COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1535 **Cir. Ct. No. 2015CV90**

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

NATHAN POLLNOW AND ESTHER POLLNOW,

PLAINTIFFS-RESPONDENTS,

V.

TOWN OF ELBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The Town of Elba appeals a judgment of the circuit court declaring a portion of Frank Road discontinued under WIS. STAT.

§ 82.19(2)(b)2. (2015-16).[1] The Town argues that the circuit court erred by: (1) failing to grant the Town's motion for judgment notwithstanding the verdict; (2) failing to properly instruct the jury; and (3) failing to properly answer a question from the jury during deliberation. The Town also contends that Frank Road cannot be determined to have been discontinued because there was evidence at trial that a portion of Frank Road that is adjacent to the disputed portion but ultimately dead ends was regularly used. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Nathan and Esther Pollnow are the owners of a parcel of land in the Town of Elba. The Pollnows purchased the property in 2010 from Nathan's parents, who had purchased the property in 1996. The Pollnows' property is accessed by Frank Road, which runs north off of Highway 16/60. The portion of Frank Road that is in dispute is a one-tenth of a mile portion of Frank Road that is immediately north of the Pollnows' driveway off Frank Road.[2]

¶3 The Pollnows brought the present action seeking a declaration that the disputed one-tenth mile portion of Frank Road has been discontinued under WIS. STAT. § 82.19(2)(b)2. Prior to trial, the Town and the Pollnows stipulated that between 1997 and 2012, the Town did not expend any highway funds on the disputed portion of Frank Road. This left for the jury's determination only one

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

[2] Frank Road continues north beyond the disputed portion for an indeterminate distance before it ends in a dead end.

question—whether the disputed portion of Frank Road was "entirely abandoned as a route of vehicular travel." The jury answered this question in the affirmative.

¶4 The Town moved the circuit court for judgment notwithstanding the verdict and for a new trial based on errors at trial. The court denied the Town's motions and entered judgment in favor of the Pollnows. The Town appeals. Additional facts are discussed below where necessary.

DISCUSSION

¶5 The Town contends that the circuit court erred in denying its motion for judgment notwithstanding the verdict and its motion for a new trial. The Town's arguments on appeal are difficult to follow and we address them as best we can discern them. In addition, the Town mistakenly mixes together arguments related to whether the circuit court erred as a matter of law in denying the Town's motion for judgment notwithstanding the verdict with arguments as to whether the circuit court erroneously exercised its discretion in instructing the jury on the question of abandonment. Different standards apply to those questions and, therefore, we discuss those arguments separately.

A. Judgment Notwithstanding the Verdict

¶6 The Town contends that the circuit court erred in denying its motion for judgment notwithstanding the verdict. We review a circuit court's denial of a motion for judgment notwithstanding the verdict de novo. ***Hicks v. Nunnery***, 2002 WI App 87, ¶15, 253 Wis. 2d 721, 643 N.W.2d 809.

¶7 A motion for judgment notwithstanding the verdict may be granted where the verdict is proper but other reasons evident in the record justify judgment for the moving party. WIS. STAT. § 805.14(5)(b).[3] Essentially, a judgment notwithstanding the verdict is a post-verdict motion for a directed verdict. ***Logterman v. Dawson***, 190 Wis. 2d 90, 102, 526 N.W.2d 768 (Ct. App. 1994). A motion for judgment notwithstanding the verdict "'admits the facts found but contends that *as a matter of law* those facts are insufficient, though admitted, to constitute a cause of action.'" ***Id.*** (quoted source omitted). Unlike a motion to change a verdict answer, *see* WIS. STAT. § 805.14(5)(c),[4] a motion for judgment notwithstanding the verdict does not raise the issue of whether there is sufficient evidence to support the verdict, but instead challenges whether the facts as found in the verdict are sufficient to permit recovery as a matter of law. *See* ***Chevron Chemical Co. v. Deloitte & Touche***, 168 Wis. 2d 323, 331, 483 N.W.2d 314 (Ct. App. 1992).

¶8 The party seeking to prove that a highway has been discontinued pursuant to WIS. STAT. § 82.19(2)(b)2., must establish by clear and convincing evidence the following two elements: (1) that the highway has been "entirely abandoned as a route of vehicular travel"; and (2) that "no highway funds have been expended [on the highway] for 5 years." WIS. STAT. § 82.19(2)(b)2. and ***Town of Schoepke v. Rustick***, 2006 WI App 222, ¶¶11-14, 296 Wis. 2d 471, 723

[3] WISCONSIN STAT. 805.14(5)(b) provides: "A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment."

[4] WISCONSIN STAT. § 805.14(5)(c) provides that: "Any party may move the court to change an answer to the verdict on the ground of insufficiency of the evidence to sustain the answer."

N.W.2d 770 (burden of proof is by clear and convincing evidence in situations involving public roadways).

¶9 At trial, the Pollnows claimed that the disputed portion of Frank Road was entirely abandoned as a route for vehicular travel prior to 1996. The Pollnows argued that any usage of the roadway after that time, including usage between 1997 and 2012, the time period during which the parties stipulated no highway funds were spent on the disputed portion of Frank Road, was not relevant to the issue of abandonment. In other words, the Pollnows argued that they proved the statutory elements of discontinuance by presenting evidence that the disputed portion of Frank Road was abandoned prior to 1996, and that the Town expended no highway funds on that portion between 1997 and 2002.

¶10 The Town argues that the two elements of discontinuance "must be present simultaneously in order for a highway to be discontinued." The Town asserts that because the parties stipulated that the Town did not expend any highway funds on the disputed portion of Frank Road between the years 1997 and 2012, the Pollnows needed to establish at trial that the disputed portion of Frank Road was entirely abandoned as a route of vehicular travel at some point during that fifteen-year time period, not anytime prior to or after that time period. The Town asserts that the Pollnows failed to do so. The Town asserts that evidence at trial showed that following a storm in 1997, Nathan's father, John Pollnow, blocked the disputed portion of Frank Road with logs, and that John's act in blocking the use of the disputed portion of Frank Road "prohibit[s] a finding of abandonment" any time after 1997. The Town also asserts that there was testimony at trial that the disputed portion of Frank Road was used for vehicular travel between 1997 and 2012.

¶11 In support of its assertion that the two elements for discontinuance of a roadway under WIS. STAT. § 82.19(2)(b)2. must occur simultaneously, the Town cites ***Lange v. Tumm***, 2000 WI App 160, ¶¶5-7, 237 Wis. 2d 752, 615 N.W.2d 187. In ***Lange***, we stated that "[b]oth conditions [in § 82.19(2)(b)2.] must be met before a public highway is discontinued." ***Id.***, ¶6. We did not say, as the Town argues, that the two elements must be met "simultaneously."[5]

¶12 As we stated in ***Lange***, WIS. STAT. § 82.19(2)(b)2. provides that in order for a roadway to be considered discontinued, both elements specified in that subdivision must be met. Nothing in § 82.19(2)(b)2. requires that the elements be satisfied at a specific time relative to each other. The Town does not argue that the statutory language is ambiguous. *See* ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 163, 558 N.W.2d 100 (1997) (if the meaning of a statute is clear from its language, we apply that plain meaning).

¶13 The Town does not present this court with any statutory interpretation arguments that WIS. STAT. § 82.19(2)(b)2. should be interpreted as requiring that the conditions be met simultaneously. Arguments that are not supported by reasons or legal authority are not addressed on appeal. ***State v. Pettit***, 171 Wis. 2d 627, 646-67, 492 N.W.2d 633 (Ct. App. 1992) (we will not decide issues that are inadequately briefed). Accordingly, we conclude that the Town has not shown that there are "reasons evident in the record which bear upon matters not included in the verdict," such that "the movant should have judgment."

[5] In ***Lange v. Tumm***, 2000 WI App 160, 237 Wis. 2d 752, 615 N.W.2d 187, we discussed WIS. STAT. § 80.32(2), which was subsequently renumbered as WIS. STAT. § 82.19(2)(b)2.

WIS. STAT. § 805.14(5)(b). Thus, judgment notwithstanding the verdict is not warranted.[6]

B. Jury Instruction on Abandonment

¶14 The circuit court has wide discretion when instructing a jury. ***Nommensen v. American Continental Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. A circuit court properly exercises its discretion if the instructions, taken as a whole, communicate a correct statement of the law and do not otherwise mislead the jury. ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). A determination that the circuit court erred in instructing the jury does not equate to automatic reversal. We may reverse and order a new trial only if the error in instructing the jury affected the substantial rights of the party. ***Nommensen***, ¶¶51-52. An error affects a party's "substantial rights" if there is a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. ***Id.***, ¶52.

¶15 The Town asserts that the following quoted portions of the circuit court's instructions on the issue of whether the disputed portion of Frank Road had been entirely abandoned as a route of vehicular travel "are contrary to the law and prejudicial to the Town":

> [I]f you determine that the owner of the land over which the roadway lies again started to use the roadway for vehicular travel after the point it had been entirely abandoned as a route of vehicular travel, then you should

[6] The Town has cast its argument in terms of whether it was entitled to judgment notwithstanding the verdict. However, it might be that the Town intends to challenge the sufficiency of the evidence. We simply note here that even if the Town had challenged the sufficiency of the evidence to support the jury's finding that the disputed portion of Frank Road had been entirely abandoned, we would reject that argument for the reasons set forth in ¶¶8-13.

> not consider that use in your determination of whether or not the roadway was entirely abandoned as a route of vehicular travel as such use would be private use of an abandoned roadway.
>
> ….
>
> … If you determine that the owner of the land over which the roadway lies started to prevent others from using the roadway for vehicular travel, or in any way [led] others to believe that the roadway was not open for vehicular travel, or in any way [led] others to believe that the roadway was private and that they needed permission to use the roadway for vehicular travel after the point it had been entirely abandoned as a route of vehicular travel, then you should not consider those actions in your determination of whether or not the roadway was entirely abandoned as a route of vehicular travel as such actions would then have been actions regarding private property upon which an abandoned road had lain.

¶16 As best we can tell, the Town is arguing that the instruction misstates the law because under WIS. STAT. § 82.19(2)(b)2., vehicular travel on a roadway that has been abandoned cannot be considered "private use" until the roadway is both entirely abandoned for vehicular use *and* there have been no expenditures of highway funds on the roadway for five years.

¶17 The Town conflates abandonment with the overarching determination of discontinuance. A roadway cannot be considered discontinued under WIS. STAT. § 82.19(2)(b)2. until it has been both entirely abandoned for vehicular travel and there have been no expenditures of highway funds on the roadway for five years. However, so far as we can tell from the arguments present in the briefing before us, a landowner's use of a roadway may be use of a private road, regardless of municipal expenditures on the road, if the roadway had previously been abandoned.

¶18 The Town argues that the instruction cannot be reconciled with ***Markos v. Schaller***, 2003 WI App 174, 266 Wis. 2d 470, 668 N.W.2d 755. The Town asserts that this court held in ***Markos*** that "[a] road must be discontinued, not just abandoned, before the use of the owner of land over which the roadway lies can be disregarded." ***Markos***, however, does not contain this holding.

¶19 In ***Markos***, we addressed whether an owner's use of a roadway that had not yet been found to have been entirely abandoned for vehicular travel during that period of usage prevented the roadway from being "entirely abandoned" within the meaning of the predecessor statute to WIS. STAT. § 82.19(2)(b)2. ***Id.***, ¶¶2-10, 13-14. We rejected the argument that use by the property owners who believed, whether reasonably or unreasonably, that the roadway was their private property, is irrelevant to the determination of whether a roadway has been "entirely abandoned." ***Id.***, ¶¶14-18. We did not hold, as the Town suggests, that no use of a roadway by a landowner can be perceived as private use until the roadway has been determined to be discontinued under § 82.19(2)(b)2.

¶20 Because the Town has not presented this court with a persuasive argument that the instruction was erroneous, we reject its argument.

C. The Circuit Court's Response to a Question from the Jury

¶21 The Town contends that the circuit court erred in the manner in which the court responded to a question from the jury during the jury's deliberations.

¶22 As explained above in ¶14, the circuit court has wide discretion in instructing the jury, and we will reverse a judgment based upon a court's instruction of a jury when the instructions taken as a whole communicated an

incorrect statement of the law or otherwise probably misled the jury. ***Nommensen***, 246 Wis. 2d 132, ¶50, and ***Randall***, 222 Wis. 2d at 59-60. The same principles apply when a circuit court responds to questions from the jury during deliberations. *See* ***State v. Simplot***, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993). "Just as the initial jury instructions are within the [circuit] court's discretion, so, too, is the 'necessity for, the extent of, and the form of re-instruction' in response to requests or questions from the jury." ***Id.*** (quoted source omitted). When a question is received from the jury, the court is to "'respond … with sufficient specificity to clarify the jury's problem.'" ***Id.*** at 405 (quoted source omitted).

¶23 During deliberations, the jury submitted to the circuit court the following question: "Are we considering the whole 66 ft. as the roadway?" In answer, the circuit court wrote the jury a note instructing the jury that: "you should be considering the disputed portion of Frank Road."

¶24 The Town argues that the only evidence at trial regarding the width of the disputed portion of Frank Road showed that the disputed roadway was sixty-six feet wide and that by failing to "direct[] [the jury] to consider the evidence in the record," the court's answer "improperly influenced the jury's verdict." The Town does not explain how or in what way the court's answer "improperly influenced" the jury, nor does the Town develop an argument explaining how or in what way the answer misled the jury. This court does not, as a general rule, address conclusory assertions and undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.

¶25 However, were we to ignore the Town's failure to present this court with a developed argument and were we to assume for the sake of argument that the Town is correct that the only evidence presented at trial was evidence that the disputed roadway was 66 feet wide, we would reject its argument on the ground that we fail to see how directing the jury to consider that evidence might have caused the jury to misunderstand the law or its task.

¶26 Accordingly, we reject the Town's argument that the circuit court erroneously exercised its discretion in the manner in which it responded to the jury's question.

D. The Jury's Finding of Abandonment

¶27 In an argument framed as a challenge to the sufficiency of the evidence, the Town argues that the jury could not find that the disputed portion of Frank Road had been "entirely abandoned" because evidence was presented at trial that the portion of Frank Road that is immediately to the north of the disputed portion of Frank Road was regularly used. The Town argues that the word "entire" is defined as "whole; complete in all its parts; not divisible into parts," and that it "logically [] follows" that for a highway to have been "entirely abandoned as a route of vehicular travel" as that phrase is used in WIS. STAT. § 82.19(2)(b)2., the "whole roadway must no longer be used as a route for vehicular travel."

¶28 Although the Town has framed its argument on appeal as a challenge to the sufficiency of the evidence, we conclude that the Town is in fact making a statutory interpretation argument and raises this argument for the first time on appeal. As a general rule, a party seeking reversal of a circuit court decision may not advance an argument that was not presented to the circuit court. *See* ***State v.***

Rogers, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). An exception to this general rule applies when an appellant raises a true sufficiency of the evidence challenge. ***State v. Hayes***, 2004 WI 80, ¶4, 273 Wis. 2d 1, 681 N.W.2d 203.

¶29 The Town raises a novel issue of statutory interpretation for the first time on appeal by asking us to interpret the phrase: "[A]ny highway that has been entirely abandoned as a route of vehicular travel." WIS. STAT. § 82.19(2)(b)2. The Town did not object in the circuit court to the pattern jury instruction on this ground and did not ask the circuit court for a different or additional instruction on this phrase. Accordingly, we reject the Town's attempt to advance a novel statutory interpretation argument on appeal that was never made in the circuit court.

¶30 However, even if the Town had not forfeited this argument, we would reject the Town's argument. First, the Town misreads WIS. STAT. § 82.19(2)(b)2. The word "entirely" does not, as the Town argues, modify the term "highway." Instead, the word "entirely" modifies the word "abandoned." Thus, it is the a highway that a party claims has been discontinued that must be wholly, or completely abandoned as a route of vehicular travel. The plain language of § 82.19(2)(b)2. does not require that the entire highway be abandoned and the Town does not develop an argument that it should be interpreted as such. Second, the Town's interpretation of § 82.19(2)(b)2. would lead to absurd results in many situations where significant portions of highways are entirely abandoned and the Town does not point to language in the statute that would permit treating very short portions of a highway differently from more substantial portions.

CONCLUSION

¶31 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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