

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1012-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEPHEN BOUDWIN AND CYNTHIA BOUDWIN,

PLAINTIFFS,

TOWN OF SUAMICO,

PLAINTIFF-RESPONDENT,

v.

WINDJAMMERS SAILING CLUB, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
J. D. MCKAY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

PER CURIAM. Windjammers Sailing Club, Inc., appeals a judgment that requires it to remove its gate blocking Channel Road in the Town of

Suamico.¹ Windjammers argues that the trial court was without jurisdiction to declare the existence of the town road, that the Town failed to prove the existence of the road and that if there was a town road, it was discontinued under § 80.32(2), STATS. It also argues that the Town is estopped from claiming it as a town road. We reject Windjammers' arguments and affirm the judgment.

Channel Road is an unrecorded town road. The town supervisor, Patrick Chambers, testified concerning the events leading to the present dispute. He stated that in the late 1940s, he used Channel Road to reach a tavern known as Jenks Channel located at the end of the road. Channel Road extended .12 miles north to a dead end at a parking lot in front of the tavern. The tavern served food and drinks to the public, and had a boat launch "where people who had their own boat could launch a boat and go out fishing." The tavern owners also rented boats to their patrons.

Chambers testified that he had worked for a local trucking company, and several times between 1947 and 1982 he graded and plowed Channel Road. He indicated that the Town performed whatever maintenance was required. Chambers stated that Jenks Channel changed hands several times between 1975 and 1991, but had always remained open to the public. The public used Channel Road to reach the tavern until 1991, when Windjammers purchased the tavern for use by its sailing club.

Chambers testified that he also acted as the town road commissioner. Shortly after Windjammers bought the property, it dredged its outer harbor, using Channel Road to remove the dredging. Chambers stated that Channel Road was in

¹ This is an expedited appeal under RULE 809.17, STATS.

good shape before the dredging operation and afterwards it was terrible. As a result, the Town hauled in crushed stone to repair the road, and Windjammers leveled it off with their equipment.

In 1992, Chambers observed Windjammers' personnel erecting a gate over Channel Road where it enters Windjammers' property. As town supervisor, he told them they could not put a gate over a public road. They replied that it was private property. After the gate was erected, the Town no longer plowed or graded north of the gate.

Within a month of the gate's installation, Stephen and Cynthia Boudwin contacted Chambers objecting to the gate. Stephen Boudwin testified that he owns vacant land directly north of the Windjammers' property. When he purchased his property in 1989, he used Channel Road to access his property. At that time, there was no gate or fence obstructing his use of the road. He testified that he frequently observed patrons of the tavern using Channel Road.

After Windjammers erected the gate, it provided the Boudwins a gate key. Windjammers also provided a key to the Town. The Boudwins were dissatisfied with that arrangement, however, because they felt the gate was an inconvenience and a safety hazard. They wanted to build a house on their property, but have not done so due to concerns about access.

In 1997, the Boudwins initiated this lawsuit seeking removal of the gate. They amended their complaint to add a claim against the Town alleging that the Town failed to enforce its ordinance by allowing an obstruction on a town road. The Town answered and sought a declaration that Channel Road extended .12 miles north from Resort Road through a portion of Windjammers' property,

and sought the gate's removal. The trial court granted leave to the Town to intervene as a party plaintiff.

After a bench trial, the court found that Channel Road is a town road .12 miles long and four rods wide. It found that Windjammers' gate illegally blocked the road and enjoined Windjammers from interfering with the public's use of the road.² Windjammers appeals the judgment.

Windjammers argues that the trial court lacked jurisdiction to declare the existence of the town road because of the absence of necessary parties. It contends that before the road reaches the Windjammers' properties, it passes through properties owned by three other parties. It claims that without the participation of these parties, the judgment is constitutionally defective, citing generally to art. 1, § 13, of the Wisconsin Constitution.

The failure to join indispensable parties is not a jurisdictional defect.

This question is resolved by *Heifetz v. Johnson*, 61 Wis.2d 111, 211 N.W.2d 834 (1973), in which our supreme court clearly provided that the failure to join an indispensable party was not a jurisdictional defect which by itself warrants dismissal of the action. "We conclude that the Wisconsin Supreme Court has not viewed the requirement of joinder of indispensable parties as jurisdictional" *Id.* at 122, 211 N.W.2d at 840. The court reasoned that joinder of indispensable parties is a desirable goal of judicial administration and fairness but does not prevent any action at all if all indispensable parties are not joined. *Id.* at 121, 211 N.W.2d at 840.

² The court also found that the Boudwins' easement abuts the end of Channel Road to provide access to their property. No issue concerning this easement is raised on appeal.

County of Rusk v. Rusk County Bd. of Adj., 221 Wis.2d 526, 530, 585 N.W.2d 706, 708 (Ct. App. 1998). We conclude that Windjammers fails to identify any jurisdictional impediment to resolve the issue in dispute.³

Next, Windjammers argues that the evidence was insufficient to prove the existence of a town road. We disagree. With exceptions not relevant here, § 80.01(2), STATS., provides in part: “All highways not recorded which have been worked as public highways 10 years or more are public highways, and are presumed to be 4 rods wide.” There is no dispute that Channel Road was unrecorded. At trial, testimony disclosed that the Town plowed, graded and maintained Channel Road from the late 1940s until the gate was erected in 1992. The record supports the finding that Channel Road had been worked as a public highway for more than ten years.⁴

Under § 80.01(2), STATS., upon a town's showing that it maintained an unrecorded highway for ten years, the public's use of the road is presumed adverse and the landowner bears the burden of showing otherwise. See *Ruchti v. Monroe*, 83 Wis.2d 551, 557, 266 N.W.2d 309, 313 (1978). Because the Town worked Channel Road as a public road for at least ten years, and Windjammers did not show that the public's use of the road was permissive, we must presume the road to be four rods wide. See § 80.01(2), STATS.

³ Because Windjammers' jurisdictional argument is undeveloped, we may reject it on that ground alone. See *Barakat v. DHSS*, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

⁴ See § 990.01(12), STATS., defining “highway” to include “all public ways and thoroughfares.” 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 n.3 (Ct. App. 1996).

Windjammers contends that the record fails to support the court's finding that the road is four rods wide. It contends that several witnesses testified that the road was of various widths, all under four rods. It further contends that land on the west side of the road is wetland and cannot be filled. We are unpersuaded that apparent variations in the width of traveled portions and the existence of a natural obstacle rebut the four-rod presumption. "If the landowner does not show the use is permissive, the four-rod presumption arises, whether or not the town worked, or the public adversely used, a four-rod width." *Threlfall v. Town of Muscoda*, 190 Wis.2d 121, 127, 527 N.W.2d 367, 369 (Ct. App. 1994). Also, "[t]his court has repeatedly held that travel tends only to establish the existence of a highway of the ordinary width or as laid out, although it may cover only a part." *Town of Randall v. Rovelstad*, 105 Wis. 410, 430, 81 N.W. 819, 825 (1900). We conclude that proof that the western edge of the road was not regularly used and included wetlands fails to rebut the presumption of width in § 80.01(2), STATS.

Windjammers also contends that the record was insufficient to confirm the road's precise boundaries. We disagree. Several witnesses and exhibits identified the traveled portion of Channel Road. The record supports the court's finding that the traveled surface occupies the easterly portion of the presumed four-rod road. In any event, to the extent Windjammers requires clarification of the boundaries, this issue is one that could have been, but was not, raised in post-trial proceedings.

Windjammers additionally argues that the record shows that the road ends in brush, swamp and trees and, because of these conditions, there cannot be a public road because the general traveling public cannot traverse its property to go anywhere. We disagree. That the road is a dead end does not necessarily

demonstrate that the road is not publicly used. See *Rutchie*, 83 Wis.2d at 558, 266 N.W.2d at 313.

Windjammers further claims that the court erred when it described the road as paved, when in fact it was gravel. Testimony at trial established that at times portions of Channel Road were paved and at other times gravel. The court's remark, when read in context, referred to the traveled portion of the road. We are unpersuaded that the court's reference constitutes reversible error.

Next, Windjammers argues that if there was a town road, it was discontinued under § 80.32, STATS. We disagree. With exceptions not claimed here, § 80.32(2) provides in part:

“[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.

In *State ex rel. Young v. Maresch*, 225 Wis. 225, 232, 273 N.W. 225, 229 (1937), our supreme 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. See *Heise v. Village of Pewaukee*, 92 Wis.2d 333, 349, 285 N.W.2d 859, 866 (1979).

We conclude that the evidence fails to show entire abandonment of Channel Road as a route of travel. The record discloses that the Town maintained and the public used Channel Road from the late 1940s. After 1992, when Windjammers installed the gate, the Boudwins and Windjammers' members used

the road as a route of travel.⁵ The lack of regular vehicle traffic on Channel Road, other than to and from the Boudwins' property and the Windjammers' club, does not detract from our conclusion. *See id.* at 348, 285 N.W.2d at 865-66 ("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."). While Channel Road terminates before the waters' edge, the same principle applies because it terminates within Windjammers' property, which borders the water.

Because Windjammers fails to meet the first condition, it is not necessary for us to examine the second. *See id.* at 349, 285 N.W.2d at 866 ("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.").

Finally, Windjammers argues that the Town should be estopped from claiming rights to the road because Windjammers' tax bill reflects that it has been taxed on the entire parcel, without deduction for the portion claimed to be a public road. Windjammers cites no legal reference for this argument, and therefore we may reject it on that ground alone. *See State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Also, Windjammers' argument implies equitable considerations. The trial court, however, found that Windjammers has illegally blocked public access to a town road since the installation of its gate in 1992. We conclude that a determination of equities requires more development than

⁵ Additionally, Windjammers interprets, without discussion, the first requirement under § 80.32, STATS., as referring to abandonment as a "public" route of travel. This construction imports a term not present in the statute. In this case, however, it is undisputed that members of the public, the Boudwins, continued to use Channel Road after the gate was installed.

the three-sentence argument contained in its brief. We decline to abandon our neutrality to develop its argument.

Last, we address the Town's argument that Windjammers' appeal is frivolous within the meaning of § 809.25(3), STATS., entitling the Town to reasonable costs and attorney fees. While we reject Windjammers' arguments, there is nothing to suggest that they could not have been made in good faith. An appeal is not frivolous merely because the appellant is wrong. *See Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis.2d 605, 614, 345 N.W.2d 874, 879 (1984) (action not frivolous merely because court does not accept party's argument).

By the Court.—Judgment affirmed.

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

