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,

REPLY 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

When a party to a partition action seeks to force a public sale of property, statutes and common law require that party to meet a high burden – a finding of prejudice. Glen and Neil's brief tacitly acknowledges that they did not submit evidence to support a finding of prejudice, and that the circuit court did not make such a finding. Nor do Glen and Neil dispute that both during and after trial they did not request ownership of Parcels 4, 6 and 7.[1]

According to Glen and Neil, none of that matters. They assert that all parties were requesting that property be sold, and that if they had a burden of demonstrating prejudice then so did Cherie. The record is clear that the parties were not, and are not, asking for the same remedy. Cherie never sought an order for public auction. There is a difference in a partition action between a court using its discretion to equalize compensation by private sale between owners versus a court sending property(ies) to auction against the wishes of an owner. Partition statutes and case law require a finding of prejudice in order to send property to public sale.

Glen and Neil also argue that Cherie has waived or should be estopped from arguing the prejudice requirement. But Cherie's position has been consistent: she sought partition and payment of fair market value while keeping the Parcels in the family. Like the circuit court, she understood

[1] While they requested in their post-trial submission that Parcel 12 be partitioned to Glen, they have not disputed or appealed the order sending Parcel 12 to auction, making it apparent that they accept this remedy.

before trial that Glen and Neil wanted ownership of the Parcels at issue. When that changed, her post-trial submission argued that Glen and Neil had not met their burden of showing that a public auction was necessary. Glen and Neil's arguments on this score are just another way of asserting that Cherie sought the same remedy as them – which she did not.

It is undisputed that: (1) Glen and Neil represented to the circuit court that they did not want Parcels 4, 6 and 7; (2) the circuit court determined the fair market value of Parcels 4, 6, 7 and 12; (3) Cherie (along with Dan) is willing to pay fair market value; and (4) there was no finding of prejudice by the circuit court. The circuit court's decision to send Parcels 4, 6, 7 and 12 to public auction without applying the proper standard was reversible error.

ARGUMENT

Prior to trial, Glen and Neil indicated that they wanted to keep ownership of Parcels 4, 6, 7 and 12. At trial, Glen and Neil made clear that they didn't want to own Parcels 4, 6 and 7 but that they wanted to get the maximum value for their interests. The case presented was whether partition was appropriate and, if so, the fair market values of the Parcels so that an appropriate division could be made between the parties. Glen and Neil provided their opinion regarding the value of the Parcels while also asking that Parcels 3 through 7 should be sold at public auction. Because they were the only ones requesting a public auction, Glen and Neil had the burden of proof on the issue. The circuit court's decision to order Parcels 4, 6, 7 and 12 to auction without a finding of prejudice must be reversed.

I. THE LACK OF A FINDING OF PREJUDICE BEFORE ORDERING A PUBLIC AUCTION CONSTITUTES REVERSIBLE ERROR.

A finding of prejudice is required when a court orders public sale of property in a partition action. Forcing a public sale of property as a remedy in a partition action is an "extraordinary and dangerous power" to be used sparingly. *Marshall & Ilsley Bank v. De Wolf*, 268 Wis. 244, 247, 67 N.W.2d 380 (1954). There is a "strong presumption for partition rather than sale" under the statutes, but Wis. Stat. § 842.17(1) "clearly establishes judicial sale as a remedy if partition would result in prejudice to the owners." *Boltz v. Boltz*, 133 Wis. 2d 278, 282-83, 395 N.W.2d 605 (Ct. App. 1986) (emphasis

added). "[J]udicial sale occurs at public auction pursuant to Wis. Stat. § 842.17." *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 51, 369 Wis. 2d 387, 882 N.W.2d 371.

Courts possess authority to fashion an equitable remedy between parties, which may include a private sale. *Prince Corp.* at ¶ 52 ("Additionally, the circuit court specifically noted and considered its ability to fashion some other remedy such as partitioning the real estate and ordering a private sale to Van De Hey 'free and clear of all liens and encumbrances'") (citing *Schmit v. Klumpyan*, 2003 WI App 107, ¶¶ 22, 26, 264 Wis. 2d 414, 663 N.W.2d 331; *Heyse v. Heyse*, 47 Wis. 2d 27, 37, 176 N.W.2d 316 (1970)). But if one or more of those parties wants to force a public sale, then prejudice must be demonstrated.

A. Glen and Neil Had the Burden of Demonstrating Because They, Not Cherie, Sought To Force A Public Sale.

Glen and Neil suggest that the prejudice requirement is limited to cases where a physical partition is sought, or that no such finding is required where all parties seek partition by sale.[2] Setting aside that Cherie did not seek a public auction, their attempted distinction does not change the bedrock principle discussed in *De Wolf*: "The power to convert real estate into money

[2] In a footnote, Glen and Neil also argue that the Wisconsin cases cited by Cherie regarding the prejudice requirement are distinguishable because no party in this case requested physical partition. *Respondents' Brief*, pp. 19-20, n.10.The cases actually apply with even greater force since the parties in those cases wanted to retain ownership of the properties at issue. Regardless, the point is that the law is clear that prejudice must be found to force a public sale.

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." *De Wolf*, 268 Wis. at 247 (*citing Vesper v. Farnsworth*, 40 Wis. 357, 362 (1876)) (emphasis added).

Glen and Neil wanted to force a public auction of various Parcels. Cherie (and the other defendants) sought partition and equalization of compensation. 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." *De Wolf.* at 248 (*citing Idema v. Comstock*, 131 Wis. 16 (1907)).

Under Wis. Stat. § 842.17(1), Glen and Neil needed to demonstrate that they would be prejudiced by the partition if they wanted to force a public auction. *See also, e.g.*, *Boltz* at 282-83. Glen and Neil testified regarding the value of each Parcel individually. They did not present testimony regarding values if the Parcels were each individually divided or testimony comparing the value of all twelve Parcels together versus the twelve separated.

Instead, the case that was tried was the alleged litany of wrongs by the parties against each other and the fair market value of the Parcels. The circuit court found partition appropriate and accepted the fair market values found by Mr. Christ. A difference of opinion regarding valuation of the same

property does not amount to prejudice supporting a forced public sale, especially where Glen and Neil do not want ownership of the Parcels at issue.

Glen and Neil assert that Mr. Christ agrees with them regarding a public auction. Their argument continues their attack on Mr. Christ's qualifications and provides an out of context quote. *Respondents' Brief,* p. 10, n.4. Aside from not addressing their burden, the testimony in context does not support them:

> Q: You did not look at any properties that were merely listed for sale, true?
>
> A: That's correct.
>
> Q: And that's because when a property is merely listed for sale, that's just the owner's belief as to what the owner might be able to obtain if the property was purchased, correct?
>
> A: That's correct.
>
> Q: And the way to determine what the 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, correct?
>
> A: Correct.
>
> Q: And that's consistent with the purpose and use of the appraisal section in your report, true?
>
> A: Correct.

(R.127:388-89.)

Glen and Neil argue that prejudice was not required or that if it was, then Cherie had the same burden because all parties requested partition by

sale.[3] Their position conflates a value equalization between the parties to a partition case with an order forcing property to public auction. *See Prince*, ¶ 52. The partition statutes recognize the distinction. Wis. Stat. § 842.14(4) allows for compensation "by one party to the other for equality of partition."

The burden for judicial sales is addressed in Wis. Stat. § 842.02(2) and Wis. Stat. § 842.17(1). Section 842.02(2) provides:

> 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, and division of the proceeds.

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.

The case Glen and Neil presented did not address the necessity of a public sale or whether partition could not be made without prejudice.

B. *Heyse* Supports Cherie, Not Glen and Neil.

Glen and Neil argue that *Heyse v. Heyse*, 47 Wis. 2d 27, 176 N.W.2d 316 (1970), is "determinative of the issue in this appeal." One of the arguments presented in *Heyse* was that the trial court erred by not referring a partition case to a referee under Wis. Stat. § 276.10 (now Wis. Stat. § 842.07)

[3] Glen and Neil did not appeal circuit court's order that provides them compensation for their portion of Parcels 2, 3 and 5 based upon Mr. Christ's opinion of fair market value.

for a prejudice determination. Glen and Neil point to the Supreme Court's rejection of this argument as dispositive. But, Cherie is not arguing that the trial court abused its discretion by failing to refer the matter to a referee for a prejudice determination. She is arguing that the circuit court's failure to make a prejudice determination before ordering the Parcels to public auction was error.

The appellant in *Heyse* also argued that a sheriff's sale was required under Wis. Stat. § 276.20 (now Wis. Stat. § 842.17(1)).[4] The Supreme Court found that the issue had not been raised in the trial court and that further court action would have been required to force a sale. *Heyse* at 37.

Heyse does not address whether a prejudice finding is required to force a sale because a sheriff's sale had not been ordered. Here, the circuit court has issued a final order that Parcels 4, 6, 7 and 12 be sent to public auction. *Heyse* does not carry the day for Glen and Neil. Indeed, it supports Cherie because, as noted above, it stands for the proposition that a court may fashion a remedy that includes a private sale between the parties. *Prince* at ¶ 52 (citing *Heyse* at 37 for "authorizing circuit court to order private sale if appropriate").

[4] As noted in *Boltz*, when § 842.17(1) was adopted in 1973, the legislature changed the standard of judicial sale from one of "great prejudice to prejudice." *Boltz* at 283. "There is nothing in the revised statute to indicate that the legislature intended that substantial economic loss should not be found to be prejudice." *Id.*

II. CHERIE CONSISTENTLY ARGUED THAT GLEN AND NEIL HAD NOT MET THEIR BURDEN ON FORCING A PUBLIC SALE, AND THEIR WAIVER AND ESTOPPEL ARGUMENTS HAVE NO SUPPORT IN THE RECORD.

Glen and Neil argue that Cherie has waived her arguments regarding prejudice because she did not seek an order for physical partition in circuit court. Cherie consistently argued against a sale by public auction, instead seeking partition and equalization of value pursuant to compensation by one party to the other.

As the circuit court noted, Glen and Neil changed their requested remedy for the Parcels. (App. Appx. 0017.) Prior to trial, the parties submitted proposed findings of fact and conclusions of law. Glen and Neil's proposed findings included:

- Physical partition of all the properties was not possible.
- Parcel 2 should be physically partitioned.
- Parcels 3, 4 and 5 should be sold at auction with the proceeds divided equally.
- Parcels 6 and 7 should be partitioned to Glen and Neil as tenants in common.
- Parcels 8 and 9 should be partitioned to Dan and Cherie.
- Parcels 10, 11 and 12 should be partitioned to Glen and Neil as tenants in common.

(R.58:12-13, ¶¶ 8-9.)

Cherie's (and the other Defendants') proposed findings included the following:

- A fair and equitable partition of Parcels 2-12 is possible. (R.57:8, ¶ 3.)

- Physical partition can be made amongst the parties without prejudice to them. (R.57:9, ¶ 9.)

- Parcel 4 should be partitioned to Dan based on a significant financial interest. (R.57:9, ¶ 13.)

- Parcel 6 should be partitioned to Cherie, with an easement granted to Dan and payment of fair market value to other owners "as determined by the sole appraisal performed in this case." (R.57:11, ¶ 37.)

- Parcel 7 should be partitioned to Dan based upon a significant financial interest, with Dan paying other owners fair market value "as determined by the sole appraisal performed in this case." (R.57:11, ¶¶ 29-30.)

- Parcels 8 through 12 should be partitioned to Glen and Neil, with payment of fair market value to other owners "as determined by the sole appraisal performed in this case." (R.57:12, ¶¶ 42-43.)

- "Based on the Proposed Findings of Fact, it would be unreasonable and inequitable to force judicial sale of the Parcels, especially the Parcels used for the ongoing business operations of the Groeschel Company." (R.57:13, ¶ 49.)

After trial, the parties submitted Amended Proposed Findings of Fact and Conclusions of Law. (R. 102, 103.) As the trial court noted in its Decision, Glen and Neil had originally wanted Parcels 6 and 7 but no longer did. Their amended proposed findings sought an order for public auction of Parcels 3, 4, 5, 6 and 7. (R.102:16, ¶ 16.) They wanted Parcel 12 to be partitioned to Glen. (R.102:17, ¶ 16.h.) They did not propose a finding that physical partition of the properties was not possible.

Cherie's amended proposed findings noted the changes in Glen and Neil's position and proposed findings that they had not met their burden to force a sale:

- Two individuals want to sell their interests and two do not. It would be equitable to grant title to Dan and Cherie, who want to keep the properties, and award the fair market value that the court had determined to Glen and Neil, who did not want ownership. (R.103:14, ¶¶ 6-7.)

- That partition can be made without prejudice to the parties such that a forced sale by auction is not necessary or warranted, citing *De Wolf*. (R.103:15, ¶¶ 13-14.)

- Forcing a sale would be unreasonable and inequitable, and Glen and Neil "have not clearly established the necessity for a forced sale of Parcels 2-12…" (R.103:23, ¶¶ 83-84.)

Likewise, in Defendants' Closing Argument (R.100), Cherie and the other defendants argued that Glen and Neil had not met their burden of forcing a public auction, and cited the *De Wolf* case. (R.100:5-6.)

The argument that Cherie has waived her prejudice argument is therefore unfounded. She argued it in her submissions before and after trial. She is not playing "fast and loose" with the courts – she consistently made the argument that she presents on this appeal: Glen and Neil did not meet their burden.

Glen and Neil make the curious argument that Cherie was required to raise the issue again after the oral decision had been rendered in order to preserve her argument. *Respondents' Brief*, p. 26 ("Additionally, Cherie was provided several opportunities after the court's decision to raise the alleged

error"). This position amounts to a requirement that a motion for reconsideration be presented before filing an appeal. There is no such requirement and indeed they are simply inviting reconsideration motions as a matter of course. Moreover, a motion for stay pending appeal of the auction requirement was in fact filed and denied, which would fulfill their purported requirement. (R.115 and 116.)

Cherie consistently raised these issues with the circuit court. Glen and Neil's argument on this score finds no support in the record.

CONCLUSION

Glen and Neil do not want ownership of Parcels 4, 6, 7 and 12, and the case they presented related to the fair market value of their interests. The circuit court adopted Mr. Christ's opinion of the fair market value of those Parcels. A prejudice finding is required to force a public sale in a partition action. Glen and Neil had the burden because they sought the remedy. Their current efforts to equate a judicial sale at public auction with a private sale among the parties is unsupported in the law and the record. There is no finding of prejudice here and as a matter of law, the decision to force a sale of Parcels 4, 6, 7 and 12 must be reversed. Dan and Cherie should be granted ownership of those parcels and Glen and Neil should receive payment for their percentages of ownership based upon the fair market value determined by the circuit court.

Dated this 3rd day of June, 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 2,967 words.

Dated this 3rd day of June, 2021.

Electronically Signed By Christopher M. Meuler

_____

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 3rd day of June, 2021.

Electronically signed by Christopher M. Meuler
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