STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM M. SHIREMAN and CHARLOTTE L. ROBLYER,

Plaintiffs-Appellants,

v

VAN BUREN COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
July 15, 1997

No. 189892
Van Buren Circuit Court
LC No. 94-039442-CZ

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment entered on jury and bench trial verdicts in favor of defendant. We affirm.

This case arises out of the parties' conflicting claims with respect to a portion of plaintiffs' property that is traversed by Fish Hatchery Road (the disputed property).

Defendant claimed below that it possessed a right-of-way over the disputed property under the theory of highway-by-user. See MCL 221.20; MSA 9.21. Plaintiffs argue that this claim is inconsistent with the position defendant asserted in the 1992 litigation between the parties. In the 1992 litigation, defendant sought to condemn the disputed property as a means of obtaining what defendant characterized as a new and additional right of way for the purpose of augmenting an older right-of-way not disputed by either party. Plaintiff asserts that the trial court erred in ruling that defendant was not judicially estopped from raising its inconsistent highway-by-user theory in this case. We disagree.

In the context of these proceedings, this Court has adopted the "prior success" model of judicial estoppel. *Paschke v Retool Ind*, 445 Mich 502, 509; 519 NW2d 441 (1994); *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 474; 556 NW2d 517 (1996). Under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent one at a subsequent proceeding. *Paschke, supra*; *Harvey, supra*. As explained in *Paschke, supra* at 510:

> Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.

The "prior success" model is narrowly tailored to allow for alternative pleadings in the same or different proceedings. *Id*. at 510, n 4. Thus, it may be seen as focusing less on the danger of inconsistent claims, than on the danger of inconsistent rulings. *Id*.

In this case, there is no indication that the court in the 1992 litigation ever accepted defendant's position (that condemnation was necessary in order to acquire a right-of-way) as true where the 1992 litigation was settled with plaintiffs conveying to the defendant a clear-view easement, not a right-of-way for roadway purposes. Thus, we cannot say that defendant successfully asserted a prior inconsistent position. We further conclude that defendant's position in this case is not wholly inconsistent with its position in the 1992 litigation, but rather simply constitutes an alternative theory for the purpose of establishing a legal interest in the disputed property. Accordingly, we find no error in the court's ruling that defendant was not judicially estopped from asserting its highway-by-user theory in this case.

We briefly address plaintiffs' remaining issues. We find no error in the court's equitable decision to not order the removal of the wooden boundary posts from plaintiffs' lawn. *Webb v Smith (After Second Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 185573, issued 6/13/97), slip op p 4. We find no abuse of discretion in the court's decision to exclude from evidence the Almena Township map and the Hunt mortgage survey. *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 669; 538 NW2d 420 (1995). We find no abuse of discretion in the court's decision to admit into evidence two aerial photographs of the intersection of Van Kal Street and Fish Hatchery Road. *Foehr, supra*. The court did not abuse its discretion in refusing to give plaintiffs' requested non-standard supplemental jury instructions entitled "Highway By User-Elements", "Highway By User-Notice" and "Highway By User-Permissive Use" where the instructions given by the trial court fairly and adequately instructed the jury with respect to the elements of highway by user. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990); *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 694; 442 NW2d 725 (1989). We find no abuse of discretion in the court's refusal to give plaintiffs' requested instruction entitled "Highway By User-Admission By Defendant." *Wiegerink, supra*. Defense counsel's disputed comments during opening statement do not warrant a new trial where they were substantially supported by the evidence and there is no indication that they had any effect on the verdict. *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997). We find no clear error in the court's finding that the intersection did not constitute a public or private nuisance. *Webb, supra*. Finally, we find no error in the court's equitable decision to not order a change in the traffic controls at the intersection. *Id*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski