COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP1222 **Cir. Ct. No. 2007CV481**

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

ROBERT D. HATCH AND KELLY L. HATCH,

PLAINTIFFS-RESPONDENTS,

V.

RONALD J. CUCHNA AND LINDA CUCHNA,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

ZIEGLER CONSTRUCTION, INC.,

THIRD-PARTY DEFENDANT,

GREGORY A. KNUTSON,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, P.J. Ronald and Linda Cuchna appeal an order of the circuit court enjoining the Cuchnas from encroaching on an easement on their property, requiring them to remove all obstructions from the easement, dismissing their claims against third-party defendants, and ordering them to pay reasonable attorneys' fees and costs for one third-party defendant, Gregory Knutson, pursuant to WIS. STAT. § 802.05(3)(b).[1]

¶2 The Cuchnas argue that the circuit court erroneously interpreted and applied the standards governing their affirmative defenses of waiver, equitable estoppel, laches, and unclean hands. The Cuchnas also contend that the circuit court misused its discretion in ordering sanctions against the Cuchnas in the form of requiring payment of Knutson's reasonable attorneys' fees.

¶3 We affirm the circuit court in all respects.

Background

¶4 The Cuchnas and Robert and Kelly Hatch own adjoining lots on Lake Wisconsin. Both the Cuchnas and the Hatches own a section of shoreline, but the Hatches can only access their shoreline by way of an access easement over the Cuchnas' property. This access easement was created by a written instrument

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

between the Cuchnas' and the Hatches' predecessors in title in 1994 and was set forth on a certified survey map created by Gregory Knutson, the third-party defendant in this action.

¶5 The easement generally runs along the east line of the Cuchna property at a width of fifteen feet and then angles to the west at a width of ten feet to provide access to the Hatches' shoreline. There is a roadway on the ground surface that follows the easement along the east line of the Cuchna property and arcs to the west where the easement turns along the shoreline toward the Hatches' property. Although the Hatches use this roadway to access their shoreline, the roadway does not entirely line up with the easement. The roadway is at least partially outside and to the southwest of the surveyed metes and bounds description of the recorded access easement. The roadway that is actually used is not shown on the 1994 survey map or on another survey map Knutson prepared for the Cuchnas in 1996.

¶6 The Cuchnas constructed a boathouse in the northeast corner of their property. The boathouse does not encroach on the roadway, but it is undisputed that the boathouse encroaches the full width of the recorded easement where the easement angles to the west. In August 2005, prior to beginning construction, the Cuchnas hired Knutson to survey their land in preparation for building a boathouse in the future. The 2005 survey did not reference either a future boathouse or the roadway.

¶7 In 2006, after construction of the boathouse was complete, the Hatches retained Knutson to survey the Cuchna property and the Hatches' easement. This survey showed that the roadway did not fully fall within the easement and that the boathouse encroached on the easement.

¶8 The Hatches filed suit against the Cuchnas, claiming that the boathouse obstructs their use of the easement. The Hatches sought to enjoin the Cuchnas from further obstruction, and requested that the Cuchnas be required to remove the boathouse. The Hatches also sought exemplary or punitive damages. The Hatches filed for summary judgment, and the Cuchnas responded with affirmative defenses of modification of the easement, adverse possession, equity, waiver, equitable estoppel, laches, and unclean hands.

¶9 Based on the pleadings, the circuit court dismissed the affirmative defenses of modification of the easement, adverse possession, and equity at the summary judgment stage, but determined that questions of material fact existed as to the affirmative defenses of waiver, equitable estoppel, laches, and unclean hands. After a two-day bench trial, the circuit court found that the remaining affirmative defenses were without merit. The circuit court enjoined the Cuchnas from placing any obstructions on the access easement, and required the Cuchnas to remove the boathouse on or before May 31, 2011. The circuit court also dismissed the Cuchnas' claims for contribution against third-party defendants, and awarded sanctions to Knutson. The Cuchnas appeal.

Discussion

I. Standard Of Review

¶10 This appeal presents questions of fact, discretion, and law. The particular standard of review for each affirmative defense and the award of sanctions will be discussed below. As a general matter, an analysis of each affirmative defense requires a review of the circuit court's findings of fact, which we uphold unless those findings are clearly erroneous. ***Ag Servs. of Am., Inc. v. Krejchik***, 2002 WI App 6, ¶11, 250 Wis. 2d 340, 640 N.W.2d 125 (Ct. App.

2001). In particular, where the circuit court has made a determination as to the credibility of a witness, we will accept the inference drawn by the circuit court. ***Schultz v. Sykes***, 2001 WI App 255, ¶32, 248 Wis. 2d 746, 638 N.W.2d 604. Finally, when an express finding is not made, appellate courts normally assume that the circuit court made findings in a manner that supports its final decision. *See* ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960).

II. Affirmative Defenses

¶11 The Cuchnas argue that the circuit court misused its discretion by finding that the Cuchnas failed to meet their burden of proof with respect to their affirmative defenses. According to the Cuchnas, the circuit court's decisions with respect to all of the affirmative defenses were founded entirely on the court's determination that the Cuchnas had a duty not to interfere with the easement. The flaw in the Cuchnas' argument is that they erroneously assume that they remain free on appeal to argue a view of the facts that is contrary to the circuit court's express and implicit findings of fact, even if such findings are not clearly erroneous. For example, the Cuchnas do not accept as true the fact that the Hatches did not know that the boathouse foundation intruded on the easement and that Robert Hatch, when speaking with a cement contractor, relied on Ronald Cuchna's assurance that the boathouse would not intrude on the easement. However, those and other factual findings by the circuit court are binding on appeal so long as they have support in the record.

A. Waiver

¶12 Whether the Hatches waived their right to the access easement is a mixed question of fact and law. *See* ***All Star Rent A Car, Inc. v. DOT***, 2006 WI 85, ¶15, 292 Wis. 2d 615, 716 N.W.2d 506. As previously discussed, we uphold

the circuit court's findings of fact unless those findings are clearly erroneous. ***Ag Servs. of Am.***, 250 Wis. 2d 340, ¶11. The application of the legal standard of waiver to these findings is a question of law that we review de novo. ***Meyer v. Classified Ins. Corp. of Wis.***, 179 Wis. 2d 386, 396, 507 N.W.2d 149 (Ct. App. 1993).

¶13 Waiver is the "voluntary and intentional relinquishment of a known right." ***Attoe v. State Farm Mut. Auto. Ins. Co.***, 36 Wis. 2d 539, 545, 153 N.W.2d 575 (1967). The elements of waiver are: (1) "a right, claim, or privilege in existence at the time of the claimed waiver"; (2) "the person who is alleged to have waived such a right had knowledge, actual or constructive, of the existence of his or her rights or of the important or material facts which were the basis of his or her right"; and (3) "the person waiving such right did so intentionally and voluntarily." WIS JI—CIVIL 3057.

¶14 Intent to waive can be inferred from the conduct of the party against whom the waiver is claimed. WIS JI—CIVIL 3057. "[I]t is not necessary to prove an actual intent to waive." ***Attoe***, 36 Wis. 2d at 545; *see also* ***Rasmusen v. New York Life Ins. Co.***, 91 Wis. 81, 89, 64 N.W. 301 (1895) ("Doubtless, the act out of which the waiver is deduced must be an intentional act, done with knowledge of the material facts, but it cannot be necessary that there should be an intent to waive."). However, "[a]lthough the waiving party need not intend a waiver, he or she must act intentionally and with knowledge of the material facts." ***Nugent v. Slaght***, 2001 WI App 282, ¶13, 249 Wis. 2d 220, 638 N.W.2d 594. This knowledge may be actual or constructive. ***Attoe***, 36 Wis. 2d at 546. "'Constructive knowledge is knowledge which one has the opportunity to acquire by the exercise of ordinary care and diligence.'" ***Nugent***, 249 Wis. 2d 220, ¶13

(quoting WIS JI—CIVIL 3057). In the absence of knowledge of material facts, waiver is not possible. WIS JI—CIVIL 3057.

¶15 It is undisputed that the Hatches have a right to the access easement. Thus, the first element of waiver is fulfilled.

¶16 The record supports the circuit court's implicit finding that the Hatches did not have actual knowledge of the correct location of the recorded easement. The circuit court found that Robert Hatch's testimony that he did not know where the actual easement was but knew only where the roadway went through the property was credible. This testimony is supported by the fact that the 1994 survey map that showed the metes and bounds location of the recorded easement did not provide a location of the roadway in comparison to the easement. The actual location of the recorded easement as compared to the roadway was only discovered and brought to the Hatches' attention in 2006, after Knutson surveyed the property for the Hatches. In fact, Ronald Cuchna stated in his testimony that everybody who used the roadway assumed that the roadway fell within the recorded easement.

¶17 The Cuchnas argue that the Hatches had constructive knowledge of where the recorded easement was located. The Cuchnas assert that the Hatches could have used the 1994 survey map to "take their own measurements to roughly determine whether the staked out proposed boathouse obstructed the [] easement." The Hatches contend, on the other hand, that they could not have waived their right to the easement because they were mistaken as to its correct location. We agree that case law has established that waiver cannot be established based on a mistake of fact. *See, e.g.*, ***Nolop v. Spettel***, 267 Wis. 245, 249, 64 N.W.2d 859 (1954) ("'Waiver cannot be established by a consent given under a mistake of

fact.'" (citation omitted)). However, case law is unclear as to how we reconcile mistake of fact with constructive knowledge. That is, if the Hatches could have corrected their mistaken understanding of the easement location through ordinary care and due diligence, would they have been capable of waiving their right to the easement?

¶18 We need not address how to reconcile these competing ideas of mistake of fact and constructive knowledge to decide this appeal. Even if we assume that the availability of the 1994 survey map amounts to constructive knowledge of the location of the recorded easement and that the Hatches could have waived their right, we conclude that waiver still fails because the record supports the circuit court's implicit determination that the Hatches did not intend to waive their right to the easement.

¶19 The Cuchnas argue that the Hatches waived their right to the easement by telling the cement contractor that he could continue to construct the boathouse foundation. The circuit court determined that the credible testimony of Robert Hatch established that the Hatches never gave permission to proceed to build the boathouse on the easement. Robert Hatch's testimony in the record supports the circuit court's finding. At trial, Hatch testified to a conversation he had during construction of the boathouse with the cement contractor. During this conversation, Hatch and the contractor discussed the foundation of the boathouse and whether it might obstruct the easement. Hatch stated that Ronald Cuchna had assured him that the boathouse would not interfere with the Hatches' easement. Hatch also testified he thought that, because the boathouse was not on his property, he could not stop construction. Hatch testified that he therefore told the contractor that he could "go ahead" with the construction.

¶20 These facts support the conclusion that the Hatches did not intend to waive their right to the easement. The Hatches were not giving a knowing "go ahead" to build the boathouse on their easement. Rather, viewing the evidence in a light most favorable to the circuit court's decision, Robert Hatch simply said "go ahead" because he was relying on Ronald Cuchna's assurance that the boathouse would not intrude on the easement. This is not an intentional and voluntary waiver of a known right.[2]

¶21 The circuit court's determination that Robert Hatch's testimony was credible is supported by the record and, as applied to the elements of waiver, establishes that the Hatches did not intend to waive their right to the easement.

B. Equitable Estoppel

¶22 Equitable estoppel again presents a mixed question of fact and law. Where the circuit court's findings of fact are not disputed, "'it is a question of law whether equitable estoppel has been established,'" and we review questions of law de novo. ***Nugent***, 249 Wis. 2d 220, ¶29 (quoting and citing ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997)). "[O]nce the elements of equitable estoppel have been established as a matter of law, the decision to actually apply the doctrine to provide relief is a matter of discretion." ***Id.***, ¶30.

¶23 The doctrine of equitable estoppel "focuses on the conduct of the parties." ***Milas***, 214 Wis. 2d at 11. "The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted,

[2] The Hatches also argue that, under the statute of frauds, they could not have waived their right to the easement orally. Because we conclude that the Hatches did not waive their right to the easement, we need not address the statute of frauds issue.

(3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." ***Id.*** at 11-12. Because the Cuchnas did not rely on any action or non-action of the Hatches in construction of their boathouse, we conclude that the doctrine of equitable estoppel does not apply. We therefore need not address each element of estoppel.

¶24 The Cuchnas argue that they relied on both action and non-action of the Hatches in locating and building their boathouse. They claim that the Hatches acted by giving the cement contractor the "go-ahead" to proceed with construction. The Cuchnas also assert that the Hatches' non-action is the Hatches' failure to return phone messages from the Cuchnas regarding the placement and construction of the boathouse.[3]

¶25 Assuming without deciding that the Hatches' action and non-action fulfills the first element of estoppel, we conclude that the Cuchnas fail to establish that they relied on that action or non-action in locating their boathouse. The circuit court found credible the testimony that the Cuchnas thought the roadway was in the easement and relied on that assumption in locating the boathouse, not on the action or non-action of the Hatches. The record supports this conclusion. Robert Hatch testified that Ronald Cuchna assured Hatch that the placement of the boathouse would not interfere with the easement. Ronald Cuchna testified that he took care to ensure that the boathouse was located clear of the roadway, which

[3] The Hatches deny receiving any phone messages from the Cuchnas. The circuit court did not make a final determination that these phone messages actually existed, indicating only that the "credible testimony does establish that Cuchna *may* have called Hatch and left a message on his answering machine ..., and this *may* have occurred twice" (emphasis added). For purposes of this appeal, we assume, without deciding, that the Cuchnas did leave phone messages for the Hatches.

Cuchna equated with the recorded access easement. In a conversation with Robert Hatch during construction, Ronald Cuchna stated: "An easement is a right of access. You have a roadway, ten foot roadway which you are entitled to.… [Y]ou have got exactly what the easement called for, ten foot access." The record also shows that the Cuchnas were not even aware of the Hatches' "go ahead" given to the cement contractor until after construction was complete.

¶26 Because we conclude that the Cuchnas relied on their own assumptions about the location of the easement and not on the action or non-action of the Hatches, the defense of equitable estoppel fails.

C. Laches

¶27 Whether the elements of laches are met in this case presents a question of law, which we review de novo. *See* ***Zizzo v. Lakeside Steel & Mfg. Co.***, 2008 WI App 69, ¶6, 312 Wis. 2d 463, 752 N.W.2d 889. "If the defense of laches is proved, whether to apply laches … is left to the discretion" of the court. ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900, *opinion clarified on denial of reconsideration*, 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424.

¶28 The doctrine of laches is an equitable defense to an action based on unreasonable delay in bringing suit where such delay is prejudicial to the defendant. The exact wording of the test to determine the application of laches differs from case to case in Wisconsin. *See* ***id.***, ¶19 ("Wisconsin courts have used various tests for laches without explaining their differences or why they have used the tests that were chosen."). In general, laches requires that the defense prove that "1) the plaintiff unreasonably delayed in bringing the claim, 2) the defense lacked any knowledge that the plaintiff would assert the right on which the suit is

based, and 3) the defense is prejudiced by the delay." ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999).

¶29 The circuit court found credible the testimony that the Hatches did not know until the 2006 survey that the roadway was not in the access easement. We conclude that the Hatches did not unreasonably delay in bringing their claim and, thus, the defense of laches fails.

D. Unclean Hands

¶30 Whether to award the defense of unclean hands is within the circuit court's discretion. ***Timm v. Portage Cnty. Drainage Dist.***, 145 Wis. 2d 743, 752, 429 N.W.2d 512 (Ct. App. 1988). For relief to be denied a plaintiff in equity under the "clean hands" doctrine, "it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." ***S&M Rotogravure Serv. v. Baer***, 77 Wis. 2d 454, 467, 252 N.W.2d 913 (1977). In order to constitute unclean hands, an act must rise to the level of "injustice or bad faith." ***Id.***

¶31 This argument fails because the record, as already amply discussed, supports the finding that the Hatches did not know the location of the recorded easement and thus could not have been acting in bad faith by, for instance, hiding that information from the Cuchnas until after construction of the boathouse was completed.

III. Third-Party Claims Against Knutson

¶32 Under WIS. STAT. § 802.05(2), an attorney certifies that, based on his or her reasonable inquiry, any papers filed and legal contentions within those papers are not "presented for any improper purpose," are "warranted by existing

law," and have "evidentiary support."[4] WIS. STAT. § 802.05(2). "If the circuit court finds that any one of the … requirements set forth under the statute has been disregarded, it may impose an appropriate sanction on the person signing the pleading or on a represented party or both." ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 548, 597 N.W.2d 744 (1999). Sanctions for a violation of § 802.05(2) "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." WIS. STAT. § 802.05(3)(b). These sanctions may include "directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of

[4] WISCONSIN STAT. § 802.05(2) reads, in full:

> **(2)** REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

the reasonable attorney fees and other expenses incurred as a direct result of the violation." WIS. STAT. § 802.05(3)(b).

¶33 "We apply two different standards of review to allegations that a lawsuit is frivolous: one for determining whether actions are *commenced* frivolously and a second for determining whether actions are *continued* frivolously." ***Keller v. Patterson***, 2012 WI App 78, ¶21, 343 Wis. 2d 569, 819 N.W.2d 841.

¶34 Our review of a circuit court's decision that an action was *commenced* frivolously pursuant to WIS. STAT. § 802.05(2) is deferential. ***Jandrt***, 227 Wis. 2d at 548. In evaluating whether a claim is frivolous, the circuit court first examines how much investigation the attorney conducted prior to filing a complaint or other paper. "[T]he nature and extent of investigation undertaken prior to filing a suit are issues of fact, and a circuit court's determinations on such questions will be upheld unless clearly erroneous." ***Donohoo v. Action Wisconsin, Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. The circuit court also examines whether that amount of investigation constituted a reasonable inquiry. This analysis of how much investigation should have been done is within the circuit court's discretion. ***Id.*** We uphold discretionary acts of the circuit court if the court "'examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** (citation omitted); *see also* ***Riley v. Isaacson***, 156 Wis. 2d 249, 256-57, 456 N.W.2d 619 (Ct. App. 1990).

¶35 Our review of whether an action was *continued* frivolously is a mixed question of fact and law. ***Keller***, 343 Wis. 2d 569, ¶22. "[W]hat an attorney knew or should have known is a question of fact." ***Id.*** Whether the

circuit court's findings of fact "support a finding of no basis in law or fact is a question of law which we review de novo." ***Id.*** We resolve doubts regarding whether a claim is frivolous in favor of the party or attorney against whom the frivolous action claim is made. ***Id.***

¶36 The Cuchnas' complaint against Knutson alleges that Knutson "performed a land survey and provided professional surveying advice regarding the placement and construction of the boathouse" and is therefore liable for negligence and contribution to the Cuchnas. In his answer to the Cuchnas' complaint, Knutson denied the claim that he provided professional surveying advice regarding placement and construction of the boathouse. On May 22, 2009, counsel for Knutson served upon counsel for the Cuchnas a motion for costs and sanctions that was filed with the court December 13, 2010. This motion alleged that the Cuchnas' claims against Knutson were not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law and were thus frivolous under WIS. STAT. § 802.05(2).

¶37 The Cuchnas make no showing of a reasonable inquiry into their claim against Knutson. Their response to Knutson's motion contains only the affidavit of Ronald Cuchna. There is no evidence in this affidavit that the Cuchnas hired Knutson to stake out the location of the boathouse that was built on the Cuchnas' property.[5] It was reasonable for the circuit court to determine that

[5] We acknowledge some ambiguous language in the affidavit, but conclude it does not undermine the circuit court's decision. In his affidavit, Ronald Cuchna stated that "[b]ecause Mr. Knutson was hired to stake out the relevant boundary lines on my property expressly to provide for the construction of the boathouse in the area where my pontoon boat and trolley system existed on my property and where, subsequently, my boathouse was actually constructed, his failure to exercise care in failing to provide a visual representation of the dimensions of such recorded easement violated his duty as a professional surveyor." This assertion does not plainly state that Knutson was hired to provide information to the Cuchnas so that the boathouse could be (continued)

the Cuchnas did not engage in a reasonable inquiry of the facts before filing their third-party complaint against Knutson. Thus, the circuit court's decision finding that the Cuchnas' claim was frivolous and awarding sanctions to Knutson was not a misuse of discretion.

¶38 Because we conclude that the Cuchnas' claims against third-party defendant Knutson were frivolous as commenced, we need not determine their frivolousness as continued.

Conclusion

¶39 We conclude that the Cuchnas' affirmative defenses of waiver, equitable estoppel, laches, and unclean hands fail. We also conclude that the circuit court did not misuse its discretion in finding that the Cuchnas' claims against third-party defendant Knutson were frivolous and awarding sanctions to Knutson in the form of fees and costs. We therefore affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

placed without interfering with the easement. Rather, read literally, this assertion simply makes reference to where the boathouse was "actually constructed."