

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2001

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.

No. 00-2718

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JAMES KIRK JACOBSON, VIOLET ANNITA JACOBSON AND
JOSEPH WOODROW JACOBSON,**

PLAINTIFFS-APPELLANTS,

V.

THE TOWN OF STONE LAKE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with
directions.*

Before Hoover, P.J., Peterson and Dykman, JJ.

¶1 PER CURIAM. James, Violet and Joseph Jacobson appeal a judgment declaring that a road on their property is a valid public highway. The trial court truncated evidence on whether the strip of land was properly made a

town road, focusing on whether the town abandoned the road. Because the town failed to establish that it worked the road for ten years as required by WIS. STAT. § 80.01(2) (1999-2000), or that it acquired the road by prescriptive easement, we conclude that the road is not a public highway and that the town has no legal interest in the property. Therefore, we reverse the judgment and remand the case with instructions to enter a judgment declaring that the town has no interest in the property.

¶2 The strip of property in question runs from a highway to a broken-down, uninhabited house. Although its origin is unclear, the road was first placed on the Department of Transportation gas tax map in the 1920's. The town chairman, however, found no records relating to this road before 1995.

¶3 The record does not establish that the town worked the road for ten years in a manner that would apprise the owner that the town laid claim to the road. See *County of Langlade v. Kaster*, 202 Wis. 2d 448, 456, 550 N.W.2d 722 (Ct. App. 1996). The present town chairman testified that when he was twelve years old, he rode down that strip with his neighbor on a roadgrader. The neighbor worked for the county, which at that time cared for town roads as well. That is the only evidence of any work on the road by the town until 1998. The individual workmen responsible for grading town roads for several decades testified that they performed no maintenance on the road. Rather, private landowners performed maintenance, sometimes utilizing town employees as private laborers. Longtime residents of the area testified that no work had been done on the road for decades. A soil tester analyzed soil borings from nine holes along the roadway and concluded that road gravel had been added in only one location near the end of the road in a swampy area. The town presented no evidence that it performed maintenance on the road for any ten-year period.

¶4 Likewise, the record does not support the trial court's finding that the town acquired an easement by prescription. A prescriptive easement requires twenty years of uninterrupted use that is open and notorious and inconsistent with the exercise of the titleholder's possessive rights. *See Mushel v. Town of Molitor*, 123 Wis. 2d 136, 144, 365 N.W.2d 622 (Ct. App. 1985). The town's evidence consists of individuals, not acting on the town's behalf, utilizing the property for seasonal hunting or berry picking or walking down the road to play with the children who lived in the now abandoned house. This sporadic use is not inconsistent with the titleholder's rights. While this public use might have been sufficient to defeat a claim that an existing road had been abandoned, it is not sufficient to establish a prescriptive easement. Placing the road on the gas tax map is not sufficiently open and notorious to support the town's claim of a prescriptive easement.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

