

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

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(1), 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. 95-0857-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WILLIAM PUTZE,

Plaintiff-Respondent,

v.

THOMAS A. ERNSTMEYER, JR.,

Defendant-Appellant,

**BLUE OX FORESTRY SERVICE, INC.,
a Wisconsin Corporation,**

Defendant.

APPEAL from a judgment of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Thomas A. Ernstmeyer, Jr., appeals from a judgment dismissing his counterclaim for specific performance of an agreement to sell land.¹ Because the trial court properly exercised its discretion in declining to order specific performance, we affirm.

Putze owned valuable acreage of timber that Ernstmeyer sought to purchase. Putze agreed to sell the property to Ernstmeyer, but repeatedly emphasized that he would be opposed to any large-scale removal of timber. Putze insisted that he would not accept an offer unless there were no contingencies, presumably because Putze was doubtful that Ernstmeyer would be able to secure financing and then Putze could insist upon forfeiture of the earnest money. To accommodate Putze, Ernstmeyer's offer to purchase contained no contingencies and he tendered \$10,000 earnest money. When accepting the offer, Putze believed that Ernstmeyer shared his philosophy as an environmentalist. However, Ernstmeyer's primary objective was to sell the property's marketable timber to finance the purchase.

When Putze discovered that Ernstmeyer intended to sell the timber, he sued to rescind the contract. Ernstmeyer counterclaimed for specific performance. In a prior appeal, we affirmed the trial court's ruling that Putze was not entitled to rescission because he was unable to show that he suffered any damage. *Putze v. Ernstmeyer*, No. 94-0918-FT, unpublished slip op. at 4-5 (Wis. Ct. App. Aug. 18, 1994). However, we reversed and remanded that part of the judgment that granted the counterclaim for specific performance. We directed the trial court on remand to determine whether it should enforce this contract because it also found that Ernstmeyer fraudulently induced Putze to agree to the sale. *Id.* at 5-6.

On remand, the trial court dismissed the counterclaim because it concluded that Ernstmeyer had not met his burden to demonstrate entitlement to the equitable remedy of specific performance. It also ruled that Ernstmeyer was entitled to return of his earnest money. Ernstmeyer appeals.²

¹ This appeal is expedited under Rule 809.17, STATS.

² Putze does not cross-appeal from that part of the judgment that directs him to return

Specific performance is an equitable remedy and we will not disturb the trial court's judgment unless it erroneously exercises its discretion. *Edlin v. Soderstrom*, 83 Wis.2d 58, 70, 264 N.W.2d 275, 281 (1978). The trial court properly exercises its discretion if it provides a reasonable basis for its decision. See *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987).

Ernstmeyer asserts that the trial court erred because the test is not whether he met his burden of proof or persuasion, but whether specific performance is fair under the circumstances. Ernstmeyer claims entitlement to specific performance because "there were no legal or factual considerations which would have made the granting of specific performance unfair, unreasonable or impossible, and, therefore, specific performance of the contract to convey land should have been granted as a matter of course." *Anderson v. Onsager*, 155 Wis.2d 504, 520, 455 N.W.2d 885, 892-93 (1990). However, that was not the reason for reversing the trial court's denial of specific performance in *Anderson*. *Anderson* was reversed because the trial court erroneously exercised its discretion in declining to apply the contract to the relevant facts. *Id.* at 514, 455 N.W.2d at 890.

The trial court did not err by requiring Ernstmeyer to bear the burden of proof or persuasion because the party seeking judicial intervention bears that burden. *Loeb v. Board of Regents*, 29 Wis.2d 159, 164, 138 N.W.2d 227, 230 (1965). The trial court concluded that Ernstmeyer, as the counterclaimant, bore the burden to persuade it that he was entitled to the equitable remedy of specific performance.

"The court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case; that was one of the great virtues and reason for the existence of courts of equity." *American Medical Servs., Inc. v. Mutual Federal Savings & Loan Ass'n*, 52 Wis.2d 198, 205, 188 N.W.2d 529, 533 (1971) (footnote omitted). The trial court refused to grant the equitable remedy of specific performance because Ernstmeyer "chose to proceed surreptitiously, being justifiably concerned that Putze would learn of the value of the timber and seek to revoke the agreement. Obviously, Ernstmeyer faced a

(.continued)
the earnest money.

dilemma--but it was a dilemma that existed as a result of his own machinations." The trial court concluded that Ernstmeyer had not persuaded it that he was entitled to the equitable remedy of specific performance. It based its conclusion on Ernstmeyer's misrepresentations to Putze about how he intended to use the land, knowing that those intentions were significant to Putze's decision to sell.³

The trial court refused to invoke an equitable remedy for these parties who, it claimed, "deserve[d] one another." Instead, it properly exercised its discretion in providing a reasonable basis for its decision to dismiss the counterclaim.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

³ Had we intended to adopt Ernstmeyer's position that the fraud was obviated because there was no damage, we would not have expressly directed the trial court to consider Ernstmeyer's fraud on remand, already having recognized that Putze suffered no damage. *Putze v. Ernstmeyer*, No. 94-0918-FT, unpublished slip op. at 4-6 (Wis. Ct. App. Aug. 18, 1994).