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DISTRICT IV

March 9, 2023

To:

Hon. Bennett J. Brantmeier
Circuit Court Judge
Electronic Notice

James E. Bartzen
Electronic Notice

Cindy Hamre Incha
Clerk of Circuit Court
Jefferson County Courthouse
Electronic Notice

Gerald Stevenson
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP2213

Rebecca Britzke v. Gerald Stevenson (L.C. # 2019CV419)

Before Fitzpatrick, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

This action concerns the ownership and division of real and personal property that Gerald Stevenson and Rebecca Britzke accumulated during their domestic partnership, which lasted almost 30 years and produced two children. Stevenson, pro se, appeals an order entered by the circuit court following a bench trial that divided the proceeds from the sheriff's sale of the couple's real property and determined the ownership and division of their personal property. He also challenges the circuit court's pre-trial order for partition and sale of the real property, and its decision to grant partial summary judgment in Britzke's favor, the effect of which was to dismiss Stevenson's counterclaims. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

In February 2019, following the dissolution of their domestic partnership, Britzke moved out of the house that she and Stevenson jointly owned. Britzke removed some items of personal property from the house when she moved out, but she was unable to remove all of the items she claimed as personal property because Stevenson changed the locks and denied her access.

Britzke filed a complaint against Stevenson alleging unjust enrichment, seeking one-half of the value of the real estate, as well as a division and return of personal property. Stevenson counterclaimed for unjust enrichment and conversion. The counterclaims were based on Stevenson's allegation that Britzke had been unjustly enriched by the money he had deposited into the parties' joint account to pay his share of household expenses, and his allegation that Britzke had used money in that account for her own benefit, thereby converting it. Britzke twice amended her complaint, dropping her claim for unjust enrichment and adding claims for partition of real and personal property.

In April 2021, Britzke filed a motion asking the circuit court to order partition and sale of the real estate. Stevenson opposed the motion, arguing that the issues he raised in his counterclaims had not been addressed, and that the court should wait until after the scheduled trial to decide the partition action. The court granted Britzke's motion and ordered the sale of the real property by sheriff's sale. Stevenson was the successful bidder at the sale.

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

Britzke then moved for partial summary judgment dismissing Stevenson’s counterclaims. The circuit court granted the motion during the pretrial hearing and the case proceeded to a bench trial on the remaining issues in November 2021. The issues addressed at trial included the appropriate division of the proceeds from the sheriff’s sale of the real property, and the ownership and division of personal property.

Following the trial, the court issued an order dividing the proceeds from the sale of the real property and deciding which items of personal property belonged to each party. Stevenson appeals.

On appeal, Stevenson appears to challenge many of the legal determinations that the circuit court made pre-trial, and many of the factual and credibility determinations that the court made post-trial. A significant deficiency in Stevenson’s appellate briefing is that he fails to provide citations to legal authority or to the record. We make some allowances for the failings of litigants who, as here, are not represented by counsel, but “[w]e cannot serve as both advocate and judge” by “making an argument for the litigant.” See *State ex rel. Harris v. Smith*, 220 Wis. 2d 158, 165, 582 N.W.2d 131 (Ct. App. 1998). In other words, it is not the role of an appellate court to take the raw materials that Stevenson has provided and try to fashion them into a developed argument that might or might not demonstrate circuit court error. In this case, however, Britzke’s briefing helpfully identifies the issues that Stevenson may be challenging; identifies the standard of review, legal authority, and record citations for each issue; and explains why Stevenson’s arguments are unavailing. Therefore, despite the deficiencies in Stevenson’s briefing, we are not being asked to develop the arguments for any party.

In the analysis that follows, we briefly explain our reasons for agreeing with Britzke's assessment of this appeal.

First, Stevenson argues that he was entitled to a jury trial on Britzke's claims for partition and on his counterclaims. He points out that he demanded a jury and paid the jury fee. However, partition actions are proceedings in equity, *Klawitter v. Klawitter*, 2001 WI App 16, ¶7, 240 Wis. 2d 685, 623 N.W.2d 169 (Ct. App. 2000), and Stevenson does not demonstrate that he had a right to a jury in an equitable proceeding. See *Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.*, 128 Wis. 2d 279, 288-89, 381 N.W.2d 601 (Ct. App. 1985). Stevenson might have been entitled to a jury trial on one or both of his counterclaims, except that those counterclaims were properly dismissed on summary judgment, as discussed below.

Second, Stevenson challenges the circuit court's partition order. A court order partitioning property is reviewed for an erroneous exercise of discretion. *Klawitter*, 240 Wis. 2d 685, ¶8.

Stevenson and Britzke were joint tenants and, under WIS. STAT. § 842.02, a joint tenant may sue for partition as a matter of right. *Schneider v. Schneider*, 132 Wis. 2d 171, 176, 389 N.W.2d 835 (Ct. App. 1986) ("The right of a cotenant to partition and convey his or her interest in real property is favored in the law; it is often said to be a matter of right."). Stevenson argues that the circuit court should have removed Britzke's name from the deed as a remedy for her alleged breach of oral agreements with Stevenson regarding the payment of household expenses, but Stevenson has not provided any legal authority to support his assertion that removal of a joint tenant's name from a deed is a viable remedy for breach of contract, nor did he persuade the

court that Britzke breached any contract. We conclude that Stevenson has not identified any erroneous exercise of discretion.

Third, Stevenson challenges the circuit court's grant of summary judgment dismissing his counterclaims for unjust enrichment and conversion. We review the grant of summary judgment de novo, applying the same methodology as the circuit court. *Ackerman v. Hatfield*, 2004 WI App 236, ¶9, 277 Wis. 2d 858, 691 N.W.2d 396.

Based on our review of the summary judgment filings, we agree with the circuit court's conclusions that Stevenson's response to the motion did not identify any genuine dispute of material fact and that Britzke was entitled to judgment as a matter of law on both of Stevenson's counterclaims.² See WIS. STAT. § 802.08(2). As to the unjust enrichment counterclaim, the circuit court properly found that Stevenson had no evidence to support his conclusory assertion that the money he had deposited into the joint account was more than what was needed to cover Stevenson's share of household expenses, and that the conversion counterclaim failed on the same basis. Stevenson argues that he was unable to provide this evidence because he did not use the joint account, and that the circuit court should have ordered Britzke to provide an accounting of the money from the joint account that she used to pay household expenses over the nearly 30-year partnership. We conclude that the circuit court properly rejected this argument, which was not supported by legal authority, and dismissed the counterclaims.

² In his appellate briefing on this issue, Stevenson may be relying on evidence that was introduced at trial, after the circuit court considered the summary judgment evidence and granted summary judgment on the counterclaims. As Britzke explains, any such evidence was not a part of the summary judgment record and we do not consider it in our independent review of the circuit court's grant of partial summary judgment.

Fourth, Stevenson challenges the circuit court’s post-trial division of the proceeds from the sheriff’s sale of the real property. The court divided the proceeds equally, rejecting all of the adjustments claimed by both parties except for an adjustment of \$8400 to account for Britzke’s share of the rent that Stevenson had charged for the property after she moved out.

We will affirm the circuit court’s exercise of discretion if it “examined the relevant facts, applied a proper standard of law, [and used] a demonstrated rational process” to reach a reasonable conclusion. *Franke v. Franke*, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832 (internal citation omitted). In allocating the proceeds, the circuit court followed the presumption in *Jezo v. Jezo*, 23 Wis. 2d 399, 406, 127 N.W.2d 246 (1964), that joint tenants who have an equal interest in property will split the proceeds equally, and the adjustment the court made to account for the rent was supported by legal authority and the evidence. *See* WIS. STAT. § 700.23(2). We reject Stevenson’s arguments to the contrary and conclude that the court did not erroneously exercise its discretion.

Finally, Stevenson challenges the circuit court’s post-trial determinations about the ownership and division of the parties’ personal property. These determinations were based on the court’s findings of fact and credibility determinations. Stevenson takes issue with these findings and determinations, and he asks us to find other facts on appeal, but that is not the role of an appellate court. The circuit court is the “ultimate arbiter” of the credibility of witnesses, *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998), and the court of appeals does not find facts, *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155

(1980). Stevenson has not shown that the circuit court made any clearly erroneous findings about the ownership of the personal property at issue.³

We now turn to Britzke's motion seeking sanctions for this appeal pursuant to WIS. STAT. RULE 809.25(3). Britzke argues that the appeal is frivolous under the standards set forth in RULE 809.25(3)(c)1. (allowing an award of costs and fees, including reasonable attorney fees, if the appeal was filed, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another) and RULE 809.25(3)(c)2. (allowing those same sanctions if an appeal is without any reasonable basis in law or equity and not supported by a good faith argument for an extension, modification, or reversal of existing law). We may not award sanctions under RULE 809.25(3) unless an entire appeal is frivolous. See *Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621.

Britzke's motion presents a close call for this court. Many of Stevenson's arguments on appeal are that the circuit court should have made different inferences following the bench trial to resolve the parties' genuine disputes of fact. The circuit court could have accepted Stevenson's version of the facts following the trial and, on appeal, Stevenson makes colorable arguments as to why the court should have done so. Stevenson's appeal ultimately fails because of the deferential standard of review that we use when reviewing a circuit court's findings of fact, but, based on the allowances we extend to pro se appellants and our consideration that the

³ To the extent that Stevenson's briefing attempts to raise other issues not specifically addressed in our analysis, we conclude that any such arguments are inadequately developed and do not require consideration by this court. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

nuances of appellate standards of review can be difficult for even some lawyers to grasp, we conclude that Stevenson's appeal is not entirely frivolous. We therefore deny Britzke's motion.

IT IS ORDERED that order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Britzke's motion for sanctions in the form of costs, fees, and reasonable attorney fees is denied.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals