COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP925 **Cir. Ct. No. 2011PR138**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE ESTATE OF DONALD E. MOUSEL:

ESTATE OF DONALD E. MOUSEL, BY JEFF MOUSEL, PERSONAL REPRESENTATIVE,

APPELLANT,

V.

LORI PEDERSON,

RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. The Estate of Donald Mousel, by Jeff Mousel, personal representative,[1] appeals a judgment entered in Lori Pederson's favor following a bench trial. Pederson, with whom the decedent was in a long-term, nonmarital cohabitation relationship, filed a claim against the Estate asserting entitlement to one-half of the proceeds from the sale of the couple's residence. The circuit court determined Pederson had adequately proven entitlement to that amount based on theories of unjust enrichment and promissory estoppel. We reject the Estate's arguments on appeal and affirm.

BACKGROUND

¶2 Donald Mousel died intestate on November 12, 2011, as a result of injuries sustained in a motorcycle accident that occurred approximately one month earlier. Informal administration of his estate was commenced on November 30, 2011. Mousel was not married on the date of his death, although he and Pederson had what the Estate's counsel characterized as "an on again off again relationship over the course of several years." In fact, Mousel and Pederson had lived together the majority of the time between 1994 and 2011, with two brief periods of separation, and there was evidence at trial that following the couple's reconciliation in 2006, Mousel and Pederson had exchanged rings and, later, set a wedding date.

¶3 Pederson filed a claim against the Estate, seeking "one-half of the net probateable Estate which is not yet determined because no Inventory has been filed." Pederson asserted her claim was based on an "implied contract" with

[1] For clarity, we will use "Estate" to refer to the appellant, which is the Estate of Donald Mousel. We will use "Mousel" to refer to the decedent, Donald Mousel.

Mousel and "upon the estate's unjust enrichment in retaining the benefit of the claimant's efforts." The personal representative denied this claim, and the case proceeded to trial.

¶4 Pederson filed a pretrial brief in which she clarified the nature of her claim. Pederson asserted the "facts and circumstances" surrounding her claim satisfied the standards set forth in ***Watts v. Watts***, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), regarding claims arising from a nonmarital cohabitation relationship. Pederson clarified that, based on her eighteen-year relationship with Mousel, she was seeking one-half of the value of the parties' residence, which was constructed on land Pederson sold Mousel in March 1997. Pederson asserted the testimony would show that she "made significant contributions toward the planning, building and living in the house," and that their "relationship was marital in nature and that but for [Mousel's] untimely death[,] … they would have been married and the house legally would have been half hers."

¶5 Following a bench trial, the circuit court concluded that, "by both reason of unjust enrichment and equitable [promissory] estoppel, the residence is to be equitably partitioned." The court determined that "a general ***Watts*** joint venture cannot be sustained in this case," but it did find that there "was a joint venture insofar as the residence of the deceased is concerned." The court stated:

> I find that there was a benefit conferred upon the decedent, an appreciation by the decedent of the benefit, and an acceptance of the benefit by the [decedent] under circumstances making it inequitable for the decedent or his estate to retain the benefit. Further, I find there was a promise made in 2006, it was a promise the promisor, Mr. Mousel, would reasonably expect to be acted upon, and it was acted upon. Thus, the court finds both unjust enrichment and promissory estoppel are applicable here. Each individually and separately provides a sufficient basis to support the claim of Ms. Pederson.

The circuit court further determined the claims for unjust enrichment and promissory estoppel "could have been made immediately prior to Mr. Mousel's death." Because the Estate had sold the residence, the court entered a judgment for Pederson in an amount equal to one-half of the net proceeds from the sale. The Estate now appeals.

DISCUSSION

¶6 The Estate first argues the circuit court applied an incorrect legal standard when determining whether Pederson was entitled to one-half of the proceeds from the sale of the parties' residence. The Estate asserts there was no basis for the court to apply promissory estoppel when Pederson's claim form only identified the legal theories of implied contract and unjust enrichment. The Estate contends that the circuit court could only grant relief under the legal theories stated in the claim form pursuant to WIS. STAT. § 859.13(1), which, as relevant here, provides that a claim shall not be allowed unless the written submission "describes the nature" of the claim.[2] Whether the circuit court applied the correct legal standard is a question of law we decide de novo. ***Gittel v. Abram***, 2002 WI App 113, ¶41, 255 Wis. 2d 767, 649 N.W.2d 661.

¶7 We conclude it was not necessary for Pederson to articulate each and every legal basis for her claim in the notice of claim form. The Estate provides no authority interpreting WIS. STAT. § 859.13(1) as requiring that *any* legal theory be articulated in the claim form, let alone establishing that a claimant is limited to only particular legal theories so described. To the contrary, the claimant need only

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

state the nature and amount of the claim "if ascertainable." *See* ***id.*** To the extent that a claimant is required to state the "nature" of his or her claim, § 859.13(1) sets an exceedingly low bar; a claimant need only state, for example, that he or she is a creditor of the decedent, or that the decedent had possession of property owned by the claimant.

¶8 Thus, Pederson's failure to specifically identify "promissory estoppel" as a basis for her claim was not fatal. Moreover, the omission was understandable, given that ***Watts***, on which Pederson later relied as authority for her claim, did not specifically address promissory estoppel (as it was not argued in that case). Instead, ***Watts*** can be broadly understood as establishing that cohabitating individuals in a nonmarital relationship may have, upon termination of the relationship, common law equitable and legal claims against one another for their contributions to the success of the relationship, such as increased joint assets. *See* ***Watts***, 137 Wis. 2d at 532-33. As long as a party has been wronged, Wisconsin's circuit courts have authority to grant equitable relief as necessary to meet the needs of a particular case. *See* ***Breier v. E.C.***, 130 Wis. 2d 376, 388-89, 387 N.W.2d 72 (1986); ***Prince v. Bryant***, 87 Wis. 2d 662, 674, 275 N.W.2d 676 (1979).

¶9 The Estate agrees, in its reply brief, that "[t]he use of promissory estoppel in a cohabitation arrangement can be useful to right a wrong." This statement appears to concede Pederson's argument that, consistent with ***Breier*** and ***Prince***, the circuit court can exercise its equitable authority in a proper case to fashion a remedy even if the particular legal theory on which that remedy is based was not mentioned in the claim form. At a minimum, the Estate does not directly address Pederson's argument to this effect in her response brief, and we therefore deem the matter conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs.***

Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). Rather, the Estate's reply brief primarily argues "the facts do not support a finding of promissory estoppel."[3]

¶10 Along those lines, the Estate next argues Pederson failed to sustain her burden of proof on the promissory estoppel claim. To prevail on a promissory estoppel claim, the plaintiff must establish several things. First, the plaintiff must "prove that the promise was one that the promisor should reasonably have expected to induce either action or forbearance of a definite and substantial character by the plaintiff and that the promise did induce either action for forbearance." ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 89, 440 N.W.2d 825 (Ct. App. 1989). In addition, the plaintiff must prove that enforcement of the promise is necessary to prevent an injustice. ***Id.*** The Estate challenges these findings of ultimate fact, but its argument also implicates the circuit court's findings of the historical facts.

¶11 In a challenge to the sufficiency of the evidence, we will affirm if there is any credible evidence to support the circuit court's findings of the ultimate facts. *See* ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803. The only findings of ultimate fact necessary in a promissory estoppel claim relate to the existence of a sufficient promise and reliance. *See* ***U.S. Oil Co.***, 150 Wis. 2d at 89 (promise and reliance are "questions for the fact finder"). Whether enforcement of the promise is necessary to prevent

[3] The Estate also advanced this argument in its brief-in-chief, although the Estate framed the argument as a challenge to the circuit court's application of "the correct legal standard."

an injustice is "a policy question to be decided by the court in the exercise of its discretion." ***Id.***

¶12 We will not set aside the circuit court's findings of historical fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). A finding of historical fact is clearly erroneous when it is contrary to the great weight and clear preponderance of the evidence. ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. This standard is heavily weighted on the side of sustaining the circuit court's findings of fact. ***Jones v. Jones***, 74 Wis. 2d 607, 611, 247 N.W.2d 168 (1976).

¶13 At trial, Pederson testified she met Mousel in 1994, and approximately one year later she moved in to Mousel's home on Park Ridge Drive. Pederson owned twenty acres of land on Hemlock Road, and in March 1997 she sold fifteen of those acres to Mousel for $15,000, an amount well below its market value. Pederson retained the remaining five acres, which contained a driveway and two-car garage. She and Mousel built a house on the fifteen acres in 2002 and began living there together. Pederson testified that in 2005, she and Mousel separated for approximately six months, and she moved some of her belongings out of the house. They resumed seeing each other in January 2006, after meeting a number of times in the driveway on the five-acre parcel. Pederson moved back into the Hemlock Road residence, and thereafter Mousel and Pederson exchanged "wedding rings" in April 2006.[4] Pederson then sold her remaining five acres to an unrelated party, which land the circuit court found was

[4] Although Pederson described these rings as "wedding rings," it is apparent she considered them engagement rings and did not consider herself and Mousel to be married at the time.

her "fallback in the event her relationship with Mr. Mousel dissolved. It was no longer necessary to retain this insurance land after the reconciliation."

¶14 The circuit court found that there was "a promise made … regarding the house as a result of the driveway negotiations held in 2006." The court determined the "circumstantial evidence" supported a finding "that Mr. Mousel made a promise that the house was to be theirs, a joint venture." Further, the court determined that Mousel reasonably expected the promise to induce "action of a definite and substantial character," and that it actually did so because Pederson "moved back in, they continued their lives together, and she sold her insurance land." Further, they "agreed to be married at some later date." The court found it "clear from the testimony of the decedent's sister that it was not [Mousel's] intent to leave Ms. Pederson homeless after making a life together for 15 years." Accordingly, the circuit court determined "the equities would weigh in favor of one-half the value of the home rather than the entirety [of the estate], which may have been the parties' true intent if they would have contemplated death."

¶15 The Estate argues several of the circuit court's factual findings relating to promissory estoppel were unsupported by any credible evidence, but it takes significant liberties with the record in this regard. First, the Estate asserts there was no testimony that the driveway meetings on the five-acre parcel "were about the house, moving in or a joint venture." However, this was a reasonable inference based on Mousel's and Pederson's subsequent conduct, which included Pederson moving back in, the sale of the remainder of Pederson's land, and Mousel and Pederson purchasing rings for one another. *See* ***OLR v. Lister***, 2010 WI 108, ¶32, 329 Wis. 2d 289, 787 N.W.2d 820 ("An appellate court does not substitute inferences for reasonable inferences drawn by the fact-finder.").

¶16 Second, the Estate challenges the timing of the sale of the five-acre parcel, asserting that Pederson testified it was sold in 2005 before she moved back in with Mousel in 2006. However, Pederson acknowledged during this testimony that she was "not positive" she sold the land in 2005, and later clarified that she "couldn't have sold it" in 2005 because she recalled meeting Mousel in the driveway located on those five acres before she moved back in with him in January 2006.

¶17 Finally, the Estate notes that this was an "on again off again relationship," and that Pederson "moved out of the home of Donald E. Mousel prior to his passing and took all of her belongings once again." The former is overstated—the record reflects the parties separated only twice, and only temporarily, during their approximately eighteen-year relationship—and the latter ignores testimony that Jeff Mousel, following the decedent's accident, threatened Pederson, told her to leave the house, and said he was going to change the locks on the house. To the extent the Estate cites testimony regarding events that predated the promise found by the circuit court, the significance of these matters is not explained, and we reject these arguments as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

¶18 The Estate next argues the circuit court "did not properly apply promissory estoppel when [it] found the standard under [***Watts***] had not been met[.]" As an initial matter, this argument proceeds from an incorrect premise: the circuit court found the ***Watts*** standard had not been satisfied as to all of the Estate's assets, but that Pederson and Mousel had undertaken a joint venture "insofar as the residence of the deceased is concerned." Thus, the Estate's argument is based on a misperception of the basis for the circuit court's decision.

¶19 More importantly, though, the Estate fails entirely to establish how the ***Watts*** standard regarding a "joint venture" and the circuit court's findings regarding Pederson's promissory estoppel claim are related. As previously noted, the plaintiff in ***Watts*** did not assert a promissory estoppel claim. Rather, the supreme court determined her complaint had adequately stated nonmarital cohabitation claims based on contract, unjust enrichment and partition. ***Watts***, 137 Wis. 2d at 538. Although the phrase "joint venture" was used only in relation to the plaintiff's partition claim, *see* ***id.*** at 536-37, the principles that informed the phrase were equally applicable to the plaintiff's contract and unjust enrichment theories, *see* ***id.*** at 529, 532-33 (cohabitation and joint acts of a financial nature suggest the parties intended their relationship to be a joint enterprise for contract purposes; unjust enrichment claim may lie where one unmarried cohabitant retains an unreasonable amount of property acquired through the efforts of both upon termination of the relationship). But the applicability of this notion of a "joint venture" in the promissory estoppel context is unclear, as a promissory estoppel claim is not so much based on the combined efforts of the parties as it is based on actions taken by one party in definite and substantial reliance on the other party's promise.

¶20 Given the foregoing, we are not persuaded by the Estate's argument, unclear as it is, that the circuit court somehow misapplied ***Watts*** to the present case when it allowed Pederson's claim based, in part, on promissory estoppel. The Estate simply observes how certain facts in ***Watts*** gave rise to a "joint venture," while observing that many of these same facts—for example, the filing of joint tax returns, maintaining joint bank accounts, and children born as a result of the relationship—are absent in this case. This argument does nothing to address the circuit court's findings or reasoning in concluding that the trial evidence

adequately established the elements of promissory estoppel. For this reason, and because the Estate does not respond to Pederson's arguments regarding ***Watts***, we decline to address this issue further. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

¶21 Lastly, the Estate argues the "trial court's finding that Lori Pederson's claim against the estate for one-half of the value of the house is contrary to the great weight and clear preponderance of the evidence." The contours of this argument also are not entirely clear, and, again, the Estate fails to respond in any way to Pederson's arguments to the contrary. Nonetheless, we will address the argument as best we understand it.

¶22 The Estate appears to be challenging the circuit court's findings of fact related to Pederson's unjust enrichment claim. An action for unjust enrichment requires proof of three elements:

> (1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit.

Watts, 137 Wis. 2d at 531. Once again, the Estate's argument implicates both the circuit court's findings of ultimate fact and its findings of historical fact. *See supra*, ¶¶11-12.

¶23 The Estate first argues the circuit court clearly erred by finding that Pederson considered the sale of the fifteen acres to Mousel part of her contribution to their home together. Instead, the Estate asserts, the "benefit conferred was by [Mousel] to [Pederson,] who lived in the home … free of charge." The Estate cites Pederson's testimony that she did not ask for one-half of the value of the

property when she moved out in 2005, and that she did not ask to have her name put on the deed when she moved back in. However, that testimony does not establish that the sale of the land at below market value was not to Mousel's benefit, or that Pederson did not consider the sale a contribution to the parties' life together. Further, the Estate's argument regarding Pederson living rent-free ignores significant labor contributions she made while the home was being built, as well as payment of household expenses, half of the property taxes and fuel expenses while the parties lived in the house together. The circuit court's findings on these matters were not clearly erroneous.

¶24 The Estate also takes issue with the circuit court's finding that after the couple's reconciliation in 2006, Pederson paid one-half of the real estate taxes.[5] The Estate notes checks from Mousel written to the municipality, and it asserts that the property tax payments only appear on Pederson's tax returns "because she told [the tax preparer] to put it there." However, the Estate cites nothing to establish the total amount of real estate taxes due in any year after 2006; as a result, it has not shown that the circuit court's finding that Pederson paid half of the tax bill was clearly erroneous. In any event, even if Mousel's checks were for the full amount of the property tax bill, the Estate does not rule out that Pederson may have reimbursed Mousel for her portion of the payment.

¶25 The Estate next challenges certain of the circuit court's findings relating to Mousel's appreciation of the benefits conferred by Pederson. The

[5] The Estate also challenges the circuit court's finding that Pederson paid one-half of the home fuel costs, but it does not develop any cognizable argument on this point. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

circuit court found "the circumstantial evidence clearly, satisfactorily, and convincingly [shows] that there … was a meeting of the minds [in 2006] regarding the parties about their life together." Among other things, the court found that Pederson and Mousel were engaged to be married and had set a wedding date of November 11, 2011. The circuit court acknowledged that although some of Pederson's contributions to the relationship occurred prior to the 2006 reconciliation, at that time there was "basically a subsequent ratification by Mr. Mousel of what had come before and, in that sense, an appreciation [by the decedent] of those earlier conferred benefits."

¶26 The Estate's brief makes evident the Estate's position that the circuit court clearly erred by finding that Pederson and Mousel had selected a date to be married, but its argument in that regard is difficult to discern. Apparently, the Estate believes Pederson was untruthful when she testified that, about three weeks before the accident that caused Mousel's death, they had set the date for the wedding of November 11, 2011. Pederson also testified that they had started making plans and "were just going to go in front of a judge, and we had talked about having the neighbors … stand up, and then we agreed that the following summer we would have a yard party." No less than four witnesses corroborated Pederson's testimony regarding the anticipated date of the wedding. "When a trial judge acts as the finder of fact, he or she acts as the ultimate arbiter of the credibility of witnesses." ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981).

¶27 The Estate challenges many of the circuit court's other factual findings in cursory fashion. We reject these arguments wholesale, as the Estate's arguments are, in general, an attempt to retry the case before this court. Simply because there is evidence that "may have also sustained a finding contrary to that

made by the trial court" does not permit this court to disturb the inferences drawn from the evidence and the findings made by the trial court. ***Jones***, 74 Wis. 2d at 613. As far as we can tell, the circuit court's findings as to the elements of both unjust enrichment and promissory estoppel were amply supported by credible evidence or were reasonable inferences from the evidence, and the findings were not clearly erroneous. In any event, the Estate once again fails to respond to Pederson's arguments to the contrary, and it is therefore deemed to have conceded the issue. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.