

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1217

STATE OF WISCONSIN

Cir. Ct. No. 2001CV225

**IN COURT OF APPEALS
DISTRICT IV**

WILBUR DAYE, JAMES DAYE AND DAVID HOEFT,

PLAINTIFFS-APPELLANTS,

v.

**MARK A. BEBEL, JUNE BEBEL, JON WILCOX, JANE WILCOX AND
TOWN OF DAKOTA, A WISCONSIN MUNICIPALITY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Wilbur Daye, James Daye, and David Hoeft appeal from a judgment regarding interests in land. The issue is whether

the circuit court erred in denying their motion under WIS. STAT. § 806.07 (2003-04)¹ for relief from a stipulation. We affirm.

¶2 The appellants commenced this action for a prescriptive easement and other relief. The case was originally resolved by an oral stipulation on the record in January 2004; however, no written judgment was entered at that time. In August 2004, the appellants moved for relief from that stipulation. The circuit court denied the motion orally in October 2004, and in March 2005 entered a judgment disposing of the substance of the case. The appellants appeal from that judgment. The court's oral ruling on the motion for relief from the stipulation is brought before us under WIS. STAT. RULE 809.10(4) as a prior non-final ruling.

¶3 The appellants' motion for relief from the stipulation asserted that an official of the Town of Dakota had, during his deposition, made misstatements about the extent of the records he had reviewed about town roads, and about the extent of the records that existed. The appellants asserted that they later discovered for themselves that additional records existed, and that they would not have settled the case if they had seen those records. In denying the motion, the circuit court analyzed it in terms of newly discovered evidence under WIS. STAT. §§ 806.07(1)(b) and 805.15.

¶4 On appeal, the appellants argue that their motion was brought under WIS. STAT. § 806.07(1)(c), which relates to fraud, misrepresentation,

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

or other misconduct by an opposing party, and that the motion should have been granted on that ground. The circuit court did not reach a conclusion on that basis. We would not be able to grant that relief ourselves, because relief on the ground of fraud, misrepresentation, or other misconduct would require a factual finding that such misconduct occurred. This court is not a fact-finding court. *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 869 (1980). Accordingly, the real question is whether the circuit court erred by addressing the motion under § 806.07(1)(b) rather than under § 806.07(1)(c).

¶5 We conclude that the appellants did not sufficiently state that the legal basis for their motion was fraud, misrepresentation, or other misconduct. The motion itself identified WIS. STAT. § 806.07(1) as the basis, but did not specify which paragraph of that subsection. The appellants' brief in support of the motion did not specify the paragraph or otherwise focus its argument on a specific legal ground. Similarly, during oral argument at the hearing on the motion, the appellants did not specifically direct their argument to the question of fraud, misrepresentation, or other misconduct. The substance of their argument was that the records were available to the official, and should have been disclosed during his deposition. They would not have settled the case had they known about the additional records. We cannot fault the circuit court for treating the motion as one based on § 806.07(1)(b) rather than on § 806.07(1)(c).

¶6 Because the appellants did not sufficiently identify WIS. STAT. § 806.07(1)(c) as the basis for their motion in circuit court, they are essentially attempting to raise the issue for the first time on appeal. We

usually do not address arguments made for the first time on appeal, see **Wirth v. Ehly**, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to do so in this case.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

