

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-1316

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JAMES A. SHIVES AND RITA M. SHIVES,

PLAINTIFFS-RESPONDENTS,

v.

WILLIAM L. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PETERSON, J. William Powell appeals the portion of a judgment finding that Old Whistler Road was entirely abandoned as a route of travel. He claims that the circuit court applied an incorrect legal standard when it held him to

the burden of proving that the road was not abandoned. John and Rita Shives, adjacent landowners, concede that they, rather than Powell, had the burden of proof. The facts that the circuit court specifically adopted as its findings are insufficient for us to decide, as a matter of law, whether the Shives satisfied their burden. Therefore, we reverse that portion of the judgment and remand for further proceedings consistent with this opinion.

¶2 Powell owns both a fifteen-acre and an eighty-acre parcel of land in Sand Lake Township. The Shives own an eighty-acre parcel located between Powell's two parcels. Powell needed to cross Shives' property to access his eighty acres, and he did so by travelling along a route known as Old Whistler Road.

¶3 The circuit court concluded that the road was a public highway at one time because it had been worked for more than ten years. *See* § 80.01(2), STATS. However, the court concluded that the evidence was insufficient to satisfy Powell's burden of proof that the road had not been entirely abandoned as a route of travel.

¶4 The Shives do not challenge the circuit court's factual finding that the road was, at least at one time, a public highway. The Shives also concede that the circuit court applied the wrong burden of proof and that they, rather than Powell, had the burden of proving that the road was abandoned. *See Heise v. Village of Pewaukee*, 92 Wis.2d 333, 349, 285 N.W.2d 859, 866 (1979). Nevertheless, they argue that this court should affirm the circuit court's decision because they met their burden of proving that the road was entirely abandoned.

¶5 We may affirm a circuit court decision that applies an incorrect legal standard if the undisputed facts of record applied to the proper legal standard support the court's conclusion. *See State v. Pittman*, 174 Wis.2d 255, 268-69, 496

N.W.2d 74, 79-80 (1993). Accordingly, we must determine whether the circuit court's findings support the court's conclusion that the road was entirely abandoned. We conclude that they does not.

¶6 Section 80.32(2), STATS., provides, in relevant part, that “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.” Both conditions must be met before a public highway is discontinued. *See Heise*, 92 Wis.2d at 349, 285 N.W.2d at 866. Powell does not claim that any funds have been expended on the road in the last five years. Therefore, the only issue is whether the road has been entirely abandoned as a route of travel.

¶7 Wisconsin courts have broadly construed the phrase, “entirely abandoned as a route of travel.” Indeed, our supreme court has stated that “[i]f [a public highway] is open to all who desire to use it, it is a public highway although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others.” *State ex rel. Happel v. Schmidt*, 252 Wis. 82, 86, 30 N.W.2d 220, 222 (1947) (quoted source omitted).

¶8 In this case, the circuit court found that the road was generally used by the public prior to 1928, but that there was little proof about its use after that time. The court did note that “[a]t most the testimony supports use of the highway or at least an old trail over the area that was once Old Whistler Road, by local residents, who had sporadic occasion to go back to the Powell 80 to fish or cut hay.” The court also noted that the Shives had produced sufficient evidence to

convince it that the road “was in fact abandoned and was used only by a few local residents who knew about [it.]”

¶9 According to *Happel*, it does not matter that only a relatively small number of people were aware of the road. *See id.* Nevertheless, we are not certain whether the court’s observations were intended as factual findings or were intended as comments related to its view of the burden of proof. Therefore we remand for factual findings and a decision regarding whether the Shives met their burden of proving that the road was entirely abandoned as a route of travel.¹

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Appellant is awarded costs

Not recommended for publication in the official reports.

¹ Because this mandate does not contemplate further proceedings within the meaning of § 801.58(7), STATS., no party is entitled to a substitution of judge upon remand.