

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 01-2837
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-158

**IN COURT OF APPEALS
DISTRICT III**

DUANE GURTNER AND MARILYN GURTNER,

PLAINTIFFS-APPELLANTS,

v.

WAYNE GURTNER,

DEFENDANT-RESPONDENT.

APPEAL from judgment of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Duane and Marilyn Gurtner appeal a judgment that determined they entered into a partnership with Wayne Gurtner and ordering their real estate sold and proceeds divided, after the payment of certain debts. Duane and Marilyn argue that the record shows that no partnership existed, the real estate was not partnership property, and Wayne is obligated for double rent pursuant to

WIS. STAT. § 704.27.¹ We reverse the judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 In 1998, Wayne and Duane Gurtner, who are brothers, discussed forming a partnership to build three rental vacation cabins on 3.1 acres of land owned by Duane. Initially they planned to be equal partners, with each making contributions to the cabin construction. Duane, who owned a lumber company, agreed to contribute materials. Wayne, who owned a stucco company, planned to contribute labor and stucco. The brothers named their business D&Z Condos and opened a checking account in that name.

¶3 Duane testified that after construction began in April of 1998, they had secured no financing for the project. After a number of months, he had \$20,000 in judgments against him personally for sewer and electric work, because “I was the only one ... liable for the property out there.” In order to pay for the costs of construction, Duane and his wife Marilyn obtained two loans, totaling \$90,000.

¶4 In 1999, Wayne became liable for unsatisfied federal tax liens unrelated to the project. Duane testified that as a result, he and Wayne decided not to maintain a partnership that would own and manage real estate. During their first business year, their accountant filed a first-year and final return with the IRS, with no activity being reported because the partnership “never got started.”

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 Duane and Marilyn paid Wayne \$16,000 for labor and materials he put into the property. Duane also paid other bills for labor and materials. Initially payments were made from the D&Z Condos checking account, but after the partnership plan ended, Marilyn issued payments from her personal account. During December 1998, Duane deeded the property to Marilyn to protect it from creditors of another business he owned.

¶6 Wayne claimed that he incurred \$50,000 expenses in building the cabins but, because he was paid \$16,000, he claimed he was owed \$34,000. Duane and Marilyn claimed to have spent more than \$90,000 on the project.

¶7 The cabins were rented to vacationers. In February 1999, Wayne moved into one of the cabins and agreed to pay \$450 per month rent to Duane and Marilyn. The rents received were used to service debts incurred in constructing the cabins. In February 2000, Wayne claimed he was owed money and stopped paying rent, but did not move out until April 2001.

¶8 Duane and Marilyn initiated a small claims action seeking past due rent against Wayne. They also claimed Wayne owed double rent for holding over after notice to vacate. Wayne answered that he did not owe rent because he was Duane's partner. He alleged he had a lien against the realty for materials and labor furnished on behalf of the partnership. He also filed a counterclaim, alleging that Duane and Marilyn had been unjustly enriched by more than \$50,000 as a result of his efforts.

¶9 Following a bench trial, the court entered judgment finding that Wayne and Duane were equal partners in the construction of the cabins and ordered that the cabins and realty be sold and, after certain debts were paid, any proceeds be divided equally. The court ruled that because the parties were

partners, pursuant to WIS. STAT. § 704.27, double rent provisions did not apply. Duane and Marilyn now appeal.

DISCUSSION

¶10 Duane and Marilyn argue that the trial court erroneously determined that the parties owned and operated a partnership.² We agree. In *Heck & Paetow Claim Serv. v. Heck*, 93 Wis. 2d 349, 359-60, 286 N.W.2d 831 (1980), the Wisconsin Supreme Court set forth the test for determining the existence of a partnership: (1) The contracting parties must intend to form a bona fide partnership and accept the legal requirements and duties necessary to such a relationship; (2) there must exist a community of interest in the capital employed by the partnership; (3) each partner must have an equal voice in the management of the partnership operation; and (4) the profits and losses of the corporation must be shared and distributed. “The ultimate and controlling test as to the existence of a partnership is the parties’ intention of carrying on a definite business as co-owners.” *Id.* at 360. The burden of proving a partnership is on the party asserting its existence. *Id.*

¶11 Here, although the parties at one time considered forming a partnership, it is undisputed that they agreed not to operate as a partnership after considering the effect of Wayne’s tax liens on partnership property. Also, the record fails to disclose any agreement with respect to financing and payment of various contractors, overdue taxes and mortgage payments. It shows that Marilyn

² We note that Wayne’s response brief consists of four paragraphs. We do not attempt to develop a respondent’s argument for him. See *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

handled the books without input from Wayne. As Wayne testified: “I know at the time of construction Marilyn did his book work and his paperwork, but she did none of mine.” A partnership depends on a meeting of the minds of the parties. *Id.* at 59. There was no evidence of a meeting of the minds regarding crucial terms of management and no evidence that a partnership was created.

¶12 Next, Duane and Marilyn contend that the trial court erroneously included their real estate as partnership property. Because it was undisputed that the parties did not intend the realty to be partnership property, we agree. “When title to property is held in the name of a partner, the question of whether it is partnership property hinges ... on the intention of the parties.” *Estate of Schreiber*, 68 Wis. 2d 135, 149-50, 227 N.W.2d 917 (1975). Both parties disavowed any intent to make the land partnership property due to Wayne’s tax liens. In light of this undisputed testimony, we conclude that the trial court erroneously ruled that the realty was partnership property. Therefore, we reverse the judgment and remand the matter for the trial court to determine whether to grant relief on Wayne’s counterclaim under an alternative legal theory.

¶13 Finally, Duane and Marilyn argue that the trial court erroneously denied them damages of double rent from Wayne, pursuant WIS. STAT. § 704.27.³

³ WISCONSIN STAT. § 704.27, entitled “Damages for failure of tenant to vacate at end of lease or after notice” provides:

(continued)

By the time of trial, Wayne had vacated the premises and the court found that he owed sixteen months' back rent at \$450 per month. The trial court denied relief under § 704.27 on the ground that Wayne was a partner, not a tenant. Because we have concluded that the record fails to support the determination of partnership, the court's reasoning cannot be sustained. On remand, the trial court may consider whether Duane and Marilyn are entitled to relief under § 704.27.

By the Court.—Judgment reversed and cause remanded with directions.

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

If a tenant remains in possession without consent of the tenant's landlord after expiration of a lease or termination of a tenancy by notice given by either the landlord or the tenant, or after termination by valid agreement of the parties, the landlord may recover from the tenant damages suffered by the landlord because of the failure of the tenant to vacate within the time required. In absence of proof of greater damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession. As used in this section, rental value means the amount for which the premises might reasonably have been rented, but not less than the amount actually paid or payable by the tenant for the prior rental period, and includes the money equivalent of any obligations undertaken by the tenant as part of the rental agreement, such as payment of taxes, insurance and repairs.

