COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2799-FT

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

ALTON B. ISON, JR. AND MAJEL E. ISON,

PLAINTIFFS-RESPONDENTS,

V.

LUCILLE V. NEFSTEAD AND
FIRST FINANCIAL BANK, F.S.B.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Oneida County: ROBERT E. KINNEY, Judge. *Affirmed.*

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

PER CURIAM. Lucille Nefstead appeals a summary judgment reforming a deed to declare that Alton and Majel Ison are owners of a disputed driveway strip.[1] She argues that outstanding issues of material fact preclude

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

summary judgment and that the Isons failed to establish as a matter of law their entitlement to reformation based on mutual mistake. We reject these arguments and affirm the judgment.

Nefstead owns Government Lot 7, located directly west of the Isons' Government Lot 6. In 1949, Victor and Elvira Johnson owned both properties. The Johnsons also owned the property south of Lot 7. When they conveyed Lot 6 to the Isons' predecessor in title, they also conveyed a driveway connecting Lot 6 to the town road that runs east and west along the southern border of the lot south of Lot 7. The driveway runs from the town road through the property south of Lot 7 to Lot 6. The trial court determined that a 30' x 30' area in the southeast corner of Lot 7 was also conveyed for this driveway, and the court amended the deeds to reflect that conveyance.

A deed may be reformed based on mutual mistake. *See* ***First Nat'l Bank v. Scalzo***, 70 Wis.2d 691, 700, 235 N.W.2d 472, 477 (1975). Mutual mistake is established by showing that both parties intended to make a different instrument than the one signed, and both agreed on facts different from those set forth in the deed sought to be reformed. *See* ***Newmister v. Carmichael***, 29 Wis.2d 573, 577, 139 N.W.2d 572, 574 (1966). Reformation may be established by evidence of the circumstances, nature of the transaction and the party's conduct, provided the natural and reasonable inferences to be drawn from this evidence clearly and decidedly prove the alleged mistake. *See* ***Jeske v. General Acc. Fire & Life Assur. Corp.***, 1 Wis.2d 70, 87, 83 N.W.2d 167, 176 (1957).

The 1949 deed conveying Lot 6 and the driveway to the Isons's predecessor in title contains provisions that, if read literally, would be impossible. The deed describes the driveway as "30 feet in width" and "for the purposes of

ingress and egress from Government Lot Six," but also indicates that the driveway runs "to the Southwest corner of Government Lot 6." The southwest corner is a point. It is inconsistent to describe a driveway that comes to a point but still is 30 feet wide and allows ingress and egress. Therefore, the only reasonable construction of the deed is that the driveway does not end literally at the southwest corner of Lot 6, but either occupies a part of Lot 7 or the property south of Lot 6 or both.

The deed cannot be construed to place the driveway on the property south of Lot 6 for two reasons. First, the record does not establish that the Johnsons owned that property. Second, even if they owned the property, another provision of the deed required the Johnsons to "construct a fence along the north border of said driveway" in 1949. The driveway runs north-northeast, off the town road to Lot 6. The only place that could reasonably be described as the north border of the driveway would be on Lot 7 where the driveway would turn into Lot 6. It is inconceivable that the parties would have agreed that after selling Lot 6 and the driveway access, the Johnsons would be required to build a fence on Lot 6 cutting off the lot from the driveway. Therefore, the only reasonable construction of the deed is that the Johnsons conveyed a driveway through the property south of Lot 7 and through the southeastern corner of Lot 7 where it would turn to the east and connect Lot 6 to the town road. The fence then would be constructed on Lot 7 north of the driveway where it turns to the east.[2]

[2] This construction of the transaction was apparently shared by the parties to the conveyance. The driveway they constructed traverses the southeast corner of Lot 7. The remnants of an ancient fence are located north of the driveway on Lot 7. The Johnsons' intent to convey a part of Lot 7, despite the inconsistent language used in the deed, is shown by their conduct following the conveyance. *See* ***Cutler v. Industrial Comm.***, 13 Wis.2d 618, 632, 109 N.W.2d 468, 474 (1961). The conduct and beliefs of subsequent owners of the property is not evidence of the Johnsons' intent.

Nefstead argues that the affidavit of her predecessor in title, John Crossen, creates an issue of material fact that precludes summary judgment. Most of Crossen's affidavit relates to an adverse possession claim that was not decided by the trial court and is not before this court on appeal. Crossen avers: "the reason that the driveway is on Government Lot 7 is that where the driveway crosses Government Lot 7 immediately to the east is a swampy area. The road was moved to the west onto Government Lot 7 which was higher ground than was available immediately to the east." Crossen was not born when the Johnsons initially conveyed the driveway. His affidavit states no basis for his implied assertion that the driveway was ever intended to cross the property south of Lot 6 rather than Lot 7. An affidavit must contain "evidentiary facts" of which the affiant has "personal knowledge." *See* ***Hopper v. City of Madison***, 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977). Crossen's affidavit does not establish his personal knowledge of any fact that sheds light on the intent of the parties to the original conveyance.

By the Court.—Judgment affirmed.

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