COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1258 **Cir. Ct. No. 99CV000339**

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

LARRY F. REYNOLDS AND LUCILLE B. REYNOLDS,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Larry and Lucille Reynolds appeal a condemnation award. The State Department of Transportation (DOT) condemned and took a small portion of land they owned, as part of a project to improve U.S. Highway 18 in Jefferson County. The Reynolds claim that the taking included another, larger

area. However, the trial court ruled that this disputed area was already part of the highway right-of-way. The issue is whether the trial court erred by so ruling. We affirm.

¶2 The Reynolds own a lot on Highway 18, currently occupied by an apartment building. In front of the building was a parking lot immediately adjacent to the traveled portion of the highway. The State's project eliminated the parking lot, converting it to highway use. A dispute arose because the Reynolds claimed ownership of the parking area, and sought compensation for its loss. The State contended, however, that the parking lot already fell within the highway right-of-way, such that it owed no compensation to the Reynolds for eliminating it.

¶3 In the condemnation proceeding, the trial court concluded that, by presumption, the highway was historically a sixty-six foot wide highway of record, that the sixty-six foot width always included the parking area, and that the State had not discontinued its use of that area after a 1923 highway renovation. Consequently, the parking area was located in the right-of-way from at least 1847 until the present day.

¶4 On appeal, the Reynolds argue as follows. They concede that the highway was presumptively sixty-six feet wide prior to 1923, and that the right-of-way until then included the parking area. They contend, however, after the 1923 renovation, the presumption no longer applied because the Reynolds property was then a school, and the State, by law, cannot condemn school property. Additionally, the evidence shows that the parking area was used for school purposes continually after 1923 until the school closed.

¶5 The Reynolds also contend that even if the presumptive sixty-six foot width remained after 1923, they acquired the property by adverse possession, given the continued use of it by them and their predecessors since at least 1937.

¶6 Finally, they contend that permitting use of the disputed area for other purposes after 1923 established that the DOT discontinued that part of the highway, and that its ownership thus reverted to them as the adjacent property owners.

¶7 We reject each of the Reynolds' contentions. The 1923 renovation did not alter the established sixty-six foot width of the highway. The DOT's inability, by law, to condemn school property is thus of no consequence. The highway preceded the school. Its sixty-six foot width already included the parking area. Condemnation was therefore not necessary in 1923, even if it would have then been unavailable.

¶8 The Reynolds cannot establish ownership by adverse possession. They could have obtained the lot by adverse possession only by proving the requisite period of possession before WIS. STAT. § 893.29(2)(c) (1983-84) was enacted in 1984, barring adverse possession of highways. The requisite period for possession of highway land at the time was forty years. Thus, the Reynolds' period of possession would had to have commenced not later than 1944. *See* WIS. STAT. § 893.10 (1977); Laws of 1979, ch. 323, § 28. However, the Reynolds' lot was municipally owned until 1969, and we agree with the State's contention that a municipal entity cannot adversely possess against the State. Additionally, while there is evidence showing continued use of the parking lot since 1937, that evidence does not show exclusive, non-permissive use for forty years prior to 1984.

¶9 Finally, the Reynolds did not obtain title by discontinuance. WISCONSIN STAT. § 80.01(3) provides that "[n]o lands abutting on any highway, and acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as they abut on any highway." Even if, as the Reynolds claim, the alleged discontinuance occurred before this section applied, they have not proven the alleged discontinuance. They contend that, in this case, "an alteration of an existing road constitutes a discontinuance of that part of the old road that is not included within the limits of the new road." ***Miller v. City of Wauwautosa***, 87 Wis. 2d 676, 681, 275 N.W.2d 876 (1979). However, there is no evidence here that the DOT excluded the parking lot from the highway's right-of-way after the 1923 renovation.

By the Court.—Order affirmed.

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