

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 28, 2007

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. 2006AP2640

Cir. Ct. No. 2005CV253

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DELAINE O. BURKE AND VIRGINIA L. BAUMANN,

PLAINTIFFS-APPELLANTS,

V.

DAISY F. BRAIZER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Lincoln County:
GLENN H. HARTLEY, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Delaine Burke and Virginia Baumann appeal a judgment awarding Daisy Braizer \$37,000 plus costs. Burke and Baumann primarily contest the amount of this judgment. We reverse the judgment because

the record does not demonstrate that the circuit court properly exercised its discretion in awarding this amount.

BACKGROUND

¶2 In 1992, Burke and Baumann purchased a parcel of lakefront property in Tomahawk that included a primary residence and a cottage. Shortly thereafter, their friend, Braizer moved into the cottage. The parties agreed that Braizer would make monthly payments of \$200 for a period of five years and would make contributions toward taxes. After five years, Braizer would no longer have to make the \$200 payments. However, Braizer was also responsible for improving the cottage. To protect Braizer's investment in the improvements, the parties agreed that if Burke and Baumann ever sold the property, they would compensate Braizer for her investments in the property.

¶3 One of the central issues at trial was how much Burke and Baumann agreed to pay Braizer if they ever sold the property.¹ The circuit court found that the parties agreed Braizer's "investment would be protected by her being entitled to the fair market value of the property should the property be sold." This finding appears to be based at least partly on a handwritten will made by Burke and Baumann, which provided that the property would go to "Sheryl Baumann" after their deaths, but if Shirley sold the property during Braizer's lifetime, she would have to pay Braizer the "currant[sic] market value of her property."

¹ At the time this action was commenced, Burke and Baumann still owned the property that includes the cottage. However, they sold the property before trial.

¶4 It is undisputed that Braizer made substantial improvements to the cottage, with the circuit court finding that she invested a total of \$32,874.92. However, in recent years the parties' relationship soured, with Burke and Baumann contending that Braizer was failing to maintain the property. In particular, Braizer did not replace a failing septic system, which Burke and Baumann ultimately replaced at a cost of \$6,000. The court found that the current value of the cottage was \$43,000, based upon a 2006 appraisal. The court did not make a finding as to the property's value when Braizer began living there, expressly rejecting a 1993 appraisal that valued the cottage as worthless.

¶5 In August 2005, Burke and Baumann filed an action to evict Braizer from the cottage. Braizer counterclaimed, pleading unjust enrichment. The circuit court concluded that Braizer was entitled to recover under the equitable theories of unjust enrichment, as well as promissory estoppel, and awarded Braizer \$37,000, which represented the \$43,000 value of the cottage less the \$6,000 that Burke and Baumann spent to fix the septic system. Burke and Baumann now appeal.

DISCUSSION

¶6 Burke and Baumann's arguments on appeal focus primarily on the amount of the circuit court's judgment, specifically the use of the full value of the cottage. They argue that the court's finding Braizer was promised the market value of the cottage was clearly erroneous and basing the award on this amount was an erroneous exercise of discretion.

¶7 Promissory estoppel involves three elements: (1) whether the promise is one the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) whether the promise induced such action or forbearance; and (3) whether

injustice can be avoided only by enforcement of the promise. *U.S. Oil Co. v. Midwest Auto Care Servs., Inc.*, 150 Wis. 2d 80, 89, 440 N.W.2d 825 (Ct. App. 1989). The existence of the first two elements are questions of fact, and the third is to be decided using the circuit court's discretion. *Id.*

¶8 Unjust enrichment also involves three elements: (1) a benefit was conferred; (2) an appreciation or acknowledgement of the benefit; and (3) an acceptance or retention of the benefit under circumstances making it inequitable to retain the benefit without paying its value. See *Ulrich v. Zemke*, 2002 WI App 246, ¶10, 258 Wis. 2d 180, 654 N.W.2d 458. A circuit court's decision to grant equitable relief in an action for unjust enrichment is discretionary. *Id.*, ¶8.

¶9 We uphold a circuit court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2) (2005-06). We will affirm a circuit court's discretionary acts if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process and reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶10 The circuit court's findings and reasoning were expressed in a memorandum decision. Regarding the promissory estoppel theory, the court found that Burke and Baumann promised that Braizer's investment in the cottage would be protected by her being entitled to the fair market value of the property if it were ever sold. The court concluded that allowing Burke and Baumann to evict Braizer without compensation for her investment would be unjust and inequitable. The court also stated that evicting Braizer without compensation would unjustly enrich Burke and Baumann by the value of the cottage.

¶11 Burke and Baumann’s challenge to the finding that Braizer was promised the full value of the cottage is based on the parties’ oral testimony at trial and the court’s reliance on the handwritten will. They point out that they testified Braizer was only promised the fair market value of her improvements. They also reference Braizer’s trial testimony where, when asked whether she believed she would be entitled to the fair market value of the property, she stated that she expected “at least what [she] had into it.” Regarding the will, which stated that Braizer would be entitled to the “currant[sic] market value of her property,” Burke and Baumann argue it is too lacking in detail for the court to derive any meaning from it.

¶12 We conclude the circuit court’s finding that Braizer was promised the fair market value of the cottage was not clearly erroneous. While Burke and Baumann characterize the parties’ trial testimony as undisputedly supporting their contention that Braizer was not promised the fair market value of the cottage, much of Braizer’s testimony about the promise referenced language in the will.² Much of Burke and Baumann’s strategy at trial, and on appeal, has been to emphasize a distinction between the fair market value of the improvements versus the fair market value of the cottage as a whole. The circuit court could reasonably reject Burke’s and Baumann’s testimony that they made such a fine distinction in their actual promise to Braizer and conclude that their promise more likely mirrored the language in the will, which was that Braizer would get the

² The will, which provided that the property would go to “Sheryl” after both Burke’s and Baumann’s deaths, gave Braizer the right to stay in the cottage during her lifetime, except if Shirley sold the property, in which case she would have to pay Braizer the “currant[sic] market value of her property.” Braizer, of course, has no rights under the will itself, since Burke and Baumann were both still living when this action commenced. However, the court apparently relied on the will’s language as evidence of what was promised.

“currant[sic] market value of her property.” Baumann testified that Braizer always referred to the cottage as “her property,” and the court was not clearly erroneous to conclude that Braizer was promised the market value of the cottage.

¶13 We do, however, reverse on the ground that the record does not demonstrate the circuit court’s exercise of discretion in concluding that injustice could only be avoided by awarding the amount promised. The court simply stated that it would be inequitable to not allow Braizer *any recovery* for her investment and that Burke and Baumann would be unjustly enriched by the value of the cottage. Essentially, the discretionary aspect of the court’s promissory estoppel analysis references the unjust enrichment claim, which itself requires the court to exercise its discretion to determine that it would be inequitable for Burke and Baumann to retain the value of the benefit conferred without paying for it. *See Ulrich*, 258 Wis. 2d 180, ¶10.

¶14 In order for us to affirm the circuit court’s discretionary determinations, we must be able to ascertain that the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See Loy*, 107 Wis. 2d at 414-15. While the court references the unjust enrichment theory, it does not explain how it concluded that Burke and Baumann would be unjustly enriched by the full value of the cottage. Though the court concluded that the value of the cottage was \$43,000, it expressly refused to find that the cottage was worthless before Braizer improved it.

¶15 Burke and Baumann argue the circuit court failed to consider offsetting factors in its unjust enrichment analysis, such as that Braizer only had to make the \$200 payments until 1998. Braizer contends the court may have

considered other factors in her favor, such as Burke and Baumann receiving favorable tax treatment by claiming depreciation deductions for Braizer's improvements.

¶16 While the parties speculate about what the circuit court considered, they do not actually know what the court considered, and the problem for this reviewing court is neither do we. Therefore, we reverse the judgment and remand to the circuit court so it can redetermine how much Brazier should be awarded and demonstrate its reasoning in support of that amount on the record.

By the Court.—Judgment reversed and cause remanded with directions.

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

