

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP1776

Cir. Ct. No. 2003CV261

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DEBORAH M. PLUCINSKI,

PLAINTIFF-APPELLANT,

V.

**DANA FROST, TOWN OF REMINGTON, JASON FROST, OSCAR W. COX,
JANE DOE COX, ED A. TOMETCZAK AND EDWARD J. TOMETCZAK,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Deborah Plucinski appeals a judgment denying her petition to declare public an alley located behind property she owns in the Town of Remington. The alley was formerly a public way, and the dispositive issue is

whether the once public alley became abandoned under the standard set forth in WIS. STAT. § 82.19(2)(b)2. (2003-04).¹ We conclude that the trial court properly determined the alley was abandoned. We therefore affirm.

¶2 The Town treated the alley as a public way until 1994, when the Town board passed a resolution vacating the alley. In 1996, Plucinski bought a home and lot adjoining the alley. In 2002, the Town rescinded the 1994 resolution, which was unlawfully enacted.

¶3 Later in 2002, the Town ticketed Plucinski's neighbor, Dana Frost, for blocking the alley. In the ensuing litigation, Frost challenged the ticket and the court held that the Town did not establish that the alley was a public way. Plucinski then commenced this action for a declaration that the alley was restored as a public way under the 2002 rescission resolution. After a bench trial, the court found that the 1994 ordinance remained in effect under the curative provision of WIS. STAT. § 66.1033(2)² and, in the alternative, that the alley was abandoned. Plucinski appeals those determinations.

¶4 We will affirm the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether, given those findings, the facts fulfill the statutory requirement for abandonment is a question of law we review de novo. ***Povolny v. Totzke***, 2003 WI App 184, ¶6, 266 Wis. 2d 852, 668 N.W.2d 834. WISCONSIN STAT. § 82.19(2)(b)2. contains the statutory requirement

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² WISCONSIN STAT. § 66.1033(2) provides that no defect in a resolution shall affect its validity after five years.

and provides that an abandoned highway is one that has been “entirely abandoned” as a travel route and on which no highway funds have been expended for five years.

¶5 The trial court properly determined that the alley was abandoned. It is undisputed that the Town expended no funds on the area for at least five years after its 1994 resolution. Although Plucinski contends that the five years prior to 1994 was the appropriate time to consider, the statute requires only that the period in question last for five years; it does not require a specific five years. Consequently, the trial court did not err by considering the years after 1994.

¶6 Additionally, Plucinski and other witnesses agreed that after 1994 the alley was frequently blocked at one or both ends. Plucinski described her access as fitting through some bushes growing in the alley. In the words of one witness, the area of the alley itself was “nothing but green grass,” and the adjacent owners maintained it as part of their yards. Plucinski and persons visiting her property continued to use the alley, but much of that use was by permission of her neighbors. There was also testimony that no one but adjacent property owners ever used the area. The key in determining whether the alley was “entirely abandoned,” as that term is used in WIS. STAT. § 82.19(2)(b)2., is whether the alley remained open to all who had occasion to use it. *Povolny*, 266 Wis. 2d 852, ¶8. The alley clearly did not, as it was blocked on frequent occasions and used only by permission at other times.

¶7 In dicta, the court in *Povolny* noted: “It is self-evident that a private landowner has no right to treat a public highway as his or her own private roadway so as to force abandonment.” *Id.*, ¶16. However, in this case, the landowners who sometimes blocked the alley were not doing so to force abandonment. The Town

had already vacated the alley as a roadway, and the landowners believed they were acting on their own property. *Povolny* also states that the perception of the roadway as public or private is a proper consideration in determining whether a public way has been abandoned. *Id.*, ¶18. Here, all concerned perceived the roadway as private after 1994.

¶8 Our decision makes it unnecessary to consider the continued validity of the 1994 resolution and its 2002 rescission. Abandonment of the roadway was sufficient grounds to deny Plucinski the relief she sought in this action.

By the Court.—Judgment affirmed.

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

