COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1893 **Cir. Ct. No. 2014SC219**

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

TOWN OF WINCHESTER,

PLAINTIFF-RESPONDENT,

V.

JOHN STILSON AND MICHELE STILSON,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed and cause remanded with directions*.

¶1 HRUZ, J.[1] John and Michele Stilson appeal a forfeiture order finding them in violation of a Town of Winchester ordinance regulating exterior lighting. The order required the Stilsons to pay a total of $1,925 for the violations

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and awarded the Town $6,603 in attorney's fees and costs. The Stilsons argue the Town's small claims action should have been dismissed because the parties reached a settlement prior to trial. However, we conclude no valid and enforceable settlement agreement was reached between the parties. The Stilsons also argue the circuit court erroneously awarded the Town attorney's fees and costs in excess of those permitted by statute and the ordinance was unconstitutionally vague. We conclude the Stilsons forfeited the former argument by their failure to raise the issue before the circuit court, and their argument on the latter point is undeveloped. Accordingly, we affirm. Nevertheless, we remand the matter to the circuit court to clarify a discrepancy between its oral findings of fact and the final order as to the number of days the Stilsons were found to be in violation.

BACKGROUND

¶2 The Stilsons own property on North Turtle Lake in the Town of Winchester, Wisconsin. In 2011, the Stilsons erected a mercury vapor light on a light pole in their yard. John, who has a physical disability, stated the light was intended to provide "safety and security" when maneuvering through the yard. The bulb was covered by a translucent shield that allowed the direct transmission of light. Over the next several years, the light was periodically removed and modified several times, including after occasions when it was damaged by gunshots.[2]

[2] We are concerned about the use of violence by those who were apparently disgruntled about the Stilsons' light. The circuit court stated, "The only reason that there was probably a bullet hole in the light, was because the light itself has caused concerns, and not any personal animus towards the [Stilsons]. It was a message by some idiot." Regardless of any shooter's intentions, the law abhors this extrajudicial form of self-help.

¶3 After receiving complaints from area residents regarding the Stilsons' light, the Town passed a general lighting ordinance in December 2011. *See* WINCHESTER, WIS., ORDINANCE 2011-06 (Dec. 5, 2011) (the "Ordinance"). The Ordinance stated: "All exterior lighting shall be shaded in such a manner that the illumination is directed down and controlled in such a way as to minimize glare and light trespass onto neighboring properties, roadways, bodies of water and the overhead sky." As it pertains to residential properties, the Ordinance further stated, as relevant here: "Lighting on, or designed to illuminate berthing areas and/or shorelines shall be shielded in such a way as to prevent direct visibility of the light on public waters or adjacent lands more than 50 feet beyond the berthing structure." Each day of violation was punishable by a $25 civil forfeiture, "plus court costs and/or any other legal expenses incurred by the Town of Winchester." Compliance with the ordinance was required beginning on January 1, 2012.

¶4 The Town issued citations to the Stilsons at various points in 2012, 2013, and 2014 for violations of the Ordinance. On July 11, 2014, the Town filed a small claims action against the Stilsons seeking a total of $1,300 in forfeitures for 52 alleged days of violation at $25 per day.[3] The Stilsons answered, and the circuit court set the matter for trial on October 24, 2014. Because Judge Nielsen was unavailable, former Judge Robert Kinney was appointed as a temporary reserve judge to handle Judge Nielsen's calendar that day.[4]

[3] The Town later sought to amend its complaint to allege a forfeiture amount of $10,000, the maximum money judgment a party can seek in a small claims action. The court withheld decision on the motion until after the Town's presentation of evidence at trial.

[4] *See* WIS. STAT. § 753.075(1)(b).

¶5 The town chairman, Phil Williams, appeared along with the town's attorney on the trial date. The Stilsons appeared without counsel. Before the proceedings commenced, the parties, apparently at Reserve Judge Kinney's urging, participated in an off-the-record settlement conference. After what Reserve Judge Kinney characterized as a "substantial amount of give and take," the parties reached a tentative agreement that was memorialized on the record. The Stilsons would plead no contest to citations resulting in a $1,250 forfeiture, which was due "forthwith." The Stilsons would also plead no contest to the remaining citations, which would be dismissed with no forfeiture imposed if the Stilsons committed no further Ordinance violations within a two-year period. The Stilsons agreed to remove the light and seek Town approval for a replacement. Reserve Judge Kinney stated both parties were "in agreement that [he] would act as an arbiter, or arbitrator, of the propriety of the replacement light." The Town also agreed to waive recovery of its attorney's fees, which Reserve Judge Kinney noted the Town would otherwise have sought had the Town prevailed at trial. Williams stated he would "have to sell this to the Town Board," and Reserve Judge Kinney offered to attend a board meeting to help him do so.

¶6 The parties submitted various documents following the October 24 hearing. These documents are not in the record on appeal. However, it is apparent from Reserve Judge Kinney's November 9, 2014 response letter, which is in the record, that the Town submitted a proposed order purporting to contain the parties' tentative agreement as approved by the town board in November 2014. The Stilsons objected to the proposed order, questioning whether the town's attorney adequately communicated the terms of the agreement to the town board. Ultimately, Reserve Judge Kinney determined the agreement was adequately memorialized by the transcript of the October 24 hearing. He concluded there was

no need for a written order and declined to sign the order proposed by the Town. Nonetheless, Reserve Judge Kinney directed the Stilsons to pay $1,250 by November 15.

¶7 At some point, the Stilsons wrote to Judge Nielsen, alleging the Town violated the settlement agreement and requesting that Reserve Judge Kinney arbitrate the dispute. Judge Nielsen scheduled a status conference for February 18, 2015, at which time he told the parties Reserve Judge Kinney had exceeded his authority by offering to intervene on the parties' behalf to encourage the town board to adopt the tentative settlement agreement. Judge Nielsen also stated he had concerns about Reserve Judge Kinney's proposal to act as an arbitrator for future disputes between the parties, since he was appointed to take over Judge Nielsen's calendar for just one day. Given these observations, Judge Nielsen concluded "we have a very unusual and difficult circumstance before the Court."

¶8 Judge Nielsen then questioned the parties about the status of the tentative settlement agreement. Both the Town and the Stilsons confirmed they were unable to reach an agreement regarding the language of the proposed order. However, in the meantime the Stilsons had paid the $1,250 fine, and the Town had accepted that money. Judge Nielsen stated the case had become "a big mess" and an "unwelcome circumstance." He gave the parties the option of either: (1) voiding the agreement, having the Town refund the Stilsons' payment, and setting the matter for trial; or, (2) given that it appeared to Judge Nielsen that the parties had made it "80, or 90 percent of the way here," taking additional time to attempt to complete the settlement agreement. After discussion, the parties agreed to attempt further settlement discussions and, if the efforts failed, to have the Stilsons' money refunded and proceed to trial. The court scheduled another status conference in April to give the parties time to resolve the matter.

¶9 In late March, the Stilsons wrote to the circuit court advising that, in their opinion, the Town had "elected to default on the settlement agreement." The basis for this belief was apparently the Town's failure to communicate with the Stilsons about what action, if any, the town board took regarding the case while in closed session on March 2, 2015. The Stilsons requested that the circuit court order the Town to refund the $1,250 and vacate the settlement agreement.

¶10 A trial was scheduled for May 27, 2015. On the morning of the trial, the Stilsons filed a "MOTION [TO] DISMISS THE LAWSUIT IN SMALL CLAIMS COURT." The Stilsons argued their payment of $1,250 resolved the lawsuit under the terms of "the settlement agreement," and the Town's acceptance of that amount represented an acknowledgment of the settlement. The Town responded to the motion at the hearing, stating the Stilsons' payment was "made in regard to a settlement that fell through," and representing that the Town stood ready to refund the money if the Stilsons prevailed at trial. The circuit court took the Stilsons' motion under advisement, and the parties proceeded to trial.

¶11 At the trial's conclusion, the circuit court found the Stilsons in violation of the Ordinance for a total of 77 days between May 31 and August 17, 2014. At $25 per day of violation, the court concluded the total amount of the fine was $1,925. The court offset this amount by the Stilsons' earlier $1,250 payment and ordered them to pay the Town $675.[5] The court also ordered the Stilsons to

[5] The final order indicates a finding of 72 days of violation, rather than the 77 days stated on the record at the conclusion of the trial. However, there was no corresponding reduction in the amount of the forfeiture designated by the final order. Although the Stilsons do not develop any appellate argument on the point, given this discrepancy, we remand to the circuit court to clarify the number of days of violation. If the court determines the correct number was 72 days, it must modify the final order to state the correct forfeiture amount.

pay the Town's attorney's fees and costs in the amount of $6,603. The Stilsons appeal.

DISCUSSION

¶12 The Stilsons challenge the forfeiture order on three grounds. First, they argue the circuit court erred by proceeding to trial because the Town's acceptance of their $1,250 payment constituted an accord and satisfaction under the terms of the tentative settlement agreement reached on October 24, 2014. Second, the Stilsons argue the court awarded attorney's fees and costs in excess of those permitted by statute. Finally, they argue the Ordinance did not afford constitutionally sufficient notice regarding what type of lighting was prohibited. We reject each of these arguments.

I. The parties never reached a valid and enforceable settlement agreement.

¶13 The Stilsons first argue the parties reached a binding and enforceable settlement agreement as set forth on the record at the October 24, 2014 hearing. They argue the Town subsequently breached this agreement by failing to consider their new lighting proposal. In the Stilsons' view, the circuit court erred by proceeding to trial instead of ruling on their motion to dismiss, which was effectively a motion to enforce the purported settlement agreement. They further argue the court should have granted their motion to dismiss by operation of the common law doctrine of accord and satisfaction.

¶14 A settlement agreement is a contract that, like all contracts, requires an offer, an acceptance, and consideration, all resulting from a meeting of the minds. ***American Nat'l Prop. & Cas. Co. v. Nersesian***, 2004 WI App 215, ¶16, 277 Wis. 2d 430, 689 N.W.2d 922. "The creation of a binding and enforceable

contract is predicated on the parties' intent as derived from a consideration of the parties' words, written and oral, and their actions." ***Id.***, ¶18. When the facts are undisputed, the existence of a contract is a question of law that we review de novo. ***Kubichek v. Kotecki***, 2011 WI App 32, ¶34, 332 Wis. 2d 522, 796 N.W.2d 858.

¶15 We conclude, on this record, there was no binding settlement agreement with mutually agreed-upon terms. As the Town observes, it is significant in this case that the alleged settlement agreement is between the Stilsons and a municipality. A town is a "body corporate and politic," with the power to sue and be sued, and the power to enter into contracts. *See* WIS. STAT. § 60.01. A town board is vested with authority over any legal proceeding to which the town is a party. WIS. STAT. § 60.22(2). There are no statutory provisions establishing a permanent town attorney; rather, the town board "may designate, retain or employ one or more attorneys on a temporary or continuing basis to counsel the town on legal matters or represent the town in legal proceedings." WIS. STAT. § 60.37(2). It follows from these statutes that an attorney acting in a representative capacity on behalf of a town with respect to particular litigation does not have authority to settle the litigation without express authority from the town board.

¶16 This conclusion finds ample support in ***Town of Brockway v. City of Black River Falls***, 2005 WI App 174, 285 Wis. 2d 708, 702 N.W.2d 418. There, a town involved in litigation over a neighboring city's annexation authority argued the city had impermissibly surrendered its government authority, in part because city officials were alleged to have bound the city to a development agreement with the business that owned the annexed land before the common council voted to accept the contract. ***Id.***, ¶¶21-22. We easily rejected this argument: "The general rule of municipal law is that only a duly authorized officer, governing body, or

board can act on behalf of a city, and a valid contract with the municipality cannot be created otherwise." ***Id.***, ¶24 (citing 10 EUGENE MCQUILLAN, MUNICIPAL CORPORATIONS § 29.15, at 307 (3d ed. 1999)). An attorney has authority to make a valid contract on behalf of the municipality only if he or she has prior authorization to do so. ***Id.*** Here, the Stilsons point to no evidence demonstrating that the town's attorney had authority to bind the Town to a settlement agreement without town board approval. Moreover, Williams, the town chairman, specifically stated at the October 24 hearing that he would have to "sell" the proposed settlement to the full board.

¶17 The town board did ultimately pass a resolution approving a settlement agreement in November 2014, which resolution was contained in an order submitted for Reserve Judge Kinney's signature. However, the Stilsons objected to language in the order and asserted the town's attorney had, in some way, misled the town board about the settlement agreement's material terms. If there could be no agreement until the town board acted, and the Stilsons failed to manifest their assent to the agreement that the town board ultimately passed, then it follows the parties failed to reach a binding settlement agreement in this case. Rather, as Judge Nielsen pointed out, the parties were "80 … or 90 percent of the way" to a settlement before negotiations broke down.

¶18 The Stilsons' accord and satisfaction argument also fails on the merits. "Under the common law rule of accord and satisfaction, if a check offered by the debtor as full payment for a disputed claim is cashed by the creditor, the creditor is deemed to have accepted the debtor's conditional offer of full payment notwithstanding any reservations by the creditor." ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis. 2d 95, 101, 341 N.W.2d 655 (1984). The

Stilsons argue an accord and satisfaction was reached simply because the Town cashed their check. We disagree, for several reasons.

¶19 As with settlement agreements, ordinary contract principles apply in determining whether an accord and satisfaction has been reached. ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979). "Mere performance does not operate as a satisfaction unless offered as such to the creditor or claimant." ***Id.*** In this case, the $1,250 payment was made pursuant to a tentative settlement agreement that never fully ripened into a binding, enforceable contract. Moreover, the payment did not suffice to create an independent contract because there is no proof the Stilsons tendered the $1,250 with the stipulation that it constituted "full payment" to resolve all alleged Ordinance violations. The payment also could not have been a "full payment" under the terms of the tentative settlement agreement, as the settlement required the Stilsons to plead no contest to numerous other violations that would be held open for two years (pending no future violations of the Ordinance by the Stilsons) and for which no forfeiture was immediately imposed. Finally, the Town agreed

to refund the $1,250 payment if the Stilsons prevailed at trial. Under all these circumstances, we conclude an accord and satisfaction was not reached here.[6]

II. The Stilsons forfeited their argument regarding statutorily excessive attorney's fees and costs.

¶20 Following the trial, the Town submitted an affidavit and billing statements supporting its request for attorney's fees in the amount of $8,440.34. The Stilsons objected to this amount, arguing the billing was "disproportionate and excessive considering that it covers a period where [attorney's fees were incurred] due to considerable delays, unnecessary actions and ultimately default by the Town … during the time of the overturned settlement agreement." In other words, the Stilsons objected to the Town's request on the basis that they should not be responsible for the Town's fees incurred during settlement negotiations.

¶21 The circuit court stated it had "no reason to question any element" of the town's attorney's timekeeping. It also found the rate reasonable and that the time expended was necessary. However, the court concluded it would be unfair to make the Stilsons solely responsible for fees incurred as a result of the collapsed

[6] We note the Stilsons' "motion to dismiss" was filed just before trial, and the Stilsons did not insist that the circuit court address their motion at any time. Thus, the court never issued a definitive ruling on the Stilsons' arguments regarding the validity or enforceability of the settlement agreement, and the record does not show the Stilsons sought one. We agree with the Town that any challenge on those matters has been forfeited by the Stilsons' failure to obtain a definitive ruling. *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61, ¶31, 281 Wis. 2d 173, 696 N.W.2d 194. To hold otherwise would give the Stilsons the opportunity to raise the issue prior to trial but then delay its resolution until after the results of the trial were known, presumably re-raising the issue only if they were unsuccessful at trial. However, the forfeiture rule is one of administration, not jurisdiction, and this court has the authority to ignore forfeiture in certain instances. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶23, 338 Wis. 2d 114, 808 N.W.2d 155. We elect to address the merits of the Stilsons' argument in this case because it can be decided as a matter of law based upon clear precedent, and because the circuit court failed to consider the issue, even though it was filed prior to the commencement of the trial.

settlement negotiations. Accordingly, the court reduced the amount of recoverable fees to $6,000, plus costs of $603. The court found this reduction would substantially relieve the Stilsons of liability for the Town's attorney's fees incurred between October 24, 2014 and May 1, 2015.

¶22 The Stilsons now argue the attorney's fees awarded in this case exceeded the amount authorized by statute. They rely on WIS. STAT. § 799.25(10) and WIS. STAT. § 814.04(1), which together describe the amount of attorney fees generally recoverable as costs in a small claims action. They also cite WIS. STAT. § 66.0113(1)(b)7.d., which states that a citation must indicate that a defendant's failure to contest the citation may result in an action to collect the amount of the forfeiture plus costs, fees and surcharges imposed under WIS. STAT. ch. 814.

¶23 None of these authorities, nor the Stilsons' more general argument that the attorney's fees award exceeded the amount authorized by statute, was presented to the circuit court. "A fundamental appellate precept is that we 'will not … blindside trial courts with reversals based on theories which did not originate in their forum.'" ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (quoting ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)) (ellipsis in ***Schonscheck***). We generally will not consider issues raised for the first time on appeal. *See* ***State v. Hayes***, 2004 WI 80, ¶21, 273 Wis. 2d 1, 681 N.W.2d 203.

III. The Stilsons' due process argument is undeveloped.

¶24 Finally, the Stilsons argue the Ordinance is unconstitutionally vague. The vagueness doctrine is driven by the procedural due process notion of fair play. ***State v. Smith***, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997). A statute or rule is unconstitutionally vague if there is

> some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule.

State v. Courtney, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976). However, it is not enough that the "boundaries of the area of proscribed conduct are somewhat hazy." ***Id.*** Only a reasonable degree of definiteness is required. ***Id.*** (citing ***Boyce Motor Lines v. United States***, 342 U.S. 337, 340 (1952)). The constitutionality of an ordinance is a question of law that we review de novo. ***State v. Barman***, 183 Wis. 2d 180, 197, 515 N.W.2d 493 (Ct. App. 1994).

¶25 Here, while we acknowledge the Stilsons' apparent frustration with the Town not providing them with sufficient guidance as to whether any particular lighting they use satisfies the Ordinance, they fail to adequately explain why the Ordinance fails to pass constitutional muster. Their argument highlights John's testimony at trial that he did not know what the Town found objectionable about their light and that he believed they were in compliance with the Ordinance. The Stilsons posit the "only sure means of complying with the [O]rdinance would have been to remove the light entirely." They complain that even a lit candle on the shoreline would be directly visible on the lake from a distance greater than 50 feet.

¶26 The precise contours of the Stilsons' constitutional challenge are unclear. If the Stilsons are attempting to raise a challenge to the facial validity of the Ordinance, they must establish that there is "no possible application or interpretation of the statute which would be constitutional." ***Smith***, 215 Wis. 2d at 90-91. Their bare-bones argument, which consists of less than three pages and contains mostly conclusory assertions, fails to do this. *See* ***State v. Pettit***, 171

Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."). This is particularly true since we "start with the presumption that … ordinances are constitutional and [the party challenging the ordinance] … must demonstrate otherwise beyond a reasonable doubt." ***Brandmiller v. Arreola***, 199 Wis. 2d 528, 536, 544 N.W.2d 894 (1996).

¶27 Furthermore, the circuit court repeatedly stated the Stilsons' light was "undoubtedly" in violation of the Ordinance at various times. The Stilsons do not contest on appeal that they were in violation of the Ordinance. Rather, their "vagueness" argument is more of a policy argument that no light they erect could possibly comply. This argument runs directly contrary to the circuit court's findings, wherein the court stated the Stilsons' efforts to shield the light with a black substance "probably brought that light into compliance with the terms of the [O]rdinance." Moreover, if the alleged conduct plainly falls within the prohibition of the statute or ordinance, the defendant generally may not base a constitutional vagueness challenge on hypothetical facts. ***Smith***, 215 Wis. 2d at 91. As a result, the Stilsons have failed to raise any arguable appellate issue regarding the Ordinance's constitutionality.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.