COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2026 **Cir. Ct. No. 2003CV347**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ELIZABETH LEONARD,

PLAINTIFF-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

RICHARD LYNN,

DEFENDANT-APPELLANT,

GRAND CHINA BUFFET, INC., CHEN'S BUFFET KING CORPORATION, ROBERT I. YU CHOW, YUK C. CHAN AND BLACKHAWK BANCORP, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

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

¶1 LUNDSTEN, J. Richard Lynn appeals a judgment determining damages owed to Elizabeth Leonard for unjust enrichment. The judgment followed after Richard stipulated that he was unjustly enriched during a period of cohabitation with Elizabeth. The court awarded Elizabeth one-half of the assets accumulated through a joint enterprise during the cohabitation and, additionally, the court awarded Elizabeth prejudgment interest on her share of the assets. Richard appeals both the division of the assets and the interest award. We affirm.

Background

¶2 In the summer of 1994, Elizabeth Leonard and Richard Lynn, who were involved romantically, moved in together. Prior to this cohabitation, Richard had substantial experience in the construction business and had assets that included his residence in Portage and a property in Belvidere, Illinois. Richard and Elizabeth continued living together for over seven years and, during that time, they engaged in various activities, including the acquisition and remodeling of properties and the running of businesses, leading to the accumulation of substantial assets.

¶3 In 2001, the couple first separated and, after a brief reconciliation, they separated permanently in 2002. For reasons that are disputed, but not pertinent to this appeal, in May 2002, Elizabeth quitclaimed to Richard her interest in the properties in which she was a joint tenant. In September 2003, Elizabeth sued Richard, alleging, among other claims, that he had been unjustly enriched. In a subsequent stipulation, Elizabeth agreed to dismiss all claims except the unjust enrichment claim and Richard, in return, stipulated "to the liability elements of [Elizabeth's unjust enrichment claim], as pled." This stipulation also stated that

the parties agreed to value the unjust enrichment assets "as of mid 2002 to early 2003."

¶4 After a trial on the issue of damages, the court awarded Elizabeth $1,568,000, which was half of the amount that the court determined was the total value of assets that Elizabeth and Richard had accumulated in a "joint enterprise" during their years of cohabitation. Although Elizabeth sought certain properties as damages, the court elected to award a money judgment to avoid interrupting any existing business relationships. The court also awarded Elizabeth prejudgment interest from January 2003 at a rate of 5% on her share of the assets.

¶5 Richard appeals from the resulting judgment. We reference additional facts as needed below.

Discussion

¶6 Richard and Elizabeth stipulated that they engaged in a joint enterprise to accumulate assets during their years of cohabitation. This case, then, concerns the proper division of the joint enterprise assets. *See* ***Ulrich v. Zemke***, 2002 WI App 246, ¶11, 258 Wis. 2d 180, 654 N.W.2d 458 ("Once a party demonstrates the existence of a joint enterprise, equity principles demand that the parties be treated fairly and all assets accumulated as part of the joint enterprise be divided accordingly."). We address and reject each of Richard's arguments regarding the division of the joint enterprise assets.

A. Unjust Enrichment Methodology

¶7 Richard makes several arguments that, either directly or indirectly, suggest that the circuit court applied improper standards or methods when dividing the joint enterprise assets. As the following explains, we disagree.

1. Division Asset-By-Asset

¶8 Implicit in several of Richard's arguments is the suggestion that each joint enterprise asset should be analyzed in isolation and, accordingly, divided in isolation. For example, Richard points to particular instances where, he asserts, he contributed significantly more than Elizabeth to increasing a particular asset's value, and he suggests that this means that the particular asset should be excluded from the 50/50 division. As the following explains, we disagree with Richard that this is required in the present circumstances. After explaining this disagreement, we then proceed to show how our general rejection of Richard's argument also leads us to reject several of Richard's specific arguments.

¶9 ***Ulrich***, cited by both parties, is useful for illustrating the proper approach to asset division. As is the case here, ***Ulrich*** dealt with an unjust enrichment claim following the termination of a relationship between unmarried cohabitants. ***Id.***, ¶¶2-6. In ***Ulrich***, we concluded that the parties "acted as a joint enterprise" to accumulate assets. ***Id.***, ¶14. We stated the applicable rule as follows: "Any assets acquired during the time period when the parties acted as a joint enterprise must be divided equitably between the parties unless the court determines that the contested asset was acquired by independent means, outside the joint enterprise[]'s domain." ***Id.***, ¶12.

¶10 Here, given the stipulation, we bypass the step of determining the existence of a joint enterprise. ***Ulrich*** instructs, then, that all assets acquired by the parties during that joint enterprise time period are to be part of the division, unless outside the joint enterprise's domain. *See* ***id.*** Put another way, to the extent Richard assumes that an asset-by-asset approach is appropriate, he fails to come to terms with ***Ulrich***'s focus on the overall scope of the joint enterprise. *See* ***id.***, ¶9

(adopting an approach that unjust enrichment division may be determined by "considering the overall scope of their joint enterprise and dividing the property accordingly"). Richard labors under the misconception that each and every task by Elizabeth must have a direct income-producing effect. The nature of a cooperative relationship, like the one in this case, however, involves a range of issues, both business and domestic, where one party may facilitate the accumulation of assets by freeing the other party to focus on the more direct income-producing activities. *See id.*, ¶15 (concluding that it was "immaterial that [the plaintiff] did not directly participate in the acquisition and maintenance of [a disputed property]" for that property to be included in the unjust enrichment division where the plaintiff's "contribution to the relationship" enabled the property's purchase). This facilitating behavior can reasonably be viewed equally as valuable as the direct income-producing activity.

¶11 We note that it is at times unclear to what extent Richard may be challenging certain assets as *outside* the joint enterprise's domain and to what extent he merely means to minimize Elizabeth's role in certain assets that, nonetheless, are part of the joint enterprise. To the extent Richard seeks to minimize Elizabeth's role, his points may be relevant to the overall asset division, which we address below. But, to the extent that Richard might also be asserting that certain assets acquired during the joint enterprise are outside the joint enterprise—in particular, the Broadway property and the Cascade Mountain Motel property—he fails to show that the circuit court erred by including those properties.

¶12 For example, Elizabeth testified that she contributed $30,000 in insurance proceeds and used her credit cards toward the "interior build out" of the Broadway property and that she also took part in cleaning and landscaping the

property. She also testified that the Cascade Mountain Motel was "primarily in [her] hands," which included various roles in rehabbing it and, at times, personally managing it to keep it operational. There was testimony by other witnesses also along these lines and tending to support the inclusion of these assets in the joint enterprise.

¶13 Richard, for his part, points out that his independently acquired Belvidere property was used as collateral for loans to acquire the Broadway and Cascade Mountain Motel properties. He suggests that, because the Belvidere property enabled their acquisition, these properties should not be considered as part of the joint enterprise. Beyond this suggestion, however, Richard fails to explain why this should be the case. Even assuming that Richard's ownership of the Belvidere property made the initial acquisition of the Broadway and Cascade Mountain Motel properties possible, it does not follow that the properties were outside the joint enterprise's domain. *See* ***id.***, ¶12. For example, the circuit court may have found that the joint enterprise made the acquisition feasible in the sense that Richard could not have properly managed the properties without Elizabeth's help. Because Richard does no more than assert that the use of the Belvidere property as collateral is dispositive, we reject the argument.

¶14 Richard's argument regarding the 505 Cook Street property is similarly unavailing. The Cook Street property was Richard's personal residence prior to cohabitating with Elizabeth. Richard contends that because the Cook Street property was acquired by independent means, apart from the joint enterprise's domain, it is non-divisible. *See* ***id.*** The circuit court, however, credited Richard for the equity he had in the Cook Street property prior to the joint enterprise. But the court found, at least implicitly, that the increased value of the property was attributable to the joint enterprise. This finding is supported by the

record, which includes, for example, Elizabeth's testimony that when she moved to the Cook Street property it was "in shambles" and that she and Richard both proceeded to gut and remodel it using money they made over time to purchase materials. Because Richard provides no developed argument as to why division of the increased value of the Cook Street property was error, we address the matter no further.[1]

2. Dollar Value Relationship

¶15 Richard seems to argue that, in order to divide the assets 50/50, the circuit court had to make findings that 50% of the assets' value was "the direct result" of Elizabeth's efforts. More specifically, he appears to contend that the court was required to find that "approximately $1,568,000" of the value was directly attributable to tasks Elizabeth performed. We disagree.

¶16 As ***Ulrich*** makes plain, unjust enrichment division may be determined by "considering the overall scope of their joint enterprise and dividing the property accordingly." ***Id.***, ¶9. And, as we stated earlier, Richard's asset-by-asset approach is not required. It follows that an even more particularized assessment—one attempting to match particular acts to particular increases in value—is similarly not required.

¶17 Richard relies on several cases, but none of them provide clear support for his dollar-value-connection premise. For example, Richard relies on

[1] In yet another undeveloped argument, Richard seems to suggest that the court improperly divided the increase in value of the Belvidere property. We generally decline to address inadequately briefed arguments and follow that practice with regard to the increased value of the Belvidere property. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

the following statement from ***Ward v. Jahnke***, 220 Wis. 2d 539, 583 N.W.2d 656 (Ct. App. 1998): "[The] application of unjust enrichment as a legal theory of recovery includes a requirement that the complaining party present proof of specific contributions that directly led to an increase in assets or an accumulation of wealth." ***Id.*** at 547. But this statement does not say that the "specific contributions" must be tied to specific increases in asset value.

¶18 Additionally, we reject Richard's related proposition that it is proper to analyze Elizabeth's contributions as if she were Richard's employee and to then tally her theoretical wages to determine unjust enrichment. Richard cites two cases when discussing this approach, but he does not explain how these cases support a wage-based approach in the present circumstances. *See* ***Lawlis v. Thompson***, 137 Wis. 2d 490, 505, 405 N.W.2d 317 (1987) (concluding that a cause of action for restitution was not precluded by the fact that the parties were cohabitating at the time of cash transfers); ***Graf v. Neith Co-op. Dairy Prods. Ass'n***, 216 Wis. 519, 257 N.W. 618 (1934) (rejecting an unjust enrichment theory where a plaintiff, incorrectly believing himself to be a shareholder, paid money to an association).

3. Automatic 50/50 Split

¶19 Richard asserts that the circuit court presumed that assets accumulated by a joint enterprise must be split equally. Richard points out that cases such as ***Ulrich*** speak in terms of "equitable" division, not "equal" division. *See* ***Ulrich***, 258 Wis. 2d 180, ¶12. We agree with Richard that the division must be equitable, but disagree that the circuit court presumed an equal division.

¶20 After making findings that enumerated a variety of efforts by Elizabeth and Richard, the court stated:

> Based upon the credible evidence before this court, the court finds that the parties engaged in a joint enterprise each contributing equally their skills and strengths in accumulating wealth during their cohabitation *and each should be entitled, in fairness and equity, to share equally in that accumulation*.

(Emphasis added.) It appears that Richard assumes that, because the result of the circuit court's decision was to divide the wealth equally, then it must be that the court did so through an automatic 50/50 rule. As is apparent from the above passage, however, the court's equal division is premised on its finding of equal contribution to the accumulated wealth. This is consistent with the rule that Richard cites, and there is simply no indication here or elsewhere that the circuit court applied an automatic 50/50 rule.

¶21 Having addressed and rejected Richard's general arguments about the circuit court's methodology,[2] we next address Richard's remaining arguments that the circuit court erred.

B. Richard's Will

¶22 Richard suggests that it was erroneous for the circuit court to base its 50/50 split "in large part" on Richard's 1996 will. We reject this argument because, although the court referenced this will, there is no indication that the court primarily based its 50/50 split on it.

¶23 The circuit court's discussion of the will, in its entirety, was as follows:

[2] Richard also singles out a statement by the circuit court that "it is inappropriate to separate the contribution of [Elizabeth from Richard]." In context, it is apparent that the "inappropriate to separate" comment was simply the court's acknowledgment that the success of the joint enterprise was the result of "joint efforts."

> While it is understandable that after separating each party would attempt to minimize the contribution of the other to their joint enterprise, the court finds most credible the defendant's expression of their relationship as contained in a will prepared in December of 1996. That will, exhibit 1, leaves defendant's property to the plaintiff and specifically provides for his children only if plaintiff fails to outlive him by fifteen days. That will further provides, when referring to his bequest to the plaintiff: "I recognize what we have accumulated over the last four or five years was done as a result of our joint efforts and I appreciate that."

¶24 As is apparent, to the extent the court relied on Richard's will, it was to evaluate Richard's credibility regarding his characterization of Elizabeth's contributions. And, as we have noted, the circuit court made numerous additional findings about the parties' contributions. These findings and the balance of the circuit court's unjust enrichment analysis make no further mention of the will. As such, we reject Richard's characterization that the court relied primarily on the will in formulating its 50/50 split.[3]

C. Failure To Value Benefits Already Enjoyed

¶25 Richard argues that "[t]he trial court failed to include in its calculations the value of assets [Elizabeth] took from the relationship and the value of the benefits she received during the relationship." Richard points to benefits such as food, shelter, clothing, and a Jeep Cherokee. He also notes that Elizabeth took with her certain furnishings, equipment, and various cash, including $110,000 from the sale of a property.

[3] Richard does points out that, when this will was drafted, only some of the assets were in existence and, thus, he argues that the will should only be considered as relevant to those assets. However, as we have just discussed, there is no indication that the court primarily relied on this will to divide any particular assets.

¶26 As to the benefits Elizabeth realized during the joint enterprise, it is clear that the circuit court believed those benefits were offset by benefits Richard realized during the same time. The court specifically found that "during the time the parties[] cohabitated each party was the beneficiary of their accumulation of wealth" and "each spent money as they saw fit." Thus, we disagree with Richard's general contention that the court ignored these benefits in its calculations. As to Richard's complaint that Elizabeth walked away with $110,000 in cash, the record shows that Richard is referring to a $230,000 cash sale where Richard and Elizabeth shared equally in the proceeds.[4]

D. Overall Basis For The 50/50 Division

¶27 Richard raises a number of points that, either directly or indirectly, go to whether the circuit court erred when settling on a 50/50 division of the joint enterprise assets. We addressed some of these points above, such as the role of Richard's independently owned collateral in acquiring certain joint enterprise property. *See supra*, ¶13. Richard also more generally argues that "he provided the genius and driving force, as well as the capital and credit that was necessary for the businesses to succeed." Similarly, Richard points to his role in financing, negotiating real estate transactions, and remodeling "distressed buildings."

¶28 Richard contrasts this to Elizabeth's contributions, which he characterizes as "assisting in the management of the businesses and decorating the properties." He contends that these roles were not "equally necessary to the asset

[4] Richard also points to Elizabeth's retaining $9,500 in cash from the sale of another property. The portion of the record he cites as relating to this sale indicates that this property's proceeds were split "50/50."

acquisition." In so arguing, Richard points to several cases, apparently suggesting that, in those other cases, the couples' lives were either more integrated or their skills were more comparable to each other. *See, e.g.*, ***Ulrich***, 258 Wis. 2d 180, ¶¶2, 14 (where a couple "maintained a house, raised four children, shared living expenses and continually acquired real and personal property" and "earned comparable incomes"). As the following explains, however, we conclude that Richard has failed to demonstrate that the circuit court's findings regarding the parties' relative contributions were in error.

¶29 The circuit court made substantial findings about Elizabeth's contributions to the joint enterprise. For example, the court found and the record supports that, generally speaking, Elizabeth's focus was on the management of properties, whereas Richard's focus was on construction work. The court also found that Elizabeth did much of the bookwork, worked with the accountants, did various tasks to keep the properties functional and open, such as decorating, cleaning, bartending, and various other tasks, and that her roles helped enable Richard to perform his roles. For example, the court specifically found that Richard had "little interest" in a motel they acquired and that Elizabeth kept it operational. The court also considered a variety of documents, such as financial statements filed in both parties' names, joint loan and mortgage commitments, joint title in most properties, a joint UCC statement, and so on. Richard does not demonstrate that these and other findings of fact made and relied on by the court were unsupported by the record.

¶30 The pertinent question here is whether the 50/50 division was reasonable in light of the facts summarized above. *See* ***id.***, ¶¶8, 20 (noting that the division of the joint enterprise property is discretionary and that such a decision is "sustained if the circuit court examined the relevant facts, applied a proper

standard of law, and using a rational process, reached a conclusion that a reasonable judge could reach"). We conclude that the division was reasonable. The facts, as a whole, can reasonably be viewed as demonstrating that Elizabeth and Richard contributed equally to the accumulation of assets. It was reasonable, for example, for the circuit court to find that Elizabeth enabled the enterprise to function by performing tasks that Richard was either uninterested in performing or that he could not perform as well. Accordingly, we affirm the division.

E. Prejudgment Interest Award

¶31 Richard argues that the award of prejudgment interest was improper. His argument turns on his assumption that, because the amount owed to Elizabeth was not reasonably ascertainable in advance, the court could not award prejudgment interest to Elizabeth.

¶32 The supreme court recently reiterated that,

> in a case of equity, the allowance of interest is a matter within the circuit court's discretion. A reviewing court will affirm the circuit court's exercise of discretion unless it was erroneous. The circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon the facts of the record.

Ash Park, LLC v. Alexander & Bishop, Ltd., 2010 WI 44, ¶32, 324 Wis. 2d 703, 783 N.W.2d 294 (citations omitted).

¶33 Citing ***Dahl v. Housing Authority of Madison***, 54 Wis. 2d 22, 31, 33, 194 N.W.2d 618 (1972), a contract damages case, Richard argues that, in addition to the framework we have just quoted, case law requires that damages be ascertainable or "measurable or computable" up-front as a prerequisite to awarding prejudgment interest. He also broadly asserts, without citation, that

"[t]here is simply no reasonably certain standard by which one could calculate the extent to which damages might be awarded in an unjust enrichment case involving unmarried cohabitants."

¶34 We acknowledge that the circuit court stated that the damages were "reasonably ascertainable" here. We need not address Richard's contention that the circuit court was incorrect in that regard, however, because Richard fails to show that the award in this case *must* be based on damages that were reasonably ascertainable. It is apparent from the circuit court's comments that, regardless of its reference to the damages being reasonably ascertainable, the court relied on its equitable powers, with the aim of providing a fair result under the circumstances. The court concluded:

> [Elizabeth] *has been without the benefit of the value of her interest in the joint enterprise and this court determines that she is, in fairness and equity, entitled to interest on her loss of use* of her portion of the accumulated assets from January 2003 at the rate of 5%.

(Emphasis added.)

¶35 We acknowledge that in ***Ash Park***, which awarded both prejudgment and postjudgment interest in a case applying equitable principles, the supreme court observed in a footnote that the damages were "'determinable by a reasonably certain standard of measurement.'" ***Ash Park***, 324 Wis. 2d 703, ¶92 n.33 (citation omitted). The opinion does not, however, discuss whether this "reasonably certain standard of measurement" was a necessary precondition to the interest award. Further, the court states in the body of the opinion that "once a court has determined that equitable relief is appropriate, it has wide latitude to fashion the remedy based on the equities of the case" and that "the allowance of interest in a case of equity is dependent upon the various equitable circumstances

of the case." ***Id.***, ¶¶74, 87. These statements suggest, contrary to Richard's contentions, that particular circumstances may justify interest as a matter of equity, regardless whether damages were determinable from the outset.

¶36 We need not resolve this uncertainty because it is enough to observe that Richard, as the appellant, has failed to demonstrate that the circuit court erred. He provides no case support for his assertion that prejudgment interest may never be awarded in an unjust enrichment case involving unmarried cohabitants. And, he does not otherwise point to cases that directly speak to the equitable decision to impose prejudgment interest. Rather, he relies on contract cases concerning claims for money damages. *See* ***Dahl***, 54 Wis. 2d at 29-33 (discussing whether a contractor's contract claim was liquidable and, thus, a proper subject for prejudgment interest); ***United Capitol Ins. Co. v. Bartolotta's Fireworks Co.***, 200 Wis. 2d 284, 300, 546 N.W.2d 198 (Ct. App. 1996) (directing the award of prejudgment interest for an amount owed under an insurance contract when the amount owed was precisely determinable as of a certain date).

¶37 Because Richard does not otherwise develop an argument that the interest award was improper, we affirm the circuit court's decision as reasonably based "upon the various equitable circumstances of the case." *See* ***Ash Park***, 324 Wis. 2d 703, ¶87.

F. Prejudgment Interest Rate

¶38 Richard argues that, even if some interest award was proper, the particular rate of 5% was improper. We are not persuaded.

¶39 Richard complains that the circuit court erroneously relied on several statutes. For example, Richard criticizes the circuit court's citation to WIS. STAT.

§ 138.04,[5] which Richard asserts, without further explanation, "is not facially applicable" here. *See* § 138.04 (providing that "[t]he rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year").

¶40 Here again we disagree with Richard's characterization of the circuit court's decision. Although it appears that the court referenced certain statutes as general guideposts, the court did not "rely" on the statutes in the sense that it believed it was bound to apply them.

¶41 The relevant inquiry is whether the 5% rate was an abuse of discretion in the circumstances of this case. *See* ***Ash Park***, 324 Wis. 2d 703, ¶94 (stating that the court did not abuse its discretion when setting the rate of interest based on the equities of the case); *see also* ***id.***, ¶91 n.32 (noting that the circuit court awarded prejudgment interest at a rate of 5%). On this topic, Richard merely argues that, "insofar as [Elizabeth's] principal was protected during difficult investment and real estate markets, she has already been compensated for her lack of access to the funds."

¶42 This protection-from-risk assertion, however, falls short of showing that the circuit court abused its discretion. Even granting Richard his premise that it matters that Elizabeth was shielded from risk, Richard does not explain why a 5% rate is not reasonable. Lacking that explanation, we have no basis on which to conclude that the circuit court abused its discretion.

[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Conclusion

¶43 For the reasons stated above, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.