COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2824

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

CHARLES R. AND MARYBELLE BENTLEY, CLYDE A. AND LOIS B. SELIX, TANYA CUNNINGHAM AND NEIL A. ROBINSON, R. ALEX AND PHYLLIS L. REISDORF, HOWARD AND CHARLOTTE FORD, EINAR AND VERA EVENSON, AND KENNETH KLATT,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MADISON, A MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed*.

Before Eich, Vergeront, and Deininger, JJ.

DEININGER, J. Charles and Marybelle Bentley, and the other plaintiffs, own lots adjacent to four street-end courts located along the shore of

Lake Mendota in the City of Madison.[1] They appeal a judgment dismissing their claims of title to the land encompassed by the platted courts.

Section 80.32(3), STATS., provides that "[w]hen any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands…." The Bentleys claim the City discontinued the courts under the provisions of subsection (2) of the statute:

> [E]very highway shall cease to be a public highway at the expiration of 4 years from the time it was laid out, except such parts thereof as shall have been opened, traveled or worked within such time, and any highway which shall have been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years, shall be considered discontinued.

Section 80.32(2), STATS.[2] On the parties' cross-motions for summary judgment, the trial court decided in the City's favor, concluding that the Bentleys had not made "a prima facie showing that the courts were abandoned" under the statute. We agree and affirm the judgment dismissing the Bentleys' action.

BACKGROUND

The plat of Mendota Beach Subdivision, then in the Town of Madison, was recorded in the office of the Register of Deeds for Dane County in 1896. On the plat, Mendota Avenue (now Lake Mendota Drive) is shown running roughly parallel to the shoreline of Lake Mendota. A tier of lakeside lots are

[1] We will refer to the plaintiffs-appellants, collectively, as the Bentleys.

[2] Section 80.32, STATS., was amended by 1997 Wis. Act 172 to provide that "[s]ubsection (2) does not apply to state or county trunk highways or to any highway, street, alley or right-of-way that provides public access to a navigable lake or stream." This action was filed prior to the effective date of the amendment. The City concedes the new provision is not retroactive, and it is thus not applicable to the present litigation.

platted between the avenue and the lake. At six places, however, instead of a lot on the lakeside of Mendota Avenue, the plat shows a "court," that is, a public street-end leading from the avenue to the lake. The history and present status of four of these courts is the subject of this lawsuit.

The Bentleys and the other plaintiffs own lakeside residential lots which abut the four courts at issue. Apparently believing that the City was planning to develop these courts as public parks, the Bentleys sought to establish that title to the courts had reverted to them under the provisions of § 80.32, STATS.[3] They alleged in their complaint that the four courts "have never been opened, improved or used as a public way," and that they "have been entirely abandoned as a route of travel and no highway funds have been expended for five years upon them." The City denied these allegations.

Both parties filed summary judgment motions and affidavits in support of their motions. The affidavits of the Bentleys, other lot owners, and several former residents of the area, generally establish the following: The courts are believed to have been originally intended as "fire lanes" providing access to the lake as a water source for fire protection. Except for access to the residences on the abutting lots, little or no vehicular traffic has been observed on the courts since well before the area was annexed to the City of Madison in 1955. The Town of Madison could provide no evidence of having expended funds for the maintenance or improvement of the courts, and, except for some snowplowing, the City has not maintained or improved them since the annexation. Some of the courts have trees and other vegetation growing on the lake end, and pedestrian

[3] The Bentleys also pled a cause of action grounded in adverse possession but have abandoned that claim.

traffic on the courts is infrequent and light. Two of the courts first became listed on the Wisconsin Department of Transportation (DOT) inventory of local roads in 1939, and the other two in 1959.

The City's submissions establish the following: The four courts are included as streets on the official city map and on the DOT local road inventory. Each of the courts is graded, and each is paved or graveled at least a part of the way to the lake. The City has posted street name signs on each of the courts and has posted them with "no parking" signs since 1959; it removes snow from them in winter, trims trees, and has performed some other minor maintenance (e.g., graveling, drainage improvement) on some of them. About twenty individuals who live in the vicinity averred that, since 1990, they have used the courts as pedestrians for recreational purposes and for access to the lake.

The trial court concluded that there were no material facts in dispute, and that, based on the materials submitted on summary judgment, Bentleys had failed to show abandonment of the courts under § 80.32(2), STATS. The court thus denied the Bentleys' motion, granted the City's, and entered judgment dismissing the action. The Bentleys appeal.

ANALYSIS

We review the granting and denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. *See* ***id***. When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the "'practical effect is that the facts are stipulated

and only issues of law are before us.'" *See* ***Lucas v. Godfrey***, 161 Wis.2d 51, 57, 467 N.W.2d 180, 183 (Ct. App. 1991) (citation omitted).

The Bentleys do not argue that the record on summary judgment produced disputed issues of material fact that preclude the granting of summary judgment to one of the parties. Rather, their claim is that the trial court erred in interpreting and applying § 80.32(2), STATS., to the undisputed facts in the record. That is, the Bentleys maintain that under a correct legal interpretation, they are entitled to summary judgment on this record, one which would declare the courts to have been discontinued, thus confirming their title to the land in the "former" courts. The Bentleys also take issue with some of the reasoning expressed in the trial court's written decision. They contend that the court abused its discretion, relied on facts not in the record, ignored a rebuttable presumption, created an impossible plaintiffs' burden, and applied equitable principles instead of legal analysis in reaching its result. We disagree with each of these assertions, but we do not address them further inasmuch as our review is de novo.

The parties agree that § 80.32(2), STATS., establishes two ways by which a "public highway" can cease to be one.[4] The first occurs when parts of a highway have not been "opened, traveled, or worked" within "the expiration of 4 years from the time it was laid out." ***Id***. This provision has been interpreted to require a greater showing than its language might suggest. We recently summarized holdings dating back to 1881 and concluded that "reversion does not occur under § 80.32(2), STATS., until the property is required for public use, and

[4] A "highway" is defined by § 990.01(12), STATS., to include "all public ways and thoroughfares and all bridges upon the same." This definition applies to § 80.32, STATS. *See* ***Carroll v. Town of Balsam Lake***, 206 Wis.2d 529, 533 n.3, 559 N.W.2d 261, 263 (Ct. App. 1996).

[the] public authority in charge acts with a manifest abuse of discretion in refusing to open the property." ***Carroll v. Town of Balsam Lake***, 206 Wis.2d 529, 536, 559 N.W.2d 261, 264 (Ct. App. 1996).

The Bentleys' argument regarding this first method of discontinuance under the statute suggests that we may ignore our holding in ***Carroll*** and apply the "plain language" of the statute. They contend that they should prevail because the record does not show that the courts were in fact "opened" within four years of their platting (i.e., by 1900), or in the alternative, that the record provides a sufficient basis for an inference that the courts were not opened within that timeframe. We reject these contentions. Even if we were so inclined, we could not ignore our holding in ***Carroll***. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997) (holding that only the supreme court has the authority to overrule, modify or withdraw language from an appellate court opinion). We emphasize, however, that we have no inclination to abandon the interpretation of § 80.32(2), STATS., set forth in ***Carroll***. That interpretation derives from longstanding and consistent precedents, and it serves important public policies. The additional showing required by case law ensures that streets laid out in plats for future use are not deemed abandoned simply because "the need to open them had not yet arisen." *See* ***Heise v. Village of Pewaukee***, 92 Wis.2d 333, 351, 285 N.W.2d 859, 867 (1979). A strict application of the statutory language would "clearly thwart the long-range planning and development efforts of local governments." ***Id***.

Neither can we embrace the Bentleys' attempt to shift the burden of proof on the issue to the City. Over a hundred years have passed since the platting of Mendota Beach Subdivision, and the Town of Madison has no public records regarding the use and maintenance of the courts during the sixty years they

remained within the town. The Bentleys thus face an admittedly difficult task in proving that (1) at some point a public need to "open" the courts arose, and (2) that the Town abused its discretion in refusing to meet that need. But, that indeed is the burden a private landowner must shoulder in order to wrest title to a publicly dedicated highway from a municipality. The supreme court held in ***City of Jefferson v. Eiffler***, 16 Wis.2d 123, 113 N.W.2d 834 (1962), that even though the record had established that a platted alley had been unopened for one hundred years, and that a city utility superintendent had urged the opening of the alley for at least thirteen years, the adjoining landowner had not established grounds for a reversion. *See* ***id***. at 134, 113 N.W.2d at 840 (noting the court's longstanding attitude "in favor of the public on the question of the loss of rights in public streets by nonuser or abandonment …" (citation omitted)).

The present record establishes that the courts have been at least partially opened and used for public purposes for several decades prior to their 1955 annexation into the City. Two of the courts were included in the DOT's local road inventory as of 1939. The courts are generally believed to have served as "fire lanes," and a fire truck was observed using one of the courts for a "practice run" between 1946 and 1958. "[A] pathway going down to Lake Mendota" existed "at one point" between 1939 and 1961 on or near one of the courts. There is nothing in the record to indicate that some public need arose during these years that would have required the Town, or later the City, to further open or work on the courts. Neither is there any evidence of an abuse of discretion on the part of either municipality in refusing to open the courts. We thus conclude that the Bentleys have not made the showing required to establish the first method of discontinuance under § 80.32(2), STATS.

A municipal body may also lose title to a street or highway under the statute if it is one that has "been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years…." Section 80.32(2), STATS. The parties' arguments imply that they read the statute as applying the five-year time period to both the requirement that the highway be "entirely abandoned as a route of travel," and the requirement that "no highway funds have been expended." We conclude, however, that the "5 years" relates only to the issue of highway expenditures and not to whether the highway has been "entirely abandoned." Our conclusion stems both from the language and punctuation of the statute, which places the time period within a phrase relating only to highway expenditures, and from prior judicial construction of the statute:

> Explaining this section in ***State ex rel. Young v. Maresch***, 225 Wis. 225, 232, 273 N.W. 225, 229 (1937), the court stated that "[a]bandonment of a highway by virtue of that statute can occur only when it has been 'entirely abandoned as a route of travel,' *and* when 'no highway funds have been expended [upon it] for five years.'" (Emphasis supplied.) In effect, both conditions must be met.

Heise v. Village of Pewaukee, 92 Wis.2d 333, 349, 285 N.W.2d 859, 866 (1979).

Thus, the Bentleys must establish both the entire abandonment of the courts as a route of travel, and a total lack of highway fund expenditures for five years. We conclude that the record fails to support the first requirement, and thus it is not necessary for us to examine the second. *See* ***id.*** ("In light of the fact that the Lake Street extension has been used as a route of travel, the question of whether

the village had expended money on that portion of the street within the past 5 years is irrelevant.")[5]

The affidavits of several lot owners acknowledge that the courts are regularly used by pedestrians, even if infrequently, and that they have been so used for some thirty years. The affidavits of various city employees establish that all four courts are shown as public streets in the City's official map, are included in the DOT local road inventory, are regularly plowed in winter, and are posted with street name and no parking signs. Numerous area residents travel the courts on foot for recreation and for access to the lakeshore. It may well be that, as the Bentleys argue, public use of the courts has increased since they raised their claim of title, and that prior to the City's annexation in 1955, public use and municipal attention to the courts were minimal. It is beyond dispute, however, that as of the filing of this action, the courts had not "been entirely abandoned as a route of travel."

The lack of regular vehicle traffic on the courts, other than to and from the adjoining residences, does not detract from our conclusion: "It is obvious that streets terminating at the edge of a body of water are not subject to the same degree of vehicular travel as other through streets." ***Heise***, 92 Wis.2d at 348, 285

[5] The trial court examined the record to see if the Bentleys had shown abandonment for *any* five-year period, as opposed to the five years preceding the filing of their claim to title. The City argued in the trial court that only the preceding five years were relevant, citing ***Heise v. Village of Pewaukee***, 92 Wis.2d 333, 349, 285 N.W.2d 859, 866 (1979), where the supreme court referred to "the past 5 years." The City does not renew this argument on appeal. And, as we have noted, we conclude that the five-year period applies only to the issue of highway expenditures. We do not address whether a showing of no highway expenditures for any five-year period is sufficient under the statute, because we conclude that the Bentleys have not established that the courts have been entirely abandoned as a route of travel.

N.W.2d at 865-66. Neither does the fact that the entire length of each of the courts is not presently suitable for regular travel. *See* ***id***. at 352, 285 N.W.2d at 867.

Thus, we conclude that the Bentleys have not made the necessary showing to establish either method for discontinuance of the courts set forth in § 80.32(2), STATS. The trial court did not err in granting summary judgment to the City, and in denying that relief to the Bentleys.

CONCLUSION

For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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