

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 10, 1997

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.

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

No. 96-2780

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RICHARD E. CARTER,

PLAINTIFF-APPELLANT,

V.

AUDREY B. SCHRAM,

DEFENDANT-RESPONDENT,

**BAYLAKE BANK, F/D/B AS BANK OF STURGEON BAY,
STEVE ROEM, RONALD HOEHM, RAYMOND SCHILD,
LINDA M. SCHILD, GERALD D. MUNDT, PERSONAL
REPRESENTATIVE AND TRUSTEE OF GERALD D. MUNDT
TRUST AND JOHN OR JANE DOE,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Door
County: PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Richard Carter appeals a judgment declaring interests in land located on the shore of Lake Michigan. Carter, who owns a nearby lot, claims that he was entitled to an easement running with an adjacent lot in perpetuity. Based upon a 1983 deed, the trial court concluded that the easement was personal to Carter and was not a permanent restriction on the estate upon which the easement was imposed. Carter argues that he is entitled to an easement running with the land as contemplated in a 1971 offer to purchase agreement. Because Carter's claim is barred by the statute of limitations and the trial court properly enforced the easement imposed in the 1983 deed, we affirm the judgment.

This case was tried to the court, and its findings of fact are not challenged on appeal. In 1971, Audrey Schram accepted Carter's offer to purchase a lot for \$3,500. The offer to purchase contract contained the following language: "Seller shall have entered on the deed an easement that shall run with the land granting the buyers access to the shores of Lake Michigan across the adjacent property." The contract provided that the transaction was to be closed on or before December 1, 1971, or as otherwise agreed.

Neither party recalls a formal closing, but the record shows that Schram executed a warranty deed on August 7, 1972, and recorded August 31. A second "correction deed" from Schram to Carter was signed March 3, 1973, and recorded April 23, 1973.¹ Neither deed contained any language granting an easement. The trial court concluded that Carter accepted the 1973 deed although it did not live up to the offer to purchase agreement. "Certainly after the recording

¹ The parties in their briefs do not describe the purpose of the correction deed.

of the correction warranty deed on April 23, 1973, the purchaser[] had waived the contingency or language agreeing to grant an easement." The court also found that since Carter received the initial warranty deed in August of 1972, he continuously crossed Schram's adjacent lot to get to and use the beach.

Intermittently, Carter expressed his dissatisfaction with the deeds to Harold Larson, Schram's husband, who was deceased at the time of trial. Larson was a real estate broker and, because Carter had dealt almost exclusively through him for the purposes of this transaction, the trial court found that Larson had acted as Schram's agent.

In October 1983, Schram signed a quitclaim deed granting Carter an easement "for purposes of ingress and egress to the shoreline and waters of Lake Michigan across the Southerly 10 feet of the following described land: [describing Schram's lot]." The deed also provided: "This easement is granted to the grantees for only such period of time as the grantees are the owners of that property described in Volume 239 of Records, page 275, Door County Records ... and shall terminate at such time as the grantees are no longer the owners of such tract of land."

Schram's signature on the 1983 deed was neither authenticated nor acknowledged. The day of the month was also omitted. The court found that the deed was delivered to Carter; it was not, however, recorded. The court concluded that the non-recording had no effect between the parties to the deed. In 1992, Carter recorded an affidavit giving notice that Schram had agreed to furnish an easement to Lake Michigan running with the land. The trial court concluded that Carter's interests in the shore lot were as described in the October 1983 deed and no more.

Carter argues that he is entitled to enforce the 1971 offer to purchase agreement that he would have an easement running with the land for access to the Lake Michigan shoreline. He argues that the offer to purchase contract is a conveyance under § 706.01(4), STATS.; and that he has rights under § 893.33(1) and (2), STATS., to bring an action to enforce his rights within thirty years.² We disagree.

² Section 893.33, STATS., provides:

- (1) In this section “purchaser” means a person to whom an estate, mortgage, lease or other interest in real estate is conveyed, assigned or leased 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, the state or a political subdivision or municipal corporation of the state after January 1, 1943, which is founded upon any unrecorded instrument executed more than 30 years prior to the date of commencement of the action, or upon any instrument recorded more than 30 years prior to the date of commencement of the action, or upon any transaction or event occurring more than 30 years prior to the date of commencement of the action, unless within 30 years after the execution of the unrecorded instrument or within 30 years after the date of recording of the recorded instrument, or within 30 years after the date of the transaction or event 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. This notice may be discharged the same as a notice of pendency of action. Such notice or instrument recorded after the expiration of 30 years shall be likewise effective, except as to the rights of a purchaser of the real estate or any interest in the real estate which may have arisen after the expiration of the 30 years and prior to the recording
- (3)

The offer to purchase contract is not an instrument of conveyance. *First Nat'l Bank v. Chafee*, 98 Wis. 42, 48, 73 N.W. 318, 319 (1897). It is a contract to purchase land. Section 893.33(4), STATS., provides that the thirty-year limit does not extend the right to commence an action if any other statute of limitations has extinguished the right.³ Because the offer to purchase is a contract, it is governed by the six-year statute of limitations found in § 893.43, STATS. Carter's right to enforce the agreement was extinguished by § 893.43, six years after Schram breached her promise to convey an easement running with the land. Schram breached her agreement when she deeded the property to Carter in 1972 without the easement contemplated in the purchase contract.⁴

Next, Carter argues that the trial court erroneously applied §§ 885.16 and 885.17, STATS., the deadman's statutes, to bar testimony concerning conversations with a deceased person or a deceased agent. Because we conclude that Carter's claim is extinguished by § 893.43, STATS., we do not reach this issue.

Carter further argues that the recording of his affidavit in 1992 extended the time for bringing an action to enforce his rights for another thirty years under § 893.33(3), STATS.,⁵ and for forty years under § 893.33(6).⁶ We

³ Section 893.33(4), STATS., provides: “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.

⁴ Carter does not discuss the application of § 706.04, STATS. The parties’ briefs do not discuss the doctrines of merger.

⁵ Section 893.33(3), STATS., provides:

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 or transaction or event referred to in the notice or recorded instrument may be commenced or asserted. Like notices or

(continued)

disagree. Carter's right to an easement was not set forth in any recorded instrument. His affidavit was not sufficient to impose an enforceable right, *see* § 706.02(1)(d), STATS., and, in any event, was not recorded before the § 893.43, STATS., extinguished his contractual rights.

Finally, in his reply brief, Carter argues that principles of equity and unjust enrichment support his claim. We decline to address arguments raised for the first time in a reply brief. *See Sisters of St. Mary v. AAER Sprayed Insulation*, 151 Wis.2d 708, 723 n.4, 445 N.W.2d 723, 729 n.4 (Ct. App. 1989).

By the Court.—Judgment affirmed.

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

instruments may thereafter be recorded with the same effect before the expiration of each successive 30-year period.

⁶ Section 893.33(6), STATS., provides:

Actions to enforce easements, or covenants restricting the use of real estate, set forth in any recorded instrument shall not be barred by this section for a period of 40 years after the date of recording such instrument, and the timely recording of an instrument expressly referring to the easements or covenants or of notices pursuant to this section shall extend such time for 40-year periods from the recording.

