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DISTRICT II

August 28, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2212 James E. Landon, Jr. v. Burnell Spuhler (L.C. #2010CV1263)

Before Brown, C.J., Reilly and Gundrum, JJ.

James E. Landon, Jr., appeals pro se from a judgment entered pursuant to a jury finding that he failed to establish three of the four elements required for a prescriptive easement on Burnell Spuhler's property. Landon raises several claims of trial error. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] Because Landon failed to preserve his claims in the trial court, he has forfeited appellate review, and we affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Landon and Spuhler both own property near Druid Lake in Washington County. In the late 1960's or early 1970's, Landon's father (Landon, Sr.), then-owner of the Landon property, constructed a roadway, or shortcut, connecting an existing driveway to Clearwater Beach Road.[2] In 1971, Landon, Sr., obtained an easement from another landowner permitting use of the shortcut. As it turns out, part of the shortcut was located on Spuhler's property.

It is undisputed that the shortcut was frequently used without any objection by Spuhler until at least 1987. At some point, Spuhler blocked access to the shortcut by dumping gravel and placing stakes on his land. Landon's witnesses testified that Spuhler blocked access around 1992, and Spuhler's witnesses testified that the obstruction occurred earlier, around 1987. The timing of Spuhler's obstruction was relevant to the fourth special verdict question, which asked whether the shortcut had been used for twenty continuous years.[3]

Landon moved onto the Landon property in 2009 and learned he was not permitted to use the shortcut. In 2010, Landon commenced a lawsuit under WIS STAT. ch. 843 to establish a prescriptive right to use the portion of Spuhler's property located on the shortcut.

At trial, the jury found in Spuhler's favor, and on Spuhler's motion, the trial court entered judgment on the verdict. The judgment denied Landon's claim for a prescriptive easement and

[2] There was disputed testimony concerning the timing of the shortcut construction, with Landon's witnesses generally testifying that it occurred in the late 1960's and Spuhler's witnesses testifying that it was in the early 1970's.

[3] In order to establish a prescriptive easement, Landon had to prove that prior use of the disputed land was all of the following: (1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights; (2) visible, open, and notorious; (3) under an open claim of right; and (4) continuous and uninterrupted for twenty years. ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 144, 365 N.W.2d 622 (Ct. App. 1985). The jury found in Landon's favor on the second element, that the use was visible, open, and notorious.

awarded costs and fees to Spuhler of around one thousand dollars. No further motions were made by either party.

On appeal, Landon claims that: (1) the jury instructions were too complex for the jury to understand, and the instructions failed to clarify Landon's burden of proof; (2) Spuhler's attorney misled the jury in opening and closing arguments; (3) the lawsuit was "brought in the name of Burnell Spuhler when in fact … the disputed easement was over land in the name of the Burnell J. and Marie A. Spuhler Family Trust"; and (4) Spuhler's witnesses testified falsely at trial. Because Landon failed to raise any of these issues before or during trial, or by postverdict motion, they are forfeited on appeal. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citations omitted) (an appellant must articulate each of its theories to the trial court to preserve its right to appellate review).

With regard to Landon's jury instructions' claims, the failure to object at an instruction conference forfeits any error in the proposed instructions or verdict.[4] *See* WIS. STAT. § 805.13(3); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). At trial, Landon was represented by counsel, who affirmatively stated his lack of objection to the instructions. Notably, much of the language read to the jury was taken directly from Landon's proposed instructions. At the request of Landon's attorney, the trial court customized the instructions to include special language concerning the meaning of key terms. Though the instructions were debated, the trial court's rulings all favored Landon, and Landon did not file any motions after the verdict.

[4] Further, contrary to Landon's claim, the jury was instructed on the applicable burden of proof.

Landon's remaining claims are similarly forfeited because they were never brought to the trial court's attention. "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***, 261 Wis. 2d 769, ¶11 (citation omitted). With regard to the allegedly improper arguments of Spuhler's attorney, Landon neither objected at trial, nor did he move for a mistrial.[5] *See* ***Sanders v. State***, 69 Wis. 2d 242, 263, 230 N.W.2d 845 (1975) (where the issue is counsel's misconduct, it is necessary to make an immediate objection and move for a mistrial). In addition to forfeiture, we reject Landon's claim that the "case was [improperly] brought in the name of Burnell Spuhler" because Landon, himself, commenced suit by naming Spuhler as the party defendant. We also point out that Landon has not demonstrated that any witness presented "willful false testimony under oath." As is generally the case at trial, the testimony conflicted, and both parties' witnesses were subject to cross-examination. The fact finder is the ultimate arbiter of credibility determinations and we defer to its resolution of discrepancies or disputes in the testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980).

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[5] We also note that the jury was instructed that remarks and arguments of counsel are not evidence, and "[i]f any remarks suggested certain facts not in evidence, disregard the suggestion." Jurors are presumed to follow the instructions given. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497.