

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2008

David R. Schanker
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. 2007AP974

Cir. Ct. No. 1999CV84

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EMMETT O'CONNELL, JR. AND DAVID O'CONNELL,

PLAINTIFFS-RESPONDENTS,

V.

GERALD L. O'CONNELL AND MAXINE L. O'CONNELL,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

SEAN O'CONNELL,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

MARY CATHERINE NEIMON,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Bayfield County:
 NORMAN L. YACKEL, Judge. *Affirmed*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Gerald O’Connell appeals the circuit court’s order in this ongoing family dispute over property in northern Wisconsin on Spider Lake. This case was previously before us. See *O’Connell v. O’Connell*, 2005 WI App 51, 279 Wis. 2d 406, 694 N.W.2d 429. Gerald’s primary argument on appeal is that the circuit court erred in denying his claim for disproportionately born expenses under WIS. STAT. § 842.14(4) (2005-06).¹ We affirm.

¶2 “WISCONSIN STAT. § 842.02 codifies the common law of partition, but partition remains an equitable action.” *O’Connell*, 279 Wis. 2d 406, ¶8. Where, as here, partition of real property has been ordered, “[i]f partition does not equalize the positions of the parties, the circuit court in equity may, under WIS. STAT. § 842.14(4), order compensation by one party to another.” *Id.* “We apply the erroneous exercise of discretion standard in reviewing decisions in equity.” *Klawitter v. Klawitter*, 2001 WI App 16, ¶8, 240 Wis. 2d 685, 623 N.W.2d 169.

¶3 The circuit court heard two days of testimony on Gerald’s claim that he had born disproportionate expenses improving and maintaining the Spider Lake Property from 1951 until 1994. Gerald contended that he had an oral contract with his brother Emmett, with whom he owned the property until 1994, that he would pay all of the expenses because he could afford to do so, while Emmett did not

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

have the necessary funds. He testified that they agreed Emmett would reimburse him with interest when they sold the property.² Gerald testified that he paid for the property, that he purchased all of the materials used to build and repair the homes (the first home built was destroyed by fire), that he used his trailer to haul materials to the property from Milwaukee, and that Emmett did not have a trailer. He presented receipts dating back fifty years and testified that although the tax rolls showed that his parents had paid the property taxes for some of the years, he actually paid the taxes by reimbursing his parents in cash.

¶4 Gerald's brother, Emmett, who has memory loss due to a stroke, testified that he had no recollection of any oral agreement with Gerald and that he paid his share of the improvements made to the Spider Lake property. He testified that he helped build a cabin on the property and brought construction materials that he had purchased in Milwaukee to the property in his trailer.

¶5 Emmett's son, Emmett Jr., testified that his uncle, Gerald, never mentioned any oral agreement he had with his father, even after his father had given the property to him and his brother, David, and that he did not hear about this agreement until after this litigation began when Emmett Jr. and David attempted to prohibit Gerald from logging the property without their permission. David also testified that he did not hear about this agreement until after this litigation ensued. Emmett Jr. testified that he and David spent a substantial amount of time working with their father and grandfather on building and

² Although Gerald's argument is somewhat unclear, he argued in the circuit court that this oral contract is enforceable in equity under WIS. STAT. § 842.14(4) because he bore the costs of improving the property under the oral agreement and should now be reimbursed. Gerald does not argue that this fifty-year-old oral contract is enforceable outside the equitable framework of WIS. STAT. § 842.14(4).

maintaining the homes and property. Emmett Jr. also testified that his father used his trailer to haul materials he had purchased, including toilets, sinks, plumbing, light fixtures, bags of cement, lumber and steel.

¶6 Richard Nemitz, Emmett's maternal nephew, who spent a lot of time at the property when he was growing up, including summer vacation, hunting in the fall and ice fishing in the winter, testified that he frequently assisted Emmett with projects at the property, and observed Emmet doing electrical projects, plumbing projects and tree planting at the property. He testified that he was with Emmett when Emmett brought building materials from Milwaukee and purchased items in a local town for improvements to Spider Lake. He also testified that Emmett's family never appeared to be in a position of financial distress and that he believes he would have heard about it if they were because his mother and Emmett's wife were sisters and shared a close relationship.

¶7 Finally, Constance Pipp, an experienced accountant, testified that she reviewed the receipts submitted by Gerald and found many instances in which Gerald had double-counted items, had totaled receipts and then added the total as well as each individual item and had committed other mathematical errors. She also testified that it was impossible to verify what many of the receipts were for and that Gerald had submitted receipts for items that would not have increased the value of the property.³

¶8 After listening to all of the testimony, the circuit court concluded that Gerald had not proved that he was entitled to reimbursement for

³ Gerald submitted receipts for, among other things, a television, fishing bait, liquor, boat licenses, charcoal, boat motor repair and utilities.

disproportionately borne expenses. The court found that Gerald and Emmett had both furnished labor and materials which were incorporated into the improvements located on the property. The court also found that Gerald's testimony that an oral contract existed and that he had paid all of the expenses was not credible.

¶9 The circuit court is the ultimate arbiter of both the credibility of the witnesses and the weight to be given each witness's testimony. *Pindel v. Czerniejewski*, 185 Wis. 2d 892, 898, 519 N.W.2d 702 (Ct. App. 1994). This is because "the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand." *Id.* at 898-99. This case turns on the circuit court's assessment of the credibility of the witnesses, and the circuit court concluded that Gerald's testimony was not credible. We will not overturn the circuit court's assessment of witness credibility unless the testimony is not credible as a matter of law. Here, there are several reasons supporting the circuit court's finding that parts of Gerald's testimony were not credible.

By the Court.—Order affirmed.

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

