COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1696 **Cir. Ct. No. 2014CV194**

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

KEVIN NEELIS, VICKI NEELIS AND HERITAGE SUITES, LLC,

PLAINTIFFS-APPELLANTS,

V.

THE MASQUERS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Husband and wife Kevin and Vicki Neelis, and their business, Heritage Suites, LLC, (collectively, Heritage) appeal an order dismissing their prescriptive easement and trespass claims against the Masquers, Inc., an established and incorporated community theater group, and awarding costs to the Masquers but not to Heritage. We affirm.

¶2 Heritage and the Masquers own adjacent properties. The Masquers acquired its real estate, including a building which serves as its headquarters, in 1944. Kevin Neelis purchased the Heritage property in 1989 and eventually transferred the property to Heritage Suites, LLC. The Neelises own and operate a business on their real estate and also have tenants who rent portions of the property. The roof on the Masquers' building overhangs the Heritage property by about four to five inches. The Heritage property has a parking lot with a driveway accessible from a public street. Nevertheless, the Neelises and their tenants have used the Masquers' property for ingress and egress to the Heritage property, and for parking.

¶3 In 1990, Heritage approached the Masquers to request permission to use its parking lot. Citing insurance liability concerns, the Masquers denied the request. Two years later, the Masquers' attorney wrote a letter to Kevin Neelis reaffirming the original denial and requesting that Neelis remind his staff and tenants that they were not allowed to park on the Masquers' property. In November 2002, the Masquers erected a "No Parking" sign. The Masquers' board president also sent a letter to Heritage requesting that it notify its clients and tenants not to park in the Masquers' lot. Responding on behalf of Heritage, Vicki Neelis sent a letter dated November 21, 2002, to the Heritage tenants stating:

> In an effort to continue our good relationship with our neighbors, Heritage Investments is requesting that all

> tenants of the Heritage Professional Building [address omitted] be considerate of The Masquers request. In this effort, please stop using The Masquers lot and instruct your clients, customers and friends to do the same.

Vicki Neelis provided a copy to the Masquers, along with a letter of enclosure which stated: "Please find enclosed a letter sent to all of the tenants of the Heritage Professional Building [address omitted]. I am certain that our tenants were unaware of any inconvenience they may have caused your members."

¶4 In August 2013, the Masquers erected a barricade which closed off the access drive connecting the Masquers and Heritage properties. Thereafter, the Masquers contracted to have its roof repaired. Heritage commenced suit seeking prescriptive easements (1) over the Masquers' parking lot and driveway and (2) for snow removal, and claiming that the Masquers' overhanging roof constituted a trespass. The Masquers filed an answer and counterclaim, alleging trespass claims against Heritage and a prescriptive easement for its roof overhang.

¶5 The Masquers' prescriptive easement counterclaim was dismissed by stipulation on summary judgment and the parties' remaining claims were tried to the court in October 2015. After post-trial briefing, the circuit court dismissed Heritage's prescriptive easement and trespass claims against the Masquers. At a subsequent hearing, the court declined to order the Masquers to pay costs, but required Heritage to pay costs. The court also formally dismissed the Masquers' trespass counterclaim at the hearing.[1] Heritage now appeals the circuit court's

[1] The parties did not discuss the Masquers' trespass counterclaim in their post-trial briefs and the circuit court did not address that claim in its decision. At the post-trial hearing, the Masquers agreed to draft an order dismissing its trespass counterclaim.

decision dismissing its prescriptive easement and trespass claims, and assessing costs against Heritage but not the Masquers.

The circuit court properly dismissed Heritage's claims seeking a prescriptive easement on the Masquers' property, including its parking lot.

¶6 Subject to an exception not relevant here, WIS. STAT. § 893.28(1) (2015-16),[2] provides that "[c]ontinuous adverse use of rights in real estate of another for at least 20 years … establishes the prescriptive right to continue the use." A prescriptive easement claim requires proof of four elements: "(1) adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which is visible, open and notorious; (3) under an open claim of right; (4) and is continuous and uninterrupted for twenty years." ***Ludke v. Egan***, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979); *see also* ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996). "A user must present positive evidence to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner." ***Kaster***, 202 Wis. 2d at 457. The circuit court's factual findings will not be overturned unless clearly erroneous. WIS. STAT. § 805.17(2).

¶7 In determining that Heritage was not entitled to a prescriptive easement on the Masquers' property, the circuit court found that Heritage's

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

adverse use was not continuous and uninterrupted for twenty years.[3] In particular, the court found that Vicki Neelis's November 21, 2002 letter to the Heritage tenants telling them to cease and desist using the Masquers' parking lot constituted a voluntary abandonment which interrupted Heritage's openly hostile use of the Masquers' property. *See* ***Red Star Yeast & Prods. Co. v. Merchandising Corp.,*** 4 Wis. 2d 327, 335, 90 N.W.2d 777 (1958) (citation omitted) (If use of the way is interrupted by an act of the landowner or "by voluntary abandonment of the party claiming the easement … prescription is annihilated and must begin again.").

¶8 Heritage argues that the circuit court erred in finding that Vicki Neelis's letter interrupted the prescriptive period because according to her testimony, she never intended to actually comply with her own instructions. We disagree. The court found that regardless of Vicki Neelis's subjective intent, the letter conveyed to the Masquers Heritage's abandonment of any company-sanctioned parking in the Masquers' lot. The circuit court's finding that the letter interrupted Heritage's openly hostile and adverse use is not clearly erroneous.

¶9 Citing to ***Spencer v. Kosir***, 2007 WI App 135, ¶8, 301 Wis. 2d 521, 733 N.W.2d 921, Heritage contends that the letter was inadequate to interrupt the prescriptive period because verbal expressions of intention "are effective to extinguish an easement only when they comply with the requirements of a release and operate as such." As evidenced by the preceding quote, ***Spencer*** applies to the

[3] The circuit court also determined that Heritage was not entitled to a prescriptive easement on equitable grounds, and because the ingress and egress points identified by Heritage are owned by the City of Manitowoc. The Masquers, who sold portions of their real estate to the city, have long enjoyed express right-of-way easements over the city's property. Because we uphold the circuit court's finding that Heritage's adverse use was interrupted and not continuous for twenty years, we need not reach the Masquers' proffered alternative grounds for affirmance.

voluntary abandonment of an already-established easement, not to an interruption in the twenty-year prescriptive period. Along these same lines, Heritage criticizes the circuit court's logic, stating that because Heritage's right to an easement would not have accrued until 2009, it would have been impossible for them to "abandon" the easement in 2002. Heritage is exactly right that an easement could not have accrued until at least 2009. For this reason, the circuit court found that Heritage never acquired prescriptive rights in the first instance; Heritage's reliance on ***Spencer*** is misplaced.

The circuit court properly dismissed Heritage's claim seeking a prescriptive easement for snow removal.

¶10 Heritage also sought a declaration that it had acquired a seasonal prescriptive easement allowing it to take snow from its property, drive across the Masquers' driveway and pile that snow on the Masquers' property. The circuit court found that Heritage failed to prove its claim:

> This court finds problematic the snow removal and storage prescriptive easement alleged here by Heritage. The court has been unable, despite diligently searching, to find any cases which would admit to a prescriptive easement on a seasonal basis for the removal and storage of an ephemeral product on someone else's property. Moreover, while there is testimony principally from Kevin and Vicki Neelis that this conduct persisted over a number of years, that testimony seemed lacking in specificity as to who conducted the snow removal and what kind of equipment was used. In short, the testimony supporting Heritage's assertion seemed more *ipse dixit* than the kind of evidence necessary to satisfy Heritage's evidentiary burden. For those reasons, the court finds that Heritage does not have a prescriptive easement to remove snow across The Masquers' roadway and deposit it on The Masquers' property.

¶11 The circuit court properly concluded that Heritage failed to prove its entitlement to a prescriptive easement for snow removal. Aside from the question of whether the circuit court was authorized to grant Heritage's unorthodox relief, Heritage did not sufficiently prove the factual elements necessary for a prescriptive easement. As the circuit court observed, Heritage did not establish a definable pattern of continuous and uninterrupted use. Further, Heritage did not show that the past piling of their snow on the Masquers' property was adverse and inconsistent with the Masquers' rights.

The circuit court did not err in failing to award nominal damages to Heritage based on the Masquers' overhanging roof.

¶12 Arguing that the Masquers' 2013 renovated roof encroached on its land by several inches thereby constituting a trespass, Heritage sought an order requiring the Masquers to remove the "encroaching overhang."[4] The circuit court dismissed Heritage's claim, finding it was an encroachment that was always there and that Heritage failed to identify or establish any damage from the overhang.

¶13 Heritage argues that because the circuit court found that the Masquers' roof overhung Heritage's property line by about four to five inches, "it was error for the trial court not to award any damages for the trespass in this matter." Heritage asserts that the circuit court erred in not awarding nominal damages, arguing that under ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, 328 Wis. 2d 436, 787 N.W.2d 6, "nominal damages are always appropriate

[4] In its complaint, specific to the overhanging roof claim, Heritage requested "An Order enjoining the [Masquers] from maintaining a roof overhang on [Heritage's] property," and "An Order for ejectment that requires the [Masquers] to remove its roof overhang from [Heritage's] property."

for a trespass." ***Id.***, ¶44 (citation omitted). The Masquers assert that Heritage forfeited any claim for nominal damages by not raising it in their complaint or other pleadings, at trial, in a post-trial motion, or at any point prior to the final judgment. We agree.

¶14 An appellant must articulate each of its theories to the trial court to preserve its right to appellate review. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476. "A fundamental appellate precept is that we 'will not blindside trial courts with reversals based on theories which did not originate in their forum.'" ***Id.***, (citation omitted). In its pleadings, Heritage sought injunction or ejection. *See* WIS. STAT. § 802.02 (a pleading must set forth a claim for the relief the pleader seeks). Heritage filed two post-trial briefs. In both, it specifically and solely requested an order requiring the Masquers to remove the roof overhang. After the court rendered its adverse decision, Heritage failed to file any post-trial motions or alert the circuit court in any way to its objection, even when the parties appeared at the post-trial hearing to argue costs.[5] By failing to present this claimed error to the circuit court for its appraisal and possible correction, Heritage has forfeited appellate review of this

[5] At the post-trial hearing, the Masquers did not object to the dismissal of its own trespass counterclaim against Heritage. This highlights the unfairness of Heritage waiting until now to seek nominal damages.

issue. *See* ***Paape v. Northern Assurance Co.***, 142 Wis. 2d 45, 52-53, 416 N.W.2d 665 (Ct. App. 1987).[6]

The circuit court properly exercised its discretion in assessing costs.

¶15 After trial, the parties' submitted their bills of cost and the circuit court awarded taxable costs to the Masquers but not to Heritage.[7] Pointing to the circuit court's dismissal of the Masquers' counterclaims, Heritage asserts that it, too, is entitled to costs as a prevailing party. We disagree.

¶16 Heritage relies on WIS. STAT. § 814.03(1), which provides: "If the plaintiff is not entitled to costs under [WIS. STAT. §]814.01(1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." We recognize that § 814.03(1) is mandatory, not discretionary. However, the Masquers' counterclaims bring the case under WIS. STAT.

[6] In dismissing Heritage's claim, the circuit court determined it failed to prove that the overhanging roof constituted a trespass. On appeal, Heritage contends that to the extent the circuit court based its dismissal on a finding that the Masquers acquired prescriptive easement rights protecting its seventy-five-year-old roof, the court was in error because the parties had earlier stipulated to dismiss the Masquers' prescriptive easement counterclaim. Though we rest our decision on forfeiture as to the remedy requested, the circuit court's decision does not give us pause. First, though Heritage argues that the circuit court's decision runs afoul of "res judicata," we point out that the Masquers' counterclaim was dismissed on the parties' stipulation rather than the circuit court's analysis of the facts and law, and, as with its nominal damages claim, Heritage failed to first raise this "res judicata" challenge in the circuit court. Second, recognizing that it was acting in equity, the circuit court determined that Heritage was not entitled to relief after finding that the Masquers' roof overhang was original to the building and existed for seventy-five years, the costly 2013 renovations added no additional burden to Heritage, and Heritage failed to identify any damage it was suffering or would suffer from the overhang. Heritage failed to bring any post-trial motions which would have given the court the opportunity to further explain or reconsider its rationale.

[7] Though Heritage's bill of costs is not included in the record on appeal, it appears from the motion hearing transcript that Heritage requested over $2000 in taxable costs. The Masquers requested and were awarded $746.70 in costs and disbursements.

§ 814.035(2), which states: "When the causes of action stated in the complaint and counterclaim and cross complaint arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim and cross complaint so arising shall be in the discretion of the court." In the face of the dismissal of Heritage's claims and of the Masquers' counterclaims, the award of costs was a matter of discretion for the circuit court. *See* § 814.035(2); *see also* ***Mid-Continent Refrigerator Co. v. Straka***, 47 Wis. 2d 739, 751, 178 N.W.2d 28 (1970) (under the plain language of WIS. STAT. § 271.035(2), which has since been renumbered as WIS. STAT. § 814.035(2), the circuit court's decision on costs is "purely discretionary.").

¶17 The circuit court considered that the Masquers' prescriptive easement counterclaim was dismissed by stipulation well in advance of trial, and that its trespass counterclaim was not vigorously pursued at or after trial. Given the overlapping nature of the parties' related claims, the court determined that in effect, the Masquers was the only successful party in the litigation. The circuit court engaged in a rational process and arrived at a reasonable decision supported by the facts of record and the appropriate law. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We will not interfere with this proper exercise of discretion.

By the Court.—Order affirmed.

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