COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0460-FT

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

CARL STEINBACH,

Plaintiff-Respondent,

v.

RICHARD FISCHER and MARYETTE FISCHER,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Richard and Maryette Fischer appeal from a judgment reforming the deeds to their property and that of their neighbor, Carl Steinbach. The Fischers own a rectangular piece of property 500 feet by 200 feet, facing south on a road and otherwise surrounded by Steinbach's property to the east, west and north. The deed reformation moves their north-south property lines approximately seventy feet to the east, thereby giving Steinbach additional property to the west and taking a similar size parcel away from him to the east. The trial court reformed the deed upon finding that a 1957 conveyance of what

is now Steinbach's property contained a mutually mistaken land description. The issue is whether the court heard sufficient evidence to make that finding, and whether the statute of limitations on certain real estate actions contained in § 893.33(2), STATS., barred Steinbach's action. Because the latter issue is raised for the first time on appeal, we deem it waived. ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). Because the evidence supports the trial court's finding on mutual mistake, we affirm.[1]

Henry and Marie Siewert originally owned both Steinbach's and the Fischers' property and held it as one parcel. In 1957, they conveyed the Steinbach property to George and Caroline Peters, Steinbach's aunt and uncle. Steinbach then purchased the property from the Peterses shortly afterwards. The Siewerts retained the Fischer property, and lived on it until they sold it to the Fischers in 1969. The disputed seventy-foot strip at the western edge of the Fischer property contains a north-south driveway with a tree line on its eastern side. Until 1993, it also contained a barn to the west of the driveway.

Steinbach testified that financial considerations prevented him from buying the property in 1957. Instead, the Peterses bought the property in order to hold it for him until he could afford to buy it. As a consequence, he was involved in the negotiations and subsequent transaction. He testified that the Peterses and the Siewerts intended the tree line to be the west property line between their properties. He further testified that he had always used the barn and the driveway as his own since 1957. The Siewerts' deed to the Peterses contained a provision allowing them to use the well located on the Siewerts' property "when cattle are being housed in the barn or pastured on said land conveyed." The Fischers' deed provides that their ownership remains subject to that well agreement. Steinbach was the only witness testifying as to the intent of the 1957 transaction, as all parties to it were either dead or unavailable. He was unable to explain why the land description in the 1957 deed moved the property line seventy feet west of the intended line, thus placing the barn and driveway on the Fischer parcel.

The trial court found a mutual mistake justifying reformation of the deeds based on Steinbach's recollection of the intended original property

[1] This is an expedited appeal under RULE 809.17, STATS.

line, his conduct in using the disputed land since 1957, and the well agreement. We review whether that evidence is sufficient to support that finding under the clearly erroneous standard. Section 805.17(2), STATS. The court may reform a deed if there is positive and satisfactory evidence showing a mutual mistake of fact in the agreement as written. ***St. Norbert College Found., Inc. v. McCormick***, 81 Wis.2d 423, 432, 260 N.W.2d 776, 781 (1978).

The trial court did not clearly err in its finding. The court could reasonably infer from the well agreement that the Siewerts intended to convey the barn to the Peterses. Steinbach confirmed in his testimony that the Siewerts intended to convey not only the barn but the land east of the barn, up to the tree line, as well. The trial court expressly found that testimony credible, and its determination on credibility is not subject to review. ***Rubi v. Paige***, 139 Wis.2d 300, 308, 407 N.W.2d 323, 326 (Ct. App. 1987). Additionally, it is undisputed that Steinbach had always used the driveway and the barn until its destruction. Conduct that occurs after the transaction is relevant to proving mutual mistake. ***Stadele v. Resnick***. 274 Wis. 346, 352, 80 N.W.2d 272, 276 (1957). Taken together, this evidence and the reasonable inferences available from it provide sufficient evidence for the trial court's decision, even if reasonable opposing inferences were available.

By the Court.—Judgment affirmed.

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