FILED
05-19-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

GLEN M. GROESCHEL and
NEIL D. GROESCHEL,

Plaintiffs-Respondents,

v. Appeal No. 2021AP000234

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

Defendants,

CHERIE A. BUSS,

Defendant-Appellant.

On Appeal from the Circuit Court for Fond Du Lac County
Case No. 2017-CV-437
The Honorable Robert J. Wirtz, Presiding

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS GLEN M. GROESCHEL and NEIL D. GROESCHEL

Mark E. Schmidt, SBN 1052450
Derek J. Waterstreet, SBN 1090730
VON BRIESEN & ROPER, S.C.
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
(414) 287-1249 – Phone
(414) 238-6627 – Facsimile

Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 3

I. NATURE OF THE CASE.................................3

II. PROCEDURAL HISTORY AND CIRCUIT COURT DISPOSITION...................................3

III. STATEMENT OF FACTS 5

A. FAMILY AND BUSINESS HISTORY 5

B. DESCRIPTIONS OF PARCELS...........6

C. TRIAL TESTIMONY REGARDING VALUATION AND PROPOSED SALE OF THE PARCELS 8

D. CIRCUIT COURT'S FINDINGS........10

STANDARD OF REVIEW 15

ARGUMENT 16

I. THE CIRCUIT COURT DID NOT ERR IN ORDERING THE PARCELS TO BE SOLD AT PUBLIC AUCTION WHERE ALL THE PARTIES REQUESTED PARTITION BY SALE..17

A. SUMMARY OF ARGUMENT 17

B. THE CIRCUIT COURT HAS DISCRETION TO ORDER PROPERTY BE SOLD. 17

C. THE CIRCUIT COURT RATIONALLY DECIDED TO ORDER THE SALE OF PARCELS 4, 6, 7, AND 12 AT PUBLIC AUCTION. 20

II. BECAUSE CHERIE REQUESTED PARTITION BY SALE SHE HAS WAIVED AND IS ESTOPPED FROM ARGUING FOR PHYSICAL PARTITION. 24

A. SUMMARY OF ARGUMENT 24

B. CHERIE WAIVED ANY ALLEGED ERROR REGARDING PHYSICAL PARTITION. 24

C. CHERIE IS ESTOPPED FROM ARGUING AN INCONSISTENT POSITION ON APPEAL THAT THE CIRCUIT COURT ERRED BY NOT MAKING A FINDING RELATING TO PHYSICAL PARTITION. 27

III. ANY ALLEGED ERROR OF THE CIRCUIT COURT'S DECISION IS HARMLESS BECAUSE CHERIE SEEKS PARTITON BY SALE AS RELIEF ON REMAND. 29

A. SUMMARY OF ARGUMENT 29

B. CHERIE'S REQUEST FOR REMAND SHOULD BE DENIED BECAUSE SHE DOES NOT REQUEST PHYSICAL PARTITION, BUT RATHER A PRIVATE SALE. 29

CONCLUSION 32

CERTIFICATION 33

CERTIFICATE OF COMPLIANCE WITH INTERIM RULE FOR WISCONSIN'S APPELLATE ELECTRONIC FILING PROJECT ORDER NO. 19-02 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Cases

Bolz v. Bolz,
133 Wis. 2d 278, 395 N.W.2d 605 (Ct. App. 1986) ... 19, 26

Dreifuerst v. Dreifuerst,
90 Wis. 2d 566, 280 N.W.2d 335 (Ct. App. 1979) 31, 32

Heyse v. Heyse,
47 Wis. 2d 27, 176 N.W.2d 316 (1970) 18, 20, 25, 26

Idema v. Comstock,
131 Wis. 16, 110 N.W. 786 (1907) 19

Kluthe v. Hammerquist,
45 S.D. 476, 188 N.W. 749 (1922) 30

Kresovic v. Kresovic,
No. 2015AP2159, 2016 WL 4275589
(Wis. Ct. App. Aug. 16, 2016) 15, 20

Kubina v. Nichols,
241 Wis. 644, 6 N.W.2d 657 (1942) 31

LaRene v. LaRene,
133 Wis. 2d 115, 394 N.W.2d 742
(Ct. App. 1986)... 17, 19

Lyons-Hart v. Hart,
205 N.C. App. 232, 695 S.E.2d 818 (2010) 20

Marshall & Illsley Bank v. DeWolf,
268 Wis. 244, 67 N.W.2d 380 (1954) 20

Partin v. Dalton Prop. Assocs.,
122 N.C. App. 807, 436 S.E.2d 903 (1993) 20

Schmit v. Klumpyan,
2003 WI App 107, 264 Wis. 2d 414,
663 N.W.2d 331 .... 15, 17, 30

State v. Huebner,
2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727...............25

State v. Johnson,
2001 WI App 105, 244 Wis. 2d 164,
628 N.W.2d 431 ....27, 28

Van Deurzen v. Yamaha Motor Corp. USA,
2004 WI App 194, , 276 Wis. 2d 815,
688 N.W.2d 777 27

White v. Tillotson,
256 Wis. 574, 42 N.W.2d 283 (1950) 20

Statutes

Wis. Stat. § 805.17(2)..15

Wis. Stat. § 809.19(8)(b), (c) 33

Wis. Stat. § 809.23(1)..2

Wis. Stat. § 842.02(2)..17

Wis. Stat. § 842.17(1)..17

STATEMENT OF THE ISSUES

Issue: Whether the Circuit Court properly exercised its discretion when ordering in a partition action that real property be sold at public auction where no party requested physical partition?

Circuit Court's Decision: After a three-day bench trial and the parties' post-trial submissions, the Circuit Court properly exercised its discretion when rendering an oral decision ordering that four of ten parcels of real property subject to the partition action be sold at public auction rather than a private sale.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The facts underlying the legal issues raised for purposes of this appeal are not in dispute. Therefore, while potentially helpful, oral argument is not necessary.

This case does not meet the criteria for publication under Rule 809.23(1) because the issues involve the application of well-settled rules of law and the record is sufficient to support the judgment.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal follows the Circuit Court's oral decision in a partition action ordering the sale at public auction four of ten parcels of real property in the Town of Calumet, Fond du Lac County, Wisconsin. It involves Appellant Cherie A. Buss's request that Respondents Glen M. Groeschel and Neil D. Groeschel sell their ownership interests in four parcels of real property held in common at Appellant's price and terms. It does not involve a request for physical partition (i.e. partition in kind), or whether any party would be prejudiced by physical partition – despite this claim being the basis for the appeal.

II. PROCEDURAL HISTORY AND CIRCUIT COURT DISPOSITION

In October 2017, Plaintiffs-Respondents Glen M. Groeschel ("Glen") and Neil D. Groeschel ("Neil") filed an action requesting partition and judicial sale of six parcels of land, referred to as Parcels 2-7, which they owned as tenants in common with Defendants Daniel F. Groeschel ("Dan"), Groeschel Investments, LLC, and/or Defendant-Appellant Cherie Buss ("Cherie"). (R.1.) As part of the action, Glen and

Neil also sought relief against Dan, Groeschel Investments, and Defendant Groeschel Company, Inc. for accounting and payment of rents. (*Id.*) In response, Groeschel Investments, Dan, and Cherie filed an answer, affirmative defenses, and counterclaim seeking partition of Parcels 2-7 as well as five additional parcels of vacant, unimproved residential land, referred to as Parcels 8-12. (R.10:10-18.) The Circuit Court bifurcated the partition claims from the rent claims, and a three-day bench trial was held on the partition claims on August 4-6, 2020. (R.150-R.152.)

Following hours of witness testimony at trial and the parties' submissions of post-trial briefs (R.100, R.101) and amended proposed findings of fact and conclusions of law (R.102, R. 103), the Circuit Court rendered an oral decision. (R.153.) The Circuit Court ordered the residential parcels – Parcels 8, 9, 10, and 11 – be awarded to Cherie, Dan, Neil, and Glen, respectively. (R.153:12.) The court further ordered that the other parcels – Parcels 2, 3, 4, 5, 6, 7 and 12 – were to be sold in the form of direct compensation to Glen and Neil for Parcels 2, 3, and 5, and at public auction for Parcels 4, 6, 7, and 12. (R.153:14-17.)

On November 2, 2020, Cherie appealed the Circuit Court's decision as to Parcels 4, 6, 7, and 12, only. (R.108.) The initial appeal, Case No. 2020AP1834, was dismissed for lack of a written order on February 1, 2021. (R.125.) A written order was subsequently entered on February 2, 2021 (R.126), and this appeal followed. (R.128.)

III. STATEMENT OF FACTS

Although the facts and record contained in Cherie's "Statement of Relevant Facts" are generally not in dispute, Glen and Neil submit the following in support of their Response:

A. Family and Business History[1]

The parties to this appeal and the underlying action are related. (R.102:7, ¶ 9.) Respondents, Glen Groeschel and Neil Groeschel, are brothers. (*Id.*) Dan Groeschel is the uncle of

[1] While the family and business history paint a relevant story of the complex and fraught relationship between the parties (generally, Glen and Neil v. Dan and Cherie), the detailed history does not have much importance for purposes of this appeal – except to note that: (1) the parties are generally unable to get along and were noted to both have been responsible for excluding one another at various times from the parcels; (2) each party contributed to the parcels over the years; and (3) the parties have never been able to reach an agreement concerning a sale of the business or any of the parcels, despite negotiations and offers having been presented between both parties. (*See generally* R.153.)

Glen and Neil, and Appellant, Cherie Buss, is the daughter of Dan. (*Id.*)

Until 2017, Glen and Neil were involved in the family's mechanical contracting business, Groeschel Company. (*Id.* ¶ 11.) This business was owned by Dan and Dan's brother (Glen and Neil's father), Kenneth Groeschel, until 2003 after a settlement in a shareholder dispute filed by Kenneth Groeschel. (*Id.* ¶ 9-10.) Founded in 1963, Groeschel Company grew and expanded its business over the years onto the surrounding parcels of the family's farm land, which was owned by Dan and Kenneth's parents. (*See* R.1:6, ¶¶ 17-18; Cherie's Br. at 9-10.)

B. Descriptions of Parcels

In 2000, the farm land, consisting of ten parcels, was sold to Glen, Neil, Dan, and Cherie. (Cherie's Br. at 10.)[2] These parcels of land are referred to as Parcels 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. (*Id.*)[3] The map below, Trial Exhibit 3 (R.61), depicts the parcels.

---

[2] Ownership of the parcels is not in dispute. (*See* Cherie's Br. at 7.)

[3] The partition action also involved a property known as Parcel 2, which was owned in common by Glen (25%), Neil (25%), and Groeschel Investments (50%). (R.102:2-3, ¶ 8.) Parcel 1 is not part of the partition

Each parcel can be generally described as:

- Parcel 3 is a 30.08-acre parcel of real property that contains tillable cropland, two ponds, and a well serving Groeschel Company.
- Parcel 4 is a 31.58-acre parcel that contains tillable cropland and one pond that is shared with Parcel 3.
- Parcel 5 is a 3.73-acre parcel that adjoins Parcel 3 and has been used by Groeschel Company as a buffer for neighboring properties.
- Parcel 6 is a 9.708-acre parcel containing multiple farm buildings used for storage.
- Parcel 7 is a 0.779-acre parcel containing a storage building.

action because Glen and Neil do not have an ownership interest in the property, however, Parcel 1 contains a building that significantly encroaches upon Parcel 2. (R.102:8, ¶¶ 12, 15.) The Circuit Court's decision with respect to Parcel 2 is not at issue in this appeal.

- Parcels 8, 9, 10, and 11 are approximate 0.7-acre (more or less) vacant, unimproved residential parcels.

- Parcel 12 is a 0.450-acre parcel that provides driveway access to Parcel 4.

(R.102:2-7, 10-11, ¶¶ 8, 25, 30, 33, 41.)

C. Trial Testimony Regarding Valuation and Proposed Sale of the Parcels

At trial, each party sought a sale and proposed division of the parcels. The parties generally agreed that the unimproved, residential parcels – Parcels 8, 9, 10, and 11 – could be wholly divided among one another. (R.153:12.) However, the parties disagreed as to how the remaining parcels – Parcels 2, 3, 4, 5, 6, 7, and 12 – should be partitioned. (R.153:13.) Glen and Neil asked for physical partition of Parcel 2, partition of Parcel 12 to Glen, and a sale at public auction of the remaining parcels, Parcels 3, 4, 5, 6, and 7. (R.102:16-17, ¶ 16.) Dan and Cherie, however, requested the court compel a private sale of the remaining parcels to them at their alleged prices. (*See* R.103:19-23, ¶¶ 42, 50, 58, 68, 83.)

Testimony was presented at trial as to the various parcels' valuations. Because no party sought physical partition

of the parcels (except for Parcel 2, which Glen and Neil sought physical partition), no party – including Cherie – presented testimony regarding what the parcels would be valued at if each of the six parcels were physically partitioned into twenty-four individual parcels (i.e., four divisions for each of the six parcels – Parcels 3, 4, 5, 6, and 7, and 12).

Glen and Neil testified, as owners, to what values they believed each of the parcels were worth. (*See* R.150.) They relied in part upon factual information from established prior condemnation payments from the State of Wisconsin for Parcels 2, 5, 6, and 7. (*See* R.150; R.102:9-11, ¶¶ 22, 32, 38.) They also relied upon past admissions by Dan as to the values of Parcels 3 and 4. (*See* R.150; R.102:10, ¶ 28.) Glen and Neil testified they believed an auction by a "*sale listed on the open market*" was "*the fairest way*" to determine value and then have "the four tenants in common *split the proceeds from the sale.*" (R.150:84, 111-112 (emphasis added).)

Dan and Cherie did not testify about any values for the parcels. (*See* R.150-R.152; R.102:14, ¶ 11.) Rather, Dan and Cherie relied upon the testimony of Raymond A. Christ, a residential appraiser, to attempt to establish what he believed

to be fair market value. Although Christ performed an appraisal,[4] ultimately, Christ testified and acknowledged at trial that "*the way to determine what [a] property is actually worth in the market is to put it up for sale and see who will actually pay whatever price a purchaser is willing to pay*." (R.152:72 (emphasis added).)

D. Circuit Court's Findings

The Circuit Court issued an oral decision on September 1, 2020. (R.153.) The court reviewed the parties' Amended Proposed Findings of Fact, Conclusions of Law and Judgment, the Plaintiffs' Post-Trial Brief, the Defendants' Closing Argument as well as its own notes from the three-day trial. (R.153:3-4.)

In opening its decision, the Circuit Court stated the case is about:

---

[4] Glen and Neil demonstrated at trial through cross-examination that Christ exhibited bias because of a history of working with Buss, including sending drafts of his appraisal report to Cherie asking "are you satisfied with the values for each property?" contrary to well-established professional rules of ethics. (R.152:33; R.102:14-15, ¶ 14.) Glen and Neil further raised questions and demonstrated concerns relating to Christ's professional credibility and flawed methodology for his appraisal. (R.102:14-15, ¶ 12.) Moreover, as Cherie acknowledges, Christ was not "tasked" with making determinations regarding physical partition (Cherie's Br. at 18), because Cherie and Dan sought an order from the Circuit Court requiring Glen and Neil to privately sell their interests. (*Id.* at 16-18.)

> A partition action amongst people who own property together and the issue has become what should the Court do about what has and what I believe both sides have proven to be a breakdown in the ability of these mutual owners of this property to be able to do what mutual owners should be able to do, which is have the enjoyment of their property fully. . . [E]ach party has a right, each owner has a right to the enjoyment of all the property that they own and that hasn't happened here.

(R.153:4-5.)

In the Circuit Court's decision, the court outlined the parties' ownership interests and that there was no disagreement about that. (R.153:4-6.) The court further noted the parties' broken-down family and business relationship and that each party, at some time, precluded one another from using the properties. (R.153:5-6.) The court concluded that partition was appropriate because "the situation can't go on." (*Id.*)

In its decision, the court reasoned there "were several solutions" and also appeared to be some agreements and disagreements what the parties' viewed should happen. (R.153:6.) On valuation, the court noted there was a "significant difference" in the parties' opinions. (R.153:7.) On one hand there was factual testimony provided by Glen and Neil regarding values when the State of Wisconsin compensated the parties for right-a-way takings of certain

parcels. (*Id.*) On the other hand, there was disputed opinion testimony provided by an appraiser for Dan and Cherie. (*Id.*) The Circuit Court indicated it was not inclined to accept the State condemnation valuations because the condemnation values did not value the entire parcel, which is "unique and has other attributes." (R.153:7-8.) That left, "in the Court's mind, a consideration of what the value would actually be for the entire parcel." (R.153:8.)

On the appraisal the Circuit Court stated "[g]enerally speaking, [the court] believe[s] that the valuations provided by Mr. Christ were reasonable under the circumstances" despite "some baggage." (*Id.*) Based on Christ's appraisal, the court then made findings as to each parcel's value and accepted those values – "understand[ing] that there was a lot of testimony about valuations." (R.153:11-12.)

In determining how to partition the parcels the Circuit Court found it "has the power, under partition, to divide the property between the parties, either physically or in some other way, that provides for the parties to be compensated for the value of their particular percentage share interest." (R.153:13.) The court noted there was a general agreement among the

parties for awarding Parcels 8, 9, 10, and 11 to Cherie, Dan, Neil, and Glen, respectively. (R.153:12.) However, there was "disagreement" relative to Parcels 2, 3, 4, 5, 6, 7, and 12. (R.153:13.) Based on the testimony and the parties' requests, the Circuit Court found and held:

- Parcel 2 was to be sold to Groeschel Investments to which Groeschel Investments was required to pay Glen and Neil each 25% percent of the parcel's value, because the court believed the testimony established that Groeschel Company could not continue its business the same way if the parcel was physically divided as Glen and Neil requested (R.153:14-15);

- Parcels 3 and 5 were to be sold to Dan and Cherie to which they were required to pay Glen and Neil each 25% percent of those parcels' values, because their testimony established that the parcels were necessary for the business (R.153:15-16)[5]; and

- Parcels 4, 6, 7, and 12 were to be sold at public auction by an independent broker because in part the testimony established that those parcels had little to no application to the business (R.153:16-17).[6]

---

[5] The Circuit Court noted all the parties' used Parcel 3 for fishing and hunting, but that there was "enough testimony to provide that it was integral to the operation of the business, including the well." (R.153:15.) The court also awarded Parcel 5 to Dan and Cherie because it had "some application to storage, snowplowing, other general operation of the business . . . ." (R.153:15-16.)

[6] The Circuit Court also noted all the parties' used the buildings on Parcels 6 and 7 for storage, but there was no reason that Dan and Cherie's things could not be stored on the other parcels awarded to them. (R.153:16.)

As to Parcels 4, 6, 7, and 12 the Circuit Court appreciated that Dan and Cherie wanted those parcels,[7] but was not persuaded there was "any practical or critical reason why they have or get th[ose] propert[ies]."[8] (R.153:16.) The court noted it "could order it and just award that the value be shared" but instead accepted Glen and Neil's request that those parcels be sold at public auction and the proceeds and fees be split equally among the parties. (R.153:16-17.) The Circuit Court concluded saying "[p]art of the Court's reasoning about 4, 6, 7 and 12 is that the – *the value of th[ese] propert[ies] – will be whatever it brings at auction and to the extent that a party, including the parties here in litigation before the Court, wish to buy it, they have a fair opportunity to do so*." ((R.153:19) (emphasis added).)

[7] The Circuit Court also noted that Glen and Neil originally wanted Parcels 6 and 7, but in their final submission they did not. (R.153:16.)

[8] The Circuit Court found Parcel 12 was "more reasonably sold with lot 4" as "helpful access." (R.153:16.)

STANDARD OF REVIEW

The Court of Appeals reviews a circuit court's decision in a partition action under the erroneous exercise of discretion standard. *Kresovic v. Kresovic*, No. 2015AP2159, 2016 WL 4275589, ¶ 11 (Wis. Ct. App. Aug. 16, 2016) (unpublished authored decision). A partition action is an equitable action, and the Court's review of a circuit court's discretionary decision is "highly deferential." *Id.* In review, "discretionary acts are upheld if the trial 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.* (internal citations and quotations omitted). Unless clearly erroneous, factual findings should be sustained. *Id.* (citing Wis. Stat. § 805.17(2)). "It is because the trial court is in a better position to decide the weight and relevancy of the testimony and the credibility of the witnesses that an appellate court gives substantial deference to the trial court's findings of fact." *Schmit v. Klumpyan*, 2003 WI App 107, ¶ 4, 264 Wis. 2d 414, 663 N.W.2d 331; *Kresovic*, 2016 WL 4275589, ¶ 23 (reasoning the trier of fact is entitled to reach credibility determinations regarding conflicting testimony).

ARGUMENT

The issue presented for this appeal is a red herring. Disappointed with the Circuit Court's decision, Appellant Cherie Buss argues the Circuit Court erred when it did not make a finding of whether the parcels could be physically partitioned without prejudice.[9] However, Cherie did not request physical partition and that issue was not tried to the Circuit Court. Cherie does not seek to purchase or retain her quarter interest in each parcel, which is the remedy on physical partition. Instead, Cherie seeks full ownership through a forced sale upon Glen and Neil to sell their equal shares to her and Dan at Cherie's alleged price.

Accordingly, the Circuit Court did not err when ordering partition by sale because physical partition was not at issue. Furthermore, Cherie has waived and is estopped from arguing this alleged error based on physical partition. And, nevertheless, any alleged error is harmless because Cherie continues to seek partition by sale on remand.

---

[9] Cherie's brief argues that "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." (Cherie's Br. at 3.) These statements are belied by the facts and what was requested by all parties.

I. THE CIRCUIT COURT DID NOT ERR IN ORDERING THE PARCELS TO BE SOLD AT PUBLIC AUCTION WHERE ALL THE PARTIES REQUESTED PARTITION BY SALE.

A. Summary of Argument

The Circuit Court properly exercised its discretion in ordering the sale of Parcels 4, 6, 7 and 12 at public auction. Because physical partition was not requested by the parties, the Circuit Court did not need to consider whether it would be prejudicial to physically divide and value each parcel in four partitioned portions, and as such, partition by sale was an appropriate ruling.

B. The Circuit Court has Discretion to Order Property Be Sold.

Given the equitable nature of a partition action, Wisconsin law permits a circuit court to exercise its discretion to order the sale of property – whether by private means or public auction. *See Schmit*, 2003 WI App 107, ¶ 22. Both the statutory and common law permits a property be sold and the proceeds of that sale be divided among the parties. *See id.* ¶ 26; *see also LaRene v. LaRene*, 133 Wis. 2d 115, 119-20, 394 N.W.2d 742 (Ct. App. 1986); Wis. Stat. § 842.02(2); Wis. Stat. § 842.17(1). Where physical partition is not sought, the circuit

court has the authority to order property be sold without a finding of prejudice. *See Heyse v. Heyse*, 47 Wis. 2d 27, 32, 176 N.W.2d 316 (1970).

The Wisconsin Supreme Court's decision in *Heyse* is determinative of the issue in this appeal. In *Heyse*, the trial court ordered real property be sold, and if the parties could not agree on the sale, the property should be turned over to a real estate broker. *Id.* at 37. On appeal, the appellant raised a claim that "the trial judge erred in not ordering a reference to determine whether the partition could be made without great prejudice to the owners." *Id.* at 32. The Wisconsin Supreme Court quickly dismissed the appellant's argument as "wholly erroneous" concluding that it was not mandatory that the trial court order a reference to make a finding of prejudice. *Id.* Moreover, the Court noted that no such request or objection was raised in the trial court. *Id.* at 32, 37.

Similar to the appellant in *Heyse*, Cherie made no such request or objection to the Circuit Court's decision ordering a sale of the parcels as opposed to a finding of physical partition or prejudice. While Cherie contends it was Glen and Neil's burden to show prejudice, Cherie neglects to realize she

herself, along with Dan, also brought a claim for partition and requested partition by sale for full ownership of the parcels. (*See* R.103:17-21.) Therefore, Cherie carried the same burden for requiring partition by sale. *Idema v. Comstock*, 131 Wis. 16, 110 N.W. 786, 787 (1907) (reasoning the burden of proof to establish a sale was on the party alleging same). While a finding of prejudice may be required where a party requests physical partition,[10] no such finding is required where all the

[10] Glen and Neil recognize Wisconsin law provides that where physical partition is sought a finding of prejudice may be required. Cherie cites several Wisconsin cases as alleged support for her appeal. Each case, however, is distinguishable because no party in this appeal requested physical partition. Rather, all parties in this appeal requested the parcels be sold in some manner.

- In *LaRene v. LaRene*, 133 Wis. 2d 115, 117, 176 N.W.2d 316 (1970), the Wisconsin Supreme Court held that the trial court properly ordered a sale despite a party's opposition to a sale and request to accept part of the property as his one-quarter share.

- Likewise, in *Bolz v. Bolz*, 133 Wis. 2d 278, 395 N.W.2d 605 (Ct. App. 1986), this Court affirmed a trial court's decision to order a sale. The party claimed the property should have been partitioned, rather than sold. 133 Wis. 2d at 280.

- In *Idema v. Comstock*, the Supreme Court addressed the issue of whether the property could be physically partitioned as opposed to sold based on a party's request in the trial court. The Court held that "though, it is true, the necessity for a sale is not definitely established as one would like to see in such a case, it is not without merit to an extent warranting us in holding that there is no legitimate basis for the finding complained of, much less in holding that such finding is against the clear preponderance of the evidence." 110 N.W. at 787.

parties seek partition by sale. *Heyse* is instructive in that a circuit court properly exercises discretion and is not required to make a finding of prejudice when a party does not seek physical partition for their respective ownership interest.

C. The Circuit Court Rationally Decided to Order the Sale of Parcels 4, 6, 7, and 12 at Public Auction.

The Circuit Court properly exercised its discretion when ordering the sale of Parcels 4, 6, 7, and 12 a public auction. The court's decision reflects it "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." *Kresovic*, 2016 WL 4275589, ¶ 11. The Circuit

---

- In *Marshall & Illsley Bank v. DeWolf*, 268 Wis. 244, 245-48, 67 N.W.2d 380 (1954) the Wisconsin Supreme Court reversed a decision ordering a sale where owners requested partition in kind and there was "evidence that the premises [could] be evenly divided."

- Similarly, in *White v. Tillotson*, 256 Wis. 574, 579, 42 N.W.2d 283 (1950), the Wisconsin Supreme Court reversed a decision ordering a sale because of a lack of prejudice, where in part the "testimony of the defense [was] that partition in kind [was] feasible."

Finally, Cherie cites two, non-binding North Carolina court of appeals cases. In each case, however, a party requested physical partition. *See Lyons-Hart v. Hart*, 205 N.C. App. 232, 233, 695 S.E.2d 818 (2010); *Partin v. Dalton Prop. Assocs.*, 122 N.C. App. 807, 809, 436 S.E.2d 903 (1993). Moreover, in *Partin* the remedy on remand was a new trial. *See* 122 N.C. App. at 812.

Court's findings and decision ordering Parcels 4, 6, 7, and 12 to public auction should not be disturbed.

In its decision, the Circuit Court reasoned it had "the power, under partition, to divide the property between the parties, either physically or in some other way, that provides for the parties to be compensated for the value of their particular percentage share interest." (R.153:13.) It also reviewed the parties' findings of fact and conclusions of law, which included the relevant law and facts, as well as the court's own notes from those submissions and the three days of witness testimony (R.153:3-4), including the testimony from Glen who believed an auction was "*the fairest way . . . to determine [value through] the sale listed on the open market*" (R.150:84 (emphasis added)) and Cherie's own expert who concluded that the best "*way to determine what [a] property is actually worth in the market is to put it up for sale and see who will actually pay whatever price a purchaser is willing to pay*." (R.152:72 (emphasis added).). The Court's statements show it understood the law, examined the relevant facts, and weighed the testimony from all the witnesses in deciding to order Parcels 4, 6, 7 and 12 be sold at public auction.

The Circuit Court's decision shows it reached a rational conclusion a reasonable judge could reach. The court reasoned that while it appreciated that Dan and Cherie wanted those parcels, the court was not persuaded there was "any practical or critical reason why they have or get th[ose] propert[ies]" because the parcels were not necessary for the business's operation and were not required for personal storage.[11] (R.153:16.) The court noted that it "could order it and just award that the value be shared" but instead accepted Glen and Neil's request that those parcels be sold at public auction and the proceeds and fees split equally among all the parties. (R.153:16-17.) It concluded that "[p]art of the Court's reasoning about 4, 6, 7 and 12 is that the – *the value of th[ese] propert[ies] – will be whatever it brings at auction and to the extent that a party, including the parties here in litigation before the Court, wish to buy it, they have a fair opportunity to do so*." (R.153:19 (emphasis added).)

[11] The Circuit Court found Parcel 12 was "more reasonably sold with lot 4" as "helpful access." (R.153:16.) The Circuit Court also demonstrated rational decision-making when requiring the compensation to Glen and Neil and the sale to Dan and Cherie for Parcels 3 and 5 because of the family's business use of those parcels. The court noted, without these parcels, the business could not continue as it has. (R.153:15.)

Cherie contends the "Circuit Court did not apply the appropriate legal standard with respect to ordering the sale of Parcels 4, 6, 7, and 12." (Cherie's Br. at 26-27.) She contends the Circuit Court should have first made a finding of whether physical partition was possible, and if so, whether it would prejudice the parties thereby permitting a sale nonetheless. The problem with Cherie's position is that physical partition was not requested or tried to the court.[12] As a result, a finding of whether physical partition was possible, and whether there would be prejudice if so ordered, was never required to be made by the court. Cherie does not take issue with any other reasoning or holding from the court's decision.

Under Cherie's theory, the entirety of the Circuit Court's decision for all the parcels ordered to be sold – whether privately or publicly – would suffer from the same error. Cherie does not claim this, however, because her true issue on appeal does not relate to any findings concerning physical partition or prejudice, but instead a general unhappiness with

[12] With the exception of Parcel 2, however, which is not at issue here.

the Circuit Court's order that Parcels 4, 6, 7 and 12 be sold at public auction as opposed to privately on her terms and price.

While Cherie desired the Circuit Court to order all the parcels be sold to her and Dan at her price, the Circuit Court decided differently. This is not an error, but rather one party's mere disagreement with how the court exercised its authorized discretion.

II. BECAUSE CHERIE REQUESTED PARTITION BY SALE SHE HAS WAIVED AND IS ESTOPPED FROM ARGUING FOR PHYSICAL PARTITION.

A. Summary of Argument

Even assuming the Circuit Court did not make a finding relating to physical partition, Cherie has waived any alleged error, and, relatedly is estopped now from arguing such. The Circuit Court did not need to make a prejudice finding related to physical partition when Cherie did not request physical partition at trial.

B. Cherie Waived Any Alleged Error Regarding Physical Partition.

Cherie has waived any argument on appeal that the Circuit Court erred by failing to make a finding of prejudice relating to physical partition.

First, Cherie did not seek an order for physical partition from the Circuit Court. Because she did not seek such an order, she has now waived for purposes of appeal her argument that the court erred by not making a finding related to physical partition.[13] In fact, Cherie concedes in her brief that she did not attempt to establish what the values of the parcels would be if they were physically partitioned (Cherie's Br. at 12),[14] because she did not seek to have the court physically partition the parcels. Meaning, the basis for her appeal was never an issue.

Similar to *Heyse,* where the Wisconsin Supreme Court held that because "no such request was ever made in the trial court" the appellant had no standing to urge that issue on

[13] "The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727 (internal citations omitted).

[14] "[T]he 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."

appeal, *see* 47 Wis. 2d at 32, Cherie should also be found to have waived such a request. *See also Bolz*, 133 Wis. 2d at 283-84 (rejecting appellants' contention on appeal that trial court erred by failing to appoint a referee because (1) all the parties agreed to allow the court to proceed without appointment of a referee, and (2) the appellants did not raise the issue until appeal after the trial court rendered its decision).

Additionally, Cherie was provided several opportunities after the court's decision to raise the alleged error. (*See* R.153:24 ("Anything else that you think the Court ought to address, which I haven't?"; R.153:28 ("[A]nything additional that you think we need to cover? . . . Anything else that you need the Court to address?".) Had Cherie raised the alleged error then, the court could have addressed it. This Court should disregard such after the fact objections on appeal. *See Heyse*, 47 Wis. 2d at 37 (reasoning "it should be noted that no objection was made to the order on this ground and no request for a sheriff's sale was made until this appeal. The appeal brief contains numerous objections to the conduct of the trial court which could have been raised at trial or in post-trial motions and cannot be raised for the first time in this court.")

Cherie could have requested physical partition or raised an issue relating to physical partition, but she did not. Why? – because she never pursued such a request for physical partition from the Circuit Court, and, as discussed *infra* does not seek such relief now.

C. Cherie Is Estopped From Arguing an Inconsistent Position on Appeal that the Circuit Court Erred By Not Making a Finding Relating to Physical Partition.

Cherie is also judicially estopped from arguing on appeal that the Circuit Court did not make a required finding as to whether Parcels 4, 6, 7, and 12 could be physically partitioned when she herself did not request physical partition. *See, e.g.*, *Van Deurzen v. Yamaha Motor Corp. USA*, 2004 WI App 194, ¶¶ 1, 5, 276 Wis. 2d 815, 688 N.W.2d 777 (declining to find court's factual finding erroneous and holding that judicial estoppel precluded party from asserting opposite position on appeal).

"Judicial estoppel is an equitable doctrine intended to prevent a litigant from playing fast and loose with the courts." *State v. Johnson*, 2001 WI App 105, ¶ 9, 244 Wis. 2d 164, 628 N.W.2d 431 (internal quotations omitted). It is "intended to

protect the judiciary," and there are three requirements that must be met: (1) the party's "later position must be 'clearly inconsistent' with the earlier position"; (2) the "facts at issue should be the same in both cases"; and (3) "the party to be estopped must have convinced the first court to adopt its position." *Id.* ¶¶ 9, 10.

Here, all three requirements are met. Cherie's position on appeal is that the Circuit Court erred in ordering a sale at public auction when the Circuit Court did not first consider whether the parcels could be physically partitioned, and if so, whether there was prejudice. However, Cherie's position at trial did not request physical partition. Rather, Cherie demanded a sale of all the parcels to her. The second requirement is also easily met because the same facts from trial provide the basis for her inconsistent position on appeal. Finally, the third requirement is met because Cherie convinced the court to adopt her position of requiring a private sale for at least Parcels 3 and 5.

Because Cherie did not request physical partition at trial, nor does she request such relief on appeal, she must be estopped from arguing the Circuit Court failed to make a

finding as to whether the parcels could be physically partitioned, and if so, without prejudice.

III. ANY ALLEGED ERROR OF THE CIRCUIT COURT'S DECISION IS HARMLESS BECAUSE CHERIE SEEKS PARTITON BY SALE AS RELIEF ON REMAND.

A. Summary of Argument

Any alleged error regarding the Circuit Court's decision and the failure to make a finding relating to physical partition is harmless because Cherie does not seek physical partition on remand. Instead, Cherie seeks an order requiring Glen and Neil sell their interests to Dan and her.

B. Cherie's Request for Remand Should Be Denied Because She Does Not Request Physical Partition, But Rather a Private Sale.

Cherie's requested relief on remand is not physical partition, which is the alleged basis for her appeal.[15] Rather, Cherie requests the Court should "remand with instructions that Glen and Neil receive their respective percentages of the fair market value" for Parcels 4, 6, 7, and 12 from a payment

[15] Even if remanded, the appropriate action for this Court is to remand with instructions for the Circuit Court to make additional findings of fact relating to whether there would be prejudice to any of the parties by physical partition. Cherie's requested relief on remand would still suffer from the same alleged error – thus showing another reason why her appeal of the Circuit Court's decision is illusory.

from her and Dan. (Cherie's Br. at 35-36.) Albeit a private one, this is still a request for partition by sale, not physical partition. Such a request for a private sale based on one party's price and terms is not absolute under the law.

Courts have reasoned the law does not permit co-owners of property to demand ownership and payment of a property based on another owner's terms. *See Schmit*, 2003 WI App 107, ¶ 23, n.4 (reasoning partition action should not permit an owner unwilling to sell to hold hostage the property another co-owner is willing to sell); *see also Kluthe v. Hammerquist*, 45 S.D. 476, 188 N.W. 749, 750 (1922) (reasoning "[t]he law of partition does not give to an owner of an undivided interest in real property any legal right to demand that the remaining interests in the particular land be partitioned to him at a valuation less than could be obtained at a partition sale, as against the demand of the other owners that the property be so sold."). In the present case, however, that is exactly what Cherie requests the Circuit Court should have decided – a forced sale of Glen and Neil's interests to herself and Dan based on her price.

Cherie also suggests that Christ's valuation should be binding on the Circuit Court. (*See* Cherie's Br. at 35.) However, Cherie cites no authority that requires a court acting in equity and exercising its discretion to be bound by one party's opinion. For the reasons discussed *supra* in Section I, the Circuit Court properly exercised its discretion when ordering that Parcels 4, 6, 7, and 12 should be sold on the open market for "whatever it brings at auction." (R.153:19.) *See also Dreifuerst v. Dreifuerst*, 90 Wis. 2d 566, 573, 280 N.W.2d 335 (Ct. App. 1979) ("a sale is the best means of determining the true fair market value of assets.").

Furthermore, Cherie does not explain how the Circuit Court's decision denies her the ultimate relief she seeks – to purchase the property. *See Kubina v. Nichols*, 241 Wis. 644, 648-49, 6 N.W.2d 657 (1942) (holding party did not "specify any particular in which the judgment fails to give him such rights"). In its decision, the Circuit Court stated part of its reasoning for ordering a public auction was that all parties would have "a fair opportunity" to purchase the parcels. (R.153:19.) While Cherie may be unhappy with how she must purchase the parcels, the Circuit Court's decision gives her the

ability to do so, while also being fair and equitable to the ownership interests of Glen and Neil. *See Dreifuerst*, 90 Wis. 2d at 572 (noting "a sale provides a more accurate means of establishing the market value of the assets and, thus, better assuring each partner his share in the value of the assets.").

CONCLUSION

As evidenced by Cherie's requested relief, the real issue on appeal is not any alleged error concerning physical partition or a finding of prejudice to order a sale, but rather with the manner and by which outcome the Circuit Court decided Parcels 4, 6, 7, and 12 should be sold. For the reasons stated, the Circuit Court properly exercised its discretion. This Court should affirm.

Respectfully submitted this 19th day of May, 2021.

VON BRIESEN & ROPER, S.C.

By: *Electronically signed by Derek J. Waterstreet*
Mark E. Schmidt, SBN 1052450
Derek J. Waterstreet, SBN1090730

Attorneys for Plaintiffs-Respondents

P.O. ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
(414) 287-1519
dwaterstreet@vonbriesen.com

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this brief is 6,375 words.

Word processing software (Microsoft Word) was used to determine the length of this brief. The word count above is inclusive of all words in this brief's Statement of the Case, Standard of Review, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 19th day of May, 2021.

VON BRIESEN & ROPER, S.C.

By: *Electronically signed by Derek J. Waterstreet*
Mark E. Schmidt, SBN 1052450
Derek J. Waterstreet, SBN1090730

Attorneys for Plaintiffs-Respondents

P.O. ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
(414) 287-1519
dwaterstreet@vonbriesen.com

CERTIFICATE OF COMPLIANCE WITH WITH INTERIM RULE FOR WISCONSIN'S APPELLATE ELECTRONIC FILING PROJECT, 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 May, 2021.

VON BRIESEN & ROPER, S.C.

By: *Electronically signed by Derek J. Waterstreet*
Mark E. Schmidt, SBN 1052450
Derek J. Waterstreet, SBN1090730

Attorneys for Plaintiffs-Respondents

P.O. ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
(414) 287-1519
dwaterstreet@vonbriesen.com

CERTIFICATE OF SERVICE

I hereby certify that this Response Brief of the Plaintiffs-Respondents, Glen M. Groeschel and Neil D. Groeschel, was submitted electronically to the Clerk of Court of Appeals and Appellant-Defendant Cherie Buss's counsel, Christopher M. Meuler, on May 19, 2021 via the Wisconsin Appellate court eFiling system.

Dated this 19th day of May, 2021.

VON BRIESEN & ROPER, S.C.

By: *Electronically signed by Derek J. Waterstreet*
Mark E. Schmidt, SBN 1052450
Derek J. Waterstreet, SBN1090730

Attorneys for Plaintiffs-Respondents

P.O. ADDRESS:
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202
(414) 287-1519
dwaterstreet@vonbriesen.com