COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-0780

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

PAMELA O'NEIL,

PLAINTIFF-APPELLANT,

V.

HELEN PATENAUDE, D/B/A RIVER REALTY,

DEFENDANT-RESPONDENT,

LIONEL CREVIER AND JANICE CREVIER,

INTERVENING DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

PER CURIAM. This case arises out of a real estate transaction. Pamela O'Neil, the buyer, appeals a judgment dismissing her misrepresentation claims against the seller's agent, Helen Patenaude, d/b/a River Realty. The judgment also requires O'Neil to reconvey to Lionel and Janice Crevier, the sellers, a five-acre parcel out of the twenty acres O'Neil purchased in the transaction.

O'Neil argues that (1) the trial court erroneously denied her summary judgment dismissing the Creviers' claim; (2) the evidence of misrepresentations was overwhelming; (3) Patenaude violated the Wisconsin Administrative Code by failing to perform required inspections; (4) the trial court erroneously relied on documents not produced during the course of discovery; (5) credible evidence supports findings of fraud; and (6) she is entitled to postjudgment relief based upon newly-discovered evidence, fraud and other misconduct. We conclude that the trial court erroneously denied her motion for summary judgment to dismiss the Creviers' claim. We reject her remaining arguments, however, and conclude that the trial court properly dismissed her misrepresentation claims against Patenaude. Accordingly, we affirm in part, reverse in part and remand with directions to dismiss the Creviers' claim against O'Neil.

In 1993, O'Neil entered into an agreement to purchase some vacant land from the Creviers. The August 9 offer to purchase agreement described the acreage to be sold as "15 Acres, more or less."[1] On September 17, 1993, the parties executed a land contract drafted by Lionel Crevier. Lionel derived the

[1] The offer to purchase also stated: "more particularly described as Sec 21, T 27N, R20E PRT NWSW as DESC V. 545-P114 EXC V 545 P 115, as per legal description in court house." The record is unclear as to what document this description refers.

legal description from a 1984 survey, which described an approximately twenty-acre parcel using a lengthy, complicated metes and bounds description. The Creviers do not suggest they were unaware that the legal description described the entire twenty-acre parcel. Subsequently, the Creviers filed a pro se small claims complaint seeking return of approximately five acres. O'Neil initiated a suit against the Creviers' real estate agent, Patenaude, alleging various misrepresentations regarding the parcel's size, road access and septic system suitability. The suits were joined together.

The trial court concluded that when read together, the offer to purchase and the land contract created an ambiguity with respect to the number of acres to be sold, and considered extrinsic evidence to determine the parties' intent. The trial court found that the parties bargained for fifteen acres and ordered O'Neil to deed an approximately five-acre parcel to the Creviers.

With respect to O'Neil's misrepresentation claims, the court resolved credibility issues in favor of Patenaude and concluded that the evidence was insufficient to support findings of misrepresentation. The court also concluded that the evidence was insufficient to support O'Neil's claims that her signature was forged on various documents.[2] Therefore, the court dismissed O'Neil's misrepresentation claims relating to boundaries, road access and soil conditions.

[2] One such document was an amendment to the offer to purchase, also dated August 9 and bearing the Creviers' and O'Neil's signatures, stating: "Sellers have made buyer aware that 15 acres has not been survied (sic) & that she will, at her expense, have land survied (sic) upon satisfaction of the land contract."

O'Neil filed a motion for relief from judgment and submitted expert testimony that her signature had been forged on certain documents. The trial court concluded that the evidence was not newly discovered and denied relief. O'Neil appeals.

O'Neil argues that the trial court erroneously denied her motion for summary judgment dismissing the Creviers' claim. She contends that because the land contract is unambiguous and the Creviers never pled nor demonstrated an action in fraud or mutual mistake, extrinsic evidence may not be introduced to contradict its express terms. We conclude that the land contract is unambiguous, that there is no proof of fraud or mutual mistake, and that extrinsic evidence may not be used to vary its terms. Therefore, the trial court erred when it considered the offer to purchase along with the land contract to create an ambiguity in the land contract.

An appeal from the denial of summary judgment raises an issue of law we review de novo by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry,*** 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the pleadings to determine whether they state a claim and a disputed issue of material fact. ***Id.*** If they do, we examine the moving party's affidavits and supporting documents to determine whether that party has established a prima facie case. ***Id.*** If so, we then look at the opposing affidavits and other documents to determine whether there are any material facts in dispute that would entitle the opposing party to a trial. ***Id.*** at 372-73, 514 N.W.2d at 49-50. "[A]n adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Section 802.08(3), STATS.

Here, the Creviers filed a small claims complaint stating that they sold fifteen acres to O'Neil but that she claims to own twenty, and that O'Neil's attorney coerced them into closing. Attached to the complaint was correspondence from O'Neil's attorney and a mediator setting out the dispute in more detail. Based upon our liberal rules of pleading, the Creviers' complaint may be fairly interpreted as seeking reformation of the transaction. *See* § 802.02(6), STATS., ("All pleadings shall be so construed as to do substantial justice.").

O'Neil moved for summary judgment based upon the land contract and her affidavit stating that after the execution of the offer to purchase and land contract, a new survey indicated that the parcel she purchased contained close to twenty acres. Her affidavit also stated that at no time did the Creviers mention that they intended to retain five acres of the property.

In response, the Creviers submitted their affidavit that they accepted O'Neil's offer to purchase fifteen acres. They attached a copy of the August 9 offer to purchase signed by the Creviers and O'Neil. Their affidavit also stated that on September 17, 1993, they "entered into a land contract conveying only 15 acres" and "upon the satisfaction of the land contract Pamela O'Neil was to have a survey done so there would be a description for the 15 acres." In addition, the Creviers attached the offer to purchase and addenda, a copy of the land contract, transfer tax return, and an appraisal, along with a copy of portions of O'Neil's deposition, stating that she thought she was purchasing "[d]arn close to 15 acres." Also submitted was correspondence relating to mediation of the dispute. The Creviers did not, however, state that O'Neil had agreed to reconvey five acres. Nor did they produce any evidentiary facts supporting their allegation that O'Neil's attorney coerced them into closing.

We conclude the Creviers failed to raise a disputed issue of mutual fact. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." ***FDIC v. First Mortg. Investors,*** 76 Wis.2d 151, 156 n.6, 250 N.W.2d 362, 365 n.6 (1977) (citing 3 CORBIN ON CONTRACTS § 573 (1960)). The parol evidence rule works to prevent the offer to purchase agreement, and other documents, such as the Creviers' affidavit, which stated that the conveyance was of fifteen acres, to be used to vary the unambiguous terms of the land contract.

However, before applying the parol evidence rule to prohibit extrinsic evidence, the court must determine whether the parties intended the writing to be a final, total or partial integrated agreement, or whether they intended any prior agreement to be part of their total agreement: "Parol evidence is always admissible with respect to the issue of integration, that is, parol evidence is admissible to show whether the parties intended to assent to the writing as the final and complete (or partial) statement of their agreement." ***FDIC,*** 76 Wis.2d at 158, 250 N.W.2d at 366.

In ***Bunbury v. Krauss,*** 41 Wis.2d 522, 164 N.W.2d 473 (1969), our supreme court adopted Corbin's analysis to determine if the particular writing is an integration of the contract:

> 3 Corbin, pp. 359, 360, sec. 573, *supra,* states that on the following issues evidence, oral or written, may be submitted:
>
> "(1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or

> any other reason? (3) Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract?
>
> "In determining these issues, or any one of them, there is no 'parol evidence rule' to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. *No one of these issues can be determined by the mere inspection of the written document."*

Id. at 528-29, 164 N.W.2d at 475-76 (quoting 3 CORBIN, *supra,* at 357-60) (emphasis added). Whether the parties assented to the written contract is primarily a question of fact for the trial court. ***Id.*** at 530, 164 N.W.2d at 476.

With these principles in mind, we turn to the facts asserted in the summary judgment proceedings to determine whether a dispute of material fact exists with respect to whether (1) the parties made a contract; (2) it is void because of fraud, illegality, mistake or any other reason; and (3) the parties assented to a particular writing as the complete and accurate integration of that contract.

First, there is no dispute that the parties entered into the land contract. Second, there is no suggestion of fraud or other illegality. The Creviers contend, however, that there is evidence of mistake to justify reformation of the land contract. We disagree for the following reasons:

> A mutual mistake by the parties to a contract is grounds for reforming it to conform to the true intention of the parties. However, this mutual mistake must be established by clear, convincing evidence that both parties intended to make a different instrument than the one signed and both agreed on facts different than those set forth in the instrument. Parol evidence is admissible to establish mutual mistake in a reformation action.

Newmister v. Carmichael, 29 Wis.2d 573, 576-77, 139 N.W.2d 572, 574 (1966) (footnote omitted).

Here, Lionel Crevier drafted the land contract and inserted the metes and bounds description of the entire approximately twenty-acre parcel. The Creviers do not contend that this legal description was inserted mistakenly. There is no testimony that the Creviers entered into any agreement with O'Neil that she would reconvey five acres to them upon satisfaction of the land contract. The only evidence pertaining to the alleged mistake is that the Creviers at various junctures in the transaction represented that the parcel described in the land contract contained fifteen acres. It is undisputed, however, that the Creviers knew that the legal description contained approximately twenty acres. We conclude as a matter of law that their representations in this regard do not amount to a mistake.

Our third inquiry is whether there is any genuine issue of material fact with respect to the question of the parties' assent to a particular writing as the complete and accurate "integration" of their contract. The record reveals none. Although the Creviers alleged to have been coerced into signing the land contract, they supported this allegation with no evidentiary facts. *See* § 802.08(3), STATS. In their affidavit and supporting documents opposing summary judgment, there is no evidence of any oral modification of the land contract. There is no evidence of any oral agreement. Essentially, the only proof the Creviers offer is that they represented the parcel in question to consist of fifteen acres, when in fact they knew it was closer to twenty acres. They claim that they intended to have O'Neil reconvey five acres after the satisfaction of the land contract, but offer no proof that this was communicated to O'Neil. We conclude as a matter of law that the "proof" falls short of demonstrating an issue of fact whether the Creviers assented to the land contract.

We further conclude that the trial court erroneously determined that the land contract, when considered with the offer to purchase, was ambiguous. Whether a contract is ambiguous is a question of law. *See* ***Garriguenc v. Love,*** 67 Wis.2d 130, 133, 226 N.W.2d 414, 416 (1975). A contract is ambiguous when it is fairly susceptible to more than one construction. ***Id.*** There is no claim made here that the land contract, standing alone, is ambiguous. It undisputedly conveys the parcel contained in the metes and bounds description, which consists of approximately twenty acres. Nonetheless, the Creviers sought to introduce the accepted offer to purchase, depositions, and correspondence to contradict and change the clear and unambiguous terms of the land contract. "That is exactly what the ***Morn*** [***v. Schalk,*** 14 Wis.2d 307, 111 N.W.2d 80 (1961)] holding, as quoted in ***FDIC,*** interdicts." ***Production Credit Ass'n v. Rosner,*** 78 Wis.2d 543, 550, 255 N.W.2d 79, 81-82 (1977).

We recognize that "parol evidence is always admissible to determine whether the parties intended a writing to be a final and complete expression of their agreement." ***Brevig v. Webster,*** 88 Wis.2d 165, 173, 277 N.W.2d 321, 326 (Ct. App. 1979); *see also* ***Newmister,*** 29 Wis.2d at 577, 139 N.W.2d at 574. ***FDIC*** holds that parol evidence could be admitted to complete an unfinished undertaking, but not to vary or alter the terms of a written agreement. ***Id.*** at 156, 250 N.W.2d at 365.

> When a writing is shown to be only a partial integration of the agreement reached by the parties, it is proper to consider parol evidence which establishes the full agreement, *subject to the limitation that such parol evidence does not conflict with the part that has been integrated in the writing.*

Production Credit Ass'n, 78 Wis.2d at 548, 255 N.W.2d at 81 (quoting ***Morn,*** 14 Wis.2d at 314, 111 N.W.2d at 84 (emphasis added)). Here, the proffered evidence, that the Creviers anticipated a reconveyance of five acres at some future time was a unilateral expectation and not the subject of a separate agreement with O'Neil. As a result, the extrinsic evidence is inadmissible to vary the terms of the land contract.

Next, O'Neil argues that overwhelming evidence of Patenaude's misrepresentation demands reversal. O'Neil argues that Patenaude represented that all adjoining property owners used a private road for access to their property, and all O'Neil needed to do to gain access was to lay gravel for 100 to 150 feet. Patenaude testified, however, that she did not tell O'Neil that she had an easement over neighboring property to reach the land in question. Because this is an issue of credibility, we do not disturb it on appeal. *See* ***Chapman v. State,*** 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (The trial court is the arbiter of the credibility of the witnesses and its findings will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts.).

O'Neil also argues that Patenaude represented that the property perked for a conventional septic system. Patenaude testified that she never made any statement regarding a perk test, never provided her with any perk test results and that O'Neil never asked whether one had been done. Patenaude testified that she read the offer to purchase form to O'Neil, that stated "if this offer is subject to financing, survey percolation test, specific zoning or use, then it should be so stated in this Offer to Purchase." O'Neil, however, made the offer contingent only upon the sellers accepting a land contract. Patenaude's testimony supports the trial

court's finding that Patenaude made no representations regarding a perk test. We will not overturn this credibility determination. ***Id.***

Next, O'Neil argues that Patenaude violated the Wisconsin Administrative Code requirements that she perform certain inspections. She argues that WIS. ADM. CODE § RL 24 as it existed in 1993 imposed the obligations of "ascertaining the boundaries of property and its accessibility, as well as the suitability of a conventional septic system." The nature of the duty of inspection imposed by the code is a question of law we review de novo. *See* ***Board of Regents v. Wisconsin Personnel Comm'n,*** 103 Wis.2d 545, 551, 309 N.W.2d 366, 369 (Ct. App. 1981). Interpreting administrative regulations requires first resort to the plain language to the regulation in question. ***Kerns v. Madison Gas & Elec. Co.,*** 134 Wis.2d 387, 393, 396 N.W.2d 788, 791 (Ct. App. 1986).

Chapter RL 24, entitled "Conduct and Ethical Practices for Real Estate Licensees," is composed of § RL 24.01, "Authority and Intent" through § RL 24.17, "Miscellaneous Requirements." Each section contains several subsections comprising over nine pages. O'Neil does not cite the specific subsection or the regulatory language that she claims imposes the duty to inspect and ascertain boundaries, septic system suitability and road access.[3] She does not suggest applicable remedies available for regulation violations. O'Neil's argument

[3] We note that WIS. ADM. CODE § RL 24.03(2)(d) provides: "Licensees are not required to have the technical knowledge, skills or training possessed by competent third party inspectors and investigators of real estate and related areas." WIS. ADM. CODE § RL 24.07, entitled "Inspection and disclosures duties" requires a real estate agent to conduct a "reasonably competent and diligent inspection of accessible areas of the structure and immediately surrounding areas of the property to detect observable, material adverse facts." O'Neil does not suggest how this regulation applies to vacant lands that have no structures, nor does she discuss how, in this case, the soil conditions, boundaries and road access were "observable" facts within the meaning of the regulations.

is inadequately briefed and, as a result, we decline to address the issue. *See* ***In re Estate of Balkus,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985). An inadequately developed argument will not be considered. ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).[4]

Next, O'Neil contends that the trial court erroneously relied upon three documents not produced during discovery: an amendment to the offer to purchase, an attorney review disclosure, and a waiver of inspection. O'Neil complains that despite proper discovery requests, Patenaude did not produce the documents in a timely fashion. Patenaude testified that she did not have the documents in her possession at the time of the request, but later received them from the Creviers and disclosed them at that time.

O'Neil's argument must be rejected for three reasons. First, O'Neil fails to suggest that she requested a continuance to deal with the untimely disclosures, *cf*. ***Jenzake v. City of Brookfield,*** 108 Wis.2d 537, 543, 322 N.W.2d 516, 520 (Ct. App. 1982) (a continuance is the more appropriate remedy for surprise; exclusion should be considered only if a continuance would result in a long delay); second, she fails to identify how the untimeliness of the disclosures prejudiced her claim, *see* § 805.18, STATS., and third, she fails to cite legal authority for her contention that exclusion of the document is the appropriate remedy for late disclosures of discovery. *See* ***Gulrud,*** 140 Wis.2d at 730, 412 N.W.2d at 142-43 (An inadequately developed argument will not be considered.).

[4] In 1996, 3,628 cases were filed in our 16-judge court. This figure does not include the 324 petitions for leave to appeal, 5,643 motions and 931 miscellaneous matters filed, each requiring disposition by order. ***Cascade Mt., Inc.. v. Capitol Indem. Corp.,*** 212 Wis.2d 265, 270 n.3, 569 N.W.2d 45, 47 n.3 (Ct. App. 1997). This court cannot continue to function at its current capacity without requiring compliance with the appellate rules of procedure, the purpose of which is to facilitate review.

Next, O'Neil argues that credible evidence supports a finding of fraud. She contends the trial court erroneously declined to find that Patenaude forged documents relating to the sale that indicated O'Neil was accurately informed of the boundaries, septic and access issues. The trial court ruled that it believed Patenaude's testimony that O'Neil had signed the documents in her presence. The court found unpersuasive O'Neil's testimony that the signatures did not look like hers. The trial court stated:

> To me the signatures look alike. Once these allegations were made, I was expecting to hear testimony from a handwriting expert to prove that there was in fact a forgery. … O'Neil had ample time to hire such an expert. This case has been pending for a long time and if she felt that there were forgeries, she had ample time to prove it. Ms. O'Neil has failed to meet her burden of proof concerning any wrong doing on the part of Helen Patenaude. I find the testimony of Patenaude credible.

This again is a credibility issue on which we defer to the trial court. Section 805.17(2), STATS.

Finally, O'Neil argues that she is entitled to relief from judgment and a new trial in light of newly-discovered evidence. After trial, O'Neil brought a motion for relief based upon newly-discovered evidence in the form of expert handwriting analysis that the signatures on certain documents were not hers. She contended that her failure to discover this evidence earlier did not arise from a lack of diligence because the documents were not available until shortly before trial.

The first requirement under § 805.15(3), STATS., providing for a new trial on the grounds of newly-discovered evidence is "if the court finds that: (a) The evidence has come to the moving party's notice after trial." Here, by her own

admission, the evidence of forged signatures was available at the time of trial. O'Neil does not suggest she required additional time to obtain the services of a handwriting expert. Because the evidence of the alleged forgeries is not newly discovered, O'Neil is not entitled to a new trial under § 805.15(3).

In summary, we conclude that the unambiguous terms of the land contract may not be varied by inconsistent parol evidence and, as a result, the judgment requiring O'Neil to reconvey a five-acre parcel to the Creviers must be reversed. We remand with directions to dismiss the Creviers' claim against O'Neil. We further conclude that the trial court properly dismissed O'Neil's claims against Patenaude and therefore affirm the judgment in all other respects.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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