2019 IL App (5th) 190037-U

NO. 5-19-0037

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOHN K. STAPLES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Union County.
	)	
v.	)	No. 17-SC-218
	)	
LARRY SCHEMONIA,	)	Honorable
	)	William J. Thurston,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the circuit court of Union County that ruled in favor of the defendant on the plaintiff's small claims complaint following a bench trial, because the trial judge's ruling was not against the manifest weight of the evidence that was presented at the bench trial, and because the trial judge did not abuse his discretion when he declined the plaintiff's posttrial request to reopen the proofs, which was made only after the trial judge had issued his decision in the case.

¶ 2 The plaintiff, John K. Staples, appeals the order of the circuit court of Union County that ruled in favor of the defendant, Larry Schemonia, on the plaintiff's small claims complaint. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On November 20, 2017, the plaintiff filed a small claims complaint in which the plaintiff alleged, *inter alia*, that he and the defendant owned adjoining real estate in Union County, near Alto Pass, and shared "water pumped from a spring located on [the defendant's] property." The plaintiff alleged that shortly before the date of the filing of the complaint, the defendant informed him that the defendant "was pulling the pump[,] to deprive [the plaintiff] of water," and that the defendant did so. The plaintiff alleged his "right to receive water from this spring" derived from a recorded water easement granted by the defendant's predecessor in interest to the plaintiff's predecessor in interest, and that the plaintiff possessed "the permanent right to enter onto [the defendant's] property in order to maintain the water line for the spring." The plaintiff alleged he had "incurred the sum of approximately $4,168.00 in expenses to provide water to his residence due to the continuing removal of the pump," and that the defendant had refused to allow him to enter onto the defendant's real estate to repair the pump, despite the plaintiff's legal right to do so. In the complaint, the relief requested by the plaintiff was the reimbursement of his expenses, as well as "to allow [the plaintiff] to come to the spring and repair the pump himself." Attached to the complaint as exhibits were a plat of survey and a water easement dated July 22, 1974.

¶ 5 On November 21, 2017, the plaintiff filed a motion for preliminary injunction in which he asked the circuit court to order the defendant to: (1) allow the plaintiff to repair the water pump, (2) continue to provide water to the plaintiff's residence, and (3) refrain from again removing the pump and interfering with the plaintiff's "water rights to the spring." Also on November 21, 2017, the plaintiff filed a motion for a temporary restraining order without notice or bond in which he asked the circuit court for the same relief. In an affidavit accompanying the filings, the plaintiff

averred that the defendant had disconnected the plaintiff's water supply in the past, when the two men "had differences over issues concerning our adjoining real estate."

¶ 6 On December 19, 2017, the defendant filed a verified answer to the plaintiff's small claims complaint. Therein, the defendant admitted that a spring exists on his property but denied that any water is pumped from that spring. The defendant alleged that around the year 2000, he installed a water tank on his property "where water from the spring accumulates via gravity." He contended that the plaintiff had "no legal basis to pump water from [the defendant's] water tank," and that "[t]he four corners" of the plaintiff's easement document describe "a 12-foot waterline easement to a well, not a spring, on [the defendant's] property." The defendant admitted that "he removed [the plaintiff's] electric water pump from [the defendant's] water tank" but contended that he did so "because [the plaintiff] was using [the defendant's] electric service." He further contended that he removed the electric water pump "because he was tired of providing [the plaintiff] free electric service for [the plaintiff's] pump after [the plaintiff's] dog entered upon [the defendant's] property and attacked and killed [the defendant's] dog." With regard to the applicability of the easement, the defendant reiterated his position that there was no well on his property, and that the easement applied only to a waterline to a well. Also on December 19, 2017, the defendant filed a verified reponse in opposition to the motion for preliminary injunction.

¶ 7 On May 2, 2018, the case proceeded to a bench trial. At the outset of the trial, counsel for the plaintiff indicated that her theory of the case would be that the plaintiff had both an express easement "that is of record in Union County" and an implied easement "as indicated by the actions and behavior of the parties." In response, counsel for the defendant contended that "no implied easement under Illinois law" existed that was applicable to the case, and requested a ruling on the pleadings with respect thereto. The trial judge reserved ruling on the defendant's request, and the trial began.

¶ 8 The first witness to testify for the plaintiff was Mitchell R. Garrett, who testified that he had been a professional land surveyor since 1994 and was licensed as a surveyor in six states. He testified that he had extensive experience "with easements from waterlines." He was subsequently certified by the circuit court, without objection from the defendant, as an expert in land surveying. Garrett testified that he was retained by the plaintiff in 2017 "to locate limits of a 12-foot waterline easement." Among the documents he reviewed for the plaintiff were a 1974 water easement, which was admitted into evidence as Plaintiff's Exhibit No. 2, and a 1985 survey created by a "Mr. Garner." Garrett testified that he physically inspected the property and, from points he observed there, was able to "mathematically recreate" the 1985 survey on his computer, and "make drawings and then stake out to where the water well was." Garrett testified that in his professional opinion, the water easement described in the 1974 document was "located where Mr. Garner has located it upon [the 1985] survey." Garrett testified that he "could find no other water source that was existing when" he was present on the property. He authenticated, as Plaintiff's Exhibit No. 3, a copy of the survey and photos he completed when he visited the property.

¶ 9 On cross-examination, Garrett testified that in addition to the 1974 water easement document and the 1985 survey, he used information told to him by the plaintiff "as evidence in determining an opinion." He conceded that the plaintiff "had no involvement" in the drafting of the 1974 easement but testified that because the plaintiff's mother was involved back in 1974, the information from the plaintiff could be relevant in terms of the intent behind the 1974 easement. He testified that the 1974 easement was a "blanket easement," and that "the creation and the installation of a waterline at some point after that would then define the limits of the *** 12-foot easement." Garrett testified that he believed "the parties would have fixed the location of the easement by the installation of the waterline." He conceded that he did not "walk the entirety of the property as it existed in 1974 to see if [he] could find other sources of water or old water wells,"

because some of the property in question was now owned by other individuals and he did "not think that was appropriate to walk." He reiterated that in his opinion, "the water well existed in 1974 by the way the easement is written." When asked if he knew that "an old caved-in water well" was part of the larger property in 1974, Garrett answered that he did not; when asked if he could "state with scientific certainty that the intent of the 1974 easement wasn't to provide an easement to that water well," Garrett testified that based upon the information he had, he believed "the spring/well is what [the predecessor in interest] intended for them to use," rather than anything else. He subsequently agreed that because, in 1985, Mr. Garner created a waterline easement to a spring for tracts that did not belong to the plaintiff, Garrett had "extrapolated from" Mr. Garner's easement that the spring "must be the well that they talked about in the 1974 easement." He also agreed that if there was "a well, an actual well, sticking out of the ground in 1974 and everybody knew where it was and that easement doesn't describe the location of the well, a reasonable person would assume they mean, to the well."

¶ 10 The next witness to testify was the plaintiff. He testified that he had owned his property for "25 or so years," and that when he acquired it, he was aware of the water easement, which he stated "was written and in the courthouse." He testified that since living on the property, he had always "carried water" to his residence, either "from town" or from a brown "water well tile" spring that was located on the defendant's property. He testified that the defendant was aware that he was doing that. He testified that in approximately 2000, he dug a trench and ran a waterline from his residence "down through the middle of the road on the easement, across in front of [the defendant's] house which is the easement, straight line *** to the spring." He testified that the defendant consented to this action. The plaintiff testified that he and the defendant had an agreement: the defendant "put the tank in," and the plaintiff purchased the pump. He testified that a man named "Tom"—who was a hunter who sometimes used a cabin on the property that

benefitted from pumping water from the tank—paid for the electricity to run the pump, and that the defendant never asked the plaintiff "to pay any money for electricity or anything to do with the water supply." He testified that on four prior occasions, the defendant had cut off his access to the spring, and did so just prior to the filing of his small claims complaint. He testified that he subsequently installed a cistern in his front yard to supply his water needs. He authenticated various documents that memorialized the expenses he had incurred to install the cistern.

¶ 11 On cross-examination, the plaintiff testified that he believed his right to the water came both from the 1974 easement and from his agreement with the defendant, the latter of which determined "[w]here it's at, but not that I can have it or not." He testified that the "brown tile is the same one that was" on the property in 1974, and that he got water from it as a child. He testified that the brown tile was at the location of the spring before the defendant purchased the defendant's property, and before the defendant installed his water tank. He agreed that the defendant had installed a second tile to supply water to the defendant's home, and had paid to have a cistern and pump house installed there too. He conceded that he had not paid for electricity to run his pump since the pump was installed in 2000, adding, "That's not the deal." He subsequently testified that he believed the hunter Tom, rather than the defendant, paid for the electricity, because that was what the defendant had told him. When asked if he believed the easement entitled him "to force" the defendant to pay for the electricity, the plaintiff testified that his deal with the defendant was that the plaintiff would provide the pump and Tom would pay for the electricity. He conceded the deal was not in writing. He also conceded that no waterline that he could "recall" existed between 1974 and 2000, although he and his family used the spring for water during that time. He testified that he had "never seen any well, caved-in well, or anything like that" on the property in question but subsequently agreed that he could not "say with certainty that there was not one there in 1974."

¶ 12 The next witness to testify was Ingrid Reyes Burns, who testified that she had lived with the plaintiff in his residence since May of 2015. She testified that during that time, the water supply to the residence had been turned off "more than once," which caused hardship for her. Following her testimony, the plaintiff rested his case.

¶ 13 The first witness to testify for the defendant was Charles L. Garner, who testified that he had been a registered surveyor in Illinois since 1976, and that he created the 1985 survey referenced earlier in this disposition. He was certified by the circuit court, without objection from the plaintiff, "as an expert witness with regard to surveying." Garner testified that the scope of his work with regard to the 1985 survey included creating roadway and waterline easements on tracts of land separate from the land now owned by the plaintiff. He agreed that he did not intend to create, and did not create, any easements related to the land now owned by the plaintiff. He testified that he was familiar with the 1974 easement document, and that when he created his 1985 survey, he did not intend to "interpret" the 1974 document or "memorialize" the location of its easement in his survey. He agreed that "nothing" in his 1985 survey "indicates the location or lack thereof of the 1974 easement." He testified that although he identified the location of a spring on his 1985 survey, he did not recall any infrastructure being present at the location of the spring, such as a cistern. He testified that the reason he identified the spring on the survey was to create waterline easements to it from tracts of land other than the land now owned by the plaintiff.

¶ 14 When asked if the 1974 easement document described an easement from the plaintiff's property to the spring identified in the 1985 survey, Garner testified, "No, it doesn't, or not necessarily." He testified that the 1974 document described a 12-foot easement to a water well, and that there was no water well at the location of the spring in 1985. He testified that it was "very likely" the water well in question was the purported "old water well" not located on the plaintiff's property. He agreed that the old water well, if it existed where claimed, was within the legal

description of the 1974 document. He further agreed that if the well existed where claimed in 1974, he would "deduce that the people that created this easement intended that easement to go to the location of that well." Garner testified that he believed Garrett's "after the fact" conclusion that Garner's 1985 survey identified the easement described in the 1974 document was "unreasonable" and not in accordance with accepted surveying practices, because it was based in part upon the subsequent conduct of the current parties—many years after the creation of the easement—in putting in a waterline to the spring. He testified that he did not agree with Garrett that the parties' behavior in 2000 "inform[ed] whether or not [the 1974 water easement] was supposed to go to the spring." He testified that his opinion was that, assuming the old water well existed in 1974, the 1974 document was designed to provide an easement from the plaintiff's property to that well.

¶ 15 On cross-examination, with regard to a correction he made to his 1985 report about his 1985 survey, Garner testified that on April 24, 2018, when he measured the distance from a pin he found, he noted that the distance was "now three feet longer, which means that the spring has been dug out and it's now three feet farther to the spring than it was in [1985]." When asked if he had "recorded" his correction, Garner testified there was no need for a correction because "[t]he easement at that point is still the same." He reiterated that when he was at the location of the spring in 1985, he did not see a well, a water well, or a water tile there. Upon further questioning, he agreed it was "possible" there was a water tile—or "a piece of clay sticking up, a clay top"—but in his opinion, that would not be a well. He testified that he believed the 1974 easement followed exactly along a road because "the road easement and the waterline/well easement are identical." He agreed that it was "common" in his practice to consider agreements between landowners when determining the location of an easement, or when preparing a survey. On redirect examination, however, he clarified that he relied only upon written agreements between landowners when so doing.

¶ 16 The next witness to testify was the defendant, who testified that he purchased his property in 1977. He testified that at that time, the spring was "a hole in the ground; came out underneath the tree; big enough to contain water in it." He agreed that it looked "like a small pool or puddle where water came out of the ground." He testified that in 1977, there was no infrastructure installed there, such as a cistern. He testified that in 1988, he installed "a clay tile near or around the spot where the water bubbled up from the spring." He later installed a second tile, which was plastic and about eight feet long, and the bottom of which he sealed with cement so it would hold water. Subsequently, he installed a second "holding tank" about 12 feet below the first one. Both holding tanks were gravity-fed. The defendant testified that he built a pump house in 2000—the same year he installed the second holding tank—on top of the second holding tank. He testified that prior to 2000, there was no waterline from the stream to the plaintiff's property, and that prior to 2000, he was aware of an "old well" on the northwest side of a lake near an "old house place and *** barn." With regard to the condition of the old well, the defendant testified the well "had fallen in and was open, just sitting there. I mean, nobody had used it." He testified that in his opinion, it was not "a useable, functioning well." He testified that in 1988, he purchased the property on which the old well was located and "filled it in." He testified that when he had Garner prepare the 1985 survey, the purpose was "[t]o divide the land into three tracts" and to prepare road and waterline easements for the tracts. The purpose was not to create an easement from the plaintiff's property.

¶ 17 With regard to the waterline installed by the plaintiff in 2000, the defendant testified that he gave the plaintiff permission to install it, to use the line to draw water from the second holding tank, and to put a pump in the pump house to pump the water. He provided the electricity to run the pump from 2000 to "January of 2018." The defendant testified that his arrangement with the plaintiff was that the plaintiff could use the water from the holding tank "as long as we were friendly, get along." He testified that once they no longer got along, he disconnected the plaintiff's

pump, and that there was never a written agreement between the two of them. He testified as to the costs he incurred to provide electricity to the plaintiff's pump for 18 years, and agreed that electricity was "substantially cheaper" in 2000 than at present. He testified that he "never intended to enter into a binding agreement for [the plaintiff] to install a waterline permanently."

¶ 18 On cross-examination, the defendant conceded that the plaintiff had provided the pump for the pump house most of the time since 2000, and testified that he only cut off the plaintiff's water supply one time—on October 29, 2017—shortly before the filing of the small claims complaint in this case. Following the defendant's testimony, the bench trial was adjourned until June 20, 2018. On that date, the plaintiff called two witnesses in rebuttal, over the objection of the defendant. Garrett testified that he disagreed with Garner's opinion, and testified that if the old water well had existed, Garner should have identified it on his 1985 survey because it "would have encumbered the three parcels that Mr. Garner was working with [the defendant] to convey to new parties." He further testified that in his "preparations," he did not "note any landmarks or monuments to suggest that there was a water well located on Tract III northwest of the lake of the Garner 1985 survey." He defended his reliance on what the parties did in 2000, stating his opinion that his reliance was not outside the realm of professional surveying practice.

¶ 19 The next witness called in rebuttal was the plaintiff. He testified that to his knowledge, there was never a water well located on Tract III, northwest of the lake shown on the 1985 survey. He testified that the occupant of Tract III in 1985 did not get water from a "water well" but instead from "the spring water well." He testified that he knew this to be true because a waterline ran "through [a] pond all the way to the house," and that he personally "hooked it" when fishing in the pond as a child. At the conclusion of the testimony, the trial judge allowed the request of the parties to provide written closing arguments. After those were submitted, he took the matter under advisement.

¶ 20 On October 3, 2018, the trial judge entered a written order in which he ruled, *inter alia*, that the plaintiff had "not proven by clear and convincing evidence that he has an easement with respect to pumping water from the spring." The trial judge stated that the 1974 document was "not dispositive," in part because the document referred to permanent use of a "water well." The trial judge stated that "[b]ased on the testimony of the parties, and the weight to be accorded to their respective testimony," he concluded "that the spring did not contain a water well of any sort on or before July 22, 1974," and that this was true "even using the broadest definition of the term" water well. The trial judge noted the plaintiff's contrary testimony recalling a brown tile in the spring "around 1974," but stated that although he found the plaintiff "to be a credible witness," he also recognized "that memory recollection, especially decades after the fact, can be a tricky thing." He further noted "there is evidence in the record that a water well actually existed in a second location on the property," and he described the old well that purportedly was located on Tract III, northwest of the lake.

¶ 21 The trial judge's order then found that the plaintiff had not proven he suffered damages from the removal of the water pump, noting the plaintiff's property had not diminished in value as a result of the "improvement to his property" of installing a cistern. He denied the request for a preliminary injunction, noting again that the plaintiff had "no rights pursuant to" the 1974 document; however, he stayed his ruling for 15 months to allow the plaintiff "time to consider and weigh his options and secure an alternate source of water," in light of the previous verbal agreement between the plaintiff and the defendant.

¶ 22 On October 23, 2018, the plaintiff requested that the trial judge reopen the proofs to allow an individual named Dale Hickam to testify in support of the plaintiff's "claim of the existence of the water well tile prior to 1974." Hickam's affidavit, which accompanied the plaintiff's request, stated that he was a neighbor of both parties, had lived on his property his entire life, was familiar

with the defendant's property, and knew "that since the 1950s, there has been a brown water well tile near the spring" in question. Hickam did not aver that he was not available to testify at the previous bench trial but did aver that he had a heart condition that "caused [him] to have heart attacks," and that he was "not in the best of health" and tried "to avoid stress whenever possible." He further averred that he "was hesitant to get involved in this action between [his] two neighbors because of the stress and fear of repercussions if" the defendant became angry with him or with the plaintiff. The plaintiff's request to reopen the proofs was denied on December 19, 2018, and this timely appeal followed.

¶ 23 ANALYSIS

¶ 24 On appeal, the plaintiff contends the trial judge's rulings with regard to damages, and with regard to injunctive relief, were against the manifest weight of the evidence, and that the trial judge abused his discretion when he declined the plaintiff's posttrial request to reopen the proofs. In light of the manner in which the plaintiff has framed his issues on appeal, we begin our analysis with the applicable standards of review. With regard to the first two issues raised by the plaintiff on appeal, we note that when a trial judge renders a decision following a bench trial, we review that decision using a manifest weight of the evidence standard that provides " 'great deference' " to the decision of the trial judge, because we recognize the reality that the trial judge " 'is in a superior position to determine and weigh the credibility of the witnesses, observe witnesses' demeanor, and resolve conflicts in their testimony.' " *Cincinnati Insurance Co. v. Pritchett*, 2018 IL App (3d) 170577, ¶ 16 (quoting *Wade v. Stewart Title Guaranty Co.*, 2017 IL App (1st) 161765, ¶ 59). Accordingly, we will deem the decision of a trial judge following a bench trial to be against the manifest weight of the evidence only if the opposite conclusion to that reached by the trial judge is apparent, or if the findings of the trial judge appear to be unreasonable, arbitrary, or not based on the evidence that was before the judge. *Id*. With regard to the final issue raised on appeal by

the plaintiff, "[i]t is within the sound discretion of the trial court to decide whether a case may be reopened for further evidence[,] and this discretion will not be interfered with except where it is clearly abused." *People v. Figueroa*, 308 Ill. App. 3d 93, 101 (1999). A clear abuse of discretion occurs only if the trial judge's ruling on an issue " 'is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial [judge].' " *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20 (2000)). We further note that this court may affirm the ruling of a trial judge on any basis supported by the record. See, *e.g.*, *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (2007); see also, *e.g.*, *People v. Johnson*, 208 Ill. 2d 118, 134 (2003). We may do so because the question before us on appeal is the correctness of the result reached by the trial judge, rather than the correctness of the reasoning upon which that result was reached. See, *e.g.*, *Johnson*, 208 Ill. 2d at 128.

¶ 25 In this case, the plaintiff first posits the trial judge erred because the plaintiff's claim for damages was "directly related to the [d]efendant's interference with the express easement previously granted." Accordingly, the plaintiff's contention of error is premised, by the plaintiff's own language on appeal, upon the assumption that the plaintiff proved that the express easement at issue in this case gave the plaintiff the right to use water from the holding tank the defendant had installed on his property to collect water from the spring. In the absence of such proof, there would be no violation of the terms of the express easement and no entitlement to damages. We note that it is undisputed that an express easement exists in this case and was recorded; the sole dispute is over the location of the water source referred to in that easement. Indeed, the entire purpose of the bench trial in this case was for the trial judge to gather factual evidence from the

parties so that the trial judge could determine the location of the water source referred to in the express easement, a location that is not clear from the terms of the easement itself.[1]

¶ 26 As described in detail above, the parties presented competing theories at the bench trial with regard to the location of the water source referred to in the express easement. The plaintiff's theory, supported by his testimony and buttressed by the testimony of his expert witness, surveyor Mitchell R. Garrett, was that the water source referred to in the easement document is the spring that is located on the defendant's property, which the plaintiff has been accessing via the waterline he ran to the defendant's holding tank. The defendant's theory, supported by his testimony and buttressed by the testimony of his expert witness, surveyor Charles L. Garner, was that the water source referred to in the 1974 easement document is an old water well that existed elsewhere on the subject property in 1974, which the defendant in 1988 filled in due to its deteriorated condition. The defendant concomitantly contended at trial that the plaintiff's use, between 2000 and 2018, of the spring water collected in the defendant's holding tank was entirely permissive, and that the defendant had the right to terminate that permissive use at any time, which he did when the parties no longer got along.

¶ 27 After hearing the testimony supporting each of these theories, the trial judge issued an order in which he concluded the plaintiff had not proven he has an easement with respect to pumping water from the spring. The trial judge stated that the 1974 document was "not dispositive," in part because the document referred to permanent use of a "water well." The trial judge stated that "[b]ased on the testimony of the parties, and the weight to be accorded to their respective testimony," he concluded "that the spring did not contain a water well of any sort on or before July

[1]Neither party in this case argues on appeal that the trial judge erred by considering parol evidence, or that he should have made a decision strictly on the basis of the express language found in the four corners of the easement document itself.

22, 1974," and that this was true "even using the broadest definition of the term" water well. The trial judge noted the plaintiff's contrary testimony recalling a brown tile in the spring "around 1974," but stated that although he found the plaintiff "to be a credible witness," he also recognized "that memory recollection, especially decades after the fact, can be a tricky thing." He further noted "there is evidence in the record that a water well actually existed in a second location on the property," and he described the old well that purportedly was located on Tract III, northwest of the lake. The trial judge's order also denied the request for a preliminary injunction, reiterating that the plaintiff had "no rights pursuant to" the 1974 document.

¶ 28 We find no error, let alone reversible error, in the trial judge's order. As explained above, when a trial judge renders a decision following a bench trial, we review that decision using a manifest weight of the evidence standard that provides " 'great deference' " to the decision of the trial judge, because we recognize the reality that the trial judge " 'is in a superior position to determine and weigh the credibility of the witnesses, observe witnesses' demeanor, and resolve conflicts in their testimony.' " *Cincinnati Insurance Co.*, 2018 IL App (3d) 170577, ¶ 16 (quoting *Wade*, 2017 IL App (1st) 161765, ¶ 59). Accordingly, we will deem the decision of a trial judge following a bench trial to be against the manifest weight of the evidence only if the opposite conclusion to that reached by the trial judge is apparent, or if the findings of the trial judge appear to be unreasonable, arbitrary, or not based on the evidence that was before the judge. *Id*. Here, the trial judge evaluated the conflicting testimony and made credibility determinations based upon his observation of the witnesses and the evidence as a whole, as well as his recognition of the fact that even witnesses who otherwise may be credible can have mistaken recollections decades after the fact. Although the plaintiff contends on appeal that discrepancies in Garner's testimony render his credibility suspect, and that his testimony therefore should be discarded entirely, the trial judge was in a far better position than is this court to determine Garner's credibility. Having reviewed

the entire bench trial, we conclude that there is nothing unreasonable, arbitrary, or not based on the evidence about the trial judge's conclusions and ruling, and the opposite conclusion to that reached by the trial judge is not apparent. Accordingly, his ruling is not against the manifest weight of the evidence, and we decline to disturb it.

¶ 29 The plaintiff next contends the trial judge erred in denying the plaintiff's request for injunctive relief. The plaintiff again premises his contention of error upon the assumption that he proved the express easement at issue in this case gave the plaintiff the right to use water from the holding tank the defendant had installed on his property to collect water from the spring. We reject this argument for the same reasons we rejected it above. We note as well that the plaintiff did not contend, in his opening brief on appeal, that an implied easement of any sort exists in this case. Accordingly, the plaintiff has forfeited consideration of such a claim. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

¶ 30 The plaintiff's final contention on appeal is that the trial judge erred when he declined the plaintiff's posttrial motion to reopen the proofs. As explained above, "[i]t is within the sound discretion of the trial court to decide whether a case may be reopened for further evidence[,] and this discretion will not be interfered with except where it is clearly abused." *Figueroa*, 308 Ill. App. 3d at 101. A clear abuse of discretion occurs only if the trial judge's ruling on an issue " 'is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial [judge].' " *Blum*, 235 Ill. 2d at 36 (quoting *Hall*, 195 Ill. 2d at 20). When deciding whether to grant a motion to reopen the proofs, the factors to be considered by a trial judge include whether (1) the movant has provided a reasonable excuse for failing to submit the additional evidence during trial, (2) granting the motion would result in surprise or unfair prejudice to the adverse

party, and (3) the evidence is of the utmost importance to the movant's case. See, *e.g.*, *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 55. Related to the question of whether the movant has provided a reasonable excuse for failing to submit the additional evidence during trial is the question of whether failing to introduce the evidence in question at trial was inadvertence or calculated risk. See, *e.g.*, *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 44. "If evidence offered for the first time in a posttrial motion could have been produced at an earlier time, the court may deny its introduction into evidence." *Chicago Transparent Products, Inc. v. American National Bank & Trust Co. of Chicago*, 337 Ill. App. 3d 931, 942 (2002).

¶ 31 In this case, as explained above, more than four months after the trial concluded—and nearly three weeks after receiving a ruling that ended the case with a decision in his opponent's favor—the plaintiff requested that the trial judge reopen the proofs to allow an individual named Dale Hickam to testify in support of the plaintiff's "claim of the existence of the water well tile prior to 1974." Hickam's affidavit, which accompanied the plaintiff's request, stated that he was a neighbor of both parties, had lived on his property his entire life, was familiar with the defendant's property, and knew "that since the 1950s, there has been a brown water well tile near the spring" in question. Hickam did not aver that he was not available to testify at the previous bench trial but did aver that he had a heart condition that "caused [him] to have heart attacks," and that he was "not in the best of health" and tried "to avoid stress whenever possible." He further averred that he "was hesitant to get involved in this action between [his] two neighbors because of the stress and fear of repercussions if" the defendant became angry with him or with the plaintiff.

¶ 32 In light of the foregoing, the trial judge, weighing the appropriate factors, could have concluded that the request to reopen the proofs should be denied for the following reasons: (1) no reasonable excuse was given for the failure to call Hickam at trial, because the motion and Hickam's affidavit provide no excuse at all, with the affidavit not providing that Hickam was

unavailable but providing instead only the insinuation that he was not called due to the stress it might have caused him in light of his heart condition; (2) the failure to call Hickam was a calculated risk taken by the plaintiff, rather than inadvertence, because the plaintiff at no point and in no way contended the failure was inadvertent, and the timing of the motion—only after the plaintiff lost his case—strongly suggests the failure was a calculated risk; (3) even if one assumed, *arguendo*, that because the plaintiff briefly alluded to Hickam during the plaintiff's testimony at the bench trial, the defense therefore would not be "surprised" by Hickam's testimony, the defense nevertheless would be unfairly prejudiced by allowing the plaintiff to present additional testimony more than four months after the trial ended, and nearly three weeks after the plaintiff lost, as this would essentially give the plaintiff the proverbial "second bite of the apple" and would cause the defendant to incur considerable expenses of time and money to relitigate a case he had already won; and (4) although Hickam averred that he could provide evidence that would be important to the plaintiff's case, that evidence would not be "of the utmost importance" because it would merely corroborate the evidence already provided by the plaintiff's testimony. Such conclusions by the trial judge would not be unreasonable in any way, and certainly would not constitute reversible error. Indeed, the mere fact that the plaintiff waited more than four months after the trial concluded—and nearly three weeks after receiving a ruling that ended the case with a decision in his opponent's favor—to request a reopening of the proofs, coupled with the plaintiff's failure to show that Hickam was unavailable for the original bench trial, provides ample support for the trial judge's decision. See *Chicago Transparent Products, Inc.*, 337 Ill. App. 3d at 942 ("If evidence offered for the first time in a posttrial motion could have been produced at an earlier time, the court may deny its introduction into evidence."). Accordingly, the plaintiff has failed to convince us that the trial judge's decision not to reopen the proofs constituted a clear abuse of the trial judge's discretion, because we are not convinced that the trial judge's ruling is arbitrary, fanciful, or

unreasonable, and we certainly do not conclude that no reasonable person would take the view adopted by the trial judge.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm the order of the circuit court of Union County that found in favor of the defendant.

¶ 35 Affirmed.