COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2839

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

H. JAMES OBERG AND PATRICIA E. OBERG,

PLAINTIFFS-RESPONDENTS,

v.

DONALD W. HELGESEN AND JOAN H. HELGESEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Donald and Joan Helgesen appeal from a judgment against them in the amount of $579,517.43, plus interest and costs, pursuant to the trial court's award of restitution to H. James and Patricia Oberg after the court rescinded a land contract between the parties. The Helgesens argue that the trial court erred in awarding the Obergs restitution and, if restitution is appropriate, that

the trial court erred in its calculation of the award. We disagree and therefore affirm.

BACKGROUND

On October 19, 1990, the Helgesens and Obergs entered into a land contract under which the Helgesens agreed to transfer approximately three hundred acres of land to the Obergs for $1.2 million to be paid over fifteen years, with interest. A parcel of 1.55 acres surrounded by the remaining property was excluded from the land contract because the Helgesens had previously sold this parcel to a different buyer.

Around the time that the parties executed the land contract, the Obergs expressed an interest in purchasing the 1.55 acre lot if the Helgesens were able to reacquire it. The Helgesens later reacquired the parcel. In October 1991, Donald Helgesen refused to sell the lot to James Oberg for less than $100,000 to $150,000. From October 1991 to May 1994, the Obergs made several attempts to purchase the lot from the Helgesens at prices ranging from $15,000 to $30,000, but the Helgesens continuously refused to sell the land. In the spring of 1994, the Obergs gave a written offer to the Helgesens to purchase the 1.55 acre lot for $15,000. Joan Helgesen signed the offer indicating her acceptance, but Donald Helgesen refused to accept the offer.

On July 19, 1994, the Obergs filed an action in the circuit court seeking rescission of the land contract. The basis for this action was a Rock County ordinance which provided that no lot of less than fifteen acres may be divided or created without county approval. The Obergs argued that the land contract unlawfully created the 1.55 acre parcel, which is less than fifteen acres, and therefore they were entitled to rescission of the land contract and restitution.

After the Obergs commenced their action, the Helgesens offered to add the 1.55 acre lot to the land contract at no cost. The Obergs refused to accept the offer and continued to seek rescission because of their frustration in dealing with the Helgesens, because they had expended money to initiate their lawsuit, and because by the time the Helgesens offered to include the 1.55 acre lot, developers who were previously interested in purchasing the land if it included the 1.55 acre lot were no longer interested. On February 13, 1996, the trial court rescinded the land contract because the exclusion of the 1.55 acre parcel resulted in an illegal land division.[1]

On July 31, 1996, a trial was held on the issue of restitution. The court concluded that the Helgesens should return to the Obergs all principal and interest paid under the land contract, which totaled $610,699.44 ($299,909.88 principal plus $310,789.56 interest). The court also concluded that the Helgesens were entitled to an offset for $25,757.01 in property taxes they had paid on the property for the period the Obergs were in possession of the land. The court offset the award by an additional $5,425.00, which represented the value of the land for pasture from the time the parties entered the land contract to the date of rescission. Finally, the court concluded that the Obergs were not entitled to recover the value of improvements they had made to the property. The Helgesens appeal from the trial court's award of restitution.

STANDARD OF REVIEW

[1] The trial court originally reformed the land contract to include the 1.55 acre parcel. We reversed the trial court's judgment, however, concluding that reformation was not appropriate in this case. *See* ***Oberg v. Helgesen***, No. 95-1225-FT, unpublished slip op. (Wis. Ct. App. Aug. 31, 1995).

Restitution is an equitable remedy. *See* ***Gross Common Carrier v. Quick-N-Clean Corp.,*** 26 Wis.2d 288, 291, 132 N.W.2d 576, 578 (1965). We review decisions in equity for an erroneous exercise of discretion. ***Consumer's Co-op v. Olsen***, 142 Wis.2d 465, 472, 419 N.W.2d 211, 213 (1988). For us to uphold an exercise of discretion, the decision must be the product of a rational mental process by which the facts of record and law relied upon are considered together for the purpose of achieving a reasoned and reasonable determination. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

DISCUSSION

The Helgesens first argue that the Obergs are not entitled to restitution because they are a party to an illegal contract. They cite ***Smith v. Smith***, 255 Wis. 96, 38 N.W.2d 12 (1949), to support their argument. We provided in ***Hiltpold v. T-Shirts Plus, Inc.***, 98 Wis.2d 711, 717, 298 N.W.2d 217, 220 (Ct. App. 1980), however, that "a party not in *pari delicto* may have restitution of benefits conferred under an illegal contract." Therefore, even if the contract is illegal, the Obergs may have restitution if they are not *in pari delicto*.

The Helgesens argue that the parties were *in pari delicto*, or "in equal fault," and therefore the Obergs should be denied recovery. The Helgesens argue that the trial court's findings of fact and conclusions of law support their argument. The trial court stated:

> [T]he [Helgesens] attempt to accuse the [Obergs] of having "unclean hands." If there is fault to be assigned in this case, the [Helgesens] are at least as culpable as the [Obergs] and allowing the [Helgesens] to keep both the subject land and the money paid by the [Obergs] would be inequitable.

We do not agree that this passage shows the trial court found the parties to be in equal fault. The trial court stated: "*If* there is fault to be assigned, the [Helgesens] are *at least as culpable* as the [Obergs]." (Emphasis added.) The trial court could have thought that neither party was at fault, but addressed the Helgesens' contention of fault *arguendo*.

The Helgesens argue that the Obergs were at fault because the Obergs failed to accept their offer to transfer the 1.55 acre parcel to them for no cost. On the other hand, the Obergs argue that the Helgesens offer was "too little, too late" because it came after the action for rescission was already started. They argue that the Helgesens were at fault for failing to accept a reasonable offer for the 1.55 acre parcel before they started their lawsuit.

It is obvious to us that either party could have avoided rescission by compromising with the other party at some point. We do not believe, however, that a failure to compromise must necessarily be characterized as "fault." Some compromises are reasonable. Some are not. The trial court found that if the parties were at fault, the Helgesens were at least as culpable as the Obergs. This leaves open the possibility that the Helgesens were more at fault than the Obergs. Considering the fact that the Helgesens waited until after this action was filed to offer the parcel to the Obergs at no cost, we cannot conclude that the trial court erroneously exercised its discretion in awarding restitution.

In addition, ***Venisek v. Draski***, 35 Wis.2d 38, 50, 150 N.W.2d 347, 353 (1967), provides that a court may aid a party to an illegal agreement "where there is a slight illegality and recovery of anything transferred is permitted if necessary to prevent a harsh forfeiture." The trial court awarded the Obergs restitution because it concluded that it would be inequitable to allow the Helgesens

to keep both the land and the money paid under the land contract. The illegality here was not a violation of criminal law, but a land division contrary to county ordinance. We believe that it is appropriate to characterize this as a "slight illegality." Because the illegality was slight and the trial court found that failure to award restitution would be inequitable, we cannot conclude that the trial court erroneously exercised its discretion in making the award.

Second, the Helgesens argue that the trial court erred in the amount it awarded the Obergs as restitution. Both parties agree that upon rescission of the land contract, the Obergs were entitled to recover "the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may have reasonably been worth." ***McIndoe v. Mormon***, 26 Wis. 588, 590-91 (1870). They disagree, however, as to how much should be deducted from the award of restitution for the reasonable value of the Obergs' use of the premises.

The Helgesens argue that the award should be offset by the value of the best and most valuable use of the property. They argue that the parcel was not best used as pasture in part because only thirty-one acres of the land was suitable for pasture. Instead, they contend that the property should be valued as residential development property with an interim use as an extension of an adjacent residential property owner. The Helgesens' expert testified that this was the property's highest and best use. Because rental data was not available for such property, the Helgesens' expert used the interest on the value of the property, or $310,789.45, as an indicator of its use value.

The problem with the Helgesens' argument is that it mixes the law of damages with the law of restitution:

> Damages always begins with the aim of compensation for the plaintiff, although that aim may be deflected by some special considerations …. Restitution, in contrast, begins with the aim of preventing unjust enrichment of the defendant. To measure damages, courts look at the plaintiff's loss or injury. To measure restitution, courts look at the defendant's gain or benefit.

DAN B. DOBBS, LAW OF REMEDIES § 3.1, at 210 (2d ed. 1993). *See also* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 196 Wis.2d 578, 599-600, 539 N.W.2d 111, 120 (Ct. App. 1995), *aff'd in part, rev'd in part*, 206 Wis.2d 157, 557 N.W.2d 67 (1996) ("Restitution, the recovery for an unjust enrichment, is granted … [when] it would be inequitable to allow a defendant to retain a benefit without paying for it.")

The Helgesens seek to be compensated for what they lost, which is the opportunity to benefit from the property's highest and best use. But this is an appropriate measure only under the law of damages, not the law of restitution. The Obergs did not use the property for residential development. They did not gain the benefit of this use. Therefore, it would have been inappropriate for the court to use the value of the property for residential development in its award of restitution.

Throughout the course of their occupancy, the Obergs used the property for pasture land and as an adjunct to their residential parcel. The Obergs' expert testified that the value of the property as pasture land during the time of the Obergs' occupancy was $5,425.00. The trial court found that this rental value of the property as pasture land did not adequately account for the actual use of the property as an adjunct to residential occupancy. The court also found that the Obergs were responsible for the payment of all real estate taxes incurred during the period of their possession as part of the cost of their use of the premises. We

believe that the trial court used a reasonable and rational decision-making process in valuing the Obergs' use of the premises. Therefore, we conclude that the trial court did not erroneously exercise its discretion.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.