COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP506 **Cir. Ct. No. 2010CV236**

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

GEORGE L. STAMPER, JR.,

PLAINTIFF-APPELLANT,

V.

MCDONALD FAMILY HOLDINGS I, LLC, MCDONALD FAMILY HOLDINGS II, LLC AND MCDONALD FAMILY HOLDINGS III, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Langlade County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. George Stamper, Jr., appeals a judgment dismissing his complaint seeking to impose an easement by estoppel on adjoining property in Langlade County owned by the various McDonald Family Holdings,

LLCs (collectively referred to as "the McDonalds"). Stamper argues that the McDonalds are estopped from revoking oral permission "to drive to his forty acres" granted by the McDonalds' predecessor in title. We reject Stamper's argument and affirm.

¶2 Arthur Bishop owned Stamper's property from 1938 until 1985. To access his forty acres, Bishop used a private road on adjoining property owned by Consolidated Water and Power Company. Bishop's property was eventually sold several times in the ensuing years. When Stamper was interested in purchasing it, the property was vacant and had been logged off. Stamper wanted to build a hunting shack, but the private road Bishop used would not accommodate hauling building materials. Stamper contacted Consolidated and received permission from Dan Meyer, the office manager, to construct a new junction road at Stamper's expense. Meyer subsequently installed a gate to prevent individuals from dumping tires and other refuse on the road, and Meyer allowed Stamper to put a lock on the gate. Consolidated and Stamper each had keys to the lock.

¶3 Consolidated subsequently sold the property to Plum Creek Land Company in 2002. Plum Creek in turn sold the property to the McDonalds in 2009. During this time, Stamper continued to use the private road.

¶4 On July 5, 2010, Stamper drove to the gate and the lock was changed. He found a note indicating that he was no longer allowed on the McDonalds' property. Stamper's demand for a key was denied. He then commenced a lawsuit alleging four causes of action: (1) estoppel to deny an easement; (2) judicial conveyance of an easement; (3) temporary injunction allowing Stamper access to his forty acres; and (4) nominal, actual and punitive damages for interfering with his use of the forty acres. Stamper also filed a

lis pendens on the property. The McDonalds filed a motion to dismiss for failure to state a claim. After a hearing, the circuit court dismissed the complaint and this appeal follows.

¶5 We review a motion to dismiss independently of the circuit court. *See* ***Lane v. Sharp Packaging Sys., Inc.***, 2001 WI App 250, ¶15, 248 Wis. 2d 380, 635 N.W.2d 896. We limit our review to the facts alleged in the complaint and we must assume those facts are true.[1] ***Id.***, ¶6.

¶6 In the circuit court, Stamper contended in his brief in opposition to the motion to dismiss that his complaint was "based upon Restatement (third) of Property …."[2] Stamper stated, "the question before the court initially is if the facts alleged in the complaint bring this dispute within § 2.10 of the Third Restatement of Property at Illustration 5." That provision is set forth as follows:

> § 2.10 Servitudes Created by Estoppel
>
> If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
>
> (1) The owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief ….
>
> ….

[1] Stamper's complaint is much more detailed than our recital of the facts. We set forth only the facts we deem necessary for the resolution of appellate issues.

[2] At paragraph sixty-six of his complaint, Stamper also alleged that an easement was created by estoppel pursuant to section 2.10, subsection one, RESTATEMENT (THIRD) OF PROP. (2000), and in particular, illustration 5.

> Illustrations
>
> ….
>
> 5. O, the owner of Blackacre, knew that Whiteacre, an adjacent unimproved property, was landlocked, and that A, its owner, had been using an old road across Blackacre for occasional access to Whiteacre. When A built a house on Whiteacre, using the old road to bring in construction materials, and then graded and paved the road to provide a driveway to the house, O said nothing about his right to revoke A's permission to use the road, even though he discussed the progress of the construction with A on several occasions. The conclusion would be justified that O is estopped from denying that A holds the benefit of a servitude for access to Whiteacre because it should have been apparent to O that A was relying on continued permission to use the road in making the investment to build the new house. The fact that the parties were neighbors, that O knew Whiteacre was landlocked and that A had been using the old road across Blackacre shifted the burden to O to notify A that his permission to use the road was revocable.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (2000).

¶7 Stamper argued the facts alleged in his complaint were "similar enough" to fit within illustration 5, because he was "given a license to use the road with no conditions or mention of that license being revocable." Therefore, he argued the failure to advise him that the license was revocable created an implied easement by estoppel.

¶8 However, as the circuit court correctly observed, Wisconsin has not adopted the Restatement section cited by Stamper. In fact, Stamper concedes as much on appeal, and argues "[t]he question is not whether or not Wisconsin must specifically adopt [the Restatement section]. Appellant is asking the Court system to apply that section in the context of long standing principles addressing the duty to disclose." In support of this argument, Stamper cites ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 41-42, 288 N.W.2d 95 (1980).

¶9 ***Ollerman*** has no application to the present matter. That case involved a developer's duty to disclose known defects related to an underground well. *See* ***id.*** at 20-23. There was no claim of easement.

¶10 More importantly, Stamper's position is inconsistent with more than 150 years of Wisconsin precedent holding that oral permission is revocable and does not create an easement. In ***French v. Owen***, 2 Wis. 250, [*184], 254-55, [*187-88] (1853), the court held that a parol license was revocable and not permanent unless "expressed by deed or conveyance in writing." Similarly, in ***Thoemke v. Fiedler***, 91 Wis. 386, 64 N.W. 1030 (1895), the plaintiff alleged a permanent easement to use a drainage ditch based upon oral permission. The plaintiff alleged he had expended money on improvements based on the oral license and it was therefore irrevocable. The court stated:

> The oral agreement under which the ditch across the defendants' land was made did not create an easement in the land. An easement is a permanent interest in the lands of another, with a right to enjoy it fully and without obstruction. Such an interest cannot be created by parol. It can be created only by a deed in writing, or by prescription. But this agreement did have the effect of a parol license. A license creates no estate in lands. It is a bare authority to do a certain act or series of acts upon the lands of another. It is a personal right, and is not assignable. It is gone if the owner of the land who gives the license transfers his title to another, or if either party die[s]. So long as a parol license remains executory it may be revoked at pleasure. So an executed parol license, under which some estate or interest in the land would pass, is revocable. Otherwise title would pass without a written conveyance, "in the teeth of the statute of frauds." Nor is such license made irrevocable by the fact that a valuable consideration is paid for it, or because expenditures have been made on the faith of it.

Id. at 389-90 (emphasis omitted).

¶11 This rule was confirmed again in ***Huber v. Stark***, 124 Wis. 359, 365, 102 N.W. 12 (1905). In that case, the court stated:

> [A] mere verbal permission by one to use the land, to some extent, of another, no consideration being paid therefor, though that other, on the faith thereof, enters upon such land and makes valuable improvements thereon to enable him to enjoy such permission, conveys no interest in the land and no right which, as to acts done by him after his privilege shall have been revoked, can be successfully asserted, defensibly or otherwise, as against the owner of the premises.

Id.

¶12 In ***Rohr v. Schoemer***, 1 Wis. 2d 283, 83 N.W.2d 679 (1957), the circuit court granted a prescriptive easement to a plaintiff to use a driveway constructed thirty-three years earlier pursuant to an oral agreement between predecessors in interest and then used continuously by both sides.[3] ***Id.*** at 284-87. Citing ***Thoemke***, our supreme court reversed with instructions to dismiss the complaint, because an oral license to use property is revocable and cannot create an easement. ***Id.*** at 287.

¶13 Nevertheless, Stamper insists an easement by estoppel has been recognized at common law "in narrow circumstances to avoid a constructive fraud."[4] Stamper further contends that "[t]he remedy available to plaintiff is the

[3] A prescriptive easement is established by adverse use of the property that is uninterrupted for a continuous twenty years, which is not at issue in this case. *See* ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144-45, 365 N.W.2d 622 (Ct. App. 1985).

[4] In support of his argument, Stamper cites "1 Thompson on Real Property § 355 p. 574 (1939)." There is no page 574 in Volume 1 (1939). Moreover, this treatise has been superseded several times. We will not consider arguments not properly supported by citation to authority. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

imposition of a constructive trust on McDonalds' road route." This argument was not made below, and we will not consider it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). In any event, Wisconsin case law prohibits an implied easement in this case, and it follows that the prohibition would extend to Stamper's argument concerning a constructive trust.[5]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[5] Stamper also contends "[t]he license became irrevocable because the third owner became estopped to revoke the license due to laches separate and distinct from any actions of the first owner." However, Stamper fails to refute the McDonalds' assertion that "there is nothing related to laches in [Stamper's] Complaint." We therefore consider the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).