

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2010

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. 2009AP1322

Cir. Ct. No. 2007CV163

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FRANCIS E. ALTMAN,

PLAINTIFF-APPELLANT,

V.

CHRISTINE A. MESSER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Marathon County:
THOMAS CANE, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Francis E. Altman appeals a summary judgment dismissing his action against Christine Messer and an order denying his motion for reconsideration. Because we conclude the court improperly made findings of fact

based on credibility of witnesses, we reverse the orders and remand the cause for further proceedings.

¶2 Altman sued his sister, Messer, claiming ownership in a real estate parcel. The property had been subject to a federal forfeiture proceeding after Altman was arrested for manufacturing drugs on the premises. In the forfeiture proceeding, through his attorney, Altman stated he had no interest in the property and it belonged to his father. His father subsequently transferred the property to Messer. Messer filed a motion to dismiss based on claim preclusion because Altman denied ownership of the property in the federal forfeiture action. Altman responded that he was the record title holder, and his father left the property to Altman as a gift after the federal forfeiture action. The trial court granted the motion to dismiss, stating, “I just don’t believe you.”

¶3 Altman’s brief raises numerous issues that are difficult to comprehend. He appears to argue for reversal in the interest of justice, and invokes the plain error doctrine. He also argues by analogy that the court’s informing the U.S. Attorney of Altman’s action is comparable to a court view of the scene. Finally, he attempts to apply the rules of judicial notice to this action. We will not specifically respond to any of these arguments because they are not germane to this case.

¶4 Because the motion to dismiss was based on evidence outside the pleadings, the motion is treated as one for summary judgment. *See* WIS. STAT. § 802.06(3). On summary judgment, the circuit court may not engage in fact-finding or resolve the witnesses’ credibility. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977). Therefore, we reverse the summary judgment and remand this matter for trial.

By the Court.—Orders reversed and cause remanded.

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

