are asking the Court to set aside findings which are clearly erroneous and not supported by substantial and competent evidence. The quote from *City of McCall v. Seubert* 142 Idaho 580, 130 P.3d 1118 (2006) found at the bottom of page 10 of Respondent/assessor's brief is distinguishable and illustrates a very important point. There the City did not prevail because the court found that the methodology "was not flawed, just different." In this case the evidence is undisputed that the methodology is flawed.

The paragraph following the language quoted above and at page 10 of Respondent's brief states:

"A review of the trial transcript indicates there is support for [the Appraiser's] methodologies and opinion."

Here, a review of the record indicates the methodology was flawed. Frank E. Harrison's text *Appraising the Tough Ones* is a publication of The Appraisal Institute cited by the Board of Tax Appeals in its decision below. (Am. R.,p.276) and the basis for an educational course

attended by deputy assessor Erin Sacksteader. (Tr., p.23,L.23) A portion of that text, reprinted as Appellants' Trial exhibit 7-6, states:

> When the appraiser goes out geographically to find comparable sales in an alternative market, a location adjustment is required."

No required adjustments were made in this case. No authority was cited or testimony presented to explain why the mandatory adjustments were not made. Taxpayers presented exhibits and testimony that the markets differed in many respects.(Argument in Support of Assignment of Error VII.) The assessor made no effort to refute or rebut any of that testimony. The examination of the record in this case, following the practice suggested by *City of McCall v. Seubert*, thus shows that the methodology was flawed, clearly erroneous and not supported by substantial evidence

E. (2.) Respondent's argument that Appellants' are trying to change the law through judicial fiat is incorrect.

Respondent argues at pages 11 and 12 of his brief that Appellant is trying to change the law by judicial fiat and is asking the Assessor to use methods beyond Idaho law. If that were the case, Respondent's argument would be persuasive. That is not what Appellants have argued.

At the risk of being repetitious, Appellants will again explain what they are arguing. This is a summary of the argument in support of assignment of error VI. Found starting at page 14 of appellants' brief. Citations and authorities are found there and will not be repeated hers. Idaho statute requires the Assessor to assess property in accord with rules established by the Tax

Commission and the legislature. That assessor's valuation is "Market value for assessment purposes." It is determined by using mass appraisal methods which recognize that limitations of time and resources require these *ad valorem* practices be less stringent than those applied to licensed appraisers, who are tasked with establishing "market value."

The entire statutory scheme for Boards of Equalization and Tax Appeals is necessary and has been created in large part because even proper application of the approved mass appraisal techniques may not yield accurate market value valuations. The job of the County Commissioners sitting as a Board of Equalization is to determine market value, not whether the assessor used proper mass appraisal techniques.

The prepared script the Board of Equalization reads at the start of each hearing reads in part: "The decision of this Board will be based on actual market value...." (Amended R. p. 62, L.6) The *Merris v. Ada County* quote at page 14 of Appellants' brief makes it very clear that even a value determined in accord with Tax commission regulations will be set aside if it does not reflect fair market value.

Appellants do not argue that "the Assessor should use a different method beyond Idaho law to determine the value of the subject property" as Respondent claims. (Resp. Brief, p.12) The assessor must use those methods (and must use them properly), but if those methods don't result in an accurate fair market value determination, the assessor must present fair market value evidence after the taxpayer meets the burden of going forward.

That is what the Assessor did not do at any point in these appeals. In spite of Appellants repeatedly explaining the law, the Assessor presents no market value evidence and doesn't even address Appellants' argument or the *Merris* case.

F. Respondent 's argument concerning equitable remedies is invalid because it attempts to apply rules from to the legal side to the courts' broader powers in equity and ignores the established equitable maxims cited by appellants.

Respondent argues that it is 'not appropriate for this Court to be the initial finder of fact for the 2012 tax year valuation" and that taxpayers have failed to exhaust administrative remedies. (Resp. brief, p.12) Testimony established that the assessor works on a 5 year revaluation cycle. (Tr.P.99,L.3) The record contains revaluation documents from 2003 (Am. R., P.143) and 2008. (Am. R., P.88) Thus a new revaluation will be done in 2013.Whatever ratio is determined to be appropriate in this case for the 2010 and 2011 tax years will also be appropriate for 2012. If this appeal results in the 66.66% discount rate being applied for 2010 and 2011, it should also be applied in 2012, the last year of the assessment cycle. The Court will not be deciding the 2012 ratio in a vacuum. It will simply be directing that the ratio found applicable after extended litigation is to be applied for the last year of the five year appraisal cycle.

Respondent never addresses equitable jurisdiction or principles in its brief. The only case cited by respondent in section "F." of its brief is *Regan v. Kootenai County,* 140 Idaho 721,100

P.3d. 615, 2004.That case was a case at law which did not address directly equitable issues. The Court did however clearly state at page 725 that the Court has recognized an exception "when the ends of justice so require...." This is such a case. Equity jurisdiction by its very name deals with equity-that is justice. The equitable maxims developed over hundreds of years to guarantee that the ends of justice are served. The two maxims cited at the top of page 34 of Appellants' brief,- adjudication of all rights so as to avoid a multiplicity of suits, and not requiring the doing of a useless thing apply here. If taxpayers prevail on the ratio issue, equitable principles and Idaho law require that they get the relief for 2012 also.

Respondent made two arguments: This is a new issue raised for the first time on appeal; and failure to exhaust administrative remedies. Tax year 2012 valuation is new, but it is an issue determined by the decision in this case which will have been fully briefed and argued. Initiating another administrative appeal to decide the same issues now before this Court would be waste of time and resources. The County Commissioners have already said the will await the result of the appeal process. Equity should not follow rigid legal rules when application of such rules violates long established equitable maxims which have not been challenged by Respondent.

G. (1) Even if Kootenai County prevails, it is not entitled to attorney fees because Appellants did act with a reasonable basis in law and fact.

The entire record in this case is replete with citations to statutes, cases, appraisal authorities and arguments showing there are numerous issues of law and fact properly before this Court. The respondent would not find it necessary to resort to the harmless error doctrine if there were no reasonable basis in fact or law for Apellants' positions.

This Court has set an extremely high bar for parties seeking attorney fees under I.C, § 12-117. *Taylor v. Canyon County Board of Commisioners*,147 Idaho 424, 210 P.3d 532 (2009), was a case in which the county sought attorney fees under the statute. At page 441 this Court wrote:

> "We have previously found that the parties acted without a reasonable basis in fact or law for purposes of awarding attorney fees under I.C. § 12-117 when there was no statute authorizing judicial review, but have only done so in cases where this Court was barred from reviewing all claims."

In this case, appellants clearly had a right to appeal to this Court and *Taylor* mandates that no attorney fees be awarded.

CONCLUSION

The Idaho Supreme Court should hear this case and issue a decision explaining more fully the application of *Merris v. Ada County* and *Kimbrough v. Idaho Board of Tax Appeals* to real property valuation appeals. Appellant taxpayers have argued that the cases and the law are clear. *Merris* establishes that conformance with Tax Commission mass appraisal standards is not sufficient if the assessment does not reflect fair market value. I.C.§ 63-511 and I.C. § 63-3812

clearly mandate that the burden of proof before the Board of Tax Appeals and the District Court hearing appeals from either Board of Equalization or Board of Tax Appeals is a simple preponderance of the evidence. *Kimbrough* doesn't change that rule or conflict with it. The language in *Kimbrough* which seems to confuse the trial Court and Respondent deals with the standard of Appellate Review- a court made rule- and not the burden of proof at the *de novo* District Court hearing- a rule established by the legislature. Respondent and the trial court never address taxpayer/appellants' arguments and citations to authority on these issues, apparently not understanding them in spite of repeated efforts to focus on these issues. The meaning of these cases and rules must be clarified by this Court so taxpayers get full and fair hearings of their property tax appeals.

The Assessor presented evidence of compliance with mass appraisal standards and ratio statistics showing such compliance. General statistical compliance proves nothing in an individual instance. The Assessor's effort to use the "going out geographically' approach to find comparable sales was fatally flawed methodology because it failed to make the required location adjustments for differences in the markets. There was simply no credible, substantial evidence of market value presented by the Assessor after Taxpayers presented a case based on opinions of informed property owners and a licensed appraiser and repeated references to standard appraisal texts, and authorities.

Respondent argues that Judge Kerrick "also found that the Petitioner did not shoulder his burden under Idaho Code § 63-511."(Resp Brief p.6) As argued above, the Judge's findings are

not supported by the facts or law and are completely contaminated by his misreading of the *Kimbrough* case. It is impossible to tell what he found from the decision he wrote. Had this been a carefully constructed, meticulously crafted decision, maybe his language would have the import Respondent tries to give it. The decision unfortunately is full of transpositions, misapplication of statute and case law, inaccurate recitation of the record and a general failure to understand or consider Appellants' arguments. There was no credible market value evidence presented by the Assessor to counter or rebut Taxpayers' evidence of fair market value. The trial court should be reversed and judgment entered for taxpayers settting values at one third the buildable rate for tax years 2010, 2011 and 2012, and awarding costs as specified at page 36 of Appellants' brief.

No reconsideration at the trial level seems necessary. The assessor had ample notice of Taxpayers' theories and contentions and chose not to present any credible evidence of market value. If remand should be ordered, it should be directed to a new trial judge in order that Appellants obtain a fair hearing before a Judge who will listen to their arguments.

Appellants should be the prevailing party and entitled recover their costs upon a timely submission of the Memorandum of Costs.

RESPECTFULLY SUBMITTED THIS 22d day of February, 2013

Sid Wurzburg

I hereby certify that on the 22d day of February, 2013 I hand delivered two copies of this Reply Brief to John Cafferty, attorney for Respondent, 451 N. Government Way, Coeur d'Alene, Idaho, 83816.

Sid Wurzburg

Sid Wurzburg, Appellant