

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 28, 2010**

A. John Voelker  
Acting 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.

**Appeal No. 2009AP2315**

**Cir. Ct. No. 2008CV92**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOYCE AFFELDT, WALTER ALAN AFFELDT AND DAVID AFFELDT,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**GREEN LAKE COUNTY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Green Lake County:  
WILLIAM M. McMONIGAL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 SNYDER, J. Joyce Affeldt, Walter Alan Affeldt, and David Affeldt (Affeldts) appeal from an order granting summary judgment in favor of Green Lake County. The Affeldts contend that the circuit court erred when it determined

that there were no genuine issues of material fact to preclude summary judgment. They further contend that if Green Lake County is permitted to work County Trunk Highway B (Highway B) to a full width of four rods, it will result in an illegal taking of their property. We conclude that there are no material facts in dispute and the applicable law favors the County. We affirm the summary judgment, although we do so on an alternate theory of law than that employed by the circuit court.

### **BACKGROUND**

¶2 The Affeldts own two farms in the town of Green Lake, which abut Highway B to the north and south. The Affeldts' property was homesteaded in the early 1920s and has since remained in the family's possession.

¶3 Highway B travels east and west and is approximately four miles long. The existence of Highway B dates back to the late nineteenth century. Highway B has existed in its present location and has been maintained by the County for at least twenty years.

¶4 In 2008, the Green Lake County Highway Department scheduled a highway project to be completed on Highway B. The project called for the reconstruction and maintenance of Highway B, including the full right-of-way width of sixty-six feet (four rods). The project was discussed with all the affected property owners along Highway B prior to work being commenced and all approved of the reconstruction and the removal of fences that were within the highway's right-of-way, except for the Affeldts. The Affeldts repeatedly notified the County that the fence line and trees that were on the Affeldts' property were not in the right-of-way and could not be removed. The Affeldts claimed that any

removal, cutting, damaging, or destroying of the fence line or trees on the property would violate their rights as landowners.

¶5 On April 15, 2008, the Affeldts filed a declaratory judgment action with the circuit court asking for a temporary restraining order and permanent injunction against the County, and seeking to immediately stop the County from removing, cutting, damaging, or destroying trees on the Affeldts' property. The County moved the court to dismiss the complaint on its merits. The circuit court denied the Affeldts' request for a temporary restraining order. The court held that the Affeldts failed to provide documentation to support their motion and ordered that the County could proceed with the Highway B project.

¶6 On November 6, 2008, the County moved for summary judgment. The County argued that Highway B is a public highway with a four-rod right-of-way and that the County has the authority to maintain it. The Affeldts countered that summary judgment would be inappropriate because disputed material facts exist as to the width of the right-of-way. In particular, the Affeldts contested the affidavit of registered land surveyor, Jason M. Ingram, who stated that Highway B was a "major" roadway since the 1800s and that the "best determination" of the right-of-way was four rods, in part because the "ancient fences" were inconsistent with a three-rod road. The Affeldts also contested summary judgment on grounds the law favored their rights as property owners and that allowing the County to widen the right-of-way to four rods would result in an unconstitutional taking of their property without compensation.

¶7 Ultimately, after arguments and additional briefing, the circuit court granted summary judgment in favor of the County. The court stated that even though it is venturing "slightly outside the bounds" of summary judgment, there

was “merit to the [C]ounty’s position that every 100 foot property owner cannot have a different fence line otherwise the highway system would result in chaos.” The Affeldts appeal.

### STANDARD OF REVIEW

¶8 We review a summary judgment “independently, using the same methodology as the circuit court.” *City of Prescott v. Holmgren*, 2006 WI App 172, ¶5, 295 Wis. 2d 627, 721 N.W.2d 153. The methodology and standards establishing our de novo review of a trial court’s grant or denial of summary judgment have been repeated many times and need not be restated here. *Zubek v. Edlund*, 228 Wis. 2d 783, 787-88, 598 N.W.2d 273 (Ct. App. 1999); see *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816. Under WIS. STAT. § 802.08(2) (2007-08),<sup>1</sup> a motion for summary judgment may be granted by a circuit court when it determines that there are no material facts that are in dispute in a case and the moving party is entitled to judgment as a matter of law.

### DISCUSSION

¶9 The dispositive issue on appeal is whether Highway B is a recorded, laid out highway and is, therefore, four rods in width under the standards established for improvements on town roads. See WIS. STAT. §§ 82.31(1) and 82.50(1).<sup>2</sup> The Affeldts contend that the road was created by user and that,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated.

<sup>2</sup> The Wisconsin legislature has determined that the “geometric design standards” established for town roads are four rods wide, with only two exceptions for local roads with minimal traffic. See WIS. STAT. § 82.50(1).

regardless of Highway B’s origin, they must be afforded an opportunity to rebut any presumption that the County can work the Highway B right-of-way to a width of four rods. *See Threlfall v. Town of Muscoda*, 190 Wis. 2d 121, 131, 527 N.W.2d 367 (Ct. App. 1994) (the existence of ancient fences within the right-of-way rebuts the statutory presumption that the highway is four rods wide). Essentially, the Affeldts contend that they are entitled to contest the information in Ingram’s affidavit and that summary judgment has robbed them of their day in court. We understand that they have done much research and have facts in their possession that are relevant to the history of Highway B and their existing fences and trees.

¶10 By beginning with the statutory presumption and a property owner’s right of rebuttal, however, the Affeldts put the cart before the horse.<sup>3</sup> The presumption of a four-rod right-of-way is triggered where the highway has “not been fully and sufficiently described or recorded or for which the records have been lost or destroyed” or where the road is an unrecorded highway. *See* WIS. STAT. § 82.31(1) and (2). That is not the case here.

¶11 A “recorded highway” is defined as follows:

[A] highway for which the order laying out or altering the highway ... has been recorded in the office of the register of deeds in the county in which the highway is situated or, for highways that were laid out or altered before January 1, 2005, in the office of the clerk of the town or the county in which the highway is situated.

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<sup>3</sup> The issues as framed by the parties do not bind or limit an appellate court. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

WIS. STAT. § 82.01(8). The term “laid out” means “any formal act or process by which a municipality determines the location of a highway.” Sec. 82.01(4).

¶12 The evidence demonstrating that Highway B is recorded and laid out derives directly from Resolution No. 38 of the Green Lake County Board minutes dated November 21, 1939. The proceeding minutes state:

BE IT RESOLVED by the County Board of Supervisors of Green Lake County duly assembled in regular session begun November 14th, 1939,

THAT the following described road lying wholly in the Towns of Green Lake and Marquette be added to the System of Town Roads maintained by the County:

Beginning at the center of the East one-half of Section 27 at its junction of State Highway 73 and extending west through Section 27, 28 to its junction to what is known as the “Danze’s Tavern Road”—a distance of approximately one mile.”

Presented by  
FRANKLIN JAHNKE, Supervisor  
ADOLPH FREIHEIT, Supervisor

Roll call on Resolution: Ayes—18, Nays—3.  
Passed and adopted this 21st day of November, 1939.

¶13 In her affidavit, Joyce Affeldt references Resolution No. 38 as the county board proceedings that “describe[] what is presently County Highway B. At these proceedings the county board of Supervisors adopted a resolution that this road be added to the system of town roads, that were maintained by the county.” In their brief opposing summary judgment, the Affeldts state, “[D]ocumentation supports that what is now County Highway B was one created by user, became a

town road in 1939, and which was later taken over by the County, probably in the 1940's." The status of Highway B as a recorded highway is undisputed.<sup>4</sup>

¶14 Despite their acknowledgment of Resolution No. 38, the Affeldts build their case around the statute addressing unrecorded highways. They contend that under WIS. STAT. § 82.31(2), the legislature provided a presumption that a right-of-way is four rods wide and that they should have the opportunity to rebut the presumption. That statute states in relevant part: "[A]ny 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 [four rods] wide." *Id.* We acknowledge that in some circumstances, a rebuttable presumption exists. However, the circumstances giving rise to a presumption are not present here. The legislature provided for the presumption in cases where records were unavailable to show the road was recorded and laid out, *see* § 82.31(1), or where the road is an unrecorded highway, *see* § 82.31(2). Here, a record exists of the resolution to create Highway B, including a description of its location, the vote count, passage, and adoption of Highway B as a town highway.

¶15 To overcome summary judgment, the proffered information must be material to the outcome of the dispute. *See Marine Bank v. Taz's Trucking, Inc.*, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90. Here, the record facts establish that Highway B is a recorded highway. Under WIS. STAT. § 82.50(1), a town road has a right-of-way that is four rods wide. Because nothing triggers the

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<sup>4</sup> Upon reflection, the Affeldts appear to retreat from this position by arguing from *Muehrcke v. Behrens*, 43 Wis. 2d 1, 169 N.W.2d 86 (1969), that Resolution No. 38 is insufficient. The *Muehrcke* court held that a clerk's notation in the town record book was insufficient to show that the road was formally laid out. *Id.* at 5, 7-8. This analogy fails. None of the formalities associated with the adoption of Resolution No. 38 were present in *Muehrcke*.

need to resort to the statutory presumption, the facts offered by the Affeldts are not material to the dispute. Summary judgment was appropriate.<sup>5</sup>

### CONCLUSION

¶16 Resolution No. 38, dated November 21, 1939, states that the “road lying wholly in the Towns of Green Lake and Marquette” (which both parties identify as Highway B), be added to the “System of Town Roads” and maintained by the County; thus, Highway B is officially laid out and recorded. The parties acknowledge that Highway B has been maintained by the County for decades. We therefore reject the Affeldts’ contention that this is a case of improvements to an unrecorded highway. Because we conclude that Highway B is a recorded highway subject to the standards set forth in WIS. STAT. ch. 82, the right-of-way is four rods wide.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>5</sup> We do not reach the Affeldts’ constitutional argument because it is premised on their right to rebut a presumption we conclude does not apply.



