COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2944

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

ANTON H. TURRITTIN, RACHEL M. SCHMITT AND HUGH L. TURRITTIN,

PLAINTIFFS-APPELLANTS,

V.

TOWN OF LA POINTE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Anton Turrittin, Rachel Schmitt and Hugh Turrittin (collectively, "the Turrittins") appeal a summary judgment dismissing their complaint against the Town of La Pointe. The Turrittins' complaint sought a declaration of rights with respect to the ownership of the northern 380 feet along

the eastern border of their property on Madeline Island. The Turrittins argue that the trial court erroneously concluded, as a matter of law, that the disputed area was a public highway. We agree. Therefore we reverse the summary judgment and remand for further proceedings.

The Town makes five arguments in support of its contention that it is entitled to summary judgment: (1) Kron Dahlin Road was created by common law dedication; (2) it has never been discontinued or abandoned; (3) until it is required for actual public use, it cannot be considered to be abandoned as a route of travel; (4) a slight deviation in the roadway due to natural obstacles does not constitute an abandonment of the unused portion of the road; and (5) a landowner is estopped from denying the existence of a road when a predecessor in title was paid damages for the right to build a highway. We reject these arguments and conclude that the trial court erred by granting summary judgment in favor of the Town.

The record discloses the following facts. In 1930, for the sum of $100, the Turrittins' predecessor in title signed a document that released to the Town all claims relating to the laying out of a highway over what is now the Turrittins' southern and eastern borders.[1] This document was not recorded at the time.

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[1] The release provides:

> Whereas, upon application duly made therefor, the supervisors of the town of La Pointe have decided to lay out a highway, which will pass through the following described lands, of which I am an owner, to wit, Lot 4 in section 27 of Township 51 Range 2 West. *Right of way to extend 2 rods in Lot 4 of Town 51 of R. 2W and to Lake.*
>
> Now therefore, know all men by these presents, that I, Charles Kron, in consideration of the sum of $100.00 One Hundred dollars to me paid have released and do hereby release to said

(continued)

In the late 1920s or early '30s, the Town constructed Kron Dahlin Road. A survey map shows that it extends easterly along the southern border of the Turrittins' property, and then northerly along their eastern border. As it continues north, the developed portion of the easement veers off the Turrittins' property altogether and terminates in a parking lot on neighboring property. A path from the parking lot on the adjoining property leads to a beach on Lake Superior.

The Town's affidavit states that it built the road partly to the east of the Turrittins' property "rather than just to the west in the two rod strip where it was supposed to be built due to the fact that the land in the two rod portion originally deeded to the Town is poorly drained swampy land and the cost of building the road in that area would have been much higher." The point at which the developed easement leaves the Turrittin's property is located approximately 380 feet south of the Lake Superior shore. The undeveloped portion of the easement, 380 feet by two rods wide extending to the shore of Lake Superior, is the area in dispute.

Nelson Dahlin, a town resident since 1920, stated: "All of the road has been regularly graded, brushed and otherwise maintained by the town of LaPointe since it was built." Kron Dahlin Road is regularly used to get to the beach for swimming and fishing. This assertion is qualified, however, by the Town's admission that the survey map shows approximately where the developed portion of the easement veers off the Turrittins' property. Except where developed, the easement has never been opened, traveled or worked.

> Town, all claims for damages sustained or to be sustained, by me by reason of the laying out of said highway through my said lands.

The Turrittins assert that in 1954, when Hugh Turrittin purchased his property, he had no notice that the Town had any rights or interest in the disputed area. They admit, however, that they were aware that the developed and traveled portion of the easement was partially on their property and do not dispute the Town's rights to that portion of the easement as indicated on the survey map. In 1987, the Town first recorded the 1930 release of claims. In 1992, Hugh deeded his property to his two children, Anton and Rachel, reserving a life estate for himself.

The Turrittins brought this action for declaration of rights. Both parties moved for summary judgment. The trial court denied the Turrittins' motion and granted the Town's motion dismissing the Turrittins' claims. The Turrittins appeal the dismissal of their claim.

We review a summary judgment de novo, applying the same standards as the trial court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The moving party must demonstrate facts to support a prima facie claim. If there are no disputes of material fact, summary judgment is proper if the moving party is entitled to judgment as a matter of law. ***Id.***

We conclude that the trial court erroneously granted the Town's motion for summary judgment. The Town contends that Kron Dahlin Road was created by common law dedication. We agree that a road may be dedicated by common law as well as by the procedure outlined in ch. 80, STATS. ***Poynter v. Johnston,*** 114 Wis.2d 439, 447, 338 N.W.2d 484, 489 (1983). "Our statutes do prescribe methods for the dedication of land for highway purposes, but the statutory provisions are not exclusive. We still recognize common-law

dedications …." ***Id.*** at 448, 338 N.W.2d at 489 (citation omitted). Nonetheless, the record fails to establish that dedication of the disputed area was ever accepted.

"The intention of the owner to dedicate and the acceptance thereof by the public are the essential elements of a complete dedication." ***Galewski v. Noe***, 266 Wis. 7, 12, 62 N.W.2d 703, 706 (1954). Common law dedication requires an intention to dedicate expressed in some form … and an acceptance of the dedication by the proper public authorities, or by general public user. ***Id.***

In this case, the Turrittins' predecessor in title offered to dedicate the Kron Dahlin Road by a release signed in 1930, and this is not an issue. The issue is whether the Town accepted the dedication of the entire easement. "Public use for a considerable length of time constitutes an acceptance by the public of a common-law dedication." ***Galewski***, 266 Wis. at 14, 62 N.W.2d at 707. Public authorities may also make a formal acceptance. ***Id.*** Because there is no evidence that the disputed area was formally accepted, opened, worked or used, the dedication of the undeveloped portion of the easement is incomplete.

Nonetheless, the Town further contends that the disputed portion of the easement may not be considered abandoned under ***Carroll v. Town of Balsam Lake,*** 206 Wis.2d 529, 559 N.W.2d 261 (Ct. App. 1996), because until the time arrives when any street or part of street is required for actual public use, "no mere non-user, for any length of time will operate as an abandonment of it …." ***Id.*** at 534, 559 N.W.2d at 263 (*citing* ***Reilly v. City of Racine,*** 51 Wis. 526, 529, 8 N.W. 417, 418 (1881) (emphasis omitted)). It is evident, however, that the rule enunciated in ***Carroll*** pertains to the rules governing areas for which a plat has been accepted. ***Carroll***, 206 Wis.2d at 535, 559 N.W.2d at 263-64 ("The Town presented evidence to support its claim that public use of Deer Lake had not yet

expanded to the point where opening the *platted road* was required."). (Emphasis added.) Because there is no plat, ***Carroll*** does not apply to the case before us.

In ***Reilly,*** the case on which ***Carroll*** relies, our supreme court addressed the issue whether there had been an acceptance of the dedication of a two-block area of Racine Street. ***Reilly,*** 51 Wis. 528-29, 8 N.W. at 417-18. In 1849, the state had laid out and platted the street and sold it to an individual under whom the plaintiff claimed title. The area in dispute had not been opened, improved or used by the public for more than twenty years. ***Id. Reilly*** held: "[W]here the *state*, by authority of law, makes a city plat of its own land, and thereby dedicates the streets and other public grounds marked thereon to the public use, the same high public authority that makes the dedication, by the same act accepts it on behalf of the public. The dedication and its acceptance are in the same public act." ***Id***. 51 Wis. at 529, 8 N.W. at 418 (emphasis in the original).

Reilly concluded that because the dedicated plat had been accepted, until the time arrives when the street or any part of it is actually required for public use and authorities are called upon to open it, "no mere *non-user,* of any length of time, will operate as an abandonment of it." ***Id. Reilly*** pointed out that in relation to "the *plats* of cities and villages in the old states of Connecticut and Massachusetts," this principle is well-recognized. ***Id.*** at 530, 8 N.W. at 418 (emphasis added). Because there is no evidence of any plat in the case before us, the rule enunciated in ***Carroll*** and ***Reilly*** does not apply.

Here, the trial court erroneously relied on ***Carroll,*** concluding that the lack of a plat is a non-material distinction and that non-use is not abandonment until the road is required for use. ***Reilly*** and its progeny, including ***City of Jefferson v. Eiffler,*** 16 Wis.2d 123, 113 N.W.2d 834 (1962); ***Heise v. Village of***

Pewaukee, 92 Wis.2d 333, 285 N.W.2d 859 (1979),[2] and ***Carroll***, reveal that the distinction between platted and non-platted land is a material one. Because a recorded plat provides notice, it dispenses with the need for formal acceptance or continued public use.[3]

The trial court found troublesome the following language in ***Carroll***: "The landowners argue that both ***Reilly*** and ***Jefferson*** are inapplicable because a private entity platted and conveyed the land to the Town of Balsam Lake. They cite no authority to support their assertion and we consider it a distinction without a difference." ***Id.*** at 537, 559 N.W.2d at 264. The trial court apparently believed that the distinction referred to platted versus unplatted land. We disagree. The distinction referred to land platted by a "private entity" versus land platted by a public entity.

Mushel v. Town of Molitor, 123 Wis.2d 136, 365 N.W.2d 622 (Ct. App. 1985), is instructive. ***Molitor*** held that a release of damages for consideration is a sufficient indication of a landowner's intent to dedicate a road and that public use may constitute an acceptance of a common law dedication. ***Id.*** at 145-46, 365 N.W.2d at 627. However, ***Molitor*** ruled that no common law dedication resulted because there was no evidence that the public traveled the road within four years after the release of damages. ***Id.*** at 146, 365 N.W.2d at 627. Because the landowner's offer to dedicate road was not "accepted" by the Town

[2] Contrary to the Town's contentions, ***Heise v. Village of Pewaukee,*** 92 Wis.2d 333, 285 N.W.2d 859 (1979), does not lend it support. ***Heise*** dealt with a extension of a platted street. The land in question was either submerged or not in existence at the time of the 1887 plat, which showed the street extending to the shoreline. Here, the land in question is not newly added as the result of accretion, reliction or reclamation, as in ***Heise.*** *See* ***id.*** at 344-45 , 285 N.W.2d at 864.

[3] The reason for this distinction becomes clear when ch. 236, STATS., is considered, which provides specific procedures for approving and vacating plats.

within four years, no dedication resulted. Here, because the Town offers no evidence that the disputed area was opened, worked or traveled, the dedication to the undeveloped portion of the easement was not "accepted." *See also* § 80.01, STATS.[4]

Next, the Town argues that proof that it constructed the road within four years of the release of damages is evidence of its acceptance. This argument, however, is unsupported by the record. While it is undisputed that the Town constructed the road up to 380 feet south of the lakeshore, there is no evidence that the Town constructed any road in the area in question.

Nonetheless, the Town contends that the road has never been discontinued within the meaning of § 80.32, STATS.[5] This argument is

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[4] Section 80.01(1), STATS., provides:

> **Creation, alteration and validation of highways. (1)** VALIDATION OF HIGHWAYS, RECORDING. All highways laid out by the town supervisors, the county board or by a committee of the board, or by commissioners appointed by the legislature, or by commissioners appointed by the legislature, or by any other authority, and recorded, any portion of which has been opened and worked for 3 years are legal highways *so far as they have been so opened and worked.* The filing of an order laying out any highway or a certified copy thereof in the office of the clerk of any highway or a certified copy thereof in the office of the clerk of the town or the county in which the highway is situated is a recording of such highway within the meaning of this section. (Emphasis added.)

[5] Section 80.32, STATS., provides:

> **Discontinuance of highways; reversion of title. (1)** Any unrecorded road or any part thereof which has become ori s in the process of becoming a public highway by user in any town may be discontinued in the manner hereinbefore provided. Any proceedings taken therefor shall not be evidence of the acceptance at any time by the town of such road or any part thereof.

(continued)

unpersuasive because it is based on the unproved premise that the area in dispute is a valid Town highway by reason of the acceptance of the common law dedication. The evidence is undisputed that the area in question has never been used by the public. Also, the Town failed to offer evidence that it has expended funds on this area. *See* § 80.32(2), STATS.

Next, the Town argues that a slight deviation in the roadway due to natural obstacles does not constitute an abandonment of the undeveloped portion of the easement. This argument is equally unpersuasive because it presumes a valid acceptance of the common law dedication. And, while there are several cases that hold that a slight deviation on an opened and worked roadway is of no consequence, "[n]o doubt there may be a factual limit as to how far a city can move a roadway and still retain its easement." ***Miller v. City of Wauwatosa,*** 87 Wis.2d 676, 683, 275 N.W.2d 876, 877 (1979). The Town fails to demonstrate that its failure to open or use any portion of the 380 feet in dispute, as a matter of law, is a slight deviation.[6]

Finally, the Town argues that a landowner is estopped from denying the existence of a valid highway when a predecessor in title was paid damages for the right to build a highway, citing ***Beer v. Ozaukee County Hwy. Comm'n,*** 9

> **(2)** Every 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.
>
> **(3)**

[6] The Town also relies on ***Town of Randall v. Rovelstad,*** 105 Wis. 410, 428-29, 81 N.W. 819, 825 (1900). This case is not controlling because it refers only to the width of the highway. *See* § 80.01(2), STATS., referring to the presumed width of highways. A similar presumption does not apply with respect to length. *See* § 80.01(4), STATS.

Wis.2d 346, 101 N.W.2d 89 (1960). ***Beer*** does not, however, deal with a successor in title who purchased the property for valuable consideration without notice of the claimed easement, as asserted here. Also, "[g]ranting that this estoppel extends to his grantors, it by no means follows that even he is estopped from claiming an abandonment of the highway. When the highway is once legally abandoned, it seems plain that its status as a legal highway can be challenged by any one." ***State v. Halvorson,*** 187 Wis. 611, 616, 205 N.W. 426, 428 (1925). The Town does not develop its argument that abandonment does not apply, or that an unrecorded release binds a successor in interest who purchased the property without notice of the claim. We will not develop these arguments for him. ***State v. Gulrud,*** 140 Wis. 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987).

The Town does not point to any evidence of its acceptance of the common law dedication of the disputed area. It offers no proof of formal acceptance. It admitted that this area has not been opened, worked or used by the public because of its swampy nature. It also admitted that an alternative route was used instead. There is no proof of any plat. Because the record before us fails to establish as a matter of law the existence of a public highway at the place in question, we reverse the summary judgment and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

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