

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 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. 00-1298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JAMES A. SHIVES AND AND RITA M. SHIVES,

PETITIONERS-RESPONDENTS,

V.

WILLIAM L. POWELL,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Powell appeals the judgment finding that Old Whistler Road was entirely abandoned as a route of travel. On appeal, Powell argues that: (1) James and Rita Shives have not met their burden of proving that

the road was abandoned; and (2) WIS. STAT. § 80.02¹ prohibits discontinuance of the road. We disagree and affirm.

BACKGROUND

¶2 Powell owns both a fifteen-acre parcel and an eighty-acre parcel of land in Sand Lake Township. The Shives own an eighty-acre parcel located between Powell's two parcels. Powell needs to cross the Shives' property to access his eighty acres, and he did so by traveling along a route known as Old Whistler Road.

¶3 The circuit court concluded that the road was a public highway at one time because it had been worked for more than ten years. *See* WIS. STAT. § 80.01(2). However, the circuit court concluded that the evidence was insufficient to satisfy Powell's burden of proof that the road had not been entirely abandoned as a route of travel.

¶4 Powell appealed, claiming that the circuit court applied an incorrect legal standard when it held him to the burden of proving that the road was not abandoned. We agreed and reversed in a previous decision, remanding with directions to make further factual findings.

¶5 On remand, the circuit court made detailed findings, again finding that the former town road known as Old Whistler Road had been entirely abandoned as a route of travel. This appeal followed.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

STANDARD OF REVIEW

¶6 Although we review a trial court's legal conclusions independently, its findings of fact may not be set aside unless they are clearly erroneous. *See* WIS. STAT. RULE 805.17(2); *see also Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 837, 501 N.W.2d 1 (1993). We give due deference to the trial court's better ability to assess the witnesses' credibility. *See Noll v. Dimiceli's Inc.*, 115 Wis. 2d 641, 643-644, 340 N.W.2d 575 (Ct. App. 1983). Accordingly, we must determine whether the trial court's findings support its conclusions of law that the road was entirely abandoned. We conclude that it does.

DISCUSSION

¶7 Powell first argues that the Shives failed to prove that Old Whistler Road had been completely abandoned. We disagree. There is sufficient evidence in the record to conclude that the road was abandoned.

¶8 WISCONSIN STAT. § 80.32(2)² provides, in relevant part, that "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." Both conditions must be met before a public highway is discontinued. *See Heise v. Village of Pewaukee*, 92 Wis. 2d 333, 349, 285

² WISCONSIN STAT. § 80.32(2) reads as follows:

Except as provided in sub. (5), 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.

N.W.2d 859 (1979). Powell does not claim that any funds have been expended on the road in the last five years. Therefore, the only issue is whether the road has been entirely abandoned as a route of travel.

¶9 Wisconsin courts have broadly construed the phrase, "entirely abandoned as a route of travel." Indeed, our supreme court has stated that "[i]f [a public highway] is open to all who desire to use it, it is a public highway although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others." *State ex rel. Happel v. Schmidt*, 252 Wis. 82, 86, 30 N.W.2d 220 (1947) (quoted source omitted).

¶10 Powell argues that the testimony at trial proves the road was used continually since 1928. However, he argues facts not found by the trial court. The court made specific findings contrary to Powell's argument. The question before us on appeal is limited to the findings of the trial court, and whether those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). They are not; they are fully supported in the record.³

¶11 The trial court found that the people who had originally lived on Powell's eighty-acre parcel died or left before the road was altered and that no one was living on the road at the time. The trial court further found that people who used Old Whistler Road after it was altered did so with the express permission of the Okerlund family.

³ The trial court relied on the testimony of William Okerlund. Okerlund had lived in the area for more than fifty-years before he sold his property to Powell.

¶12 That people used the road does not make it a public road under the definition in *Happel*. See *id.* at 86. Old Whistler Road was not open to the public after it was altered. When people use a discontinued road only with permission and no one claims a right of travel without permission, the public character of the road is abandoned.

¶13 Powell cites *State ex rel. Young v. Maresch*, 225 Wis. 225, 273 N.W.2d 225 (1937), arguing that alteration of a highway does not constitute abandonment with regard to property owners who use the highway to access their land. However, in *Young*, a town road was connected with the altered part of the highway. Our supreme court held that the road had not been abandoned. However, it stated, “were it not for the fact that [the old highway] is connected with [a town road], the relocation of [the new highway] would doubtless have operated as an abandonment of [the old highway].” *Id.* at 230. *Young* does not stand for the proposition that an altered road is not discontinued.

¶14 In the present case, when Old Whistler Road was discontinued, no one was living on the road. The people who subsequently lived there after the road had been discontinued allowed people to use the road only with their permission. The road was cut off from public use and was treated by subsequent landowners as a private road. As a result, the trial court properly concluded that Old Whistler Road had been abandoned.

¶15 Last, Powell argues that he is deprived of access to his lands pursuant to WIS. STAT. § 80.02. We disagree.

¶16 WISCONSIN STAT. § 80.02⁴ provides a town affirmative means of discontinuing a highway. One of the limitations of § 80.02 is that a town may not discontinue a highway when doing so would deprive property owners access to their land. *See id.* However, under the statute, a town must affirmatively discontinue a highway. In the present case, the highway was not affirmatively discontinued under § 80.02. Rather, it was discontinued by abandonment under WIS. STAT. § 80.32(2). The restrictions found in § 80.02 do not apply here.

⁴ WISCONSIN STAT. § 80.02 provides:

When 6 or more resident freeholders wish to have a highway laid out, widened, altered or discontinued in their town, they may make application in writing to the supervisors of said town for that purpose. The application may be delivered to any supervisor or to the town clerk. In case the application is for the discontinuance of all or of a part of any highway, and it is desired, as permitted by s. 80.05, to omit from the notice the description of the lands abutting upon such highway which will be benefited, injured or damaged by the discontinuance of such highway or any part thereof, the application shall contain the description of the lands abutting upon such highway which will be benefited, injured or damaged by the discontinuance of such highway or any part thereof and shall be delivered to the town clerk with a request in writing that such application remain on file with the clerk until the time set for hearing for reference and inspection by any parties concerned. When all the owners of lands abutting on the part of a highway sought to be altered, desire such alteration, and the supervisors are of the opinion that the public will not be materially affected by such alteration, the board may make the same, and may take into consideration donations of money, land or services for the making of such alterations. When the laying out of a highway would require the construction of a bridge costing more than \$1,000, exclusive of donations, the order of the supervisors laying out such highway shall not be effective unless approved by the electors of the town, and an estimate by the department of transportation shall be conclusive of the cost of such bridge for the purposes of this section. No town board shall discontinue any part of a state trunk or county trunk highway, nor discontinue any highway when such discontinuance would deprive the owner of lands of access therefrom to a highway.

By the Court.—Judgment affirmed.

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

