**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

October 31, 2000

**Cornelia G. Clark**
**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* WIS. STAT. § 808.10 and RULE 809.62.**

**No. 99-3350**

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

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**IRON COUNTY AND TOWN OF MERCER,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**RYSZARD BORYS AND ZBIGNIEW SUPINSKI,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Iron County: DOUGLAS T. FOX, Judge. *Affirmed and cause remanded.*

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

¶1 PER CURIAM. Ryszard Borys and Zbigniew Supinski appeal a judgment concluding that a strip of land they claim to own is a public road and enjoining them from blocking access to the road and boat landing. The trial court also dismissed their slander of title counterclaim and found it frivolous. They

argue that (1) Iron County is not the real party in interest and attempted to gain standing by entering into a statutorily-deficient intergovernmental agreement; (2) Iron County and the Town of Mercer failed to make the required proofs necessary to establish a public highway under WIS. STAT. § 80.01(2);[1] (3) the trial court erroneously placed the burden of proof on Borys and Supinski to establish that public use of the road was permissive; and (4) the trial court erred when it dismissed the counterclaim on the basis of immunity. We reject these arguments and affirm the judgment. We also conclude that the appeal is frivolous and remand the cause to the trial court to award the respondents the reasonable attorney fees incurred in this appeal.

¶2 The Town and County brought this action to abate a public nuisance after Borys and Supinski placed boulders on a roadway, denying access to a public boat landing. The trial court granted summary judgment dismissing the counterclaim for slander of title.[2] At trial, the parties presented conflicting evidence on whether the road was "worked" for ten years or more as a public highway. *See* WIS. STAT. § 80.01(2). The trial court found that "the overwhelming weight of the evidence demonstrates that employees of the Town of Mercer, and County employees on behalf of the Town of Mercer, performed regular, visible, substantial, and continuous maintenance on the access road from the early 1960's through the 1980's."

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

[2] The counterclaim arguably alleged other claims against the Town and County that are not pursued on appeal. We construe the failure to argue any other claim as a concession that the other claims were properly dismissed and were frivolous.

¶3 Iron County has standing to bring this action to abate the public nuisance. Borys and Supinski lose title to the property and are properly enjoined from blocking access even if Iron County could not bring the action because the Town could bring the action on its own with identical results. We address the issue only because it exemplifies the frivolousness of this appeal. Barricading a public road is unlawful, and both the Town and County have the power to abate the nuisance under WIS. STAT. § 823.01. *See* ***State ex rel. Cowie v. La Crosse Theaters Co.***, 232 Wis. 153, 161, 286 N.W.2d 707 (1939). Borys and Supinski argue that Town and County entered into an illegal intergovernmental agreement to give the County standing, based on their reading of WIS. STAT. § 66.30(3p) that the agreement requires the approval of the Department of Transportation. Their argument ignores the part of the statute regarding creation of commissions. The intergovernmental agreement to share legal expenses does not require creation of a commission or approval of the DOT. *See* WIS. STAT. § 66.30(2). Counsel's incomplete quotation from § 66.30(3p) resulted in an unreasonable interpretation of the statute. The argument is frivolous as defined in WIS. STAT. RULE 809.25(2)(c)2.[3]

¶4 Borys and Supinski's argument that the Town and County failed to prove all of the statutory requirements under WIS. STAT. § 80.01(2) is also frivolous. They argue at length that the Town and County failed to designate the public highway. They again take out of context language from the statute and from ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 140, 365 N.W.2d 622 (Ct.

[3] WISCONSIN STAT. RULE 809.25(2)(c)2 defines a frivolous appeal as one in which "the party or the party's attorney knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

App. 1985), when they attempt to extrapolate requirements of WIS. STAT. § 80.01(1) into the requirements for § 80.01(2). All that is required under § 80.01(2) is that the governmental entities establish that they "worked" the road for ten years or more. Any other reading of the statute is unreasonable. In ***Mushel***, this court laid out various alternative ways for creating public highways. Counsel should have known that the discussion involving alternative ways of creating a public road did not apply to a road created under § 80.01(2).

¶5 The evidence supports the trial court's finding that the road was worked by Town and County employees for more than ten years. Numerous witnesses testified that the road was regularly graded, graveled, cleared of brush and marked with appropriate signs. Borys and Supinski cite testimony that the road was not adequately worked. Their argument ignores the highly deferential standard of review for findings of fact made by the trial court. *See* WIS. STAT. § 805.17(2). The trial court was not required to find credible the testimony that a witness saw no damage to a tree root, indicating that the road was not graded, or that the witness could not differentiate the gravel placed on the surface from the native soils. Borys and Supinski's failure to apply the correct standard of review and acknowledge the trial court's ability to decide the credibility of witnesses renders their appellate argument frivolous.

¶6 There is no requirement that the road meet the standards of WIS. STAT. § 80.26(1)(a) to establish that it was worked as a public highway. A municipality's failure to meet those standards does not constitute proof that the road was not "worked," nor does it establish that a reasonably diligent landowner would not be apprised of a municipality's claim merely because the obvious road was not maintained to the standards set out in § 80.26.

¶7 The trial court properly placed the burden of proof on Borys and Supinski to establish permissive use of the property. While merely traveling over wild land is presumptively permissive, the acts of improvement found by the trial court were far greater than "mere use of a way." *See* WIS. STAT. § 893.28(3). The argument that the trial court improperly assigned the burden of proof amounts to nothing more than a renewed challenge to the finding that the governmental units graded, graveled, cut trees and brush, erected signs and constructed an outhouse. These improvements establish that the land was no longer "wild," and the burden was properly placed on Borys and Supinski to prove permissive use. *See* ***Ruchti v. Monroe***, 83 Wis. 2d 551, 556-57, 266 N.W.2d 309 (1978). The anecdotal evidence of individuals who believed it was a private access road and asked for permission to use it does not establish that the improvements made by the governmental entities resulted from permission.

¶8 The trial court properly dismissed the slander of title counterclaim and found it frivolous. Because the governmental entities correctly claimed that the road was public, there is no factual underpinning for the counterclaim. In addition, the Town and County are immune from suit under WIS. STAT. § 893.80(4) for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions, effectively entailing almost all discretionary acts. Borys and Supinski do not identify any ministerial act as the basis for their counterclaim. Our conclusion that the trial court correctly found the counterclaim frivolous renders that aspect of this appeal frivolous as well. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Therefore, we remand the matter to the trial court to award the Town and County the reasonable attorney fees they incurred in this appeal.

*By the Court.*—Judgment affirmed and cause remanded.

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