

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 12, 2011**

A. John Voelker  
Acting 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. 2010AP927**

**Cir. Ct. No. 2008CV728**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**DAVID JAHIMIAK,**

**PLAINTIFF-APPELLANT,**

**V.**

**LAURIE LONG,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment and an order of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 SHERMAN, J. David Jahimiak appeals an order of partial summary judgment and a judgment of the circuit court following a bench trial on the remaining issues. Jahimiak brought multiple financial claims against Laurie

Long for debts he alleged Long incurred to him while he and Long resided together. Long, in turn, sought partition of the residence (hereinafter “Losey property”) that she and Jahimiak shared and which was titled in her and Jahimiak’s names as joint tenants. The circuit court entered judgment in favor of Long on all of Jahimiak’s financial claims. The court also ruled in favor of Long with respect to the Losey property, and ruled that one-half of what the court determined to be the parties’ equity in the Losey property be awarded as a financial judgment in favor of Long.

¶2 On appeal, Jahimiak challenges the circuit court’s finding that Long had a valid interest in the property, the court’s decision to award Long a money judgment rather than apply one of the remedies available in a partition action, and the court’s rulings with respect to some of his financial claims against Long. We affirm in part and reverse in part.

## **BACKGROUND**

¶3 Jahimiak and Long, who were engaged to be married, lived together as a couple at the Losey property for approximately fifty-eight months, from August 2003 until June 2008. The Losey property was originally titled solely in Jahimiak’s name. However, on November 11, 2006, Jahimiak conveyed the property to himself and Long as joint tenants by quit claim deed. In June 2008, Jahimiak and Long’s relationship came to an end and Long moved out of the Losey property.

¶4 After Long moved out, Jahimiak brought a small claims action against her for \$4,736. Jahimiak alleged in his complaint that he had made two loans to Long—one in the amount of \$2,500 and a second in the amount of

\$2,000—which Long had failed to repay. Jahimiak also alleged that Long had caused \$236 in damage to the Losey property’s garage door.

¶5 After the matter was transferred to the circuit court, Long filed a responsive pleading in which she agreed that she owed Jahimiak \$236 for the damage to the garage door, but denied that she owed Jahimiak the remaining \$4,500 he sought. Long also counterclaimed “[f]or a partition of the [Losey property] according to the respective rights and interests of the parties.”

¶6 In his reply to Long’s counterclaim, Jahimiak denied that Long had an interest in the property. Jahimiak also increased his financial claims against Long to \$194,685.59, which included “house debts and other loans made to [Long] for herself and her children.” More specifically, the amounts claimed by Jahimiak in his reply included one-half of all the expenses Jahimiak paid relating to the Losey property, including the down payment, mortgage payments, utility payments, real estate tax payments, home owner’s insurance, and home improvement expenses. It also included amounts he claimed to have “loan[ed]” Long during their relationship. The alleged loans included in part: the two loans he had identified in his original complaint plus an additional amount for estimated interest; money he gave Long to buy Christmas presents; costs he expended to obtain an annulment of his first marriage; uninsured dental work that he (a dentist) provided Long; the “lease value” of his vehicle, which Long used; automobile insurance paid by him on the vehicle used by Long; amounts paid by him for the uninsured portions of two motor vehicle accidents involving Long; money Long allegedly took from his wallet when she thought he was sleeping; and the value of a student loan for Long’s child for which he had co-signed. Jahimiak also sought to recover expenses he allegedly incurred repairing damage done to the Losey

property by Long, “storage fee[s]” for items Long left at his dental office, and a Charter Communications bill.

¶7 Both Jahimiak and Long moved the court for summary judgment. The court denied Jahimiak’s motion in whole and Long’s motion in part. The court denied both parties’ motions with respect to their claims regarding the Losey property. However, the court entered summary judgment in favor of Long with respect to nearly all of Jahimiak’s financial claims. The only financial claims on which the court did not enter summary judgment were Jahimiak’s claims that Long owed him money for: (1) damage caused to the garage door; (2) costs incurred refinishing a floor damaged by Long’s daughter; (3) costs incurred repairing damage caused by Long to wallpaper; (4) one-half the amount of the down payment on the Losey property; (5) storage fees; and (6) the Charter Communications bill.

¶8 The issues remaining after summary judgment were tried to the court without a jury. At trial, the court ruled in favor of Long with respect to all of Jahimiak’s remaining financial claims against Long. The court also ruled in favor of Long with respect to the Losey property. At trial, Jahimiak argued that Long did not have an interest in the Losey property because the real estate transfer—the quit claim deed he executed in November 2006 naming himself and Long as joint tenants—was a gift contingent upon his and Long’s marriage. He argued that because they never married, the condition on the transfer was not met and therefore, despite the deed, Long had no interest in the property.

¶9 The circuit court rejected Jahimiak’s argument. The court found that before the quit claim deed was executed, the issue of marriage “had already been resolved.” The court further found that “[t]here was no conditional language” on

the face of the quit claim deed, which the court found to be “very strong evidence” that the real estate transfer was not contingent.

¶10 The circuit court awarded Long a judgment in the amount of \$52,388.55, which the court determined was Long’s fifty-percent interest in the parties’ equity in the Losey property. The court explicitly declined to partition the property. In response to a question by Jahimiak’s trial counsel as to whether the court was “going to look at partition,” the court stated:

No.... First of all, Plaintiff has not made an argument for partition.... if we’re going to get into the partition argument, one could very easily get bogged down saying okay, what [is] the value of all of the work that [] Long did. That wasn’t presented before the Court. It’s not an issue before the court.

¶11 Jahimiak appeals. Additional facts will be discussed below as necessary.

## **DISCUSSION**

¶12 Jahimiak asserts that the court erred in three respects in: (1) determining that Long had equal ownership in the Losey property; (2) awarding Long a money judgment instead of applying the law of partition with respect to the real property; and (3) finding in favor of Long with respect to a number of his financial claims against her. We address each argument in turn below.

### **1. LONG’S INTEREST IN THE PROPERTY**

¶13 Jahimiak challenges the circuit court’s ruling that the November 2006 quit claim deed was not contingent on the parties’ actual marriage and that Long has a valid interest in the Losey property. Before we address Jahimiak’s

arguments with respect to this issue, we first clarify the appropriate standard of review.

¶14 Jahimiak suggests that our review is de novo because it involves the construction of a contract. This suggestion, however, is in direct conflict with his assertion before the circuit court that the real property transfer in this case “can only be one thing ... a conditional gift.” Furthermore, the court did not treat the transfer itself as stemming from a contract between the parties wherein Jahimiak agreed to transfer an interest in his property to Long in consideration for Long marrying him. The court found that the issue of marriage had been decided by Long and Jahimiak well before the transfer took place, and that the primary purpose of the transfer was long-term security for Long, in the event that Jahimiak died first. Accordingly, we agree with Long that our review here is of the circuit court’s factual findings—namely whether the transfer of a one-half interest in the property to Long was an absolute transfer or was contingent upon her marrying Jahimiak. The court’s factual findings will be affirmed unless they are clearly erroneous. WIS. STAT. § 805.17(2).<sup>1</sup> A circuit court’s factual findings are not clearly erroneous if there is credible evidence to support those findings. See *Holt v. Ellsworth Farmers Union Coop.*, 118 Wis. 2d 335, 337-38, 347 N.W.2d 612 (Ct. App. 1984).

¶15 The circuit court found that the quit claim deed was not contingent on Jahimiak and Long getting married. The court found that the issue of marriage

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

had been resolved “well before” the quit claim deed was executed and that primary reason for the property transfer to Long was financial security for her.

¶16 Jahimiak argues those findings are clearly erroneous because it would “necessitate[] a reasonable person to believe that [he] would give away half the equity in a home to any girlfriend who agreed to ‘be together’ with him in the moments before the deed was executed.” Jahimiak’s argument is disingenuous. Long was not simply “any girlfriend who agreed to ‘be together’ with [Jahimiak] in the moments before the deed was executed.” She was the woman to whom he had been engaged to marry and with whom he had been cohabitating.

¶17 Jahimiak also argues that the court’s findings are clearly erroneous because he presented facts “support[ing] the truth of [his] testimony and argument that the conveyance of the property interest was only to become final upon his marriage to [] Long, while there is little in the way of fact or reason to support” Long’s claim that the marriage was not a condition precedent to the conveyance. Even if Jahimiak is correct, we still cannot say that the court’s finding was clearly erroneous because there is credible evidence supporting the court’s findings. *Id.* (a circuit court’s factual findings are not clearly erroneous if there is credible evidence to support those findings).

¶18 This evidence included: (1) testimony by Long that the conveyance was not contingent on her marrying Jahimiak, but rather was made in exchange for them “being together” and her agreeing not to purchase another house for herself; (2) the deed, which was devoid of any conditions precedent to the transfer and which had been filed with the county register of deeds; and (3) testimony by Jahimiak that Long’s name was added to the deed for Long’s security in light of his hobby of race car driving and history of cancer.

¶19 Jahimiak has failed to establish that the circuit court was clearly erroneous in finding that it was not the intent of the parties that the property transfer to Long be contingent on their marrying and, therefore, we affirm the court's finding.

## 2. MONEY JUDGMENT VERSUS PARTITION

¶20 Jahimiak contends that the circuit court erred in awarding Long a money judgment for an amount the court calculated to be one-half the parties' equity in the home, rather than applying one of the remedies available to the circuit court in a partition action. Whether the court had the authority to award a financial judgment, rather than partition the property, presents a legal question. We review questions of law de novo. *Tatge v. Chambers & Owen, Inc.*, 210 Wis. 2d 55, 52, 565 N.W.2d 150 (Ct. App. 1997).

¶21 WISCONSIN STAT. § 840.03 sets forth a non-exclusive list of remedies that an individual with interest in real property may seek in an action relating to that property. Those remedies include, in part: (1) a declaration of interest; (2) partition of interest; and (3) damages. *Id.* With respect to the Losey property, the sole remedies sought by either party were a declaration that Long has no interest in the Losey party, which Jahimiak sought in his reply to Long's counterclaim, and partition of the property, which Long sought in her counterclaim against Jahimiak and which Jahimiak requested in the event that the court determined Long has a valid interest in the property. Neither party sought damages, nor any other financial judgment with respect to the property, nor did they litigate the case as though they were requesting such a remedy.

¶22 Thus, when the court rejected Jahimiak's assertion that Long had no interest in the Losey property, the sole surviving remedy sought by either party



was partition of the Losey property.<sup>2</sup> However, the court apparently believed the remedy of partition was not before it, although each party had requested this remedy in his or her pleadings.

¶23 The procedure for partition of real property in Wisconsin is set forth in WIS. STAT. §§ 842.01 thru 842.31. Section 842.02, which codifies common law partition, provides that an individual with an interest in real property may sue for judgment partitioning his or her interest, unless otherwise prohibited by law or by agreement. Section 842.02(1); *O’Connell v. O’Connell*, 2005 WI App 51, ¶8, 279 Wis. 2d 406, 694 N.W.2d 429.

¶24 Under WIS. STAT. § 842.07,<sup>3</sup> a circuit court is given three alternatives in a partition action. First, the court may find the location for partition is clear and order a partition along that line. *LaRene v. LaRene*, 133 Wis. 2d 115, 119, 394 N.W.2d 742 (Ct. App. 1986). Second, the court may find that a suitable location for the partition line is not clear and appoint a referee. *Id.* The referee will then either suggest where to draw the partition line or suggest that no matter

---

<sup>2</sup> A court is given discretionary authority to amend *sua sponte* the pleadings after the close of evidence “[i]f issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” WIS. STAT. § 802.09(2). Neither party suggests that the court did so here, and the record does not reflect that either party either expressly or implicitly consented to an amendment of their pleadings to reflect a remedy alternative to partition or a declaration of the parties’ interest. See *State v. Peterson*, 104 Wis. 2d 616, 631-634, 312 N.W.2d 784 (1981).

<sup>3</sup> WISCONSIN STAT. § 842.07 provides in relevant part:

[A]fter trial of issues, the court shall by findings of fact and conclusions of law determine the rights of the parties. If the basis for partition is clear, the court may enter judgment partitioning the interests. If the basis for partition is not clear, the court shall appoint a referee to report either a basis for partition, or the conclusion that partition is prejudicial to the parties.

where the line is drawn, partition is unfair and a sale is preferable. *Id.* Third, the court may determine as a matter of law that partition is impossible, and therefore prejudicial, and order a sale of the property. *Id.* at 120; WIS. STAT. § 842.17(1). The partition statutes do not give the court the option of awarding one co-tenant a cash payment equal to the value of his or her share of the property. Thus, in awarding Long a money judgment equal to what it calculated to be her undivided one-half interest in the property, the court acted outside the law of partition.

¶25 Long argues that the circuit court nevertheless had authority to award her a financial settlement for her interest in the property under WIS. STAT. §§ 840.03(1) and (2). Section 840.03(1) sets forth a non-exclusive list of remedies that a plaintiff having an interest in real property may seek. It reads in pertinent part: “Any person having an interest in real property may bring an action relating to that interest, *in which the person may demand the following remedies singly, or in any combination, or in combination with other remedies not listed ...*” Section 840.03(1) (emphasis added). Section 840.03(2) clarifies that a combination of remedies may be sought in an action pertaining to real property.<sup>4</sup>

¶26 The plain language of WIS. STAT. § 840.03 authorizes a party holding an interest in real property to seek a variety of remedies with respect to an action regarding that property. However, nothing in the plain language of § 840.03 authorizes a circuit court to ignore the pleadings and employ a remedy which has been neither pleaded, nor litigated.<sup>5</sup>

---

<sup>4</sup> WISCONSIN STAT. § 840.03(2) provides: “The indication of the form and kind of judgment in a chapter dealing with a particular remedy shall not limit the availability of any other remedies appropriate to a particular situation.”

<sup>5</sup> See footnote 2.

¶27 In conclusion, in awarding Long a financial judgment, the circuit court exceeded its authority in a partition action, the sole remedy pled and litigated by the parties that remained after the court determined Long had an interest in the property. Accordingly, we reverse that portion of the court’s judgment and remand the proceeding back to the circuit court to partition the Losey property.<sup>6</sup>

### 3. JAHIMIAK’S FINANCIAL CLAIMS

¶28 Jahimiak challenges the circuit court’s conclusion on summary judgment that certain expenditures he made to “preserve and maintain” the Losey property were “absolute gifts” to Long. Those claims are: (1) mortgage payments; (2) property insurance premiums; (3) real estate taxes; and (4) utility payments. Jahimiak also challenges the circuit court’s finding at trial that one-half the down payment on the Losey property was not a loan to Long.

#### *a. Conclusions on Summary Judgment*

¶29 We review summary judgments de novo, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no

---

<sup>6</sup> Jahimiak argues that the circuit court erred in determining that he may not seek contribution from Long under the partition statute, WIS. STAT. § 842.14(4), for unequal payments relating to the Losey property. Section 842.14(4) authorizes a circuit court to “provide in its judgment that compensation be made by one party to the other for equality of partition” in the event that partition “cannot be made equal between the parties without prejudice to the rights or interests of some of them.” However, as we have explained, the circuit court did not partition the Losey property. Whether contribution is appropriate when the Losey property is partitioned on remand is a question for the circuit court to resolve at that time.

Furthermore, nothing in the record indicates that the circuit court ordered Long to convey to Jahimiak her undivided one-half interest in the property, the interest Jahimiak was ordered to pay Long the value of. On remand, the necessity for such an order will be eliminated by following the appropriate procedure in a partition action.

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶30 The circuit court concluded that, based on undisputed facts, the mortgage payments, property insurance premiums, real estate taxes, and utility payments were not loans to Long as Jahimiak maintained, but instead “absolute gift[s].” The court concluded that the summary judgment submissions did not give rise to a reasonable inference that Long would pay half of everything Jahimiak agreed to pay for. We have reviewed the record before the circuit court on summary judgment and conclude that summary judgment was appropriate.

¶31 The summary judgment submissions are devoid of any evidence upon which a jury could have reasonably found that one-half the mortgage payments, property insurance premiums, real estate taxes and utility payments were loans to Long. *See Johnson v. Zeigler*, 2002 WI App 103, ¶11, 255 Wis. 2d 751, 648 N.W.2d 480. There was no evidence, nor was there a reasonable inference from the evidence, that Jahimiak and Long had agreed that Long would repay one-half the mortgage, real estate tax, homeowners insurance and utility payments made by Jahimiak.<sup>7</sup> Nor was there any evidence, or reasonable inferences from the evidence, that Jahimiak had asked Long to reimburse him for any of those expenditures or that Long was aware that Jahimiak expected that she would reimburse him one-half of those expenditures at a later date.

---

<sup>7</sup> In his deposition, Jahimiak stated that he never *asked* Long to pay any type of rent, never *asked* her to pay a portion of the property insurance premium, and never added her name to the insurance policy. He later averred that he *asked* Long to contribute to the mortgage, real estate taxes, property insurance premiums and utilities, but that she refused to do so. This supports the conclusion that there was never an *agreement* between Jahimiak and Long that she should pay one-half of those expenses.

*b. Finding at Trial*

¶32 With respect to the down payment on the Losey property, the circuit court found after trial that this expenditure was also a gift to Long. The court found that Jahimiak and Long lived together as partners, that Long maintained the house, and that each paid different bills.

¶33 Jahimiak did not present any evidence that could lead us to conclude that the court's finding with respect to the down payment was clearly erroneous. Jahimiak merely testified that he did not seek money from Long to assist with the expense in order to avoid an argument with her over it. Long, in contrast, testified that she and Jahimiak had agreed that she would pay certain bills and he would pay others, and that she performed various tasks around the property to maintain it. The circuit court had the opportunity to observe the witnesses and accepted Long's testimony. The circuit court is the final arbiter of a witnesses' credibility. *Hughes v. Chrysler Motors Corp.*, 188 Wis. 2d 1, 21, 523 N.W.2d 197 (Ct. App. 1994). Because there is credible evidence supporting the court's finding with respect to the down payment, we cannot say the finding was clearly erroneous. *Holt*, 118 Wis. 2d at 337-38.

CONCLUSION

¶34 For the reasons discussed above, we affirm the circuit court's dismissal of Jahimiak's financial claims against Long and the court's determination that Long has a valid interest in the Losey property. However, we reverse that portion of the court's judgment awarding Long a financial judgment equal to one-half of the parties' equity in the property and remand the proceeding to the circuit court for the property to be partitioned.

*By the Court.*—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

