COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

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. 97-1376-FT

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

RONALD A. BODART,

PLAINTIFF-APPELLANT,

V.

JAMES L. HENDRICKSON, NANCY HENDRICKSON, HIS WIFE, CHARLES HOCKERS, AND KAREN HOCKERS, HIS WIFE,

DEFENDANTS-RESPONDENTS,

STEWART TITLE GUARANTY COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed.*

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

PER CURIAM. Ronald Bodart appeals a summary judgment dismissing his lawsuit against James and Nancy Hendrickson and Charles and Karen Hockers.[1] Bodart sought title to a wooded real estate parcel he claimed he had purchased from the Hendricksons in 1985. A 1993 survey showed that the parcel lay outside the legal description of the 1985 deed. Bodart sought to show, however, that the parties had intended to convey the wooded parcel. He claimed that the parties had assumed in 1985 that the wooded area lay within the deed's legal description, in reliance on a 1966 survey and an informal 1985 survey.

The trial court barred Bodart's attempt to introduce extrinsic evidence on summary judgment, concluding that Bodart's proposed proof would directly contradict the deed's legal description and thereby violate the parol evidence rule. On appeal, Bodart argues that the trial court misapplied the parol evidence rule and should have denied summary judgment. The trial court correctly granted summary judgment if there was no dispute of material fact and the Hendricksons and Hockers deserved judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We reject Bodart's arguments and affirm the summary judgment.

First, the trial court correctly applied the parol evidence rule to exclude extrinsic evidence contradicting the deed's legal description. The description was unambiguous. This made Bodart's extrinsic evidence of what the description meant inadmissible. *See* ***American Mut. Liability Ins. Co. v. Fisher***, 58 Wis.2d 299, 304, 206 N.W.2d 152, 155 (1973). Second, the undisputed facts merited summary judgment. They showed that the woods lay outside the deed's

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

legal description. The 1993 survey established this beyond dispute. This ended Bodart's claim to the wooded parcel, regardless of what he claimed the parties intended to convey in 1985. The trial court correctly ruled that the Hendricksons and Hockers deserved judgment as a matter of law.

Last, we note that Bodart has not sought to reform the deed's legal description for mutual mistake. If he had, the parol evidence rule would not bar the evidence. *See* ***Badger Savings B. & L. Ass'n v. Mutual B. & S. Ass'n***, 230 Wis. 145, 150-52, 283 N.W. 466, 468-69 (1939). Under the common law, however, the Hockers would still take the property free of Bodart's claim in equity for the legal description's reformation. The Hockers were evidently good faith purchasers without notice; reformation in equity is ineffective against such bona fide purchasers. *See* 2 POMEROY'S EQUITY JURISPRUDENCE § 776, at 1597 (4th ed. 1918), *citing* ***Garrison v. Crowell***, 4 S.W. 69, 70 (Tex. 1887) (mistake in deed's legal description not correctable as to bona fide purchasers); *see also* ***Cities Serivce Oil Co. v. Dunlap***, 115 F.2d 720, 722 (5th Cir. 1940) (bona fide purchasers protected from reformation of deed in equity); 6A POWELL ON REAL PROPERTY § 901(3), at 81A:166-67 (1996). In addition to the common law, the Hockers would also take the property free of any adverse claims that contradict facts of record by virtue of Wisconsin's title-clearing statute. *See* § 706.09(1)(i), STATS. Under the statute, Bodart's claims would have contradicted the legal description of record and therefore would have had no effect against the Hockers.

Although Bodart could not have asserted mistake and reformation against the Hockers, he evidently could have tried to reform the deed for the purpose of seeking damages against the Hendricksons. He could have used the reformation as a predicate to claim breach of the covenants for title. *See* ***Schorsch v. Blader***, 209 Wis.2d 401, 408-09, 563 N.W.2d 538, 541 (Ct. App. 1997), *citing*

Messer v. Oestreich, 52 Wis. 684, 696, 10 N.W. 6, 10-11 (1881). However, neither Bodart's complaint, his two-page summary judgment affidavit, his oral argument at the summary judgment hearing, nor his brief on appeal have alleged mutual mistake or sought the deed's reformation. Bodart had an obligation to raise those issues at some minimal level at some time in the trial court. Instead, Bodart's two-page summary judgment affidavit made general allegations of adverse possession, acquiescence in boundary lines, reliance on representations, reliance on surveys, and breach of covenants. He did not support these allegations with evidentiary facts. At the summary judgment stage, litigants must allege evidentiary facts. *See* ***Ruchti v. Monroe***, 83 Wis.2d 551, 558, 266 N.W.2d 309, 313 (1978). They may not survive summary judgment by conclusory allegations. Bodart did not successfully raise the specific issues of mistake and reformation by making general allegations of reliance on surveys and representations. He has therefore waived such issues as a basis to claim damages for breach of the covenants for title.

By the Court.—Judgment affirmed.

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