

IN THE SUPREME COURT OF IOWA

NO. 15-0011

BERNARD J. WIHLM AND
PATRICIA M. BALEK

Plaintiffs-Appellees

vs.

SHIRLEY A. CAMPBELL, individually and as Executor
Of the ESTATE OF JOHN JOSEPH WIHLM, and as Trustee
Of the JOHN JOSEPH WIHLM REVOCABLE TRUST dated April 2,
2012 and PARTIES IN POSSESSION

Defendant - Appellant

APPEAL FROM
CERRO GORDO COUNTY DISTRICT COURT EQCV068660
FRANKLIN COUNTY DISTRICT COURT EQCV500145
THE HONORABLE JUDGE DEDRA SCHROEDER

**APPELLANT'S RESISTANCE TO APPLICATION FOR
FURTHER REVIEW**

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QUESTIONS PRESENTED

1. Whether the Trial Court erred in holding that Defendant-Appellant did not prove that partition in kind would be equitable and practicable.
2. Whether the Court of Appeals erred by applying law that is inapplicable in the State of Iowa.
3. Whether the Court of Appeals erred when disregarding the trial court's findings of credibility of all three experts, and relied solely upon the expert testimony of one expert.
4. Whether the Court of Appeals erred in deciding an issue that was determinative of the outcome but that was not presented to it.

TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

1. The trial court did err in holding that Campbell had not proven a partition in-kind would be equitable and practicable and Court of Appeals correctly assessed the issues de novo consistent with the weight of the evidence.

Sears, Roebuck & Co. v. Sieren 484 NW 2d 616, 617 (Iowa Ct. App. 1992).

Spies v. Prybil, 160 NW 2d 505, 507 (Iowa 1968)
(*Blacks Law Dictionary* 6th Ed., 1990 p 118.)

2. The Court of Appeals applied law applicable in the State of Iowa and controlling in prior decisions.

68 CJS Partition Section 125

68 CJS Partition, Section 123

Dee v. Collins, 15 NW2d 883, 885 (Iowa 1944).

Spies v. Prybil, 160 NW 2d 505, 507 (Iowa 1968)

3. The Court of Appeals did not err in disregarding the trial court's findings of credibility of all three experts and accepted each expert subject to the qualifications and testimony provided.

Crouch v. Nat'l Livestock Remedy Co. 231 NW 23 (Iowa 1930).

4. The Court of Appeals did not err in deciding the issue of reliability of appraisals generally and specifically as that discussion was central to the decision of both the trial court and the Court of Appeals.

Newhall v. Roll, 14-1622 2015 WL 5965206.

RESISTANCE TO STATEMENT IN SUPPORT OF FURTHER REVIEW

Pursuant to Iowa Rule of Appellate Procedure 6.1103 Appellant respectfully requests that the Court deny further review of the Iowa Court of Appeals' decision filed on September 14, 2016. As set forth herein, the Court of Appeals correctly applied the law of the case protecting a defendant in a partition action to the right to partition in-kind if defendant carries the burden of proof by preponderance of the evidence that the partition in-kind proposed is equitable and practical in the Court of Appeals de novo review of the evidence.

The Iowa Rule of Civil Procedure 1.1201(2) and Spies v. Prybil, 160 NW 2d 505 (Iowa 1968) was correctly applied with the findings of the Court of Appeals that the Defendant herein carried her burden of proof that division in-kind was both equitable and practical.

Plaintiff-Appellees failed to show Court of Appeals' analysis relies upon law which Supreme Court has held is no longer applicable in its assertion that sentimental attachment to the property is a factor that weighs in favor of the equitable analysis in establishing a partition in-kind.

Further, the Court of Appeals did decide that the particular appraisal introduced into evidence was both reliable and sufficient to establish the equitable division of real estate herein.

The presumption in favor of partitioning real estate by sale is undisputed in this case. The only question raised is the sufficiency of evidence presented by the Defendant Appellant to establish by preponderance of the evidence the equity and practicality of division in-kind as proposed.

The Court of Appeals has properly exercised its de novo review of this case both factually and legally and accordingly no further review should be granted under Iowa Rule of Appellate procedure 6.1103 (1)(b)(1), (2),(3), and (4).

STATEMENT OF THE CASE

Plaintiff-Appellees Bernard Wihlm and Patricia Balek sued their sister, Defendant Appellant Shirley Campbell in Cerro Gordo and Franklin counties on January 31, 2014 (App. p. 1-9, 10-13) to partition by sale two parcels of land in each county. Shirley filed her Answer to the Partition Action March 12, 2014 (App. p. 14) in Cerro Gordo County and in Franklin County on March 31, 2014.

The 300 acres (80 in Franklin and 220 in Cerro Gordo County) involved had been gifted to the three siblings by the estate of their mother who died in 2004 who granted them a remainder interest subject to their father's life estate in 220 acres and by their father who died in 2012

granting them an outright his 1/2 interest in 160 acres in Cerro Gordo County. Their father's estate remains open at the time of this writing.

The case went to trial on September 24, 2014. Bernard testified for Plaintiffs and Campbell testified on her behalf. Defendant Appellant offered the testimony of Appraiser Fred Greder as to the value of the farm and Plaintiffs submitted three separate appraisals in connection with the trial. Exhibits 5, 6, and 7. Fred Greder testified as to the topography, soil types, CSR values and general farmability of each parcel, its value and the reasons supporting the same. (App. pp. 413-414) Defendant used Exhibits 6 and 7 as evidence pursuant to her assumption of the burden of proof to establish the equity of the proposed division, along with Greder's testimony of current or day of trial and supporting emails on the same (Exhibit 104 and Exhibit 105 App. p.73 and 74) that her proposal identified in Exhibits 107 and 108 were both practical and equitable.

Plaintiff-Appellees offered no appraisal on which the trial court could establish values. Plaintiffs attempted to impeach the credibility of the appraisals through testimony of an auctioneer that an auction of the property was the only way to properly divide the same on an equal basis (not equitable) (App. p-. 416-417) and a land buyer who had no significant connection to the property or credentials on valuation. (App. pp. 355-356)

Plaintiffs sought partition by sale arguing only a sale would treat each of the parties exactly equal in the distribution of assets which they asserted was the only equitable position. (App. pp. 391-398) Plaintiffs argued that conducting a survey, a partition of additional real estate to equalize the land values would be impractical, even though a partition of the homestead 4.4 acres was to be required for separate sale of that land anyway. Campbell proposed merely extending and squaring off the 4.4 acres to add an additional 14.06 acres for a new parcel totaling 18.46 acres. This would keep the integrity of the balance of the property in straight rows.

The district court failed to recognize that the variables which the trial court stated made comparison of property impractical under the factors of Spies v. Prybil, 160 NW 2d 505, (Iowa 1968) , and rested on the fact that in Spies no appraisal identifying those factors and giving a basis for comparison had been offered by any party. The Spies court noted:

“It appears from the record that the tract consists of approximately 143 acres of land, part of which is improved and part of which is not improved; but how much there is, or the respective values of each kind, does not appear. It appears that there are improvements, consisting of a house and barn and a few other buildings, on the premises; but how these are located, and the value thereof, is not shown.” (citing Porter v. Wingert, 195 Iowa 317, 319, 190 NW 330, 331)

Fred Greder offered testimony on all of these issues either directly or through the appraisals submitted in a well-reasoned and fair market value comparison. Campbell's Exhibit 106 demonstrated the reconciliation and opinion of value methodology used by Greder.

The trial court further erred in finding to establish the time of trial as a valuation for real estate parcels rather than engage in speculation as to what future prices might be on an unknown and unknowable future day of sale. (App. p. 393)

The Court of Appeals correctly identified that the only way a partition defendant can maintain burden of proof that a division is equitable and practical is through a qualified appraisal of the property. No other valuation method, short of sale, allows a defendant to present credible valuation testimony, a right to which the Defendant is entitled and must assume.

Plaintiff-Appellees would defeat the statutory right of partition in-kind defendants enjoy by the blanket assertion that only an equal (not equitable) division is fair, and only by sale can an equal division be guaranteed. Plaintiff-Appellees would further deny the rights guaranteed by statute by putting the burden on the partition defendant to repurchase at sale any interest that Defendant wishes to retain as the basis of her remedy of equity. The statute allows and requires the Defendant to be able to retain

ownership without meeting her burden of proof. The issue of whether an alternate better remedy than the statute could be implemented is immaterial.

The Court of Appeals reversal essentially finds that Fred Greder was the only qualified certified appraiser who testified and that the speculation of other expert witnesses did not impeach the qualifications, reasoning and factual presentation contained in the appraisals and his testimony to negate the preponderance of the evidence established by Campbell through this testimony and various exhibits. There is no sound reason to grant further review of this decision.

The Court of Appeals has correctly ruled upon the law and established the facts of the case in its de novo discretion according to case law and the rules of the Court. (Iowa R. Civ. P. 1.1201(1); Spies v. Prybil, 160 NW 2d 505, 507 Iowa 1968). The Court of Appeals considered the deference properly accorded to the lower court in making this decision. In re: PC No. 16-0893 2016 WL 43795801 at 2 (Iowa Ct. App. August 17, 2016) (See page 4 of Decision of Court of Appeals.)

ARGUMENT

1. The trial court did err in holding that Campbell had not proven a partition in-kind would be equitable and practicable and Court of Appeals correctly assessed the issues de novo consistent with the weight of the evidence.

The Court of Appeals recognized that Spies v. Prybil, 160 NW 2d 505, 507 (Iowa 1968) was the controlling authority on a partition action. The Court of Appeals recognized that the rule in Iowa is unequivocal and recognized partition by sale and places upon the objecting party the burden to show why this should not be done in this particular case. (Slip Opinion, 5-6)

The Court of Appeals noted that the case largely turned upon the testimony of three expert witnesses, a certified real estate appraiser, an auctioneer, and the owner of a real estate business. (Slip Opinion, 5).

The Court of Appeals considered the construction and detailed information contained in the appraisals (Exhibit 5 and 6). Kuper's testimony at trial was largely limited to his buyers that he represents in large businesses (App. pp. 353-356) and his opinion that appraisals do not factor in fence line buyers. The Court of Appeals noted that Kuper felt fence line buyers "overpay" for land to which they are emotionally attached. (Slip Opinion 6.) The statutory remedy of in-kind division is designed to protect the interests of current owners of land from being forcibly divested of their ownership to the benefit of others when equity allows in-kind division.

The Court of Appeals noted that Cory Behr testified farm sales at auction “almost always exceeded the appraised value of the property and that auctions establish a fair market value.” (Slip Opinion 6 of 11.) The Court of Appeals further noted that Behr believed “the true value of the land” could only be established if interested buyers were put into a room to bid on it. (Slip Opinion p. 6.)

The Court of Appeals logically considered this would defeat and curtail the very remedy that the Iowa Statute intended to grant to defendants and was a rejection of appraisals generally as a methodology of valuation.

The trial court’s acceptance of the “auction only” valuation of land negates the statutory right of the Defendant to establish equitable and practical division in-kind by any practical means, except by the contested sale itself. The Court of Appeals noted that appraisal by farmland is “a subjective exercise of professional judgment by qualified and skilled individuals who may reasonably disagree.” (Slip Opinion p. 7) citing Sears, Roebuck & Co. v. Sieren 484 NW 2d 616, 617 (Iowa Ct. App. 1992). It is important to recognize that Plaintiff-Appellees did not offer any contradictory evidence by a qualified appraiser. Neither Kuper nor Behr offered their own valuations of land as of the day of trial or substantiating

analysis of a comparative value. They simply stated their belief that appraisals were not the best measurement of actual value compared to a sale. Defendant believes this is again confusion between the question of equitability and an exact division which could only be decided by sale. However, this is not the requirement established by the statute or the case law. Spies v. Prybil, 160 NW 2d 505, 508 (Iowa 1968) suggests that had the defendant offered more testimony than his “unsupported opinion” the result in that case may have been different. Clearly, Spies did not intend to limit the submission of qualified appraisal testimony as used at trial.

The Court of Appeals noted that on a de novo review that the Court of Appeals affords “some deference” to the decision of the district court. (Slip Opinion p. 4). The Court goes on to determine even given that deference on de novo, review Campbell has proven both the proposed division was equitable (Slip Opinion, p. 7) and practical (Slip Opinion, p. 8).

The Court of Appeals noted that property could be divided without “material diminution of the value of the remainder.” Only the north 160 acres in Cerro Gordo County must be divided by survey. All the rest of the property was set by previously acquired legal description. The 160 acres was to be divided and surveyed even if sold at auction due to the necessity of carving out the building site from the adjacent farmland. Defendant

Appellant proposed merely extending the 4.4 acres agreed to be in the building site to add an additional 14.06 acres. This can be accomplished cleanly by extending the north line of the acreage straight across the parcel to the east until the requisite number of acres is included. (Exhibits 107, 108, App. pp. 77-79). This avoids an irregular survey line on the 4.4 acre parcel itself and preserves the straight line farming row favored by Kuper and Behr. (App. p. 363-364)

The fact that the Court of Appeals considered the value and reliability of both appraisals generally, and Greder's appraisal specifically, was noted by the Court of Appeals when stating: "We see no reason to reject the concept of appraisal, generally, and Greder's testimony, specifically, out of hand." The Supreme Court should not discount the fact that Greder as the certified appraiser was agreed upon by all parties. (Slip Opinion p. 5). Indeed if the common sense and clear division of property proposed and utilized by Campbell is not equitable, there seems to be no circumstances under which a division in-kind could ever be sustained merely by preponderance of the evidence. The weight of the evidence need not be overwhelming. It need merely be of the greater weight than the opposing evidence. (*Blacks Law Dictionary* 6th Ed., 1990 p 118.)

Plaintiff-Appellees allege that the trial court's appointment of Behr as a referee to oversee the partition by sale is somehow suggests they determined Behr's credibility greater than Kuper or Greder. However, it merely suggests that the trial court believed that a partition by sale was the only appropriate avenue. Neither Fred Greder nor Kuper are in the business of selling real estate.

Plaintiff-Appellees focus on speculation that there may be unidentified fence-line buyers who would bid higher than the fair market. At trial, Fred Greder acknowledged that part of his appraisal was based upon the "strong market" of the pieces in the particular region in which they were located, which would in fact incorporate the history of strong neighboring farmers being active and strong bidders in prior sales incorporated into his comparative sales used on the appraisals. (Exhibit 6 and 7) Greder testified he was familiar with the land and the area and strong buyers in the region was a factor in the retention of value against state-wide dipping prices considered by him. (App. pp. 410,411,412).

The hope and expectation that fence-line buyers may participate in a sale and drive up prices is mere speculation and not substantial evidence to overcome the appraisal valuations and testimony. Defendant Appellant met her burden of proof and further review is not appropriate.

2. The Court of Appeals correctly applied law applicable in the State of Iowa and controlling in statute and prior decisions

The argument of Plaintiff-Appellees is essentially that by citing 68 CJS Partition, Section 123, cited by the Court of Appeals as a factor in the consideration of what is equitable or not. (Slip Opinion, p.8), the Court of Appeals is citing law no longer controlling in Iowa. In citing CJS §123, the Court of Appeals is examining the factors of what equity or equitable division consists of, not the burden and proof issues set out in Spies, in §125 of CJS. The Court of Appeals defines “sentimental attachment” simply as “a further equitable consideration (which) favors division in-kind.” (Slip Opinion p. 8.)

The Court of Appeals merely indicates that all other factors being equal, the sentimental attachment and protection of multi-generational ownership of the property is one additional factor that may be considered in defining the equity of a partition in-kind.

Plaintiff-Appellees would have the Supreme Court believe that the Court of Appeals failed to acknowledge the allocation of burden of proof established in Spies overruling in Iowa previously cited cases in 68 CJS Partition, Section 125. (Emphasis added.) The Court of Appeals did not rely upon outdated or inapplicable law as to the burden of proof, but merely

determined protecting family ownership of land is a valid factor to be considered by the Court in defining whether a partition is equitable or not – regardless of who has the burden. However, it is important to acknowledge that the Court of Appeals stated its conclusion that Campbell as Defendant Appellant had established equitability before considering multi-generational farm protection as “an additional” factor in the overall equation and assessment by the Court of Appeals.

Indeed, there was no reason to give Defendant in a partition action a right to defend and request a partition in-kind against a partition by sale except in recognition of the unique qualities of real estate generally and the specific attachment individuals have relating thereto. This concept has long been recognized in specific performance cases, Dee v. Collins, 15 NW2d 883, 885 (Iowa 1944).

3. The Court of Appeals did not err in disregarding the trial court’s findings of credibility of all three experts and accepted each expert subject to the qualifications and testimony provided

The Court of Appeals independently, pursuant to its authority under a de novo review assessed not only the creditability but the credentials of all three experts who testified at trial.

Fred Greder testified as to his qualifications as a certified appraiser (Tr. p.p. 170-173) and his qualifications are additionally outlined and

attached to Exhibit 7 (Appendix p. 304).

Additionally, the professional qualifications of the appraiser who conducted Exhibit 6 Gary Howell, for Greder's firm, were set out at App. p. 257.

Exhibit 6, the appraisal of 220 acres in Cerro Gordo County is 49 pages in length and contains in the table of contents (App. p. 192) a specific consideration of land use (App. p. 195), subject land description and comparative sales, sales adjustments, reconciliation, limiting conditions, certification, and provides the details of comparison that the trial court claimed was missing for her to make a reasoned decision (App. pp. 26-28)

Exhibit 7, Appraisal of 80 acres in Franklin County is 32 pages in length and the contents are summarized at App. p. 260 to include essentially the same information and detail as contained in Exhibit 6. Neither of Plaintiff-Appellee's experts offered any written documents, or support for their opinions.

The Court of Appeals was correct to assess the qualifications of the experts separately from their credibility. Neither Kuper nor Behr had the professional qualifications to render a fair market value opinion as to the real estate, qualifications as an auctioneer or a land buyer respectively not providing the court substantial grounds upon which their content of

testimony could be assessed against the of the certified appraiser. Neither Behr nor Kuper lack the requisite qualifications to be who they purport to be as an auctioneer and a land purchaser. However, neither have the qualifications to properly establish fair market value of land without sale, or to impeach the detailed and thorough analysis of the specific appraisals upon which Fred Greder relied. (App. pp. 366-367, 372, 381.)

Fred Greder further provided to the Court exhibits 104 and 105, (Emails of Fred Greder dated 8-6-14 and 7-24-14 (App. p. 72 and 73) further supplementing earlier appraisals and buttressing his testimony of value on the day of trial. Fred Greder specifically affirmed valuations of the appraisals as accurate on the date of trial. (App. p. 412)

For Plaintiff-Appellees to suggest that a finding of credibility of witnesses is the same as finding witnesses have the same credentials simply cannot stand and is without common sense.

While it is true that the trial court is a fact finder who is not bound to surrender its judgment to that of any person testifying as an expert witness, neither is the Court of Appeals required to do that. Crouch v. Nat'l Livestock Remedy Co. 231 NW 23 (Iowa 1930). The Court of Appeals relied not just on opinion testimony, but on the detailed factual material presented by Fred Greder in each of the appraisals upon which his opinion

was based. This is truly an assessment of the “substantive facts” which allow the Court of Appeals to make its decision based upon the whole of the evidence, rather than limited snippets taken from the trial court’s opinion.

4. The Court of Appeals did not err in deciding the issue of reliability of appraisals generally and specifically as that discussion was central to the decision of both the trial court and the Court of Appeals.

The Court of Appeals correctly identified the basic issues on appeal and before the trial court as to the sufficiency of practicality and equitability of division. The Court of Appeals correctly noted that determination rests primarily upon three experts who testified, a certified appraiser, an auctioneer, and a land buyer. No claim of any other individual was made as to valuation of the land.

The second issue identified by the Court of Appeals was “whether or not appraising farmland is so speculative that partition in-kind becomes impractical.” (Slip Opinion p. 5). It was not the Court of Appeals that delineated the specific appraisal of Fred Greder versus appraisals in general.

Rather, at trial it was Plaintiff-Appellees who asserted that in a volatile farm market, appraisals themselves are untrustworthy. (App. p. 368). In fact, auctioneer Behr testified that he was familiar with the work of Fred Greder and had used his appraisals in the past. It was not Fred

Greder that he attacked, but the nature of appraisals generally versus actual sales in reaching the fair market value of real estate. The decision of the trial court that a partition based on two specific certified appraisals and the undisputed trial testimony and analysis of a certified appraiser is “merely guesswork when factoring in the nature and qualities of the land” (App. p. 29) ignores the fact that an appraisal is intended and does accomplish the harmonization of the various factors of the nature and qualities of the land in assessing all of the differences of the various soil qualities, waterways, soil types, and market location, that the trial court found as contributing factors the trial court being unable to do anything but take a “shot in the dark” as to the true valuation and equity of Defendant’s proposal. (App. p. 28).

The appraisals itself is the basis for comparing land having variations of CSR values and other qualities by reducing each to a common denominator of fair market values. The appraisals note the comparable sales relied upon by the appraiser and the adjustments for each comparable sale based upon the listed factors. The appraisals are in fact the apples versus oranges reduction to a common denominator of fair market value that was precisely missing in Spies and served as the basis of the Court’s rejection of in-kind partition in that case.

The Plaintiff-Appellee here asserts that if the Court of Appeals decision is upheld, it would prohibit any party from ever challenging the validity of an appraisal “regardless of other facts or considerations to which a fact finder should give consideration. (Application for Further Review, p. 31)

This case is factually distinguished from Newhall v. Roll, 14-1622 2015 WL 5965206. In Newhall there was a specific contest between qualified appraisers that the trial court found could not be reconciled. The Court of Appeals in Newhall determined that the appraisals were not sufficiently opposing given all other evidence that a partition in-kind could not be ordered. Here, no opposing appraisal has ever been submitted into evidence and the qualifications and conclusions and methodology of the appraisal cannot and were not successfully impeached.

The dire claim that affirming the decision by the Court of Appeals herein would impede any challenge to the farmland appraisal ignores the fact that preponderance of the evidence does not require the defendant to prove its case against speculation or other unsupported opinions. That is not the case. Here, the detailed factual analysis stands against efforts to force the court to accept a resolution different than the standards of the statute itself. Plaintiff-Appellee would eliminate the ability of a partition

Defendant to rely upon any pricing in any down market, or for that matter apparently a rising market. This is but a circular argument that only an auction and actual sale can determine what equity can mean between opposing land owners. This is not the law, or the facts of the case.

CONCLUSION

Campbell respectfully prays that the Supreme Court deny the application for further review and affirm the decision of the Court of Appeals herein.

CERTIFICATES OF COST, SERVICE, AND COMPLIANCE

CERTIFICATE OF COST

The undersigned attorney for Defendant-Appellant certifies that the amount actually paid for printing and duplicating the necessary copies of this Resistance to Application for Further Review in final form was \$0.00.

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant-Appellant certifies that on the date referenced below, he filed this Resistance to Application for Further Review with the Clerk of the Supreme Court by EDMS and also served two (2) copies of this Resistance to Further Review on counsel for the Plaintiffs' Appellees:

Collin M. Davison
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CERTIFICATE OF COMPLIANCE

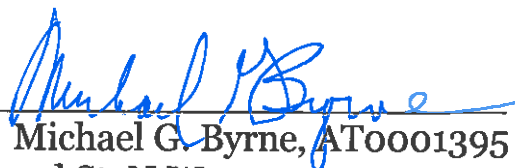
1. This Resistance complies with the type volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Resistance to Application for Further Review contains 4,101 words, excluding the parts of the Resistance exempted by Iowa R. App. P. 6.1103(4).

2. This Resistance to Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Resistance has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point Georgia font.

Submitted and served this 14th day of October, 2016.

Respectfully Submitted,

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