COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2075 **Cir. Ct. No. 2010CV205**

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

DAVID TYLER AND KAREN TYLER,

PLAINTIFFS-RESPONDENTS,

V.

JACQUELINE SCHOENHERR,

DEFENDANT-APPELLANT,

ASSOCIATED BANC-CORP.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Clark County: THOMAS T. FLUGAUR, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. This case involving a property boundary line dispute resulted in a trial to the circuit court, after which the court entered judgment for reformation of a real estate warranty deed in favor of David and Karen Tyler. Neighboring property owner Jacqueline Schoenherr appeals that judgment.

¶2 Schoenherr argues that the circuit court erred in concluding that the Tylers' complaint: (1) alleges a claim for reformation; (2) pleads mistake with sufficient particularity; and (3) is not barred by the six-year statute of limitations for "action on contract," under WIS. STAT. § 893.43 (2009-10).[1] In addition, Schoenherr argues that the court erred in finding at trial that the Tylers proved by clear and convincing evidence that there was a mutual mistake meriting reformation of the deed conveying real estate to the Tylers in 2000.

¶3 For the following reasons, we affirm the judgment.

BACKGROUND

¶4 Relevant history begins with a parcel of property owned by Linda and William Ganther. The Ganthers' parcel included farm land, a single-family residence, and various farm structures (such as a dairy barn, silo, and various sheds and coops). When the Ganthers put the parcel up for sale in 1993, one potential buyer, Larry Naedler, wanted to buy only the farm-related portions of the parcel, not the residence and not the real property or improvements immediately

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

surrounding the residence. As the circuit court summarized the evidence, Naedler was a farmer who "had no use for the homestead."

¶5 Consistent with this goal, in the fall of 1993, Naedler and his father, Marvin Naedler, "measured off" and then drove stakes into the ground to delineate all farm-related property, including farmland, the barn, a silo, and a steel pole machine shed—as distinguished from house-related property, such as the house itself and some structures near the house. Marvin Naedler testified that the stakes created a boundary line that "would work out for Larry's [Naedler's] interests" in raising crops. The Naedlers drove the stakes with permission from the Realtor handling the sale for the Ganthers and the Realtor visited the property after the stakes were in and inspected it without objecting to the placement of the stakes.

¶6 Subsequently, in early 1994, the Ganthers sold their parcel in two separate transactions: one warranty deed executed and recorded in January 1994 conveyed to Larry Naedler farm land and property that included the barn, but not the single-family residence; a second warranty deed executed and recorded in March 1994 conveyed the single-family residence and a surrounding area to Harry Burkhalter.

¶7 The stakes were still in place when Burkhalter purchased the residence-related property, and they remained in place until the summer of 1994, when Burkhalter removed them so that he could mow the lawn around his house, the barn, and a machine shed.

¶8 In October 2000, Harry and Michelle Burkhalter sold the residence-related property to Schoenherr, who is Harry Burkhalter's sister. In November 2000, Larry Naedler sold the farm-related property to the Tylers, through an

executed and recorded warranty deed conveying real estate that is the focus of this case.

¶9 In 2010, a disagreement over an issue unrelated to the boundary line at issue here developed between the Tylers and Schoenherr. In the course of that unrelated dispute, the Tylers discovered what they believed was a discrepancy between the recorded boundary line and the actual boundary line. In July 2010, the Tylers filed this action in circuit court naming Schoenherr as a defendant.[2] The complaint is described in more detail below, but summarizing briefly here, it recited the legal descriptions reflected on the respective deeds held by Schoenherr and the Tylers. It alleged that property that the Tylers believed to be theirs "may actually be included within the legal description of the Schoenherr Property," creating an area of "Disputed Property." The complaint sought relief, pursuant to WIS. STAT. § 841.01,[3] declaring the Tylers' "legal interest in the Disputed Property." The complaint alleged that the Tylers were "entitled to legal ownership of the Disputed Property pursuant to" WIS. STAT. § 706.04 (equitable relief regarding property transactions) or WIS. STAT. § 893.27 (possession based on seven years' uninterrupted adverse possession). Among the prayers for relief was the following: "For declaratory judgment defining [the Tylers] as the legal owners of the Disputed Property and for the execution and recording of the appropriate legal instruments to that effect."

[2] The Tylers also named Associated Bank as a defendant, because it was alleged to hold a mortgage against the Schoenherr property, but the Bank was subsequently dismissed from this action.

[3] WISCONSIN STAT. § 841.01(1) provides, "[a]ny person claiming an interest in real property may maintain an action against any person claiming a conflicting interest, and may demand a declaration of interests."

¶10 Following a two-day trial, the court made oral rulings that were subsequently memorialized in a judgment for reformation of the Tylers' deed to include the Disputed Property, which had been included in the property description in the Schoenherr's deed. After the oral rulings and before entry of the judgment, by written order the court denied Schoenherr's motion for reconsideration of the court's denial of Schoenherr's motion to dismiss based on the statute of limitations. The court accomplished the reformation by ordering that the Tylers' deed be reformed to include an "outlot" described in a recorded certified survey map and that Schoenherr "shall have no right, title or interest in" the outlot. Schoenherr appeals the judgment.

DISCUSSION

I. Claim for Reformation

¶11 Schoenherr argues that the complaint did not put her or the court "on fair notice that" the Tylers "would seek reformation based on mutual mistake," and therefore the circuit court should have dismissed the complaint because the only potentially viable claim proven by the Tylers at trial was reformation.[4] The circuit court concluded that the Tylers' complaint stated a cause of action requesting reformation of the Tylers' deed based on mutual mistake.[5] For the

[4] Explaining further, as stated above, the complaint explicitly purported to state causes of action under WIS. STAT. §§ 893.27 and 706.02. However, the circuit court treated these two purported causes of action as having been effectively abandoned by the Tylers by the close of trial, and the Tylers do not now advance either theory as a viable cause of action. The parties appear to agree that, without a reformation cause of action, no cause of action is stated that matters in this case. We need not, and do not, express any opinion about the applicability of any aspect of §§ 893.27 or 706.02 to this case.

[5] While not determinative on any issue, we note for context that the timing of the court's decision on the motion to dismiss was unusual, coming only after the court conducted the two-day trial, because Schoenherr failed to file a timely motion. Instead, in a single set of motions (continued)

following reasons, we conclude that the circuit court's legal determination was correct.

¶12 Whether a complaint states a claim for relief is a question of law that appellate courts review de novo. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

¶13 In addressing motions to dismiss for failure to state claims, courts are to:

> (1) accept all facts pleaded as true; (2) derive all reasonable inferences from those facts; and (3) construe those facts and inferences in the light most favorable to the plaintiff. Thus, a court properly grants a motion to dismiss only if it is clear that "a plaintiff cannot recover under any circumstances."

Preston v. Meriter Hosp., Inc., 2005 WI 122, ¶13, 284 Wis. 2d 264, 700 N.W.2d 158 (citations omitted); *see also* ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶20, 284 Wis. 2d 307, 700 N.W.2d 180 (claims should be dismissed only "if it is 'quite clear' that there are no conditions under which … plaintiff could recover") (citations omitted).[6]

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styled as a "Trial Brief" and filed five days before the trial began, Schoenherr argued that she anticipated that the Tylers "may claim that their lawsuit is an action to reform the deeds at issue to a legal description compatible with their claim of possession," but that this relief was not available, in part, because the Tylers had "not [pleaded] any elements of a reformation claim." Having just received Schoenherr's Trial Brief, the circuit court on the first day of trial observed that this amounted to a tardy motion to dismiss for failure to state a claim. The court elected to entertain the tardy motion, but only after trial, instead of taking time already scheduled for witness testimony to address this issue.

[6] Both parties make reference to factors that are not tied to the terms of the complaint and which are therefore irrelevant to the question of whether the court should have dismissed the complaint for failure to state a claim. For example, Schoenherr points to the fact that the Tylers did not obtain a survey of the property until approximately two months before trial and asserts (continued)

¶14 The requirement that it be "quite clear" that a complaint is inadequate in order to sustain a motion to dismiss is premised on the notice pleading standard, WIS. STAT. § 802.02(1)(a), which provides that a pleading seeking relief

> shall contain all of the following:
>
> (a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.
>
> (b) A demand for judgment for the relief the pleader seeks.

In addition, "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." § 802.02(5). In a similar vein, "[a]ll pleadings shall be so construed as to do substantial justice." § 802.02(6).

¶15 However, our supreme court has explained that, while only a "short and plain statement" identifying key facts is required,

> a complaint cannot be completely devoid of factual allegations. The notice pleading rule, while intended to eliminate many technical requirements of pleading, nevertheless requires the plaintiff to set forth a statement of circumstances, occurrences and events in support of the claim presented. For example, a claim in negligence must state general facts setting forth that the defendant had knowledge or should have had knowledge of a potential and unreasonable risk. A bare conclusion does not fulfill a plaintiff's duty of stating the elements of a claim in general

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that she would have called additional witnesses if she had understood the case to have included a reformation claim. The Tylers assert that Schoenherr did not attempt adequate discovery. These lines of argument are off point. The inquiry on a motion to dismiss for failure to state a claim for relief is limited to the allegations in the complaint.

> terms. In short, we will dismiss a complaint if, under the guise of notice pleading, the complaint before us requires the court to indulge in too much speculation leaving too much to the imagination of the court. It is not enough for the plaintiff to contend that the requisite facts will be supplied by the discovery process.

Archdiocese of Milwaukee, 284 Wis. 2d 307, ¶36 (citations, quotation marks, and brackets omitted).

¶16 We begin our analysis by observing that reformation has been described both as "a cause of action," ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶53, 244 Wis. 2d 802, 628 N.W.2d 876 (citation omitted), and as a "remedy," ***id.***, ¶59. However, in this appeal, the parties generally proceed under the assumption that reformation is a cause of action, so we will do the same. We now summarize what must be shown to prove a reformation claim.

¶17 "[A] court in equity can reform written instruments that, by mutual mistake, do not express the true intentions of the parties." ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 241 (addressing equitable power of court to reform a deed) (citing ***Van Brunt v. Ferguson***, 163 Wis. 540, 545-46, 158 N.W. 295 (1916)). The party seeking reformation must prove "that both parties intended to make a different instrument and had agreed on facts that were different than those set forth on the instrument." ***Id.*** (citing ***Kadow v. Aluminum Specialty Co.***, 253 Wis. 76, 78, 33 N.W.2d 236 (1948)). "A mistake is only mutual if it is reciprocal and common to both parties." ***Id.*** at ¶20 (citing ***Jentzsch v. Roenfanz***, 185 Wis. 189, 193, 201 N.W. 504 (1924)).

¶18 Thus, "[t]hree elements must be proved by clear, satisfactory, and convincing evidence," and those elements are: "(1) The parties reached an

agreement; (2) the parties intended that such an agreement be included in the written expression of agreement; and (3) the oral agreement was not included in the written expression because of the mutual mistake of the parties." ***Frantl Indus., Inc. v. Maier Constr., Inc.***, 68 Wis. 2d 590, 592-93, 229 N.W.2d 610 (1975).

¶19 As relevant here, the complaint:

(1) Recites a detailed legal description of real property for which Schoenherr is "the record holder" in Clark County;

(2) Recites a detailed legal description of what appears to be adjoining real property that the Tylers purchased from Larry Naedler on or about November 2, 2000, also in Clark County (including a "sic" notation, informing the reader of at least one alleged error in one numeral used in the legal description of the Tyler property);

(3) Alleges that the Naedler-to-Tylers sale was "reduced to writing in a deed" recorded in Clark County;

(4) Alleges that, in connection with this sale, Naedler and the Tylers "reached a mutual understanding of the physical dimensions of the Tyler Property and of the improvements included on the Tyler Property";

(5) Alleges that, after their purchase of this property, the Tylers "possessed, used, maintained, improved, and paid property taxes" on all of the property "that they believed and understood they owned when purchasing" the property from Naedler;

(6) Alleges that some of the property that the Tylers believed and understood they owned "may actually be included within the legal description of the Schoenherr Property," creating "Disputed Property";

(7) Demands "declaratory judgment defining [the Tylers] as the legal owners of the Disputed Property and for the execution and recording of the appropriate legal instruments to that effect."

¶20 We conclude that, accepting as true all facts pleaded, along with reasonable inferences from those facts, and construing them in the light most

favorable to the Tylers, the following is alleged in the complaint. Real property (the Disputed Property) was inaccurately included within the property description in the Schoenherr deed that in fact belongs within the Tyler deed. This resulted from a mutual misunderstanding between the Tylers and Naedler regarding the terms used in the Tyler deed, which contradicted their mutual understanding about the actual dimensions of the property the Tylers purchased from Naedler in 2000.[7] Because of this mutual misunderstanding about the contents of the deed conveying the property to the Tylers, it should be rewritten to include the Disputed Property. While the complaint may not have been as clear as it could have been, we conclude that it includes sufficient detail regarding "circumstances, occurrences and events" necessary to allege reformation based on mutual mistake. *See* ***Archdiocese of Milwaukee***, 284 Wis. 2d 307, ¶36.

[7] We now clarify one factual point regarding the timing of the mutual mistake. The Tylers' argument at trial, accepted by the circuit court, was that the original mutual mistake occurred in 1994 among the Ganthers, Burkhalter (who bought the residence-related property from the Ganthers and sold it to Schoenherr), and Naedler (who bought the farm-related property from the Ganthers and sold it to the Tylers) as to the legal descriptions of the Disputed Property, and that this mutual mistake was perpetuated among all involved persons when the Tylers, as successors-in-interest to Naedler, purchased their parcel from Naedler in 2000. In challenging the adequacy of the complaint with respect to reformation, Schoenherr does not argue that there is anything about the continuing nature of the mistake—that is to say, about the fact that it originated among persons who did not include the Tylers or Schoenherr—that changes the analysis.

It is only in addressing the separate statute of limitations issue discussed below, and then only in her reply brief, that Schoenherr for the first time references the concept that "the deeds that need to be reformed are the 1994 deeds from the Ganthers," and that there was "no connection between [Schoenherr] and the Tylers as far as the legal descriptions of their deeds." Both because this concept is not offered as a developed argument in connection with the motion to dismiss and is referenced only in the reply brief, we decline to address it as an issue in this context. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we need not address undeveloped argument); ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (well-established rule that we do not consider arguments raised for the first time in reply brief).

¶21 It is true that the complaint does not use the term "mutual mistake," but it clearly suggests that the deed executed was flawed and failed to reflect the "mutual understanding" of the Tylers and Naedler. One reasonable inference from the allegations in the complaint is that there was a mutual mistake in the deed regarding the Disputed Property.

¶22 It is also true that the complaint does not purport to describe how the mistake occurred, nor precisely what fraction of the Tyler property description needed to be rewritten in order to be accurate. Yet the complaint in effect demanded a rewrite of the Tyler deed to include some portion of the property erroneously described as part of the Schoenherr property description. We conclude that additional details about the cause of the mistake and the precise dimensions of the Disputed Property are not necessary to place Schoenherr on notice as to the nature of the claim.

¶23 While the complaint does not contain the terms "reform" or "reformation," the demand for judgment "defining [the Tylers] as the legal owners of the Disputed Property and for the execution and recording of the appropriate legal instruments to that effect," if construed reasonably in favor of the Tylers, plainly brings to mind reformation. Under the provisions of WIS. STAT. § 802.02 cited above, a complaint need not identify specific legal claims by name; instead it must set forth facts that, together with reasonable inferences from those facts, give rise to legal claims.

¶24 Schoenherr argues that, because the complaint purported to claim only two other causes of actions, she was "prepared and ready at trial to defend" only against each of those two purported claims. However, we conclude that she

also should have been prepared and ready to defend against reformation based on the complaint.

¶25 Schoenherr relies on ***Archdiocese of Milwaukee***, but that case turned on an "essential" "unpleaded fact." ***Archdiocese of Milwaukee***, 284 Wis. 2d 307, ¶57. Schoenherr does not point to any essential unpleaded fact in this case. Instead, she primarily argues that she focused only on the adverse possession and Statute of Frauds issues and was surprised by the reformation legal theory at trial. However, the complaint in this case is not "completely devoid of factual allegations" nor does it consist of a "bare conclusion" that required "too much speculation," as concerned the court in ***Archdiocese of Milwaukee***. The allegations necessary for the Tylers to sufficiently allege reformation in this case are straightforward.

¶26 Schoenherr also relies on an employment law case, ***Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin***, 2005 WI App 217, 287 Wis. 2d 560, 706 N.W.2d 667, but fails to explain its relevance here. In ***Wolnak***, the jury returned a verdict in favor of the plaintiff on his claim that the defendant breached a contract by failing to pay him according to the contract. ***Id.***, ¶10. As relevant here, the plaintiff filed a post-trial motion to add penalties for wage claim violations in accordance with WIS. STAT. § 103.455. ***Id.***, ¶¶10, 46. We rejected this argument, holding that § 103.455 prohibits a specific practice and a penalty for employers engaged in that practice, and that a violation of § 103.455 does not depend on the existence or breach of a contract. ***Id.***, ¶51. Therefore, we concluded that merely alleging a contract breach was insufficient. *See* ***id.***, ¶¶49-52. Thus, in ***Wolnak*** there was a complete disconnect between the contract breach that went to the jury and the post-trial penalties sought. In sharp contrast here, as

discussed above, a reasonable inference from the complaint was that the Tylers sought reformation of their deed based on mutual mistake.

¶27 Similarly, in another opinion cited by Schoenherr, ***Town of Campbell v. City of La Crosse***, 2003 WI App 247, 268 Wis. 2d 253, 673 N.W.2d 696, this court concluded that the complaint was insufficient because it lacked any factual allegation to support the bare assertion that an annexation was "invalid as a matter of law." *See* ***Town of Campbell***, 268 Wis. 2d 253, ¶14. In other words, it could not reasonably be inferred from the complaint that any aspect of the annexation was in fact invalid. *See* ***id.*** In contrast, as explained above, the complaint here can reasonably be read to demand reformation of the Tylers' deed to correct the result of a mutual mistake regarding the identified parcels of property.

¶28 It is not clear whether Schoenherr intends to argue that the reference to WIS. STAT. § 841.01 in the complaint in some manner undermined the sufficiency of the complaint as a claim for reformation, but, if so, the argument is undeveloped and we do not address it. On this topic we simply note that, by including reference to § 841.01 in the complaint, the Tylers signal that they are, in the words of § 841.01, "claiming an interest in real property," namely the Disputed Property, against the "conflicting interest" of Schoenherr, which is consistent with a claim for reformation.[8]

[8] Having determined that the complaint stated a claim for reformation, we do not need to reach the question of whether the circuit court could have exercised its discretion to permit an amendment to the complaint, which a court may freely do in the interests of justice after six months from the filing of the summons and complaint. *See* WIS. STAT. § 802.09(1). The circuit court implied that it might have granted such a motion, but concluded that it was not necessary to exercise its discretion in this way. We note only that, on appeal, Schoenherr fails to point to evidence that the Tylers waived or forfeited their right to pursue multiple and even inconsistent (continued)

II. Alleging Mistake With Particularity

¶29 Schoenherr argues that, even if the complaint could be said to seek reformation, it violates WIS. STAT. § 802.03(2), because it does not allege a mistake with particularity. For reasons that echo the discussion above, we reject this argument.

¶30 WISCONSIN STAT. § 802.03(2) provides:

> **(2)** FRAUD, MISTAKE AND CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

¶31 Schoenherr fails to cite a Wisconsin case involving a claim of mistake, as opposed to a claim of fraud or misrepresentation, in support of her position. However, based on a variety of authorities, she argues that the complaint is insufficient because it fails to allege "what the mistake is, when it was made, who made it, or what deed should be reformed."

¶32 Assuming without deciding that these are allegations that must be included in the complaint to satisfy WIS. STAT. § 802.03(2), we conclude that each allegation can be reasonably inferred from the complaint, as suggested by our discussion above. The complaint could be reasonably read to allege: (1) that the mistake was in the description of the property in the Tyler deed, which should have included some of the property within the Schoenherr deed; (2) that this

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claims, which is permitted under WIS. STAT. § 802.02(5)(b), or, more generally, that the Tylers made any representations to Schoenherr or the court aimed at lulling Schoenherr or the court into believing that their only claims at trial would be adverse possession and a claim resting in some manner on the Statute of Frauds.

mistake occurred (at least) at the time of the property transfer from Naedler to the Tylers and was mutual between them; and (3) that the deed in need of reform was (at least) the Tylers'. Thus, using the standards that Schoenherr herself offers, the complaint is pleaded with sufficient particularity.

III. Statute of Limitations

¶33 The complaint was filed in July 2010, not quite ten years after the November 2000 Naedler-Tyler transfer, and sixteen years after the respective Ganther transfers to Naedler and Burkhalter in 1994. Schoenherr argues that there is a statute of limitations of six years in this action, pursuant to WIS. STAT. § 893.43 ("Action on contract"), but fails to cite any authority directly supporting this contention. Instead, Schoenherr primarily argues that, because deeds are contracts and this action sought reformation of a deed, then by definition this was an action on a contract subject to § 893.43.

¶34 The Tylers agree that there is a statute of limitations, but point to the thirty-year recording requirement of WIS. STAT. § 893.33(2) ("Action concerning real estate"), and also take the position that, if that is not the case, the lawsuit was timely filed, pursuant to the ten-year statute of limitations found in WIS. STAT. § 893.50 ("Other actions"). However, like Schoenherr, the Tylers come up short in identifying authority directly supporting either of these alternative contentions and, in particular, the Tylers do not develop any argument as to why § 893.50 should apply if WIS. STAT. § 893.43 does not, even though both provisions are premised on actions on contracts.[9]

[9] WISCONSIN STAT. § 893.50 provides as follows: "All personal actions on any contract not limited by this chapter or any other law of this state shall be brought within 10 years after the (continued)

¶35 Both parties appear to operate from the premise that there *must* be a statute of limitations that applies to this action, and that the legal question presented is which of the statutes of limitations is the *most* suitable, regardless of any incongruous aspects of the best-of-the-lot. To the extent that either party takes this view, it is not correct because at least some causes of action do not have an applicable statute of limitations. *See* ***Haferman v. St. Clare Healthcare Found., Inc.***, 2005 WI 171, ¶¶58-61, 286 Wis. 2d 621, 707 N.W.2d 853 (legislature has not provided a statute of limitations for a claim against a health care provider alleging injury to a developmentally disabled child; however, even in the absence of legislative action, affirmative defense of laches may remain available). Instead, in order to invoke a statute of limitations defense, Schoenherr is obligated to establish that the legislature has created an applicable statute of limitations for the cause of action in this case and that the action was commenced beyond the prescribed period following a time of accrual that we can determine. *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 346, 565 N.W.2d 94 (1997) ("The legislature determines when the opportunity to file a claim for an accrued cause of action expires.").

¶36 We conclude that Schoenherr has failed to identify a statute of limitations applicable to this case. We need not attempt to reach, and do not reach, the point of concluding, either way, whether there is an applicable statute of limitations that could apply here. We conclude only that Schoenherr has failed to

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accruing of the cause of action." WISCONSIN STAT. § 893.43 provides as follows: "An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred."

identify a statute that applies and therefore she has not provided an adequate basis to reverse the court's rejection of this affirmative defense.

¶37 The parties appear to agree that there was a clear answer to this question before the general revision to Wisconsin's statutes of limitations, through Chapter 323, Laws of 1979, and they also appear to agree that this has not been the correct answer since 1980. *See* ***Landis v. Physicians Ins. Co. of Wisconsin, Inc.***, 2001 WI 86, ¶47, 245 Wis. 2d 1, 628 N.W.2d 893 (referencing general revision). More specifically, they agree that the ten-year statute of limitations in WIS. STAT. § 893.18(4) (1977) (previously numbered WIS. STAT. § 330.18(4) (1953)) would have applied before 1980 because that statute of limitations applied to any action that was, before February 28, 1857, "cognizable by the court of chancery, when no other limitation is prescribed in this chapter." *See* ***Langer v. Stegerwald Lumber Co.***, 262 Wis. 383, 390-391a, 55 N.W.2d 389 (1952) (reformation of a lease agreement on the basis of mutual mistake); *see also* ***Milwaukee County v. City of Milwaukee***, 259 Wis. 560, 561-62, 49 N.W.2d 902 (1951).

¶38 However, the legislature, in substantially revising the statutes in Chapter 323, Laws of 1979, apparently failed to provide a clear statutory replacement for the cognizable-in-chancery-court provision that had been applicable in this context. The legislature is presumed to act with knowledge of the existing case law. ***Reiter v. Dyken***, 95 Wis. 2d 461, 471, 290 N.W.2d 510 (1980). Thus, it could be argued that the legislature, by failing to provide a replacement for the cognizable-in-chancery-court provision, decided to eliminate a statute of limitations for reformation. We do not adopt that view as dispositive, but the statutory history creates a challenge for Schoenherr on this topic that she needed to do more to address.

¶39 Schoenherr attempts to address this concern by arguing that, because the legislature did not explicitly replace the cognizable-in-chancery-court statute with any other statute, and because the court in ***Langer*** suggested that the only alternative to the cognizable-in-chancery-court statute in this context was the predecessor statute to WIS. STAT. § 893.43, the latter, general contract period applies. We disagree that ***Langer*** can be reasonably read this way, or that we should conclude that the legislature has acquiesced to such a result.[10] Even putting aside the uncertainty created by major statutory revisions of 1979 that long post-dated ***Langer***, the court in ***Langer*** merely presented the statutes as the two alternatives argued by the parties in that case, and never stated or implied that the contract period would in fact apply if for some reason the cognizable-in-chancery-court period did not.

¶40 Schoenherr places great weight on the persuasive authority she argues is found in ***Dairyland Power Coop. v. Amax Inc***., 700 F. Supp. 979, 992-93 (W.D. Wis. 1986), in which a federal district court determined that the statute of limitations set forth in WIS. STAT. § 893.43 applies to a claim of unconscionability of contract. Schoenherr cites this case because the plaintiff power company sought rescission or reformation as remedies based on allegedly onerous terms in a contract with a coal supplier. ***Id.*** at 981. We find this case to be wholly distinguishable on multiple grounds, including the district court's own observation that the facts of that unconscionability action do not resemble Wisconsin cases such as ***Langer*** and ***Milwaukee County***, which address the

[10] A Judicial Council note quoted by Schoenherr, to the effect that the former WIS. STAT. § 893.18(4) was "repealed as dated, unnecessary, or superfluous in view of new provisions in recreated ch. 893" is ambiguous on this point.

equitable action or remedy of reformation. *See* ***id.*** at 992 ("Nothing in ***Langer*** suggests that a chancery court would have recognized an action for reformation on the grounds asserted in the present case."). Therefore, we make no further reference to this federal court decision.

¶41 This leaves Schoenherr with essentially no authority supporting her bare assertion that, because deeds are contracts, WIS. STAT. § 893.43 applies to this action for reformation of a deed.

¶42 In addition, as the Tylers suggest, there is another potential problem regarding application of either of the two contract-based statutes of limitation cited by the parties.[11] The problem is how one would determine a time of accrual based on an alleged contract breach in an action of this type. "[I]n a cause of action for breach of contract ... the statute of limitations begins to run from the moment the breach occurs." ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp***., 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993). The problem is that there is no claim in this case that anyone breached a contract, including any deed; to the contrary, what is alleged is a mutual mistake, first arising in 1994 and continuing through 2000 and beyond, regarding the contents of deeds.

¶43 Schoenherr fails to explain how we might overcome this potential mismatch between the general need for a breach of contract to trigger WIS. STAT. § 893.43 and the absence of any apparent breach here. If anything, she seems to argue against her own position by asserting, "[a] cause of action for reformation of

[11] We use the shorthand "contract-based," even though WIS. STAT. § 893.43 addresses not only "[a]n action upon any contract," but also an action upon any "obligation or liability, express or implied," for ease of reference and because the additional terms do not appear to add anything to the analysis in this case.

a deed accrues when the deed is recorded." Thus, Schoenherr's position on accrual, at least in itself, would appear to support application of the thirty-year statute of limitations in WIS. STAT. § 893.33(2), which defines accrual, when there is a recorded instrument, as being the date of recording ("no action ... may be commenced ... which is founded upon ... any instrument recorded more than 30 years prior to the date of commencement of the action").

¶44 We need not review the several arguments that Schoenherr presents in support of her position that WIS. STAT. § 893.33(2)[12] does not apply here. This

[12] WISCONSIN STAT. § 893.33 provides in relevant part:

> **(1)** In this section "purchaser" means a person to whom an ... interest in real estate is conveyed ... for a valuable consideration.
>
> **(2)** Except as provided in subs. (5) to (9), no action affecting the possession or title of any real estate may be commenced, and no defense or counterclaim may be asserted, by any person, ... which is founded upon ... any instrument recorded more than 30 years prior to the date of commencement of the action, ... unless within ... 30 years after the date of recording of the recorded instrument, ... there is recorded in the office of the register of deeds of the county in which the real estate is located, some instrument expressly referring to the existence of the claim or defense, or a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction or event on which the claim or defense is founded, with its date and the volume and page of its recording, if it is recorded, and a statement of the claims made....
>
> **(3)** The recording of a notice under sub. (2), or of an instrument expressly referring to the existence of the claim, extends for 30 years from the date of recording the time in which any action, defense or counterclaim founded upon the written instrument ... referred to in the notice or recorded instrument may be commenced or asserted....
>
> **(4)** This section does not extend the right to commence any action or assert any defense or counterclaim beyond the date at which the right would be extinguished by any other statute.

(continued)

is a "general real estate statute" that does not apply where a more specific statute of limitations is shown to apply. *See* ***City of Prescott v. Holmgren***, 2006 WI App 172, ¶9, 295 Wis. 2d 627, 721 N.W.2d 153; *see also* § 893.33(4) ("This section does not extend the right to commence any action or assert any defense or counterclaim beyond the date at which the right would be extinguished by any other statute."). It is dispositive that Schoenherr has failed to support her argument that WIS. STAT. § 893.43 applies, and we affirm on this issue on that basis.[13]

> **(5)** This section bars all claims to an interest in real property, whether rights based on marriage, remainders, reversions and reverter clauses in covenants restricting the use of real estate, mortgage liens, old tax deeds, death and income or franchise tax liens, rights as heirs or under will, or any claim of any nature, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within the 30-year period provided by sub. (2) there has been recorded in the office of the register of deeds some instrument expressly referring to the existence of the claim, or a notice pursuant to this section. This section does not apply to any action commenced or any defense or counterclaim asserted, by any person who is in possession of the real estate involved as owner at the time the action is commenced....
>
> ….
>
> **(7)** Only the following may assert this section as a defense or in an action to establish title:
>
> (a) A purchaser of real estate; ....

[13] Schoenherr does not present an argument based on the equitable doctrine of laches. *See* ***Haferman v. St. Clare Healthcare Found., Inc.***, 2005 WI 171, ¶¶58-61, 286 Wis. 2d 621, 707 N.W.2d 853.

IV. Sufficiency of the Evidence

¶45 The focus of Schoenherr's argument challenging the sufficiency of the evidence rests on a single assertion: There was no proof presented at trial revealing the intent of the Ganthers, in making the 1994 real property conveyances, regarding the Disputed Property. As we now explain, assuming without deciding that such evidence was necessary, we reject this argument because there was evidence from which the court could have answered this intent question favorably to the Tylers.

¶46 A party seeking reformation on grounds of mutual mistake must prove by clear and convincing evidence that the written agreement does not set forth the intention of the parties. ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 233, 509 N.W.2d 294 (Ct. App. 1993). Whether a mutual mistake occurred is a question of fact. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986).

¶47 "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The ***Poellinger*** test applies to bench trials as well as jury trials. *See* ***State v. Oppermann***, 156 Wis. 2d 241, 246-47, 456 N.W.2d 625 (Ct. App. 1990). Thus, when the trial court sits as fact finder, it is the ultimate arbiter of the witnesses' credibility, and we uphold its factual findings unless they are clearly erroneous. ***Kersten v. H.C. Prange Co.***, 186 Wis. 2d 49, 56, 520 N.W.2d 99 (Ct. App. 1994).

¶48 We assume without deciding that it was necessary, as Schoenherr suggests, for the court to have had before it sufficient evidence to support a finding about the Ganthers' intentions in 1994 in order for the Tylers to prove their case. The record reflects such evidence.

¶49 The circuit court concluded that the Tylers had proven their case "not just by a preponderance of the evidence but by, really, proof beyond a reasonable doubt," thus far beyond the required level of certainty. In reaching this conclusion, the court credited aspects of the testimony of surveyor Kevin Boyer regarding how unusual it would be for parties to draw boundary lines through the buildings at issue, as the lines reflected in the challenged deeds would have it. Further, as to persons who had direct interactions with the Ganthers in the original, 1994 transactions, the court found both Marvin and Larry Naedler to be credible witnesses in testifying to strong evidence that the intended property line did not bisect the milkhouse and leave the machine shed on the residence-related property, but found Burkhalter to be an incredible witness in testifying to opposing evidence. Our review of the court's findings of fact reveals that there was ample evidence for the court to find that it was only through mutual error, including error by the Ganthers, that the legal description "sends the property right through a milkhouse and through the machine shed, past a driveway that was built by Marvin Naedler, and out to an area of farmland that's currently being cultivated by" the Tylers. This included evidence that, soon after he purchased the farm-related property, Naedler constructed a driveway to the north of the machine shed to allow access to the barn, silo, and machine shed. The court implicitly found that the Ganthers did not intend the property description in the deed to run through these buildings but instead intended to convey the Disputed Property as the Tylers alleged, and this was a reasonable inference from the evidence.

¶50 If Schoenherr means to argue that direct testimony from Linda or William Ganther was necessary on this question, she fails to present any authority for this proposition.

CONCLUSION

¶51 For these reasons, we conclude that the circuit court properly denied the motion to dismiss the complaint on each of the three grounds addressed above, and we agree with the court's conclusion that the facts presented at trial were sufficient to support reformation. We therefore affirm the court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.