COURT OF APPEALS
DECISION
DATED AND RELEASED

August 31, 1995

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(1), STATS.

NOTICE

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

No. 95-1225-FT

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

H. JAMES OBERG
and PATRICIA E. OBERG,

Plaintiffs-Appellants,

v.

DONALD W. HELGESEN
and JOAN H. HELGESEN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Rock County: JOHN H. LUSSOW, Judge. *Reversed and cause remanded with directions*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. H. James Oberg and Patricia E. Oberg appeal from a judgment which dismissed their complaint seeking rescission of a land contract, reformed the contract to include additional land, and granted strict

foreclosure on the contract. We conclude that the contract may not be reformed. We therefore reverse.

The Obergs filed their complaint in July 1994, alleging as follows. In October 1990 they executed a land contract with Donald W. Helgesen and Joan H. Helgesen to purchase approximately 295 acres of land in Rock County. A parcel of 1.55 acres was excluded from the terms of the contract. Under Rock County ordinances, no lot of less than fifteen acres may be divided or created without county approval. Because the 1.55-acre parcel cannot lawfully be created, the Helgesens executed an unlawful contract and cannot comply with its terms. The Obergs sought rescission of the contract and return of monies paid.

The Helgesens' amended answer admitted most of the allegations in the complaint. It further stated that the 1.55-acre parcel "has been unconditionally tendered to [the Obergs] and, therefore, the legal description contained in the Contract is proper and lawful." The Helgesens also counterclaimed for strict foreclosure on the contract because the Obergs were in default on their payments.

The Helgesens moved for summary judgment. The trial court concluded the facts were undisputed, and held that the Helgesens' unconditional tender of the 1.55-acre parcel "cured any illegality if any existed." The court characterized the parcel as "a cloud on vendors' title or an encumbrance on the property." The court relied on ***Wiegman v. Alexander***, 4 Wis.2d 118, 127, 90 N.W.2d 273, 279 (1958), for the proposition that the vendor need not clear its title until it is required to deliver a warranty deed. The court held that by tendering the 1.55-acre parcel, the Helgesens had timely cured the defect in their title. On this reasoning, the court concluded that "reformation of the contract to include the 1.55-acre ... tract is appropriate and equitable."

The Obergs argue on appeal that while the court may reform a contract to conform it to the parties' intent, it may not create a new contract to which the parties did not agree. *See* ***Meyer v. Norgaard***, 160 Wis.2d 794, 802, 467 N.W.2d 141, 144 (Ct. App. 1991) (written agreement may be reformed if based on mutual mistake or the mistake of one party and the fraud of the other).

Here, they argue, the court has added to the contract the 1.55-acre parcel which the parties specifically agreed *not* to include in the contract.

The Helgesens argue that the court properly reformed the contract because this is a case of mutual mistake. They argue that "it is clear" that the parties intended to include the 1.55-acre parcel in the sale eventually, and that the Obergs admitted as much in their affidavits. The Helgesens do not provide a record citation for this assertion.[1] Our review of the affidavits does not disclose such an admission. Furthermore, even if the parties did intend to agree to a sale of the 1.55-acre parcel at some future date, no agreement to sell existed at the time the contract before us was executed. Therefore, we reject the argument. The contract cannot be reformed.[2]

The trial court's order rejected the Obergs' claim for rescission, but did not discuss any reason for doing so, apparently because the court concluded reformation was more equitable. On remand, the trial court should address the merits of the Obergs' claim.[3] We express no opinion as to whether rescission should be granted or, if it is, as to the appropriate terms. We express no opinion as to the equities in this case. We hold only that the contract may not be reformed in the manner done here.

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[1] In fact, the Helgesens provide no record citations whatsoever, contrary to RULE 809.19(1)(d) and (e), STATS.

[2] The Helgesens also argue that the land contract is legal. However, the trial court did not decide this issue, and it appears the issue was not thoroughly argued before that court. We decline to address it for the first time here. Similarly, we do not address the Helgesens' argument that even if illegal, a contract is merely voidable, not void, and this contract should not be voided.

[3] In connection with this issue, we note that § 236.31(3), STATS., provides that a contract to convey land contrary to that section "shall be voidable at the option of the purchaser or person contracting to purchase ... within one year after the execution of the ... contract ...."

By the Court.—Judgment reversed and cause remanded with directions.

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