COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2105 **Cir. Ct. No. 2005CV81**

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

JOANN QUINNELL REVOCABLE TRUST,

PLAINTIFF-RESPONDENT,

JOSEPH A. FLASHING, JUDITH A. FLASHING, PATRICIA BENISH AND THE WISCONSIN RIVER POWER COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

TOWN OF QUINCY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. The Town of Quincy appeals a circuit court judgment in favor of the JoAnn Quinnell Revocable Trust.[1] The dispute centers on whether a dead-end section of road abutting Quinnell's property is public or private. The Town argues that the circuit court should have dismissed Quinnell's action because she failed to establish an ownership interest in that section of the road. The Town also argues that the disputed portion of the road became public by common law dedication because the Town's state transportation aids maps, which include the disputed portion, are conclusive evidence that the Town accepted a dedication of that land. Finally, the Town argues that it is entitled to a new trial. We reject the Town's arguments. Accordingly, we affirm the judgment.

Background

¶2 In 1926, a plat of a subdivision including what is now Quinnell's property was recorded with the register of deeds. The plat shows a road called Wisconsin Street that runs the length of the subdivision. At issue here is a section of land designated in the 1926 plat as part of Wisconsin Street that abuts Quinnell's property and the property of the four involuntary plaintiffs.[2]

¶3 The 1926 plat was vacated by court order in 1935. The parties agree, however, that the property abutting the disputed portion of the road, including what is now Quinnell's property, continued to be sold with legal descriptions identifying parcels by reference to the vacated plat.

[1] For ease of reading, we refer to the JoAnn Quinnell Revocable Trust as if JoAnn Quinnell were the party.

[2] None of the involuntary plaintiffs filed briefs in this appeal.

¶4 Quinnell commenced her action after a disagreement arose regarding the Town's maintenance of the disputed portion. She sought to have the disputed portion declared private and to enjoin the Town from maintaining it.

¶5 The Town moved for summary judgment and sought dismissal of Quinnell's action, arguing that the disputed portion was public and that Quinnell had no ownership interest in it. The circuit court deferred decision on the Town's motion, but required Quinnell to file a more definite statement of her ownership interest.

¶6 Quinnell filed an amended complaint, setting forth three "claims of ownership." Each claim alleged a different basis for Quinnell's ownership interest in the disputed portion.

¶7 The Town, in its answer, denied Quinnell's claims for ownership. In counterclaims, the Town alleged that the disputed portion had become public under three theories: 1) by common law dedication, 2) by the Town's having "worked" the disputed portion within the meaning of WIS. STAT. § 82.31 (2005-06)[3] for at least ten years, and 3) by prescription, based on the public's open use of the disputed portion for more than twenty years.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. WISCONSIN STAT. § 82.31 provides, in pertinent part:

> (2) UNRECORDED HIGHWAYS. (a) Except as provided in pars. (b) and (c), any unrecorded highway that has been worked as a public highway for 10 years or more is a public highway and is presumed to be 66 feet wide.

¶8 Quinnell sought an order regarding the burden of proof. She argued that the Town should have the burden of proving that the disputed portion was public. The Town disagreed, and again moved for summary judgment.

¶9 The circuit court concluded that, although Quinnell had an initial burden to show "title," the burden then shifted to the Town to demonstrate that the disputed portion was public. The court further concluded that Quinnell met her initial burden because, under applicable common law, the abutting property owners held title to the center line of the disputed portion after the 1926 plat was vacated. The court also denied the Town's motion for summary judgment.

¶10 In addition, the circuit court rejected an argument by the Town that the Town was entitled to judgment as a matter of law on its theory of common law dedication. The Town argued that the inclusion of the disputed portion on the Town's state transportation aids maps was conclusive evidence of the Town's "acceptance" of the dedication, but the court disagreed. Accordingly, the question of acceptance went to the jury to determine in light of the transportation aids maps and other evidence.

¶11 The jury found that there had been no acceptance, thus rejecting the Town's theory that the disputed portion became public by common law dedication. The jury also rejected the Town's other theories for why the disputed portion became a public road. The circuit court entered judgment on the verdict in favor of Quinnell. The judgment provides that the disputed portion is private property, not a public highway. It also specifies that the titleholders of the abutting lots own to the center line of the disputed portion. The Town appeals. We reference additional facts as needed below.

Discussion

¶12 The Town's main arguments are directed at whether it was entitled to summary judgment. In that regard, the Town raises two issues:

(1) Whether the circuit court should have dismissed Quinnell's action because Quinnell failed to establish an ownership interest in the disputed portion; and

(2) Whether the Town's state transportation aids maps, which showed the disputed portion as part of Wisconsin Street, are conclusive evidence of the Town's acceptance of a common law dedication.

In addition, the Town argues that it is entitled to a new trial. We must begin, however, with a threshold argument made by Quinnell. She argues that we should dismiss the Town's appeal because the Town failed to timely file post-verdict motions, in violation of WIS. STAT. § 805.16.[4]

A. The Town's Late Post-Verdict Motions

¶13 The Town does not dispute that its post-verdict motions were late. Dismissal of the appeal, however, is not an available remedy. Rather, the question is one of waiver, which could result in this court summarily affirming the circuit court. An issue raised on appeal pertaining to an error "'of a category that the trial court could correct by granting a new trial'" is generally waived by the failure to timely file a post-verdict motion. *See* ***Hartford Ins. Co. v. Wales***, 138 Wis. 2d

[4] WISCONSIN STAT. § 805.16 provides, in relevant part:

> **(1)** Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents.

508, 515, 406 N.W.2d 426 (1987) (citation omitted). The summary judgment issues raised by the Town are not of such a category and, therefore, are preserved.

¶14 The arguments the Town makes in support of its request for a new trial (which we discuss further below) do, however, fall into the waived category. According to ***Hartford Ins. Co.***, the question then becomes whether we should nonetheless exercise our discretionary reversal authority based on those arguments. *See* ***id.*** at 517-18 (citing WIS. STAT. § 752.35); *see also* ***State v. Treadway***, 2002 WI App 195, ¶7 n.2, 257 Wis. 2d 467, 651 N.W.2d 334 ("'The reviewing court does not lose jurisdiction to consider such issues but may consider them in its discretion.'" (quoting ***Hartford Ins. Co.***, 138 Wis. 2d at 518)).[5] As we explain in Section C of this opinion, we conclude that the Town's arguments in support of its request for a new trial are either unpersuasive on their merits or insufficiently developed. It necessarily follows that we should not exercise our discretionary authority to reverse based on those arguments.

[5] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

B. The Town's Summary Judgment Arguments

¶15 We review the grant or denial of summary judgment *de novo*, applying the same standards as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). It is sufficient here to note that a party is entitled to summary judgment only if there are no disputed material issues of fact and that party is entitled to judgment as a matter of law. *See* ***id.*** at 315.

1. Whether The Circuit Court Should Have Dismissed Quinnell's Action Because She Failed To Establish An Ownership Interest In The Disputed Portion Of Wisconsin Street

¶16 The Town disputes the circuit court's ruling that Quinnell holds title to the center line of the part of the disputed portion of Wisconsin Street abutting her property. The Town contends that Quinnell failed to show an ownership interest in the disputed portion and, therefore, the circuit court should have dismissed her action.

¶17 Quinnell responds that whether she has an ownership interest in the disputed portion is irrelevant for purposes of her dispute with the Town. She contends that the only cognizable interest that the Town has in this action pertains to that part of the judgment declaring that the disputed portion is not a public highway, but instead privately owned. We agree, and observe that the Town fails to provide a reason why, in order to determine whether the judgment erroneously deprives the Town of ownership, it is necessary to know whether Quinnell in particular has an ownership interest in the disputed portion.

¶18 In a closely related argument, the Town contends that Quinnell lacks standing unless she has an ownership interest in the disputed portion. We

disagree. Regardless whether Quinnell has an ownership interest in the disputed portion, she has a personal stake in and is directly affected by the question of whether the disputed portion is public or private. There is no dispute that Quinnell is one of a small group of landowners whose property abuts the disputed portion and that she is directly affected by whether the Town has the right to enter the disputed portion to maintain it. *See* ***Village of Slinger v. City of Hartford***, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81 ("In order to have standing to sue, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." (citations omitted)).

¶19 Alternatively, the Town seems to be making a technical argument that, unless Quinnell showed an ownership interest in the disputed portion, the circuit court should have dismissed her action because her amended complaint consists only of three claims for an ownership interest in the disputed portion. This argument fails because Quinnell's action is not limited to those three claims. Rather, her amended complaint incorporates the allegations from her original complaint, which includes claims for declaratory and injunctive relief against the Town. As part of those original claims, Quinnell sought a declaration that the disputed portion was private and to enjoin the Town from maintaining the road. Moreover, Quinnell, in her amended complaint, continued to seek a declaration that the Town has "no right, title, or interest" in the disputed portion.

¶20 Accordingly, we conclude that Quinnell has standing, regardless of any ownership interest in the disputed portion, and that her amended complaint, by incorporation, sought a declaration that the disputed portion is privately owned. Thus, we need not decide whether the circuit court correctly concluded that Quinnell owned title to the center line of that part of the disputed portion abutting

her property. What remains is the Town's argument that its state transportation aids maps had conclusive effect.

2. Whether The Town's State Transportation Aids Maps Are Conclusive Evidence Of Acceptance Of A Common Law Dedication

¶21 On appeal, the Town advances a single theory as to why the disputed portion became publically owned. According to the Town, the property became public under common law dedication.

¶22 The two basic elements of common law dedication are (1) intent to dedicate and (2) acceptance of the dedication. Acceptance may be shown by the acts of either public authorities or the general public. *See, e.g.*, ***Gogolewski v. Gust***, 16 Wis. 2d 510, 514, 114 N.W.2d 776 (1962) ("The essential requisites of a valid common-law dedication are that there must be an intent to dedicate on the part of the owner and an acceptance of the dedication by the proper public authorities or by general public user." (citations omitted)); *see also* ***Vande Zande v. Town of Marquette***, 2008 WI App 144, ¶8, No. 2007AP2354.

¶23 We will assume, in keeping with the circuit court's ruling, that the "intent to dedicate" element is satisfied by undisputed evidence showing the sale of lots with legal descriptions identifying parcels by reference to the vacated plat. Still, the Town's argument for common law dedication fails on the second element, acceptance.

¶24 The Town does not argue that there was acceptance based on acts of the general public. Rather, the Town argues that its submission of state transportation aids maps is conclusive evidence of acceptance by the acts of Town authorities. We disagree.

¶25 Acceptance may be "informal" and may be shown by "'any act with respect to the property claimed to be dedicated that clearly indicates an intent … to treat the dedication as accepted …, such as where the public authorities assume jurisdiction and dominion over the property.'" ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 615, 617, 587 N.W.2d 923 (Ct. App. 1998) (quoting 11A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 33.47 (3d ed. 1991)). "'There need be but little affirmative action to indicate an intention to accept a dedication.'" ***Cromheecke***, 222 Wis. 2d at 617 (quoting 11A MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 33.47).

¶26 There is no serious dispute that the Town was required to annually certify a transportation aids map to state authorities pursuant to WIS. STAT. § 86.302 (2005-06) or a previous version of the statute, that such a map first showed the disputed portion as a town road at least thirty-seven years ago, and that such maps have, on at least some occasions, been certified by signature of the Town chairperson.[6]

¶27 WISCONSIN STAT. § 86.302 addresses state transportation aids to municipalities, and provides, in pertinent part:

> **(1g)** … [T]he board of every town, village and county, and the governing body of every city, shall file with the department [of transportation] not later than December 15 of every year, a certified plat of the municipality or county showing the highways under its jurisdiction and the mileage thereof to be open and used for travel as of the succeeding January 1. The department may use the plats in making computations of transportation aids….

[6] The Town explains that the statute has been revised and renumbered over the years but has remained substantially identical in substance. Quinnell does not argue that the changes to the statute matter for purposes of this appeal.

> ….
>
> **(3)** For the purposes of transportation aid determinations under s. 86.30 ["general transportation aids"], the department shall use changes in the highway mileage of a municipality or county indicated on the certified plat filed under sub. (1g) in making computations of transportation aids to be paid beginning in the 2nd year following the year in which the certified plat is filed.

¶28 The Town acknowledges that maps under the statute are "for purposes of receiving State highway aids." Although the maps must be "certified," we are not persuaded that the existence of such maps showing the disputed portion as a town road—standing alone and regardless of other evidence—constitutes the type of act that "clearly indicates" the Town's intent to accept the dedication. *See* ***Cromheecke***, 222 Wis. 2d at 617. Nothing in either the Town's arguments or its factual assertions explains how the Town decides to begin including a street on its transportation aids map or why the Town first included the disputed portion on its maps. We conclude that this omission is fatal because the case law, including key cases relied on by the Town, persuades us that maps like the Town's maps generally should not be treated as conclusive evidence of acceptance.

¶29 Two cases that the Town discusses at length merit particular attention. The first is ***Galewski v. Noe***, 266 Wis. 7, 62 N.W.2d 703 (1954). The Town argues that ***Galewski*** is "analogous" and illustrates the "informality" with which common law dedication can be accomplished. ***Galewski***, however, does not support the Town. Instead, ***Galewski*** cuts against the Town because the court there treated what appeared to be official village maps showing a disputed road as just one of many facts supporting a finding of acceptance. *See* ***id.*** at 13-14.

¶30 The other case, which the Town places even heavier reliance on, is ***Cromheecke***. ***Cromheecke***, however, did not depend on a map like the Town's, and we disagree with the Town that under ***Cromheecke*** the Town's maps are conclusive evidence of acceptance.

¶31 In ***Cromheecke***, a strip of land was deeded with a restriction that Cromheecke dedicate the land to the City of Beaver Dam for a public street. ***Cromheecke***, 222 Wis. 2d at 610-11. The city, however, was unaware of the restriction. ***Id.*** at 611-12. Cromheecke proposed a plat in which part of the strip of land was preserved as a private outlot. ***Id.*** at 611. The city's board of public works initially conditioned approval of the plat on the outlot's designation as a future public street, but Cromheecke ultimately persuaded the city to forgo the condition. ***Id.***

¶32 After approximately five years, the city again sought to acquire the outlot. ***Id.*** at 612. The city's plan commission proposed placing the outlot on an official city street map, and the city's board of public works directed the city attorney to initiate condemnation proceedings. ***Id.*** The city attorney then discovered the deed restriction and filed a declaratory action seeking rights to the outlot. ***Id.*** In addition, the city's board of public works introduced a resolution accepting the dedication of the outlot. ***Id.*** Before the city counsel could approve the resolution, however, Cromheecke presented the city clerk with a "Withdrawal of Reservation to Dedicate" signed by the original grantors of Cromheecke's deed. ***Id.***

¶33 We concluded in ***Cromheecke*** that the city's actions constituted acceptance. ***Id.*** at 618. We reasoned as follows:

> The record confirms that the City consistently expressed its interest in obtaining a public right-of-way over Outlot 1, and that the City took appropriate steps to acquire Outlot 1: first, by negotiating with Cromheecke; then by preparing to acquire the outlot by condemnation; and finally, when it became aware of the offer to dedicate, by filing a court action to confirm its interest.
>
> Once the city attorney became aware of the … deed containing the offer to dedicate Outlot 1, the city attorney acted … to confirm the City's jurisdiction and dominion over the property by filing this action seeking a declaration that the City had acquired a public right-of-way in Outlot 1 by virtue of the offer of dedication contained in the 1989 deed. "The bringing of an action by a municipality to recover land as to which there has been an offer to dedicate is generally considered to be an acceptance of the dedication." MCQUILLIN, *supra*, § 33.49; *see also* ***George W. Armbruster, Jr., Inc. v. City of Wildwood***, 41 F.2d 823, 828 (D.N.J. 1930); ***Reiman v. Kale***, 403 N.E.2d 1275, 1278 (Ill. App. 1980). With the filing of the declaratory judgment action, the City accepted the offer expressed in the … 1989 deed, and the common-law dedication of Outlot 1 was complete.

Id.

¶34 The Town argues that the case for acceptance here is even stronger than that in ***Cromheecke*** because the state transportation aids maps constitute clearer evidence of acceptance than the city's declaratory judgment action in ***Cromheecke***. The Town appears to be saying that, if the filing of a declaratory action is conclusive evidence of acceptance, then a transportation aids map must be conclusive evidence of acceptance. We are not persuaded by the Town's reliance on ***Cromheecke*** for at least two reasons.

¶35 First, in ***Cromheecke*** we cited a general rule that the "'bringing of an action by a municipality to recover land as to which there has been an offer to dedicate is generally considered to be an acceptance of the dedication,'" ***id.*** at 618 (citation omitted), but, consistent with ***Galewski***, the Town is unable to point to an

analogous rule for official maps such as transportation aids maps. *Cf. also* ***Gogolewski***, 16 Wis. 2d at 516-17 (when platted lands lie outside an incorporated city or village, approval of plat by town board and recording of plat do not constitute acceptance of platted streets as public highways); ***Hunt v. Oakwood Hills Civic Ass'n***, 19 Wis. 2d 113, 118, 119 N.W.2d 466 (1963) (removing parcel of land from tax rolls not conclusive evidence of acceptance); 11A MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 33.54 (the question is whether "all the facts and circumstances, when taken and considered together, certainly and satisfactorily show that the public, or the authorities acting on behalf of the public, intends to accept the offer of dedication").

¶36 Second, although we cited the general rule that bringing an action constitutes acceptance, we do not read our decision in ***Cromheecke*** as relying solely on this rule or as holding that the city's declaratory action in ***Cromheecke*** was conclusive evidence of acceptance. Rather, we viewed the city's filing of the action in ***Cromheecke*** as the final act in a series of acts that, when taken together, clearly indicated intent to accept. Thus, even if we agreed with the Town that its transportation aids map is comparable to a municipality's legal action seeking rights to property, it does not follow under ***Cromheecke*** that the Town's maps are conclusive evidence of acceptance.

¶37 In sum, we discern no reason why the Town's state transportation aids maps, as a matter of law, are conclusive evidence of acceptance for purposes of common law dedication.

C. Whether The Town Is Entitled To A New Trial

¶38 The Town argues that it is entitled to a new trial on three grounds. We reject all three.

1. Burden Of Proof

¶39 The Town argues that the circuit court erroneously shifted the burden of proof to the Town to prove that the disputed portion was public. The Town cites no authority for its argument, and the doctrinal basis for the argument is unclear. We will, however, address what we perceive to be the basis.

¶40 It appears that the Town is making an argument that tracks an argument the Town made in support of its request for dismissal of Quinnell's action. Namely, the Town appears to be arguing that the burden of proof should not have shifted to the Town unless Quinnell could first show an ownership interest in the disputed portion, and that she did not show such an ownership interest. If that is the Town's argument, we reject it because, as we have already explained, we see no reason why Quinnell needed to show an ownership interest in the disputed portion before the question of whether the disputed portion was private or public could be addressed.

¶41 Alternatively, the Town may be arguing that the circuit court should have placed the burden of proof on Quinnell to show that the disputed portion was private, as opposed to placing the burden of proof on the Town to show that the disputed portion was public, because Quinnell is the party who originally sought a declaration of the disputed portion's status. If this is the Town's argument, we reject it.

¶42 It is not always true that the party seeking a declaratory judgment has the burden of proof on the underlying substantive issues. *See* ***State ex rel. Lynch v. Conta***, 71 Wis. 2d 662, 675, 239 N.W.2d 313 (1976) ("Because a declaratory judgment action may involve a reversal of the roles of the usual plaintiff and defendant, care must be taken in determining where the burdens of

proof and persuasion lie."). Here, the matter is complicated by the fact that the Town asserted counterclaims against Quinnell alleging that the disputed portion became public by common law dedication and other means. Moreover, there is no presumption that a road is public, even when the road leads to navigable waters. *See* ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 140-41, 365 N.W.2d 622 (Ct. App. 1985). We reasoned in ***Mushel*** that such a presumption of public ownership would place too rigorous a burden of persuasion on persons claiming private ownership. ***Id.*** at 141.[7]

¶43 In light of the posture of this case and ***Mushel***, we fail to see any reason why the circuit court should have required Quinnell to prove that the disputed portion remained private instead of requiring the Town to prove that the disputed portion became public. Accordingly, we conclude that the circuit court correctly placed the burden of proof on the Town.

2. Limitation On Deeds Evidence

¶44 The Town argues that the circuit court erred in restricting the Town's ability to argue and introduce evidence that Quinnell's deeds did not expressly convey any interest in the disputed portion to Quinnell. The Town also asserts that this error resulted in prejudice.

¶45 The Town's argument is unclear and it cites no supporting authority. So far as we can discern, the Town is arguing that, had the jury known that Quinnell's deeds and those of other abutting landowners contained no express

[7] The circuit court here specifically relied on ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 365 N.W.2d 622 (Ct. App. 1985), in placing the burden of proof on the Town, yet the Town fails to address that case.

language granting easements over the disputed portion, the jury would likely have concluded that the disputed portion must have been public because some or all of the abutting landowners travel over portions of the disputed portion that do not abut their individual properties. We are not persuaded.

¶46 The Town does not explain why, given the law as applied to the facts, the only two permissible views of the abutting landowners' situation are that either (1) the landowners needed to have express rights of way over the disputed portion in their deeds, or (2) the disputed portion was public. Among other possibilities, perhaps the owners permitted each other to use the disputed portion without granting an easement. Similarly, the Town does not explain why the abutting landowners' shared use of the disputed portion supported any of the Town's theories at trial for why the disputed portion had become public. We conclude that the Town's argument is insufficiently developed and warrants no further consideration. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider undeveloped arguments).

3. State Transportation Aids Maps As Conclusive Evidence Of Acceptance At Trial

¶47 The Town argues that it is entitled to a new trial because the circuit court usurped the jury's function by instructing the jury that the Town's state transportation aids map was not conclusive evidence of acceptance. As we have already explained in Section B.2., above, however, the Town's maps were not conclusive evidence of acceptance. Consequently, the court's instruction to the jury was an accurate statement of the law.

Conclusion

¶48 In sum, the Town is not entitled to dismissal of Quinnell's action based on her failure to show an ownership interest in the disputed portion of Wisconsin Street, the Town's state transportation aids maps are not conclusive evidence of acceptance, and the Town is not entitled to a new trial. The circuit court's judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.