WISCONSIN COURT OF APPEALS
DISTRICT II

GLEN M. GROESCHEL and NEIL D. GROESCHEL,

Plaintiffs-Respondents,

Appeal No. 21AP234

v.

DANIEL F. GROESCHEL, GLORIA GROESCHEL, GROESCHEL COMPANY, INC. and GROESCHEL INVESTMENTS, LLC,

Defendants,

CHERIE A. BUSS

Defendant-Appellant,

BRIEF OF APPELLANT CHERIE A. BUSS

On Appeal from the Fond du Lac County Circuit Court
The Honorable Robert J. Wirtz, Presiding
Case No. 2017CV437

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INTRODUCTION AND STATEMENT OF ISSUE PRESENTED

This appeal presents a discrete legal issue regarding whether the Circuit Court as a matter of law applied the correct standard for ordering the remedy of partition by sale. The issue arises, however, within an intrafamily dispute regarding a 50+ year old family business and twelve properties located in Fond du Lac County that are owned by the business and family members. The family business, Groeschel Company, is located on some of the properties at issue. Plaintiffs Glen and Neil Groeschel are nephews of Defendant Daniel Groeschel ("Dan") and Defendant-Appellant Cherie Buss ("Cherie"). Glen and Neil's father, Kenneth Groeschel, founded the Company with Dan. Glen and Neil worked at the Company until 2017. Dan and Cherie still work at the Company.

While the Company itself has been successful, there have been a number of disputes within the family relating to the business and family properties, including a 2001 lawsuit filed by Kenneth against Dan, Glen and Neil. In the present case, Glen and Neil brought claims against Dan, his wife Gloria, Cherie, the Groeschel Company and Groeschel Investments, asserting a claim for "Partition and Judicial Sale" for eleven properties owned as tenants in common by various combinations of the parties, as well as claims relating to rent they assert is owed them. The claims have been bifurcated; the Circuit Court conducted a bench trial in August 2020 with

respect to the partition claim. Plaintiffs' claims for back rent are scheduled for jury trial in October 2021.[1]

Partition is an equitable proceeding, and Glen and Neil sought an order for public auction of five of the properties, referred to as "Parcels" in this case. Defendants did not want the Parcels to be sold at auction, and disputed the necessity for doing so. At trial, Plaintiffs presented evidence regarding the history of the family business, various allegations against Defendants, and their opinion regarding the fair market values of each of the Parcels. Defendants presented their versions of events as well as an expert appraisal regarding the fair market values of each of the Parcels. The Circuit Court made findings regarding partition of the eleven Parcels, including an order that four of the Parcels, known in the case as Parcels 4, 6, 7 and 12, be sold at public auction. It is the portion ordering the sale at auction that Cherie appeals.

While courts maintain discretion in equitable proceedings such as partition, the discretion must be applied pursuant to the correct legal standard. Under Wisconsin law, physical partition is the default and in order to invoke the "extraordinary" partition remedy of forcing a property owner to sell her property, there must be a finding of "prejudice." *See*, *e.g. Marshall & Ilsley Bank v. De Wolf*, 268 Wis. 244, 248, 67 N.W.2d 380 (1954).

[1] Cherie is not a party to the claims for back rent; hence, the partition order she appeals from is final as to her.

"Prejudice" in partition actions results if physically dividing the property would cause "substantial economic loss." *Id.* Here, the Circuit Court ordered four Parcels to auction without making the required finding of prejudice. The failure to make a finding of prejudice was reversible error.

But to be clear, this appeal does not present a mere technical error that finds correction in the record. The remedy of partition by sale is not the case that was presented or tried. Plaintiffs had the burden of demonstrating prejudice required for partition by sale. They did not present evidence that the four Parcels ordered to sale could not be physically partitioned, and the evidence of value Plaintiffs presented at trial addressed only the value of each of the Parcels as a whole – not whether their values would be substantially diminished if they were physically partitioned.

Accordingly, the issue presented to this Court is: whether the Circuit Court erred as a matter of law by ordering that Parcels 4, 6, 7 and 12 be sold by auction without evidence or a finding that the parties would be prejudiced by physical partition.

ANSWERED BY THE CIRCUIT COURT: The Circuit Court ordered Parcels 4, 6, 7 and 12 be sold by auction:

> I originally thought that 6 and 7, that Glen and Neil, the plaintiffs, wanted those parcels. In their latest submission, they don't. And I'm not – I appreciate that the defendants want 4, 6 and 7, but I'm not really persuaded that there's any practical or critical reason why they have or get that property. The Court could order it and just award the value to be shared but I – I am actually going

> to accept the plaintiffs' request that – that those lots, 3 – I'm sorry, I misspoke – 4, 6, and 7, that the Court order that they – the parties, according to the plaintiffs' request, select an independent real estate broker to list and sell those, 4, 6 and 7. And, also, 12 because I think 12 is more reasonably sold with lot 4 as – as helpful access. That those four lots, 4, 6, 7 and 12, be sold by an independent real estate broker at auction.

(App Appx. 17.)

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

This appeal involves a straightforward application of the record to established legal standards. Accordingly, Appellant does not believe that oral argument is necessary. Publication of the Court's decision is appropriate to reinforce that while exercising its discretion in a partition case, courts must find prejudice in order to force the sale of property.

STATEMENT OF THE CASE

A. Nature and Procedural Posture

Plaintiffs brought claims in 2017 regarding rental income from a family-owned business and partition of eleven properties held as tenants in common. (R.1.) There are twelve parcels involved in the case, but partition is not an issue with Parcel 1 because Plaintiffs do not have an ownership interest in it. The Circuit Court bifurcated the case, and Plaintiffs' rental income claim is scheduled for jury trial in October 2021. (R.148.) Appellant Cherie Buss is not a party to the rental income issue.

The Circuit Court held a three-day bench trial regarding the partition claim in August 2020 (R.150-152), after which the parties submitted competing Proposed Findings of Fact and Conclusions of Law. (R.102, 103.) In a decision from the bench on September 1, 2020, the Circuit Court ordered, among other things, that four of the properties be sold by auction. (Appx. 0017-0018; R.153:16-17.) This is an appeal from the portion of the Circuit Court's Decision that ordered public sale of four Parcels that the individual parties own as tenants in common. (R.126; R.153.) Appellant's initial appeal was dismissed for lack of a final written order. (R.125.) The Circuit Court entered a written order on February 2, 2021, and this timely appeal followed. (R.126, 128.)

B. Statement of Relevant Facts

There is a long, detailed history between the parties that was presented during the partition trial. A summary of the history and presentations is provided herein, because the issue presented in this appeal is a limited one. The Circuit Court ultimately found that each of the parties owns blame for the present situation.

1. Description of the Parcels

As alleged in the Complaint, the underlying litigation involves twelve Parcels located in the Town of Calumet in Fond du Lac County that have been in the Groeschel family since approximately 1960. The transactional histories and ownership percentages of the Parcels were generally undisputed. (Appellant's Appendix 0007, *Decision*, p.6) (Appendix is hereinafter cited as "App.____."). The Parcels are depicted on Trial Exhibit 3. (Appx. 0032.)

- Parcel 1 is an approximately 2.52-acre parcel of real property containing certain improvements, owned solely by Groeschel Investments. Parcel 1 was not subject to partition because Plaintiffs lack an ownership interest; but, Parcel 1 is at issue in the case because it contains a building that encroaches onto Parcel 2, in which Plaintiffs each have an interest.
- Parcel 2 is an approximately 5.23-acre parcel of real property containing certain improvements, and is owned by Groeschel

Investments (50 percent), Glen Groeschel (25 percent), and Neil Groeschel (25 percent) as tenants in common.

- Parcel 3 is an approximately 30.08-acre parcel of real property, and is owned by Glen Groeschel, Neil Groeschel, Dan Groeschel, and Cherie Buss as tenants in common, each with a 25 percent interest.
- Parcel 4 is an approximately 31.58-acre parcel of real property that is owned by Glen Groeschel, Neil Groeschel, Dan Groeschel and Cherie Buss as tenants in common, each with a 25 percent interest.
- Parcel 5 is an approximately 3.73-acre parcel of real property that is owned by Glen Groeschel, Neil Groeschel, Dan Groeschel and Cherie Buss as tenants in common, each with a 25 percent interest.
- Parcel 6 is an approximately 9.708-acre parcel of real property containing certain improvements that is owned by Glen Groeschel, Neil Groeschel, Dan Groeschel and Cherie Buss as tenants in common, each with a 25 percent interest.
- Parcel 7 is an approximately 0.779-acre parcel of real property containing certain improvements paid for by Dan. Parcel 7 is owned by Glen Groeschel, Neil Groeschel, Dan Groeschel and

Cherie Buss as tenants in common, each with a 25 percent interest.

- Parcels 8, 9, 10 and 11 are similarly-sized residential Parcels that Dan, Cherie, Neil and Glen each owned 25 percent shares of as tenants in common.
- Parcel 12 is approximately 0.37-acre property, consisting of a culvert and farm driveway. Dan, Cherie, Neil and Glen each owned a 25 percent interest as tenants in common. (R.150:39.)

(R.1, ¶11; R.10, ¶11; R.60.)

Plaintiffs alleged that the "parties have attempted to work out a purchase of their respective interests in the Properties but have been unable to reach an agreement." (R.1, ¶14.)

2. Company and Parcel Histories

In June 1963, Daniel Groeschel and his brother, Kenneth Groeschel, founded a mechanical contracting company called Groeschel Sheet Metal Company. That company later became known as Groeschel Company, and is currently known as Groeschel Company, Inc. (R.150:155; R.22, Affidavit of Daniel Groeschel, ¶¶2-4.) Groeschel Company initially operated out of a 40-foot x 48-foot building constructed at N10210 Highway 151 in Fond du Lac County. (R.150:155-56.) Frank and Evelyn Groeschel, Daniel and Kenneth's parents, owned the small plot of land on which the company's

shop and offices were constructed. (R.150:156; R.22, D. Groeschel Aff., Ex. B.) Over the next several decades, the Groeschel Company's business grew and its buildings and grounds expanded with it. (R.150:155-57.)

Glen and Neil began working at Groeschel Company in 1991. (R.150:7-8, 105.) In the mid-to-late 1990s, Groeschel Company began planning construction of an addition to the company's shop and offices. (R.150:156.) Glen, Neil and Dan were involved in various aspects of discussions, planning, design and construction. (R.150:158.) In April 2000, in anticipation of the expansion, Evelyn gifted Parcel 2 to Dan, Glen and Neil as tenants in common. Dan received a 50 percent interest, and Glen and Neil each received 25 percent interests as tenants in common. (R.22, D. Groeschel Aff., Ex. E.) At the time, Dan, Glen and Neil were the key employees; Kenneth had stopped working there a few years prior. (R.150:162.)

In November 2000, Evelyn sold Parcels 3, 4, 6 and 7 to Glen, Neil, Dan and Cherie pursuant to a land contract, which was satisfied in 2002. (R.60, p.5; R.33, G. Groeschel Aff., Ex. 3.)

Parcels 8, 9, 10, 11 and 12 were purchased from Evelyn by Dan, Cherie, Glen, and Neil, each with a 25 percent interest. (R.150:11-12.) Parcels 8, 9, 10, and 11 are residential lots. (R.150:12-13.) Parcel 12 is residential but is a small piece of land consisting of a culvert and driveway access. (R.150:39.)

3. The 2001 Intrafamily Lawsuit

In November 2000, Kenneth formally demanded that the Groeschel Company cease construction of the addition, asserting legal and equitable interests in Parcel 2 and that he did not consent to the project. (R.150:162-63.) Construction continued, and Kenneth filed a lawsuit against Dan, Glen, Neil, Groeschel Company and Groeschel Investments, seeking injunctive and other relief. (R.150:23-27; R.62.) *See also Groeschel et al. v. Groeschel et al.*, Fond du Lac County Case No. 2001-CV-0067. In February 2003, the parties entered into a Settlement Agreement and Mutual Release. There was payment from Groeschel Company to Kenneth (and his wife Dorothy) for stock redemption. Kenneth was also paid for his interest in Groeschel Investments, LLC, and Kenneth released his claims that Parcel 2 was the "business property" of Groeschel Company. All legal fees and settlement costs were paid by Groeschel Company. (R.150:164; R.22, D. Groeschel Aff., Ex. M.)

4. This Lawsuit

In 2016, Glen and Neil approached Dan about purchasing Groeschel Company from him. (R.150:165.) An agreement could not be reached. (*Id.*) In April 2017, Glen and Neil left their jobs at Groeschel Company (R.150:166) and this lawsuit was filed shortly thereafter.

In addition to claims for back rent, Plaintiffs' Complaint sought partition by sale of Parcels 2, 3, 4, 5, 6 and 7, and partition of Parcels 8, 9,

10, 11 and 12. (R.1.) A bench trial regarding the partition claims was held on August 4, 5 and 6, 2020. (R.150-152.) The evidence presented focused primarily on two issues. First, there was extensive testimony regarding the equities of the family history and various allegations between the parties. Second, the parties presented testimony regarding the use of the Parcels and the value of each of them. The values submitted were for each of the Parcels as a whole, not what the values would be if the Parcels were physically partitioned.

Plaintiffs' Presentation

Glen estimated that the Groeschel family has owned parcels 1 through 12 since around 1960. (R.150:10.) The Parcels are depicted in Trial Exhibit 3. (R.150:11; R.61, Appx. 0032.) Glen described the ownership history of each of the properties. (R.150:12-20). He testified regarding the disagreements between the parties over a number of issues, including prior usage and alleged exclusions from the various properties, allegations of harassment by Dan and Cherie, and ultimately how he would like the Parcels to be partitioned and valued. (R.150:40-48, 62-71.)

For example, when asked about Parcel 2, Glen testified: "Parcel 2, we've had some conflicts where we've been locked out by Dan Groeschel and Groeschel Company, off our property. Denied access. They've tried to limit our access on what we can store there. We've had conflicts throughout." (R.150:39.) He testified that at one point, he felt compelled to

call the Sheriff's Department regarding property access, and was told it was a matter for the civil courts. (R.150:42-43.) He testified that non-owners have been allowed to store personal property on Parcels 2, 3, 4, 6 and 7. (R.150:50-52.)

Glen testified that there is a man-made pond that is partially located on Parcel 4. (R.150:30.) Parcel 4 is used for agricultural purposes, and approximately 40 acres is rental income from farming for the four owners. There is access to Parcel 4 from Highway W. (R.150:30) He uses Parcel 4 for fishing and hunting. (R.150:48-49.) He also uses Parcel 6 for fishing and hunting. (R.150:49.)

Parcel 7 contains a storage building. (R.150:34.) He has stored some items there. Glen also testified regarding allegations of exclusion by Dan and Cherie with respect to the storage shed on Parcel 7. (R.150:47-48.) Glen also alleged that Dan and Cherie had at times wrongfully excluded him and Neil from Parcels 4 and 7. (R.150:47-48.) And Glen testified regarding various instances that he believed Dan, Cherie, and Jackson Buss (Cherie's son) had harassed him. (R.150:62-64, 67-70.)

Testimony was also provided regarding work they had performed, such as maintenance and upkeep on various Parcels, to support their claim for credit with respect to property valuation. For instance, Glen testified:

> I've done painting myself. Repairs, whether it be fixing walls, laying block, doing electrical work, mowing with tractors, fixing ruts, fixing

> driveways, sawing trees down, snowplowing on my own – these are pretty much on my own time. Improve – making improvements on buildings.

(R.150:71.)[2]

On Parcels 3 and 4, Glen testified he performed the following:

> Parcel 3, there's some grading of some – some yard stuff. There's upkeep around the ponds. I've actually provided the stone and the – which is the river rock, and filled in Parcel 3 where it was washed out on the eastern end. I provided stone that was used by others to fix the road going to the larger pond. I've gone through and I've done mowing with the large tractors. I've done mowing on regular lawnmowers. I've done the pond maintenance, provided restocking the fish, fixing of – of ditches, and making improvements of it with those.

(R.150:71-72.) His work on Parcel 4 was "very, very similar." (R.150:72.)

He testified regarding his work on Parcels 6 and 7. (R.150:72-73.) He paid for excavation work for the pond located on Parcels 3 and 4. (R.150:73-74.)

Glen and Neil were each asked what they wanted to happen with each of the Parcels. They presented various options for Parcel 2. (R.150:76-78.) At one point, the Court asked about the effect splitting Parcel 2 would have on value:

> THE COURT: Question for you. On – if you do what you're talking about and you separate 2 into a north half and a south half, are the values of those two different?
>
> THE WITNESS: The value of the land would probably be similar. There is – there is more – if you took the clay into effect, there is far more clay in the northern portion that was used. That was

[2] Neil testified to similar work. (R.150:108.)

> filled in approximately from 8 feet to 20 feet. And the southern portion was filled in approximately 3 to 4 feet. So, there would have been more clay used in that value. For a land value, it would, you know, be similar. They both have equal road access and equal utilities in play.

(R.150:77.)

They proposed a division amongst the parties for Parcels 8 through 12. (R.150:85.) For Parcels 3 through 7, Glen testified that "we would like to have a real estate agent that is an auctioneer service list those on the public market for sale." (R.150:84.) Further:

> Q: Okay. And – and why is it that you believe an auction is a good concept here?
>
> A: We would like to have the four tenants in common split the proceeds from the sale. It's the – in my opinion, it's the fairest way to have the – to determine the sale listed on the open market.

(*Id.*)

Glen and Neil testified regarding how they wanted the Parcels valued. Their testimony focused on how to value each of the Parcels as a whole. They submitted that the value should be based upon a price per acre derived from the price paid by the State Department of Transportation as part of an acquisition by condemnation. (R.96, Plaintiffs' Ex. 64.)

There was no testimony by Glen or Neil as to whether physically partitioning Parcels 3 through 7 would result in a substantial decrease in value. The potential effect on value of a physical partition only arose with respect to Parcel 2, noted above. (R.150:77.) Neil testified that he agreed with the relief Glen requested in his testimony. (R.150:111-12.)

The Plaintiffs rested their case after Glen and Neil's testimony. (R.150:122.)

Defendants' Presentation

Defendants presented testimony from Dan, Cherie, Matt Judkins, Jackson Buss and Brady Buss, who each provided testimony responding to the allegations of exclusion and harassment being made by the Plaintiffs, and offered their own allegations regarding behavior exhibited by Plaintiffs. Defendants also presented expert appraisal testimony from Raymond Christ.

Jackson Buss, Cherie's son, works at Groeschel Company and testified, among other things, regarding negative treatment he received from Glen (R.150:124-25.) and actions by Plaintiffs he had observed. (R.150:126-27.) Brady Buss, also Cherie's son, works seasonally at Groeschel Company and testified regarding his use of the building on Parcel 2 (R.150:139-40) and responded to testimony by Neil regarding a trap shooting incident on Parcel 6. (R.150:141-47.) Matt Judkins, Dan's son in law, was an employee at the Company until 2016. He testified regarding use of the building on Parcels 1 and 2, his view that Dan treated Glen fairly, and that he had not gotten along very well with Glen. (R.151:272-277.) [3]

Dan responded to Plaintiffs' allegations regarding property access. (*See*, *e.g.*, R.150:170-73.) He testified regarding Company business

[3] Page 272 is from the second day of the trial, and is the 82nd page of R.151. This brief cites the page number of the trial transcript, which goes from page 1 through page 317.

operations and his view on the necessity of the various Parcels to the business. (R.150:173-185.) He testified regarding why he thought it was important for Parcels 4 and 12 to remain together. (R.151:207-08.) He also testified that he would not want the Parcels to go to auction, and that he was willing to pay fair market value to Plaintiffs for their shares of those Parcels. (R.151:201-04.)

Cherie has a professional real estate license. She worked at the Company from 1987 to 2014, and then came back in 2017 and is currently employed there. (R.151:245.) She described the friction between her and Glen when they were both at the Company. (R.151:246.) With respect to the Parcels at issue in this appeal, she testified that she did not want those Parcels 4, 6 and 7 to go to auction and would pay fair market value to Plaintiffs for their shares of those Parcels. (R.151:251, 256-58.) She testified that it was her view that Mr. Christ's valuation was appropriate (R.151:265), that she wants to purchase Parcel 6 and that she supports Dan's effort to buy out Plaintiffs' interests in Parcels 2, 3 4, 5 and 7. (R.151:265.) She further testified as to her belief that Parcels 2, 3, 4 and 5 are needed for the business. (R.151:267.)

Mr. Christ, a real estate appraiser, provided testimony regarding the value of each of the twelve Parcels at issue, separately and independently. His valuation reports are found in the record at Trial Exhibits 19 and 53. (R.82, 83.) Plaintiffs' cross examination focused largely on Mr. Christ's

qualifications and on his valuations of Parcels 1 and 2 (R.152:321-389), and their position is summarized in their post-trial submission. (R.102, ¶¶11-12.) Plaintiffs did not inquire about the possibility of physically partitioning Parcels 4, 6, 7 and 12, or the value of those Parcels if they were physically partitioned. Nor was Mr. Christ tasked with making those determinations. Glen testified in rebuttal that he disagreed with Mr. Christ but he did not offer testimony that would address whether the parties would be prejudiced by partition in kind. (R.152:406-430.)

Parties' Post-Trial Submissions

After trial, the parties submitted amended proposed findings of fact and conclusions of law. (R.102, 103.). Plaintiffs acknowledged the standard that where a physical partition is not possible and cannot be made without prejudice to the parties, the court may order the property be sold and the proceeds divided among the parties. (R.102, ¶6.) They reiterated their request that the Court physically partition Parcel 2, order the sale of Parcels 3 through 7 at public auction, and partition Parcels 8 through 12 by awarding Parcel 8 to Cherie, Parcel 9 to Dan, and Parcels 10-12 to Glen and Neil. (*Id.*, ¶8.) They proposed a finding that this distribution would be "fair and equitable." (*Id.*, ¶16.) There was no proposed finding that physical partition was not possible for Parcels 4, 6, 7 and 12, or that physical partition would cause prejudice.

Defendants' proposed findings cited *DeWolf*'s caution that forcing a sale of property is an extraordinary remedy. (R.103, ¶13.) Defendants asserted that Glen and Neil would not be prejudiced by receiving fair market value of their ownership shares of each of the Parcels at issue, and that the Court should adopt Mr. Christ's fair market value determination rather than the value proposed by Glen and Neil that was based upon the price paid by the State in a condemnation action. (*Id.*, ¶¶39-40, 54-55, 65-67, 83-84.)

Circuit Court Decision

The Court found partition was appropriate, and that all sides had contributed to the present situation:

> I – I note that there are – from the time that the parties received these properties in the early two thousands, that there have been a number of incidents back and forth and I don't think that any of the claims made by the parties were unbelievable. And I don't – I'm not going to detail every single one of them, but suffice it to say that from both the plaintiffs' perspective and the defendants' perspectives, they set forth certain facts where they were no allowed to get into a certain piece of property, that they weren't able to enjoy all of the property and I accept those -- I accept those assertions as true, that each side, both plaintiffs and defendants, have claims that would be sufficient for the Court to say that one joint owner or one tenant in common might have been precluded from using the property as they saw fit. And it's – it's apparent to me, from saying that, that partition seems to be the answer here and is the answer here because the situation can't go on.

(Appx. 0006; R.153:5.)

The Court noted the competing testimony regarding valuation:

> On the one hand, the plaintiffs provided value that the Court ought to, what I'll say, is extrapolate from what the value of property ought to be based on what the – the State compensated the parties for relative to taking some right-of-way land along Highway 151 and that that had applicability to the value of the property as a whole. The defense provided a – an appraiser which – or who, I should say, provided values of each of the pieces of property. And there was some dispute about and argument in the final briefs about whether the Court should accept Mr. Christ's appraisal; some dispute about the value of extrapolating to the whole parcel what the State provided from the – from the plaintiffs' testimony.

(Appx. 0008; R.153:7.)

The Circuit Court declined to adopt the valuation proffered by Plaintiffs:

> I'm not inclined to accept the valuation of the – what the State of Wisconsin provided for strips of land along 151 and extrapolating that to the whole of – of land along that because it – it's – it's unique; by "it" meaning the parcels and the – the land being taken by the – by the highway department; in that it's for right-of-way purposes. It's not really a valuation of the entire piece of property which is unique and has other attributes other than just access to 151 and expansion for 151. And it leaves, in the Court's mind, a consideration of what the value would actually be for the entire parcel.

(Appx. 0008-0009; R.153:7-8.)

The Court accepted Mr. Christ's valuations:

> I understand that there was a lot of testimony about valuations; what the State paid, access, whether something had access, etc.; and I – I believe that, ultimately, the appraisal of Mr. Christ relative to values considers the total value of the land and I accept that and find that.

(Appx. 0013; R.153:12.)

The Court then addressed how the Parcels would be partitioned. For Parcels 2, 3 and 5, the Circuit Court awarded ownership to the Defendants, based in large part on the necessity of those parcels to the company's business operations. The Court denied Plaintiffs' invitation to physically partition Parcel 2, but sided with Plaintiffs in finding that their compensation would include the value of the buildings. (Appx. 0015; R.153:14.) The compensation to Plaintiffs for their shares was based upon their percentages of ownership and the fair market value, which was the appraisal by Mr. Christ. For example, the Court awarded ownership of Parcel 3 to Defendants (Appx. 0016; R.153:15) and adopted Mr. Christ's valuation of $167,859 (Appx. 0012; R.153:11.) Glen and Neil each own 25 percent of Parcel 3, and they would each receive 25 percent of $167,859. Parcels 8, 9, 10 and 11 were partitioned according to the parties' agreement on the proper division. (App. 0013-0014; R.153:12-13.)

Regarding Parcels 4, 6, 7 and 12, the Court noted that its impression before the trial was that Glen and Neil wanted possession of parcels 4, 6, 7 and 12. (Appx. 0017; R.153:16.) After trial, it was clear that Glen and Neal did not want Parcels 4, 6, and 7, and that Dan and Cherie did want ownership. The Court made findings regarding the fair market value of each of those parcels, adopting the valuations made by Mr. Christ. However, it then ordered that each of these parcels be sold at auction:

> I originally thought that 6 and 7, that Glen and Neil, the plaintiffs, wanted those parcels. In their latest submission, they don't. And I'm not – I appreciate that the defendants want 4, 6 and 7, but I'm not really persuaded that there's any practical or critical reason why they have or get that property. The Court could order it and just award the value to be shared but I – I am actually going to accept the plaintiffs' request that – that those lots, 3 – I'm sorry, I misspoke – 4, 6, and 7, that the Court order that they – the parties, according to the plaintiffs' request, select an independent real estate broker to list and sell those, 4, 6 and 7. And, also, 12 because I think 12 is more reasonably sold with lot 4 as – as helpful access. That those four lots, 4, 6, 7 and 12, be sold by an independent real estate broker at auction.

(Appx. 0017-0018; R.153:16-17.)

There was no finding of prejudice – whether these four Parcels could be physically partitioned and the impact such partitions would have on the value of the Parcels. Cherie appeals the portion of the order requiring Parcels 4, 6, 7 and 12 to go to public auction.

ARGUMENT

Forcing someone to sell property against their will faces a very high burden for good reason – protection against government interference with property ownership is ingrained in the American fabric. Partition by sale is an "extraordinary" exception, and in order to force a sale of property a party must present evidence – and a court must find – that physical partition would prejudice the parties. "Prejudice" in the partition context means causing substantial economic loss. The burden of proof regarding prejudice is on the party seeking to force the sale.

There was no evidence presented by Glen and Neil regarding whether they would be prejudiced by a physical partition warranting a judicial sale. Up until trial, the Circuit Court understood that Plaintiffs and Defendants had each indicated desire to retain ownership of the four Parcels at issue. (Appx. 17.) At trial, the Plaintiffs indicated that they wanted a public auction rather than owning Parcels 3 through 7. They presented evidence at trial regarding perceived slights, that they were prevented from using certain Parcels, that they should receive credit for omissions or work performed on certain Parcels, and the fair market values of the Parcels. Defendants presented their own version of events and offered testimony of an expert with respect to fair market value of the Parcels.

Other than Parcel 2, evidence was not presented, and findings were not sought, regarding whether the Parcels could be physically partitioned. Nor was evidence presented regarding the value of Parcels if they were physically partitioned. Accordingly, there was no evidence from which the Circuit Court could have found that physical partition of Parcels 4, 6, 7, and 12 would cause "substantial economic loss," i.e. prejudice. As a matter of law, the Circuit Court erred by not applying the prejudice standard to its order sending Parcels 4, 6, 7 and 12 to auction.

I. AS A MATTER OF LAW, A FINDING OF PREJUDICE IS REQUIRED TO FORCE A PROPERTY SALE IN A PARTITION ACTION.

Partition is governed by Chapter 842 of the Wisconsin Statutes, which represents a codification of the common law of partition. "Partition is a remedy under both the statutes and common law." *Klawitter v. Klawitter*, 2001 WI App 16, ¶ 7, 240 Wis. 2d 685, 623 N.W.2d 169. A number of statutory provisions are implicated here.

Wis. Stat. § 842.02 provides:

> (1) A person having an interest in real property jointly or in common with others may sue for judgment partitioning such interest unless an action for partition is prohibited elsewhere in the statutes or by agreement between the parties for a period not to exceed 30 years.
>
> (2) The plaintiff in the plaintiff's complaint may demand judgment of partition and, in the alternative, if partition is impossible, judicial sale of the land or interest.

Wis. Stat. § 842.07 provides:

> On default and proof or after trial of issues, the court shall by findings of fact and conclusions of law determine the rights of the parties. If the basis for partition is not clear, the court shall appoint a referee to report either a basis for partition, or the conclusion that partition is prejudicial to the parties.

Wis. Stat. § 842.14(4) provides:

> If partition is adjudged, and if it appears that it cannot be made equal between the parties without prejudice to the rights or interests of some of them, the court may provide in its judgment that compensation be made by one party to the other for equality of partition, according to the equity of the case; and where any party has with the

> knowledge or assent of the others or any of them, made improvements upon lands partitioned, the portion of such lands upon which such improvements have been made may be allotted to such party without computing their value the value of such improvements.

Wis. Stat. § 842.17(1) provides:

> If the court finds that the land or any portion thereof is so situated that partition cannot be made without prejudice to the owners, and there are no tenants or lienholders, it may order the sheriff to sell the premises so situated at public auction.

Section 842.17(1) evinces a strong presumption for partition in kind, and case law reinforces the presumption. In *LaRene v. LaRene*, 133 Wis. 2d 115, 119-20, 394 N.W.2d 742 (Ct. App. 1986), this Court addressed the remedies available under Wis. Stat. §§ 842.07 and 842.17(1) and determined that after a trial regarding partition claims, a trial court may (1) order partition along undisputed lines, (2) order partition and appoint a referee to determine either where to draw the line or that partition is prejudicial, or (3) determine that partition would prejudice the parties and order a sale of the property. The third option is referred to as a "partition by sale," as opposed to a physical partition, or "partition in kind," wherein property may be divided without prejudice to the owners and no need exists to force a sale of the property.

The burden of proof is on the party seeking to force a sale to demonstrate prejudice. *Marshall & Ilsley Bank v. DeWolf*, 268 Wis. 244, 248, 67 N.W.2d 380. "Prejudice" in this context "results if partition in kind

would cause substantial economic loss." *Boltz v. Boltz*, 133 Wis. 2d 278, 282-83, 395 N.W.2d 605 (Ct. App. 1986). As described in *DeWolf*, the "established test of whether a partition in kind would result 'in great prejudice to the owners' is whether the value of the share of each in the case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole." *DeWolf* at 248 (quoting *Idema v. Comstock*, 131 Wis. 16, 110 N.W. 786, 787 (1907).

Absent "substantial loss," partition in kind is the rule and partition by sale is the "extraordinary and dangerous" exception that "ought never to be exercised unless the necessity therefor is clearly established." *DeWolf*, 268 Wis. at 247-48.

II. THE CIRCUIT COURT ORDERED THE SALE OF FOUR PARCELS AT AUCTION WITHOUT A FINDING OF PREJUDICE.

A. There is No Finding of Prejudice, and Plaintiffs Did Not Offer Evidence That Would Support Such a Finding.

Partition is an equitable action, and the erroneous exercise of discretion standard applies to a review of a decision in equity. *Klawitter*, ¶¶ 7-8 (citations omitted). "Discretionary acts are upheld if the circuit court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* ¶ 8 (quoting *Wynhoff v. Vogt*, 2000 WI App 57, ¶ 13, 233 Wis. 2d 673, 608 N.W.2d 400). In this case, the Circuit Court did not apply

the appropriate legal standard with respect to ordering the sale of Parcels 4, 6, 7 and 12.

The Circuit Court made no finding regarding whether partition would cause prejudice justifying a forced sale, and the record is devoid of any evidence that would support such a finding. The trial was really about the parties' history and disputes, their various contributions to the values of the Parcels, and the fair market values of the Parcels. The parties, of course, disagreed on the implications of the history and the appropriate remedies. The Circuit Court found that partition was appropriate, and that based upon the parties' history all parties bore some fault for the current state of affairs.

In short, Plaintiffs did not proffer evidence of prejudice during the trial. Glen and Neil did not offer any evidence regarding a material decrease in value should the Parcels be physically partitioned – which is required for an order for petition by sale. They offered evidence regarding value of each of the parcels as a whole. There could therefore be no finding regarding the value of the Parcels if they were divided, or a finding that a partition in kind would cause a "substantial loss," i.e. that there would be prejudice. The Plaintiffs had the burden of proof on this issue if they wished to force a sale of any of the Parcels. They failed to present the evidence, and it was error for the Circuit Court to order four of the Parcels to auction.

B. Case Law Supports Reversal of the Circuit Court's Order.

Even though partition is an equitable proceeding, appellate courts have not hesitated to reverse an order for partition by sale where the order lacks a finding of prejudice. Wisconsin courts have consistently held that a finding of prejudice is essential to granting the extraordinary remedy of partition by sale. For example, *Marshall & Ilsley Bank v. DeWolf*, 268 Wis. 244, 67 N.W.2d 380 (1954), involved an action for partition of commercial real estate in downtown Milwaukee. Two tenants in common shared equal, undivided interests. The trial court found that a physical partition would cause "great prejudice" to the owners and directed a sale at public auction. Appellants argued the evidence was insufficient to order a sale rather than a physical partition.

The Wisconsin Supreme Court reversed. The Court noted that "The power to convert real estate into money against the will of the owner, is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established." *DeWolf*, 268 Wis. at 247 (*citing Vesper v. Farnsworth*, 40 Wis. 357, 362 (1876)) (emphasis added). The test of whether a physical partition results in "great prejudice to the owners" is "whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole." *Id.* at 248 (*citing Idema v. Comstock*, 131 Wis. 16 (1907)).

The record showed that the premises could be evenly divided, with a wall in the middle that allowed retail stores of equal space. *De Wolf* at 248. Further:

> The testimony shows that on account of the construction and condition of the building it would be a very expensive undertaking for the owner of either half to develop his portion independently, but expense to the one who wants to make changes is not an adequate reason for taking away property from another owner who may be content with his part of the space as it is.

(*Id.*)

The record with respect to value in *De Wolf* was that the property was more useful and more valuable as one parcel than as two, with one real estate expert testifying that the combined value if the property was split in half was $20,000 less than if the parcel remained intact. But even though the two parcels would be worth less combined than if the parcel was not divided, this was not a substantial difference and the Supreme Court said this was not determinative:

> The difficulties in the way of future independent reconstruction of either or both of the two halves of the building would be justification for the court to order a sale if it was empowered to determine whether the parties would, in the long run, be better off with a division in kind or with the value of the property converted into cash. That, however, is not the function of the court. The appellants are sui generis and entitled to have their property in kind unless the prejudice contemplated by sec. 276.20, Stats., appears. If it is so situated that a division in kind is physically feasible, partition in kind must be had unless thereby the value of the share of each owner will be materially less than his or her probable share

> of the purchase money in case the premises are sold.

De Wolf at 248-49.

There was no evidence in the record with respect to the amount reasonably to be expected by the several owners resulting from a sheriff's sale. The Court found that based on the record it was

> unable to calculate the relationship between the value of the respective shares of realty and the corresponding share of the money probably to be received in their stead as the result of a sheriff's sale. The burden of establishing that the value of a share of real estate was materially less than the probable like share of purchase money was on the respondents and the evidence was not produced to meet it.

Id. at 249.

The situation here is even clearer than in *De Wolf*. In the case at bar, the parties presented evidence of fair market value of each Parcel. Unlike in *De Wolf*, they did not present evidence regarding the values if the Parcels were physically divided.[4] If the determination could not be made based on the record in *De Wolf*, it is even more clearly not possible for the Circuit Court here to make the necessary finding where no such calculation were presented.

In *White v. Tillotson*, 256 Wis. 574, 42 N.W.2d 283 (1950), the Supreme Court also reversed an order for partition by sale. In *Tillotson*,

[4] Again, the only mention of this issue was with respect to Parcel 2, when the Court asked Glen about the value of a divided Parcel 2. Glen's response was that division would not make a difference. (R.150:77.)

tenants in common sought partition of approximately 400 acres of farmland in Jefferson County. There were two "master houses" and two "tenant houses" as well as a number of out-buildings. The two tenants in common sought to obtain the entire property, while the defendant sought to retain half the property and proposed a plan for division. The trial court held that physical partition was not possible and ordered a sale. The Supreme Court reversed, finding that plaintiffs had not met their burden of proving that physical partition could not be made without "great prejudice" to the owners.

> The testimony of the defense is that partition in kind is feasible, as against that of the plaintiffs' witnesses to the effect that a large farm would be a better investment. This is not the proper test. As said in Vesper v. Farnsworth, supra 40 Wis. at p. 362, the question to be determined is 'whether, if the premises be partitioned, the value of the share of each owner will be materially less than his or her probable share of the purchase money in case the premises are sold.
>
> Plaintiffs' witnesses expressed doubt that the farm divided would bring as much as if sold in one parcel. Such a doubt is not evidence, and if it were, it is not sufficient to establish that the owners will sustain pecuniary loss by partition in kind which will warrant an order of sale. The finding of the trial court is therefore contrary to the great weight of the evidence.

Tillotson at 579 (emphasis added).

In *Lyons-Hart v. Hart*, 695 S.E.2d 818 (N.C. Ct. App. 2010), two brothers each owned 50 percent of 0.30 acres of land on Ocracoke Island in North Carolina. After ten years of joint ownership, the petitioner informed his brother that he wished to end the tenancy in common and suggested three

options: (1) respondent could buy out petitioner's interest; (2) they could mutually agree to sell the property and split the proceeds; or (3) petitioner could demand a partition by sale. In his Petition for Partition, the petitioner alleged that a physical partition could not be made without injury. Respondent disputed the allegation, claiming that division of the property without injury was possible.

At a hearing, the court clerk found that physical partition was possible and that petitioner had not met his burden to force a partition by sale. The superior court then conducted a *de novo* hearing. Three surveys were received into evidence regarding possible physical divisions of the property. A real estate agent testified that the fair market value of the undivided lot would be $330,000, and that the proposed division into two lots would yield a market value for one lot of $265,000 and the other would have a value of $259,000.

The trial court concluded as a matter of law that partition could not be made without substantial injury to some or all of the interested parties, and ordered that the land be sold. While noting the deferential standard of review that "the determination as to whether a partition order and sale should be issued is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law," the North Carolina Court of Appeals reversed. *Hart.* at 236.

Similar to Wisconsin, there was a presumption in favor of a partition in kind and partition in sale was disfavored. "A tenant in common is entitled to partition by sale only if he or she can show by a preponderance of the evidence that actual partition would result in substantial injury to one of the other tenants in common." *Hart* at 237 (quoting *Partin v. Dalton Property Assoc.*, 112 N.C.App. 807, 810, 436 S.E.2d 903 (1993)). Further:

> To be sustained, [the trial court's] conclusion must be supported by a finding of fact that an actual partition would result in one of the cotenants receiving a share of the property with a value materially less than the value the cotenant would receive were the property partitioned by sale and that an actual partition would materially impair a cotenant's rights. These findings of fact must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place.

Id. at 237 (quoting *Partin*).

In the *Partin* decision quoted in *Hart*, there was no evidence presented of the value of the land or what the value would be were it to be divided. In *Hart*, there was evidence of the value of the land intact and divided but the trial court failed to consider and make a finding regarding fair market value as required by case law and statute.

> Without a finding regarding fair market value, the trial court's conclusion of law regarding substantial injury cannot be sustained. Assuming, *arguendo*, that the trial court had made findings concerning [the real estate agent's] testimony, such findings would not have supported the trial court's conclusion of law since the uncontroverted evidence indicates that the property is worth more divided in-kind.

Id. at 238.

The court of appeals held that the petitioner "had simply failed to meet his burden of proving a substantial injury would occur if the property were divided in kind" and remanded with directions to deny the petition for partition by sale and to enter an order for partition in kind. *Id.* at 240.

Hart is instructive to the matter at bar. Glen and Neil did not present evidence regarding (1) whether Parcels 4, 6, 7 and 12 can be partitioned in kind, and (2) the value of those Parcels if they were divided in kind. The contest at trial was about the fair market value of each of the Parcels in their present form; there was no testimony regarding the value of those Parcels if divided. The Circuit Court was unable to make any findings on these two points. Because it did not, and could not, do so, the Court erred as a matter of law by ordering partition by sale of Parcels 4, 6, 7 and 12.

C. The Court Should Remand With Directions That Plaintiffs' Shares of Parcels 4, 6, 7 and 12 Should Be Purchased at the Fair Market Value Found By the Circuit Court.

Plaintiffs had ample opportunity to put forth the evidence necessary to support a partition sale. They had the burden of proof on the issue, and they should not get a second kick at the cat with a new trial. This is not a situation where there is newly-discovered evidence. Plaintiffs made the issue at trial about the fair market value of each of the Parcels as a whole, they did not present evidence regarding whether the Parcels could be physically

partitioned or the fair market value of the Parcels if they were physically partitioned.

Indeed, the fair market values of the Parcels have been tried and the Circuit Court adopted the values presented by Defendants' expert, a finding of fact that is entitled to deference. The court listened to the testimony, weighed the evidence, and made a finding. An auction might be another way to determine market value – but fair market value has already been determined in this case.

The Circuit Court ordered that Glen and Neil receive their percentages of the fair market value of Parcels 2, 3, and 5, and the same should happen for Parcels 4, 6, 7, and 12. There is evidence of the fair market value of the four Parcels, and the Circuit Court accepted Mr. Christ's fair market value determinations. This Court should remand with instructions that Glen and Neil should receive their respective percentages of the fair market value of the four Parcels that were found by the Circuit Court.

CONCLUSION

This case presents an intrafamily dispute with a long history. The Circuit Court attempted to reach an equitable result. But, a finding of prejudice is a condition to ordering a partition by sale. There was no finding of prejudice by the Circuit Court, and there could not be because the Plaintiffs did not even attempt to meet their burden on that score. As a matter of law, the decision to force a sale of Parcels 4, 6, 7 and 12 must be reversed. Based

on the established record, this Court should remand for a finding that Dan and Cherie be granted ownership of those parcels and Glen and Neil should receive payment for their percentages of ownership based upon the fair market value of the parcels determined by the Circuit Court.

Dated this 19th day of April, 2021.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 8,571 words.

Dated this 19th day of April, 2021.

Electronically Signed By Christopher M. Meuler

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Christopher M. Meuler (SBN: 1037971)

CERTIFICATE OF COMPLIANCE WITH RULE § 809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality.

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Christopher M. Meuler (SBN: 1037971)

CERTIFICATE OF COMPLIANCE WITH ORDER NO. 19-02

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 19th day of April, 2021.

Electronically signed by Christopher M. Meuler
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