

Recent Case Law

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Introduction

In this ever-changing real estate industry, it is important for REALTORS® to keep abreast of new developments. For example, in recent *Legal Updates* we have addressed the new commercial lien law and forms, the new residential rental practice rules and forms, and other new legislation, as well as the Department of Regulation and Licensing (DRL) revisions to the approved residential listing and offer to purchase forms. It is also important, however, to keep current with the new developments in the courts.

Reviewing recent court decisions permits REALTORS® to see how the courts are interpreting real estate laws and administrative rules, and if they are applying them as we understand them to be intended. The evolution of the common law, that is, the law that comes from the courts over time, should also be monitored. This body of law shifts and changes as standard legal principles are applied to the new situations presented in our rapidly changing world.

Accordingly, this *Update* reviews recent real estate-related decisions from the Wisconsin Court of Appeals

and the Wisconsin Supreme Court. The cases discussed in this issue cover topics such as “takings,” vested rights, zoning, offers and contract law, misrepresentation, deed and land descriptions, access easements, landlord/tenant law, timber trespass, partition by sale, and adverse possession.

Case Law Summaries

The following Wisconsin case law summaries overview some of the most interesting decisions from late 1998 and early 1999. Although many of these cases were not published and thus may not be cited as legal precedent, they give insight into how issues of interest to REALTORS® are treated by our judicial system.

Takings and Vested Rights

The cases in this section demonstrate the ongoing struggle in Wisconsin and across the country to find a balance between public land use and the private property rights of the individual. In takings (sometimes referred to as regulatory takings or constructive takings) cases, the issues are whether the government regulation is a proper exercise of its

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police and regulatory powers, and, if so, whether the government has so deprived the property owner of any useful purpose for his or her land that the landowner is entitled to just compensation.

In vested rights cases, the issue generally is whether the landowner has undertaken sufficient steps in reliance upon the existing zoning so that the owner has a reasonable expectation that the zoning will not change. If so, the zoning change will not be effective with respect to that landowner's planned use.

Denial of Compensation in Temporary Regulatory Takings.
Eberle v. Dane County Board of Adjustments (Ct. App. 1998, No. 97-2869, unpublished).

The Eberles received permission from the Town of Verona to divide their 42-acre parcel into two lots for residential development, conditioned upon the Eberle's agreement that access for one of the lots would be from Timber Lane only and not from the closer Coray Lane. The Dane County Board of Supervisors adopted an ordinance rezoning the parcel to residential use and precluding access to the one lot from Coray Lane. The Eberles sold this lot and contracted to build a home for the buyers on the lot. The Eberles applied to the Dane County Board of Adjustment for a permit to build a 3,000 foot driveway from the lot to Timber Lane. The

Board denied the permit and the Eberles appealed to the circuit court.

The people who had bought the lot sued the Eberles to rescind the sale and for damages. The Eberles ended up having to repurchase the lot for \$20,000 more than the sales price. The Eberles filed an amended complaint in circuit court against the members of the Board of Adjustment, seeking damages resulting from the unconstitutional taking of their land without just compensation; damages for the denial of their due process rights during the course of the proceedings; and for attorneys' fees.


After a lengthy analysis of the Board's conclusions, the circuit court found that the Board of Adjustments had acted arbitrarily, unreasonably, and contrary to law in denying the Eberle's driveway permit. Additionally, the Board had considered ex parte communications from the DNR and visited the site without providing the Eberles with an opportunity to participate. Thus the court ordered the Board to issue the requested driveway permit to the Eberles.

With respect to their claims for damages and attorneys fees, however, the Eberles were not so fortunate. The court denied their claims against the Board members under the United States and Wisconsin Constitutions for the taking of their property without just compensation. This

decision was made despite the Eberles' contention that the denial of the driveway permit effectively landlocked their lot, rendering it useless for most, if not all, purposes. The circuit court concluded that since it had granted the primary relief the Eberles sought in granting the driveway permit, there had been no taking of their property. This decision was based upon the holding of a Wisconsin Court of Appeals case entitled Reel Enterprises v. City of La Crosse.

In the Reel case, under similar circumstances, the court held that since the courts had reversed erroneous DNR action which allegedly constituted a taking – that no taking had really occurred. The court in the Reel case indicated that there must be a “legally imposed restriction upon the property’s use” that deprives the owner of all, or practically all, of the use of the property. The court of appeals had found that since the DNR decision had been reversed in court, there had been no legally enforceable restriction on the properties in the Reel case and no taking had occurred. The Eberles argued that the Reel case is unconstitutional and contrary to both federal and Wisconsin law. The court, nonetheless, denied the Eberles' claims for compensation for the temporary taking of their land. The court also denied their claims for the alleged due process violations damages under federal law, and for attorneys' fees.

This case is currently on appeal to the Wisconsin Supreme Court and it is a WRA Legal Action case. The WRA has petitioned the court for permission to file an amicus curiae brief in this case.

 This interesting case illustrates an unusual application of the takings doctrine because the “taking,” resulting from the arbitrary and capricious denial of the driveway permit, was

temporary - the circuit court reversed the Board and granted the permit, but only after the Eberles had lost their sale and incurred more than \$20,000 in damages and attorney's fees. The Court of Appeals decisions seem to indicate that property owners should be satisfied if the erroneous regulatory action is reversed, despite whatever losses are sustained in the interim. This position arguably encourages regulatory agencies to overregulate because the only consequence for any overreaching or arbitrary decisions is reversal - no financial penalties are assessed under the Eberle and Reel holdings.

Vested Rights in Restrictive Covenants.

Zabel v. Doepker
(*Ct. App. 1998, No. 98-1610-FT, unpublished*).

The Doepkers bought a shoreline lot in a subdivision in August 1996. The lot was subject to a restrictive covenant that prohibited boathouses and accessory buildings, and any dock or pier that extended into the channel more than 5 feet. All docks and piers were required to run parallel to the shoreline. In September, the Doepkers applied for and received the necessary permits to place riprap along the shoreline, dig out a boat slip behind the shoreline, and install a boatlift and shelter. Their neighbor attempted to block these permits, but was unsuccessful.

The riprap was in place by November 1996. In February 1997 the Doepkers received their permit from the DNR for the construction of the boat slip, and in March they signed a purchase agreement for a boatlift. In April, the Doepkers' neighbors amended the restrictive covenants. The amendment provided that no owner could dredge

a channel for the purpose of placing a boat slip or boat shelter in any lot abutting the channel. In addition, no boat slip or boat shelter was permitted to extend into the channel beyond the meander line, and boatlifts were prohibited.

The Doepkers proceeded with the boat slip project in June. By the time the neighbors filed their lawsuit to stop the Doepkers' construction in July, the project was completed except for the running of an electrical line and the placing of the boatlift. The trial court found against the Doepkers and ordered them to remove all of their shoreline improvements. The Doepkers appealed to the Wisconsin Court of Appeals.

When the court of appeals evaluated the neighbors' lawsuit to enforce the amended restrictive covenants, the court noted that the law required that restrictions against property be strictly construed in favor of the free and unrestricted use of property. It was obvious to the court that the neighbors had amended the restrictive covenants for the sole purpose of stopping the Doepkers' boat slip project. The court observed that there had been an unconscionable lack of due process in the way the amendment was enacted without any notice to the Doepkers. It was also noted that parties who seek equitable remedies such as an injunction must have clean hands.

The court first noted that although the Doepkers' dock was perpendicular and not parallel to the shore, it did not violate the covenants because it did not extend into the channel at all. With respect to the covenant prohibiting boathouses or other accessory buildings, the court concluded that the boat slip and lift are not buildings. The boat shelter, however, was found to be a building in violation of the original covenants and the Doepkers were ordered to remove it.

With respect to the amended covenants, the riprap was deemed a permitted nonconforming use because it had been installed before the covenants had been amended. As to the other improvements, the court was persuaded by the Doepkers' vested rights argument against the enforcement of the amended covenants. The vested rights doctrine is recognized by Wisconsin courts in the context of determining the effect of amendments to zoning ordinances. Because restrictive covenants are a form of private exclusionary zoning, the court found that the vested rights doctrine applied as they evaluated the effect of the amendments to the covenants.

Under the vested rights doctrine, the rights of landowners to continue to use their property are protected. Owners are permitted to obtain the benefit of ordinances that are in effect at the time that they apply for permits and take other actions in reliance upon the ordinances. The theory is that landowners may proceed on the basis of their reasonable expectations. By taking concrete actions in reliance upon the then-existing ordinances, owners preserve their rights to the benefits of those ordinances and are not bound by subsequent changes. Wisconsin owners who take actions such as applying for permits, making expenditures, and incurring contractual obligations have been found to have the right to proceed based upon their vested rights.

The Doepkers had obtained the permits for the boat slip project and entered into a contract for the purchase of the boatlift before the covenants had been amended. Thus the court concluded that the Doepkers' right to complete the boat slip project was vested prior to the adoption of the amended covenants.

✍ This case is notable because the court applied the vested rights doctrine, which is generally

applied in situations involving amendments to zoning ordinances, to private restrictive covenants. The case confirms that a property owner must take some concrete, verifiable action in reliance upon an ordinance or restriction in order to benefit from the vested rights doctrine.

Zoning

The case in this section looks at the State v. Kenosha County Board of Adjustment standards used in determining whether a zoning variance may be granted.

No Feasible or Reasonable Use as Standard for Granting Variances.

State of Wisconsin v. Outagamie County Board of Adjustments (Ct. App. 1998, No. 98-1046, unpublished).

The property owners owned a 1.77-acre parcel of land within the 100-year Flood Fringe District of Outagamie County. The Outagamie County Zoning Committee granted the owners a conditional use permit to place a mobile home on the parcel because the mobile home met applicable flood proofing requirements. Four years later, the town issued a building permit to replace the mobile home with a stick-built three-bedroom ranch style home with an attached garage, but the owners did not apply for any shoreland zoning or sanitary permits. The basement floor elevation was 3.7 feet below the 100-year regional flood elevation and 5.7 feet below the Department of Natural Resources (DNR) flood protection elevation, in violation of the county ordinances and the Wisconsin Administrative Code. When the owners later

requested a permit from the zoning department to add a sunroom to the home, their application was denied because the home violated the DNR flood protection elevation requirements.

The owners sought a variance from the board of adjustments for the addition of the sunroom and an “after-the-fact” variance for their nonconforming basement floor elevation. The DNR appeared at the hearing on the variance petition to oppose the variance. The board, however, granted the variance, reasoning that the owners experienced a hardship due to the negligence of the town in issuing the building permit for the home. The state appealed to the circuit court, which affirmed the decision of the board, so the state appealed to the court of appeals.

The tone of the court of appeals opinion is apologetic: “We begin by emphasizing that the applicable law compels a harsh result we would have preferred to avoid. The State pursues this matter presumably motivated by principle, to promote the greater public good by protecting the integrity of certain zoning ordinances. For [the owners], however, the practical effect of the State’s efforts is that we order the *certain destruction* of their basement in order to avoid the *possibility* that it may be damaged in a flood. Nonetheless, we must agree with the State’s assertion that the circuit court applied the incorrect standard of law.”

The court of appeals indicated that the circuit court had applied the wrong test for proving unnecessary hardship, only requiring that the owners show that enforcement of the county zoning ordinances was unnecessarily burdensome.

Citing to the State v. Kenosha County Board of Adjustment case,

the court stated that the owners must prove unnecessary hardship by showing (1) no feasible or reasonable use can be made of the land without the variance, (2) there is a unique condition affecting the parcel, and (3) the variance is not contrary to public interest. The court observed that the owners had previously had a mobile home on the parcel and that they could have constructed a single family home with a flood proofed basement that complied with applicable codes. The court also noted that the restrictions at issue applied to all parcels in the area and that a few landowners had successfully built homes on their land. Reliance upon the town’s negligence was found to be unacceptable as a hardship because municipalities may still enforce their zoning codes even if a building inspector issues a permit for a structure the ordinance forbids. Finally, the court stated that issuance of the variance would violate the DNR flood protection elevation rules on its face. Accordingly, the court of appeals reversed the judgment of the circuit court.

✍ This case clearly illustrates that a “build first, ask later” approach can have disastrous consequences. It also confirms that the courts are now enforcing the “no feasible use” standard for granting variances that was established in the State v. Kenosha County Board of Adjustment case.

Offers and Contract Law

Different contract law issues come up almost every day for REALTORS® working with various offers to purchase. One of the cases described in this section looks at the result when a buyer buys a property “as is” after having been notified of existing property defects. Another case establishing an implied warranty of

fitness in the contract for the purchase of a home or a condominium unit from the builder/seller is also reviewed.

Closing Constitutes Waiver of Buyer's Claims.

Lunde v. Chase

(Ct. App. 1999, No. 98-0716, unpublished).

In a recent Wisconsin Court of Appeals case, the home buyer did not receive the seller's Real Estate Condition Report (RECR) until over a month after the offer had been accepted. The RECR disclosed 13 different defects, including structural defects and remodeling that had been performed without the requisite building permit. In the additional information section of the RECR, the sellers indicated that the sale was "as is." The transaction closed less than two weeks after the buyer signed the RECR to acknowledge his receipt of the report.

After closing, the drywall began to crack and the ceiling began to cave in, due to missing support beams and floor joists. After other equally serious defects were discovered, the buyer was forced to raze the structure. The cost of repairs exceeded the value of the house. The buyer sued the seller for breach of warranty, breach of contract, and misrepresentation.

The court of appeals noted that the buyer had the right to rescind the offer to purchase based upon the defects disclosed in the RECR, per Wis. Stat. § 709.05(1). The buyer instead had proceeded to closing. The court indicated that the law clearly provides that a party who proceeds with a real estate purchase, despite his or her awareness of a defect, waives any claims based upon warranties and representations relating to the disclosed defect. The purpose of the RECR and Wis. Stat. Chpt. 709 is to

give the buyer the opportunity to make an informed decision about whether to proceed to closing, seek amendments to the contract to address the defect, or rescind the contract. Once the buyer went forward and closed, he lost the right to claim justifiable reliance on any of the seller's representations that were contrary to the defects disclosed in the RECR. Accordingly, the court of appeals affirmed the court's judgment dismissing the buyer's complaint.

✍ This case emphasizes the importance of referring buyers to legal counsel before closing a transaction if the buyer has notice of any defects that are not being effectively addressed in the offer or in some other way. REALTORS® in this type of situation should urge the buyer to work with an attorney to determine what course of action will best protect and preserve the buyer's legal rights. The buyer will likely lose all rights if the buyer closes before addressing the disclosed defects.

Implied Warranty of Fitness from Builder/Seller.

Shisler v. Frank

(Ct. App. 1998, No. 97-2310, unpublished).

Three separate buyers each bought a condominium unit from the general contractor who had built them. After closing, the unit purchasers found that the basement in each of the condominium units flooded when it rained, bringing water, mud and sand into the basement. The unit owners tried many times to get the seller to address this problem. When he was unresponsive, the owners obtained bids from waterproofing contractors. Eventually they had one waterproofing contractor waterproof all three basements, and wrote to the

seller asking for reimbursement of the total cost (\$4,100). When the seller refused to pay them, the unit owners sued the seller in small claims court.

The court found that there was an implied warranty of suitability for purpose in the common (case) law, that there was such a warranty in the purchase contract for a new home, and that the seller had breached that implied warranty. People who buy homes with basements can reasonably expect to be able to use unfinished areas of the basement for storage, and to not have sand, mud and water coming in the basement after every rainstorm. Such flooding may create a health hazard, and the moisture can cause wood to rot, thus undermining the integrity of the building. The trial court held in favor of the unit purchasers and awarded them a total of \$4,175. The builder/seller appealed to the Wisconsin Court of Appeals.

The court examined the implied warranty of fitness for intended use — that the trial court had recognized — in situations where the seller of the house is also the builder. There is no published Wisconsin decision that has previously recognized such an implied warranty in a real estate transaction. There is, however, Wisconsin case law that holds that there is an implied warranty of habitability in residential leases (Pines v. Perssion), and that an owner can sue the builder for damages resulting from negligent construction (Fisher v. Simon). After examining case law from other states where the courts have held that an implied warranty arises from the builder/seller's sale of new homes, the court of appeals held that there is an implied warranty of fitness for intended use in the contract for the purchase of a home or a condominium unit from the builder/seller. Accordingly, the court affirmed the judgments of the trial court in favor of the condominium unit owners.

✍ This case demonstrates that even in the absence of specific construction warranties, buyers who purchase directly from the builder do have some protection at least against major defects. Although this case is unpublished and thus cannot be cited as precedent in other cases, it shows the trend of the Wisconsin courts away from the traditional “Buyer Beware” doctrine.

Misrepresentation

The circuit court case in this section delineates a novel remedy that a party might pursue when the other party intentionally conceals or misrepresents a defect or material fact.

Criminal Fraud Lawsuit for Misrepresentation of Basement Condition.

Griger v. Potts

(Milwaukee County Circuit Court 1999, No. 97-CV-010082, unpublished).

When the buyers purchased a home from the sellers, the sellers represented that there had been only one leak in the basement during the four years the sellers owned the house. The buyers, however, experienced serious water problems several months after they moved into the house. The buyers pursued an unusual remedy when they sued the sellers in circuit court.

Under Wis. Stat. § 895.80, a person may file a civil cause of action against a person based upon a violation of the criminal statutes. The criminal violation the sellers were alleged to have committed was a violation of Wis. Stat. § 943.20(1)(d), which relates to criminal fraud. That statute addresses situations where one

person intentionally deceives another person by making a representation that is known by the person making it to be false, that is made with the intent to defraud the other person, and that does in fact defraud the other person.

Wis. Stat. § 895.80 permits a person who suffers damage or loss by reason of intentional conduct in violation of any of a group of criminal statutes to bring a civil suit for treble damages. The person need prove his or her case by a preponderance of credible evidence, the standard typically used in civil trials. If the person prevails, he or she may recover treble damages, and all reasonably incurred costs of investigation and litigation.

In the three-day trial, the buyers had an engineer, a basement contractor, and a home inspector testify on their behalf while the sellers had only one expert witness. The jury was given the jury instructions for the criminal fraud offense, but the civil preponderance of the evidence burden of proof was used. The jury found in favor of the buyers and awarded damages in the amount of \$22,685. Pursuant to § 895.80, this amount was trebled to \$68,055, plus costs and attorneys' fees.

✍ This § 895.80 remedy for property damage or loss may benefit parties who have been the victim of another party's intentional misrepresentations. The treble damages plus costs and attorneys' fees are very attractive, but proving intentional conduct may be difficult.

Deeds and Land Descriptions

The cases in this section involve an error made during the preparation of a tax deed, and a messed-up legal description that the courts had to

resolve by reference to the intention of the parties.

Owner Regains Land Because of Errors in Tax Deed.

Thiege v. County of Vernon

(Ct. App. 1998, No. 97-0959).

Thiege failed to pay the real estate taxes due for 1990-1992 on a 19.5-acre parcel he owned in Vernon County. After following the correct procedures (tax certificate to Vernon county, notice of application for tax deed, three-month waiting period), the Vernon County Clerk executed and recorded a tax deed conveying Thiege's property to Vernon County. Unfortunately, an outdated tax deed form was used.

Thiege filed legal action challenging the validity of the tax deed. The trial court found that the tax deed was defective and void on its face. After that decision, Thiege paid the delinquent taxes and interest due in an attempt to redeem his property, but the court subsequently permitted Vernon County to record a correction deed to reform the deficiency. The court declared that the county's title to the property vested as of the date the original deed was recorded. Thiege appealed to the court of appeals. The court of appeals first sought to determine whether the original tax deed was in fact void. The form for tax deeds is set forth in Wis. Stat. § 75.16. The court observed that a valid tax deed must substantially comply with the statutory form and show that the statutory requirements for obtaining a tax deed have been complied with. The court found that the original tax deed for Thiege's property recorded by Vernon County did not show that the county complied with the present statutory requirements for obtaining a tax deed, and instead recited compliance with an outdated,

improper procedure. Thus the court found that the tax deed was fatally defective.

The court next looked at whether the circuit court erred in allowing the correction deed to relate back to the date of the original recording. Wis. Stat. § 75.01(1)(b) permits the redemption of tax-delinquent property at any time prior to the recording of the tax deed. Since Thiege paid his delinquent real estate taxes after the recording of the defective tax deed, but before the recording of the corrective deed, the court examined case law to determine whether a tax deed must be valid in order to cut off the owner's right of redemption. The court found that to be the case. Finally, the court concluded that the trial court had no authority to authorize a retroactive amendment to the void tax deed for Thiege's property. The court consequently held that Thiege had successfully redeemed his property because he paid the delinquent property taxes before the county recorded a valid tax deed.

✍ This case demonstrates that even the government can make mistakes, and that municipalities generally do not have the power to make retroactive corrections without explicit authority.

Inaccurate Legal Description Resolved Per Parties' Intentions.

Shepard v. Retzloff

(Ct. App. 1998, No. 98-0794).

The Shepards commenced legal action against Donna Retzloff to resolve their dispute with her over the ownership of a .33 acre piece of land between the Shepard's land and the property Donna conveyed to Karen Retzloff, a relative of Donna's late husband. Donna had sold her property, including a tavern and a

ballfield, to Karen by land contract. The land contract did not contain a metes and bounds description, but instead indicated that a certified survey would be obtained to determine the legal description of the real estate sold. Karen and the Shepards then met and reached an agreement as to the west line of the property conveyed to Karen under the land contract. Karen obtained and recorded a certified survey map, and Donna used the description from that survey map when she deeded the property to Karen in satisfaction of the land contract. The Shepards had to quitclaim .001 acre to Donna so that it could be included in the deed to Karen.

The Shepards then hired a surveyor to survey their property. The surveyor believed that Donna still retained legal title to a pie-shaped parcel to the west of the western boundary of the tavern parcel conveyed to Karen. This pie-shaped parcel had not been included in the certified survey obtained by Karen nor in the legal description of the parcel deeded to Karen. Although Donna believed she had conveyed all of the tavern property to Karen, she refused to give the Shepards a deed to clarify the boundary.

The Shepards then brought legal action against Donna to extinguish any legal title that she had in the pie-shaped parcel. The trial court concluded that Donna owned the disputed parcel. The Shepards appealed to the court of appeals, which concluded that Donna conveyed the disputed parcel to Karen upon her execution of the land contract to Karen.

The court began its analysis by looking at the law relating to land contracts. Wisconsin law makes it clear that the land contract vendor (seller) merely holds legal title as security for the payment of the unpaid

purchase price. The vendor's interest is considered to be personal property and not real estate. The land contract vendee (buyer), on the other hand, has full rights over the land from the date of the land contract, and is regarded as the real owner of the real estate for a variety of purposes. Thus all interest in the real estate subject to the land contract transferred from Donna to Karen upon their execution of the land contract for the tavern property.

Unfortunately, the legal description in the land contract was ambiguous. The court determined that it was proper, in such circumstances, to consider outside (extrinsic) evidence to show what property the parties intended to convey. Thus the question of whether the land contract conveyed the disputed parcel was determined by reference to the intention of the parties. The parties' testimony clearly established that Donna always intended to convey the entire parcel surrounding the tavern, including every bit of it south of the disputed northern boundary. Therefore, the court found that Donna conveyed whatever interest she had in the disputed parcel to Karen via the land contract. The legal title she retained until the contract was paid in full was extinguished when she deeded the tavern property to Karen in satisfaction of the land contract. Hence, the court held that Donna had no rights in the disputed property and the judgment of the trial court was reversed.

✍ This case highlights the importance of using correct and exact legal descriptions in conveyances of real estate. A great deal of time, effort and money would likely have been saved if the parties had had the tavern parcel, and, better yet, both parcels, surveyed before proceeding with the land contract and deed. This case also illustrates how the courts will refer to the intent of the parties

when a provision they are attempting to interpret is ambiguous.

Access Easements

The cases in this section deal with easements by necessity and prescriptive easements (by adverse possession). An easement or way by necessity arises when a landowner conveys a portion of his or her land that is landlocked to another. It is necessary that the new owner have access to the public road, and the law will imply the same over the remaining land of the first landowner. On the other hand, a prescriptive easement, or an easement by adverse possession, arises per Wis. Stat §893.28 after 20 years of continuous adverse use. A related theory is the easement by implication which also requires prior use. The cases illustrate the terrible messes created when people buy or sell real estate without first considering the issue of access.

No Easement by Implication or by Necessity.

Schwab v. Timmons
(*Sup. Ct. 1999, No. 97-1997*).

The owners and the neighbors all own property on Green Bay in the Village of Ephraim in Door County. To the west of these properties is Green Bay and to the east is a bluff, which ranges from 37 to 60 feet tall. The United States owned all of the properties prior to 1854, and did not retain any rights-of-way when it sold off various lots. At that time, however, the lots included property above the bluff that abutted a public roadway. The owners' lots originally included the area above the bluff, which has access to the public roadway. The owners, however, sold the areas above the bluff to third parties, leaving the owners with only

the land below the bluff. The owners claimed that their only access is over the road that runs over most of the neighbors' lots.

Negotiations for an agreement to extend the road to the owners' lots failed. The owners petitioned the village for access to the road under Wis. Stat. § 80.13, but the village declined their request, finding that extending the road was not in the public's best interest. The owners then commenced legal action for a declaratory judgment establishing an easement by necessity or by implication over the existing private road for ingress-egress and public utilities. The circuit court granted the neighbors' motion to dismiss, finding that the historical circumstances did not give rise to an easement by implication or by necessity. This judgment was affirmed by the court of appeals, and the owners appealed to the Wisconsin Supreme Court.

The court first reviewed the law of easements. An easement is a privilege in lands existing distinct from the ownership of the lands. With an easement there is a dominant estate, which enjoys the privileges granted by the easement, and the servient estate, which permits the exercise of those privileges. An easement can be used only in connection with the real estate to which it belongs.

An easement by implication arises when there has been a conveyance of part of a property, and a use before the conveyance took place that was so obvious and continued for so long so as to show that it was to be permanent. An easement by implication must be necessary for the beneficial use of the land that is sold or the land that is retained. The court found that the circumstances did not warrant an easement by implication for the owners because they never enjoyed the use of the private road that they now want the right to use.

The claim that the owners' property is landlocked and that their use and enjoyment is permanently impaired without access better resembles a claim for an easement by necessity, the court observed. An easement by necessity arises when an owner creates a landlocked parcel by conveying a portion of his or her land to another and retaining the portion that would have provided access. The owner of the portion conveyed is left without access to a public roadway. If this scenario is established, a way of necessity can be implied over the portion of the land retained by the original owner.

The owners looked back to the ownership by the United States prior to 1854 to establish the application of this theory to their lots. However, at the time that the United States conveyed the lots, the lots included the area above the bluff, which did provide access to a public road. The United States would have to have conveyed a landlocked parcel in order to create an easement by necessity.

The owners insist, however, that the area below the bluff was effectively landlocked because of the geographical barrier imposed by the bluff and rocky terrain. The court indicated, however, that Wisconsin courts have never recognized geographical barriers alone as circumstances warranting an easement by necessity. The "law will not imply such a way where it has provided another method for obtaining the same at a reasonable expense to the landowner." While the owners established that it would cost around \$700,000 to build a road over the bluff, they refused to consider access by a stairway or an elevator as acceptable.

The court noted that a landowner is not really landlocked when he or she has difficulty in getting to a public roadway as long as he or she can get from his or her land to the road. In this

case, the owners had access, albeit not ideal access, to the public road which they chose to sell off to others. The owners did not sell landlocked parcels to others but rather retained lots which they claim to be landlocked, so an easement by necessity is not created by those sales — an easement by necessity may be implied for a landlocked parcel sold to another, but not for a landlocked parcel retained by the original owner. Accordingly, the court affirmed the judgment of the court of appeals dismissing the owners' declaratory judgment action.

✍ This case emphasizes the need for landowners to always consider access when selling parcels to others and retaining the balance for themselves. Easements can be readily established at the time of sale, but are difficult to create after the fact.

Prescriptive Easement by Adverse Possession.

Kirner v. Froese

(Ct. App. 1998, No. 97-2305, unpublished).

The Froeses purchased land that was not accessible by public road, but they thought there was an easement over the adjoining farm owned by the Kirners. There was no recorded easement, but the prior owners had been using a field road across the Kirner's land since the 1950's. The Kirners objected, however, to the Froeses' claim based upon adverse possession because there was no evidence of the "hostility" needed to establish adverse possession.

A prescriptive easement is created by adverse possession when a person uses land in a manner that is hostile, visible, and open, under an open claim of right, in a continuous and uninterrupted way for a period of at least 20 years. "Hostility" merely

requires that the use is inconsistent with the titleholder's rights. The court of appeals agreed with the trial court that the prior owner of the Froese's land did not believe that he had permission to use the roadway over the Kirner farm, but rather erroneously believed that there was an easement allowing him to use the field road. Even though the prior owner only used the road about 20 times a year, his usage was consistent with his use of his land for recreational and personal purposes.

The trial court found that the prescriptive easement created by prior use for recreational and personal purposes, could be used by the Froeses for those same purposes, even though the field road had been widened and improved since the prior owner's use. It would be impractical, the court noted, to confine the Froeses' use to the original 10-12 foot width. Thus the court of appeals affirmed the judgment of the trial court confirming a prescriptive easement over the improved field road in favor of the Froeses.

✍ This case provides a useful example of an easement created by adverse possession.

Easements by Necessity.

Richards v. Lone Star Group, Inc.

(Ct. App. 1999, No. 98-1983).

Richards acquired a 34-acre triangular shaped parcel that has no access to a public road. A railroad track divided the parcel into two portions, one immediately adjacent to the Mississippi River (river frontage property) and the other lying east of the tracks (river bluff property). The Petersons owned the neighboring parcel and gave Richards access to the river bluff property in exchange for Richards permitting the Petersons to farm part of Richards' land. To reach the river front property, Richards

drove down a second road on the Petersons' property part of the way and then walked the rest of the way, going under the railroad overpass. Richards' access was cut off when a developer bought the Petersons' parcel in 1996.

Richards went to court to obtain an easement to the river bluff property and an easement to the river frontage property. An easement by necessity arises when an owner creates a landlocked parcel by conveying a portion of his or her land to another and retaining the portion that would have provided access. The owner of the portion conveyed is left without access to a public roadway. If this scenario is established, a way of necessity can be implied over the portion of the land retained by the original owner.

The trial court granted an easement of necessity for ingress and egress to the river bluff property, restricting it to 16 1/2 feet in width and denying Richards the right to install utilities along the easement. The trial court denied Richards' request for a second easement to the river frontage property. Richards appealed to the court of appeals, arguing that he should be entitled to run utilities along the river bluff easement, that the river bluff easement should be at least 50 feet wide, and that an easement of necessity should be granted to provide access to the river frontage property.

The court of appeals first examined the law of easements. The court noted that an easement is an interest in land in the possession of another. An easement creates two distinct property interests: the dominant estate, which enjoys the privileges that the easement grants, and the servient estate, which permits the dominant estate to exercise the granted privileges.

Utilities Along Easement to River Bluff Property

With respect to the utilities issue, Richards argued that an easement of necessity must include all that is reasonably necessary for the full enjoyment of the easement, including utilities. The court reviewed recent case law where the court held that an easement for access encompassed utilities as long as the easement language did not limit the easement to ingress and egress. The trial court, however, had granted Richards an easement by necessity for ingress and egress only, causing the court of appeals to examine the general principles regulating the granting of a way (easement) of necessity.

The court recited that a way of necessity is that which is required for the complete and beneficial use of the land to which it attaches. It is available for any and all purposes to which the dominant estate may be adapted in the present and the future. What is necessary may change over time. Today, the court noted, electric and telephone service are considered to be necessary for the reasonable enjoyment of a property, provided that the installation of the utilities does not create an unreasonable burden on the servient estate. Accordingly, the court of appeals reversed the portion of the trial court's judgment that denied the installation of utilities along the river bluff easement and remanded the case to the trial court to determine to what extent utilities can reasonably be incorporated in the court's grant of an easement by necessity.

Width of Easement of Necessity to River Bluff Property

Richards argued that the way of necessity granted for access to the river bluff property should be at least 50 feet wide instead of the 16 1/2 foot easement established by the trial court. The court of appeals remarked that it was in the discretion of the trial court to determine the easement's

burden on the servient estate. However, to the extent the trial court focused on prior use to determine the easement's width, the court found that the trial court had erred. The scope of ingress/egress ways of necessity may reasonably increase as the dominant estate's necessary and reasonable needs change over time. For instance, Richards' planned use to build a retirement home should be considered. Thus the court of appeals remanded the issue of the appropriate width for the way of necessity to the river bluff property to the trial court for further consideration.

Easement of Necessity to the River Frontage Property

Richards insisted that access to the river bluff property was not a substitute for access to his river frontage property since his property, in effect, was really like two separate and distinct parcels. He urged that a way of necessity also be granted to provide access to that portion of his land. It was noted, however, that Richards knew there was no access when he bought the property, Richard's property was no longer landlocked because of the granted river bluff easement, and the additional easement would unreasonably burden the neighbors' property.

To establish an easement by necessity, the party seeking the easement has the burden to prove (1) prior common ownership in the two parcels involved, and (2) that the property is truly landlocked. Richards argued that once these elements have been demonstrated, the trial court must grant the easement, retaining discretion only as to location and scope. On the other hand, other case law suggests that the trial court retains discretion over whether to grant or deny the easement. This disagreement is understandable, the court remarked, because the appellate courts have been unclear in this regard.

The court of appeals noted that Richards was asking for the right to pass over another's property. His request was not based upon a statutory or contractual right, but rather was based upon equity. The basis for equitable rules is the application of discretion. Accordingly, the court of appeals concluded that even if a party establishes all of the necessary elements for the equitable relief sought, a court of equity still retains the discretion to grant or deny relief. The court may assess the situation as a whole and deny relief if there are compelling equitable reasons for that decision, e.g., the overburdening of the servient estate.

In Richards' case, the river frontage property was essentially a walking beach area of about 1,000 square feet that is accessible generally only in the summer. The trial court had thought it inappropriate to burden the adjacent parcel with a mile-long car access easement to serve such a use. Additionally, Richards did have actual access over the bluffs, as difficult as that may seem. For these reasons, the court of appeals agreed with the trial court and affirmed that portion of the judgment denying an easement of necessity to the river-front property.

✍ This case is significant because of the willingness of the court of appeals to extend easements by necessity to include utility service, and to deny an easement of necessity when the total circumstances did not warrant it.

Landlord Tenant Law

The cases in this section involve both residential and commercial rental property issues. Some of the cases involve somewhat unusual scenarios such as a periodic crop lease and a gas station lease. The issues covered include the termination of tenancy,

the return of security deposits, and the mitigation of damages.

Termination of Verbal Agricultural Tenancy.

Boss v. Koch

(Ct. App. 1998, No. 98-1733, unpublished).

The Kochs rented agricultural land from the Bosses since around 1991 or 1992 when the Bosses first purchased the land. The Kochs had been renting the cropland from the previous owner, and the two agreed to continue on the same terms and conditions as before. At the end of 1995, the Bosses told the Kochs that they wanted a higher rent, to which Koch responded that he would not pay more. Boss said if Koch would not pay more, Boss would rent the land to somebody else or put the land in the CRP program. No agreement was reached and Boss understood the tenancy to be over.

Boss sued Koch for unpaid rent, and Koch counterclaimed, arguing that Boss unlawfully terminated the tenancy and that Koch was entitled to damages. The trial court concluded that Koch terminated the tenancy when he rejected Boss' demand for more money. If Boss did unlawfully terminate the tenancy, the trial court noted, Koch was entitled to no damages because Koch did not attempt to mitigate his damages by going out and trying to find replacement land in a timely manner.

The court of appeals found that the parties originally had an oral lease for one year per Wis. Stat.

§ 704.01(1). When that first year expired, the tenancy became a year-to-year periodic tenancy when Koch held over per Wis. Stat. § 704.25. In a year-to-year periodic tenancy, the parties can continue to abide by the terms of the periodic tenancy, agree to change the terms of the tenancy, or one of them can give a 90-day written

notice of termination per Wis. Stat. § 704.19. A 90-day written notice is required in a year-to-year agricultural tenancy.

The court of appeals concluded that when Boss told Koch he would rent to someone else or put the land in the CRP program, that Boss terminated the tenancy. It was Boss who was dissatisfied and spoke of ending the tenancy. This raised the issue of whether this termination was lawful because no written notice was provided as required by § 704.19(2)(a) 1. Although the statute says that no written notice of termination is necessary if the parties have agreed upon another method of termination, the court found no evidence of any such agreement. The oral notice was insufficient because the statute requires written notice.

With respect to Koch's claim for damages, mitigation of damages is a defense that must be proved by the breaching party, in this case, Boss. While Koch cannot recover any damages that he could have avoided by seeking a substitute rental, the burden is on Boss to show that a substitute rental of comparable land was available at the same price. The court, however, found no evidence that Koch would have been able to find replacement land by acting more quickly or that he could have done so at a comparable price. Hence the court concluded that Boss unlawfully terminated the tenancy by failing to provide written notice, and that Boss did not show that Koch failed to mitigate damages. The case was remanded to the circuit court for a determination of Koch's damages.

✍ This case is interesting because it illustrates the notice that is needed to terminate a year-to-year agricultural tenancy.

Proof of Return of Security Deposit.

Ostovich v. Sanderson

(Ct. App. 1998, No. 98-0260-FT, unpublished).

The tenant paid a \$1,000 security deposit when she and the landlord entered into a residential lease. When her tenancy terminated on July 31, 1997, the tenant vacated the premises. As of September 10, 1997, the tenant had not received an itemization statement regarding her security deposit.

The tenant sued the landlord, alleging a violation of Wis. Admin. Code § ATCP 134.06. The landlord responded that when the tenant had vacated he asked her for her new address so that he could mail her security deposit and/or itemization statement. The tenant declined and told him to mail it to her at the rental property address. The landlord maintained that he mailed a check for part of the security deposit and a list of damages to the tenant on August 21, 1997, but neither the check nor the letter was ever returned to him. The tenant insisted that she had never received a check or itemization of damages. Thus the central issue was whether the security deposit was mailed within the 21-day time period required by the rule. This, in turn, depended upon the competing credibility of the two parties.

The trial court chose to believe the tenant. The court of appeals noted that the trial court was in a better position as a fact finder to assess the competing credibility of the witnesses. Accordingly, the court of appeals affirmed the circuit court's decision.

✍ This case illustrates that landlords and property managers may be well served to document the mailing of security deposits and damage itemization

statements. To avoid being placed in a “he said - she said” match in court, the landlord can obtain a certificate of mailing from the post office when security deposits and itemization statements are mailed out. For 55 cents, it is cheap insurance against tenants who claim they did not receive the landlord’s letter.

Termination of Commercial Month-to-Month Tenancy.

Kaleka v. Bhardwaj

(Ct. App. 1998, No. 98-1018-FT, unpublished).

In February 1997, lessee began negotiations with the owner of a gas station in Sturtevant, Wisconsin to purchase the gas station. When the closing was delayed, an amendment to the purchase contract was prepared that said the lessee would take possession of the gas station and operate it until the closing problems were solved. The amendment provided that the lessee would pay monthly rent in the amount of \$4,191.73, commencing May 1, 1997.

In December, the lessee failed to pay rent. The owner served a 14-day notice to terminate the lessee’s tenancy on February 18, 1998. When the lessee did not vacate the premises, the owner began legal action for eviction and past due rent of \$12,600. The trial court found that the amendment was a lease, that the tenancy was month-to-month, and that the owner had properly served the lessee with a 14-day notice terminating the tenancy. The lessee appealed to the court of appeals.

The lessee argues that the amendment was a valid lease and established a tenancy of one year or less. Lessee argued that a tenancy for one year or less cannot be terminated by a 14-day notice unless the tenant first has been

given a 5-day notice to quit or pay rent. Thus the 14-day notice could not legally terminate his tenancy.

Wis. Stat. § 704.01(1) defines a lease as: “[A]n agreement, whether oral or written, for the transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building.”

The court observed that while the amendment had a definite starting date for lessee’s occupancy, an expiration date could not be readily determined. Accordingly, the court concluded, the amendment did not function as a lease. A tenant who holds possession of the premises without a valid lease and pays rent on a periodic basis is a periodic tenant per Wis. Stat. § 704.01(2). Since the tenant was in the possession of the gas station without a valid lease and paid rent on the first day of each month, the court concluded that the parties intended that the lessee was a month-to-month tenant.

Wis. Stat. § 704.17(1)(a) sets forth the method to be used for terminating a month-to-month tenancy: “If a month-to-month tenant or week-to-week tenant fails to pay rent when due, the tenant’s tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly. A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the giving of the notice,” In this case, the court concluded, the giving

of the 14-day notice was legally sufficient to terminate the tenant’s month-to-month tenancy. Thus the judgment of the trial court ordering a writ of restitution was affirmed.

✍ This case is useful because it emphasizes the distinction between a lease, which has definite beginning and end dates, and a periodic tenancy. While a 5-day pay rent or quit notice must first be given before a 14-day tenancy termination notice can be issued under a lease for one year or less, a 14-day notice can be used for a month-to-month tenancy without first giving a 5-day notice when the tenant fails to pay rent.

Preparation for Sale Constitutes Acceptance of Surrender of Premises.

Collins v. Detente

(Ct. App. 1998, No. 98-1572-FT, unpublished).

In 1994, the owners and the tenants entered into a lease with option to purchase. The term of the lease was three years. On May 29, 1997, the tenants notified the owners that they would not exercise the option to purchase, and would vacate the premises on July 31, 1997. On June 3, 1997, the parties met at the residence along with a real estate broker who inspected the property in preparation for listing the house for sale. On July 1, 1997, the tenants telephoned the owners and told them that they had vacated the house on June 30. The owners entered the residence on July 2 & 3 to inspect the property and begin any necessary repairs. On July 7 the owners notified the tenants that the \$1,200 security deposit was being withheld for the last month’s rent of \$850 and damages in the amount of \$1,321.87.

The tenants commenced a small claims action, alleging that the owners had wrongfully withheld the security deposit and challenging the amount of damages claimed as unreasonable. The owners counterclaimed for damages in excess of the security deposit.

The first issue was whether the parties had agreed during their June 3 meeting that if the tenants vacated by the end of June, the owners would waive the rent for July. The trial court found there was no such meeting of the minds and held the tenants liable for the July rent. The court next considered whether the owners had made a reasonable effort to mitigate, as required by Wis. Stat. § 704.29. The court found that the owners had made no efforts to rerent the premises and had converted the premises to their own use. The court rejected the landlords' position that they were entitled to the possession and exclusive use of the premises in order to market and sell the same, and were still entitled to the full rent for July.

The trial court held that the tenants were entitled for a credit for the July rent, that reasonable damages in the amount of \$420.27 could be deducted from the security deposit, and that the balance of \$779.73 was to be returned to the tenants. The tenants were entitled to double damages pursuant to Wis. Admin. Code § ATCP 134.06 and Wis. Stat. § 100.20(5) because the owners improperly deducted the July rent from the security deposit. The tenants were also awarded \$1,000 in reasonable attorney's fees.

The owners appealed to the court of appeals, challenging that portion of the judgment finding that they took exclusive possession of the premises after July 1, failed to mitigate damages, and thus were not entitled to July's rent. Wis. Stat. § 704.29(4) provides that the following acts do not defeat the landlord's right to recover rent and damages: "(a) Entry,

with or without notice, for the purpose of inspecting, preserving, repairing, remodeling and showing the premises; (b) Rerenting the premises or a part thereof, with or without notice, with rent applied against the damages caused by the original tenant and in reduction of rent accruing under the original lease; (c) Use of the premises by the landlord until such time as rerenting at a reasonable rent is practical, not to exceed one year, if the landlord gives prompt written notice to the tenant that the landlord is using the premises pursuant to this section and that the landlord will credit the tenant with the reasonable value of the use of the premises to the landlord for such a period; (d) Any other act which is reasonably subject to interpretation as being in mitigation of rent or damages and which does not unequivocally demonstrate an intent to release the defaulting tenant."

The court of appeals stated that the key is whether, after the tenant's surrender of the premises, the landlord unmistakably demonstrates an intent to release the tenant from the obligations of the lease. If such actions are present, no rent can be collected. When the landlord occupies the premises for his or her own use or takes exclusive possession, such actions terminate the lease and the owners' right to collect further rent. In this case, the court remarked that the owners clearly intended to sell the residence as soon as possible. The sale of the property, and activities geared towards that end, will end the tenant's obligations under the lease, while activities geared towards the rerenting of the premises will be considered the proper mitigation of damages. Accordingly, the court of appeals affirmed the judgment of the trial court.

✍ This case emphasizes that actions to rerent will be considered

mitigation of damages, while activities to the end of selling the property will terminate the tenant's obligations under the lease.

Miscellaneous Issues

This final section looks at two miscellaneous cases that may be of interest to real estate licensees and parties. The first case looks at a case of timber trespass and theft committed by an apparently unruly attorney. The second illustrates the process involved when tenants in common institute legal proceedings for a partition or division of the land in which they have an interest.

Trespass and Timber Theft.

Doyle v. Arthur

(*Ct. App. 1998, No. 97-3353, unpublished*).

Arthur is a Milwaukee attorney who owns land in Juneau County adjoining the property owned by Doyle. Arthur contracted with a logging and timber company to harvest trees on his property, apparently in anticipation of developing the property. Arthur told the logging company to not worry about property lines and in fact lied about the location of the line separating Arthur's land from Doyle's. Arthur told the logging company to not worry about affects on the adjoining property because Arthur and his wife, also an attorney, could keep people tied up in court for a long time, making litigation so expensive that most people would rather give up than face them. The logging company plowed a 200-foot long, in places four feet deep, logging road across the corner of Doyle's property. Trees and shrubs were knocked down, six large oak trees were removed from the premises, and erosion and watershed problems were created.

Doyle had purchased her property because of its unique beauty. She and her family used it for picnics and family botany excursions, and they considered the damaged part to be the most beautiful part of the property. The fair market value of Doyle's property did not decrease as a result of the damage, so Doyle sought \$34,720 in damages as the cost of restoring her property, and asked for punitive damages as well.

When Arthur learned that Doyle was going to bring legal action against him for the damage to her Juneau County property, he filed a lawsuit in Dodge County seeking a declaratory judgment that he was not responsible for the damage. The Dodge County action was eventually dismissed. Doyle moved for a default judgment when Arthur failed to answer her complaint. Five days later, Arthur filed a one-paragraph statement labeled "answer" which denied all allegations and purported to incorporate by reference all of the pleadings and documents in the Dodge County case, plus all other pleadings and correspondence among the parties. The circuit court ruled that this was not a proper answer, entered default judgment against Arthur, and scheduled a hearing on damages. After a two-and-one-half day hearing, the court awarded Doyle \$34,720 in restoration cost damages and \$75,000 in punitive damages. Arthur appealed to the Wisconsin Court of Appeals.

The court agreed with the circuit court that the document Arthur filed purporting to be an answer was over three months tardy and was lacking in both form and substance. With respect to Arthur's challenge to the punitive damages, the court found that the allegations in Doyle's complaint concerning his fraudulent conduct, theft of her timber, reckless and wanton disregard of her rights,

etc. were sufficient to state a claim for punitive damages. The court found that Wis. Stat. § 26.09, which limits damages for a timber trespass to double the actual damages, did not limit the court's ability to award punitive damages.

The trial court also found that Arthur: (1) abused the legal process, (2) gave testimony that was evasive, inaccurate and unworthy of belief, (3) accused various parties of extortion, conspiracy, theft and perjury (and accused the court of bias), (4) used his position as an attorney to create numerous conflicts of interest, (5) lied to the logging company about the location of the property line to avoid additional costs, (6) intentionally and maliciously used his legal knowledge to intimidate Doyle and her attorney and to make her legal fees so high that she would give up the fight, and (7) lied to the court and attempted to frustrate the discovery process. This, the court found, justified the punitive damages award. The court also found that the amount of the punitive damages was not excessive and that Doyle's complaint, while not specifically requesting punitive damages, did request such additional amounts that would fully compensate her for her loss. After responding to numerous other technical points raised by Arthur, the court affirmed the circuit court judgment.

✍ This case is instructive because it shows how expensive restoration cost damages for trees, shrubs and other natural vegetation can be, and how important knowing the exact location of property lines can be - a survey or employment of a surveyor is the best bet. This case also gives a picture of how ugly it can become when a party and/or an attorney chooses to abuse the legal system.

Partition by Sale.

Andre v. Tobon

(Ct. App. 1999, No. 98-2362, unpublished).

Eleanor Tobon and Norman Andre owned approximately 510 acres of wooded property surrounding Dead Lake. Richard Andre, who also owns the property as the tenant in common of Eleanor and Norman, brought a legal action requesting that the court order a partition sale of the entire parcel with the proceeds to be divided among the individuals in proportion to their respective ownership interests. The trial court found that the property had unique characteristics, that the highest and best use was as a single, private retreat for recreation and personal enjoyment, that the parties had an emotional attachment to the property, and that economic loss would ensue if the property was partitioned into three equal parcels (\$800,00 as a whole, total of \$650,000 if in three parcels). Eleanor's request that Eleanor and Norman be awarded the property and make owelty (equalization) payments to Richard was rejected, and the court ordered that the property be sold as one parcel at a sheriff's sale. Eleanor and Norman appealed to the court of appeals.

The court of appeals reviewed the basic principles of an action for partition in its opinion. Partition, an equitable proceeding at the discretion of the court, is outlined in Wis. Stat. Chpt. 842. After trial, a court may order a partition or division of the property along undisputed lines (partition in kind), order a partition or division and appoint a referee to determine the division lines, or order the sheriff to sell the whole property at public auction and divide the proceeds (partition by sale). There is a strong presumption for partition in kind, with partition by sale being the extraordinary exception.

The court confirmed the trial court's holding that the fair market value of the property as a whole was greater than its fair market value if partitioned in kind. Such a division would result in substantial economic loss and thus was prejudicial to the parties. A sheriff's sale though, could bring in the fair market value since this was not a mortgage or land contract foreclosure sale - the trial court believed that it was a nice property that would sell to a third party after six weeks of advertising or that Eleanor and Norman would buy it.

Eleanor and Norman contended that the trial court erred by not appointing a referee. § 842.07, however, contemplates the appointment of a referee only when partition is appropriate, but the boundaries for the division are not clear. With respect to the proposal by Eleanor and Norman that they receive the property and make owelty payments to Richard, the court felt uneasy because Richard's appraiser felt the property was worth closer to one million dollars. Thus, his one-third interest could be greater than the proposed owelty payment. Accordingly, the court confirmed the judgment of the trial court.

✍ This case demonstrates some of the dynamics at play when tenants in common cannot agree on a way to reasonably divide their real estate and instead must petition the court to fashion a solution. The process for a partition action is laid out in Chapter 842 of the Wisconsin Statutes.

Conclusion

It is helpful for REALTORS® to be aware of how the courts interpret and enforce different laws pertaining to real estate practice. It is certainly valuable to see how the law is applied to real life situations. Members desiring further information or a copy of any of these cases may contact the WRA Legal Hotline at (608) 242-2296 or 1-800-799-4468.

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