COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1214

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

MONICA AND PAUL KAPLEWSKI,

PETITIONER-APPELLANT,

v.

CS & DS, LTD.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Florence County: JAMES B. MOHR, Judge. *Reversed.*

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

¶1 PETERSON, J. Paul and Monica Kaplewski appeal a summary judgment granted in favor of CS & DS, Ltd. The Kaplewskis argue that pursuant

to WIS. STAT. § 80.32(3)[1], the circuit court erred by awarding an abandoned roadway to CS & DS because, according to the Kaplewskis, the roadway originally belonged to government lot 6. We agree and therefore reverse the judgment.

BACKGROUND

¶2 Andrew Bjorkman originally owned government lots 4 and 6 located adjacent to one another in Florence County, Wisconsin. In 1924, Bjorkman created Eagle Plat out of lot 4 and a portion of lot 6. The portion of the plat that came from lot 6 was dedicated as a sixty-foot roadway and is the subject of this dispute.

¶3 In 1977, the Kaplewskis purchased all of the unplatted part of lot 6. CS & DS purchased several lots within the Eagle Plat adjacent to the roadway in 1997.

¶4 In 1998, the town abandoned a portion of the sixty-foot roadway. The town awarded the abandoned roadway to CS & DS. The Kaplewskis brought a writ of certiorari seeking reversal of the town's decision in circuit court. CS & DS was made a party to the action despite objection by the Kaplewskis. The town was dismissed after it removed the portion of its written order awarding the abandoned roadway to CS & DS.

¶5 Both the Kaplewskis and CS & DS moved for summary judgment. The circuit court granted summary judgment in favor of CS & DS. The circuit

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

court found that the abandoned roadway originally belonged to the Eagle Plat and awarded the abandoned road to CS & DS. This appeal followed.

STANDARD OF REVIEW

¶6 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). Where both parties move for summary judgment, the case is put in a posture where the parties waive their right to a full trial of the issues and permit the trial court to decide the legal issue. ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989).

DISCUSSION

¶7 The Kaplewskis contend that the circuit court erred by awarding the abandoned roadway to CS & DS. They argue that the abandoned roadway originally belonged to government lot 6. We agree.

¶8 This case is governed by WIS. STAT. § 80.32(3), which reads:

> **Discontinuance of highways; reversion of title.**
>
> ….
>
> **(3)** When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; *if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained*; if not it shall be equally divided between the owners of the lands on each side thereof. (Emphasis added.)

¶9 Both parties agree that ***Schunk v. Brown***, 156 Wis. 2d 793, 457 N.W.2d 571 (Ct. App. 1990), is controlling. In ***Schunk***, we interpreted WIS.

STAT. § 80.32(3) and applied it to very similar facts. Jane Auer owned a tract of land that included the Schunk lot, the Brown lot, and a parkway parcel. In 1902, she platted Auer Park as a subdivision. The plat included only the Schunk lot.

¶10 In 1929, Auer deeded land containing the Brown lot and the parkway parcel to the Oakton Country Club. The country club then platted the Oakton Park subdivision, which dedicated the parkway parcel to the town for use as a public road. The town later discontinued the road.

¶11 The Schunks claimed they were entitled to receive half of the discontinued road that was in the Oakton subdivision because it lay between their lot in the Auer Park subdivision and the Browns' lot in the Oakton Park subdivision.

¶12 We rejected the Schunks' claim and observed that the purpose of WIS. STAT. § 80.32(3) "is to merge vacated lands with the parcel to which the vacated land originally belonged." ***Id.*** at 798. We held that the circuit court's task under the statute is to "track the vacated property … back to the parcel to which it originally belonged." ***Id.*** In other words, the circuit court must inquire "as to what parcel of land the [discontinued road] belonged before the platting and dedication." ***Id.***

¶13 In ***Schunk***, we determined that the circuit court was able to ascertain the original parcel to which the vacated lands originally belonged prior to the platting and dedication of Oakton Park. We further determined that the discontinued road was originally part of the land from which the Oakton Park subdivision was created, not Auer Park. When Oakton Park was platted and dedicated, a portion of the land was dedicated for use as a road. When it was discontinued, the road reverted back to the parcel of land to which it originally

belonged before Oakton Park was created. Because the roadway had never been part of Auer Park, the Schunks lost.

¶14 In the present case, the abandoned roadway originally belonged to lot 6 prior to the platting and dedication of Eagle Plat. When Eagle Plat was platted, the sixty feet that came from government lot 6 was dedicated as a roadway. When it was abandoned, following the logic of ***Schunk***, the roadway reverted back to the parcel of land to which it originally belonged before the platting and dedication of Eagle Plat. It is undisputed that the sixty-foot roadway belonged to lot 6 before Eagle Plat was created.

¶15 The circuit court interpreted the statute to mean that it was required to trace the abandoned roadway to the time when the plat was created. It stated that the roadway "originally belonged to Eagle Plat back in 1924. It was created by that plat and goes back to that plat once it was vacated." However, under ***Schunk***, the circuit court's task is to determine to which parcel the abandoned roadway belonged before the platting and dedication of the plat itself. *See* ***id.*** at 798.

¶16 The dissent argues that the statute requires an inquiry into what parcel the abandoned roadway belonged before the platting and dedication of the roadway. ***Schunk*** states that WIS. STAT. § 80.32(3) "inquires as to what parcel of land the vacated property belonged before the platting and dedication." ***Id.*** at 798. We applied the statute to the facts and stated that the trial court was able to "ascertain the original parcel to which the vacated lands originally belonged *prior to the platting and dedication of Oakton Park*." ***Id.*** (emphasis added). In other words, WIS. STAT. § 80.32(3) requires courts to inquire into what parcel the

abandoned roadway belonged prior to the platting and dedication of the plat, not the roadway.

¶17 The dissent further argues that Bjorkman dedicated the roadway after creating Eagle Plat. Thus, according to the dissent, the circuit court properly determined that Eagle Plat was the parcel to which the roadway belonged before it was dedicated. The record, however, establishes that the roadway and Eagle Plat were created simultaneously in 1924. Because both the roadway and the plat were created simultaneously, the roadway belonged to government lot 6 before the roadway's dedication. [2]

¶18 Finally, there is nothing fundamentally unfair with awarding the abandoned roadway to the Kaplewskis. The legislature created WIS. STAT. § 80.32(3) to further the principle that vacated lands should be merged with the parcel to which the vacated lands originally belonged. If a court can determine the original parcel to which the abandoned roadway belonged under § 80.32(3), it reverts back to that parcel. It is true, as the dissent points out, that the Kaplewskis never owned the roadway. However, CS & DS have never owned the roadway either. CS & DS simply own property within the plat that was created simultaneously with the roadway.

¶19 WISCONSIN STAT. § 80.32(3) requires the abandoned roadway to revert to the parcel from which it originally belonged. The abandoned roadway came from government lot 6. As a result, we conclude the abandoned roadway reverts to lot 6.

[2] CS & DS argues that Bjorkman's intent is relevant in determining whether the abandoned roadway was to be part of the Eagle Plat. However, nowhere in WIS. STAT. § 80.32(3) or in ***Schunk*** is the grantor's intention relevant.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

¶20 CANE, C.J. *(dissenting).* I respectfully dissent. I agree with the circuit court that the vacated roadway should be annexed to the parcel of land to which it belonged before its platting and dedication. At the time the roadway was platted and dedicated, it was part of Eagle Plat. Therefore, as the present owner of the lots in Eagle Plat adjacent to the roadway, CS & DS, Ltd. ("CS & DS") is entitled to the vacated roadway. I would affirm the circuit court.

¶21 Both sides argue that WIS. STAT. § 80.32 controls. The statute provides in part:

> **Discontinuance of highways; reversion of title.**
>
> ….
>
> **(3)** When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained; if not it shall be equally divided between the owners of the lands on each side thereof.

¶22 The purpose of this statute is to merge vacated lands with the parcel to which the vacated land originally belonged. ***Schunk v. Brown***, 156 Wis. 2d 793, 798, 457 N.W.2d 571 (Ct. App. 1990). "Stated differently, sec. 80.32(3) inquires as to what parcel of land the vacated property belonged before the platting and dedication." ***Id.*** If that can be ascertained, the vacated land "reverts" to the original parcel and, by implication, to the present owner(s). ***Id.***

¶23 Here, the vacated roadway is located between the lands of different owners, CS & DS and the Kaplewskis. Pursuant to ***Schunk***, if we can ascertain "to what parcel of land the vacated property belonged before the platting and

dedication," then we can decide which of the two owners rightfully owns the land. *See* ***id.*** If we cannot ascertain that information, then the property must be equally divided between CS & DS and the Kaplewskis. *See* ***id.***

¶24 The Kaplewskis rely on ***Schunk*** for the proposition that the roadway should revert to them because they are owners of a portion of lot 6 adjacent to the roadway. ***Schunk*** requires this court to look at the division of the property at the time the roadway was platted and dedicated.

¶25 When reading ***Schunk***, we must keep in mind that Andrew Bjorkman originally owned what the parties refer to as lots 4 and 6. He then divided these lots into two different parcels. One parcel became known as Eagle Plat containing lot 4 and a portion of lot 6. The other parcel was the remainder of lot 6, which is now owned by the Kaplewskis. Thus, after this division, there were two parcels, the Eagle Plat and the Kaplewski lot. Only after this division did Bjorkman then carve a parcel of land from the Eagle Plat for the roadway.

¶26 Like Bjorkman, Jane Auer in ***Schunk*** originally owned the tract of land containing the parcels of land owned by the Schunks and the Browns. Schunks' parcel was platted as a subdivision, but contained neither the Browns' property nor any portion of the discontinued highway. ***Id.*** at 795. Auer then conveyed the land containing the Browns' parcel to the Oakton Country Club Corporation. ***Id.*** Oakton subsequently platted a subdivision that specifically laid out the Browns' lot and also dedicated a portion of its land for the highway, which was later discontinued and vacated. ***Id.*** at 796. The Schunks claimed they were entitled to receive half of the discontinued highway that was in the Oakton Subdivision because it lay between their lot in the Auer Park Subdivision and the Browns' lot in the Oakton Park Subdivision. ***Id.*** at 797.

¶27 We rejected the Schunks' claim and concluded that because the discontinued highway and the Browns' lot were part of the same parcel of land, namely the Oakton Park Subdivision, WIS. STAT. § 80.32 required the discontinued roadway to be annexed to the Browns' property. ***Id.*** at 798. In other words, the Schunks' claim under § 80.32 for a portion of the vacated roadway failed because their property was never part of the Oakton Park Subdivision from which the highway was created. Likewise, the Kaplewskis' claim for the vacated roadway should fail because their property was never part of Eagle Plat from which the roadway was created.

¶28 Because the abandoned roadway was part of Eagle Plat when it was dedicated, it only stands to reason that its ownership reverts to those who now own the property adjacent to the roadway in Eagle Plat. Importantly, the discontinuation or abandonment of the roadway simply means that the portion of land set aside in the Eagle Plat for the roadway would not be used. To now award the Kaplewskis the abandoned roadway runs contrary to the principle that the property should revert to the property from which the roadway originated.

¶29 CS & DS refers us to JAMES J. VANCE, TITLES TO REAL ESTATE, § 14.02, at 14-17 (rev. ed. 1998), which states:

> Generally, when a street or an alley is vacated, half is attached to the land adjoining on each side. An exception to this may occur when the alley or street abuts unplatted land on one side and platted land on the other and all of the street originates from the ownership of the platted, rather than unplatted, property. It would then seem appropriate that the entire vacated portion attach only to the platted land.

¶30 I agree with this proposition and, in fact, it is consistent with our holding in ***Schunk***. Here, there is no question that the roadway was originally

created from Eagle Plat. Thus pursuant to the statute, the roadway must revert to the property to which it originally belonged when it was created. In this case, that means to the owners of the property in the Eagle Plat who are adjacent to roadway, not to the owners of property from which the roadway was never created. Therefore, contrary to the majority's reasoning, ***Schunk*** supports the circuit court's holding, which is consistent with the purpose of WIS. STAT. § 80.32.