COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP888 **Cir. Ct. No. 2011CV35**

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

SCHOOL DISTRICT OF HILLSBORO,

PLAINTIFF-APPELLANT,

V.

CITY OF HILLSBORO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Judgment reversed and cause remanded.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 BLANCHARD, J. In 1965, the Hillsboro School District constructed a high school on District property, former farmland, within the city

limits of the City of Hillsboro. The construction project included creation of a new road, School Road,[1] which provided access to the high school. In 2010, the City improved School Road to address a storm water runoff problem in the area. The City then levied a special assessment against the District to cover the District's portion of the cost of the improvements to the road.

¶2 The District filed a complaint against the City in circuit court, seeking to annul the special assessment. The District moved for summary judgment, arguing that School Road was District property and therefore the City was without authority to construct the improvements or to levy the special assessment. The City also moved for summary judgment, on the ground that School Road was no longer District property but instead had become a public highway belonging to the City, by operation of WIS. STAT. § 82.31(2)(a) (2009-10),[2] because the City had "worked" School Road "as a public highway" for more than ten years before undertaking the improvements.

¶3 The circuit court ruled in favor of the City, dismissing the District's complaint on summary judgment. The court concluded that there was undisputed evidence showing that the City had "worked" the road "as a public highway" for more than ten years.

¶4 Given case law interpreting the concept of "worked as a public highway" in WIS. STAT. § 82.31(2)(a), we conclude that case law allows a

[1] This street or driveway is called by various names in the record. We use School Road, following what appears to be the most common usage in the record.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

property owner to defeat a municipal claim under the statute by showing that such work was at least initially done by permission of the property owner, and that the municipality did not subsequently take unequivocally "hostile" actions regarding use or ownership of the property, meaning actions inconsistent with the property owner's rights. Here, there are reasonable inferences from the parties' affidavits giving rise to factual disputes as to whether the City's work on the road was initially permissive and whether the City subsequently took actions that unequivocally signaled hostility regarding use or ownership of the property. Therefore, neither the City nor the District was entitled to summary judgment and we reverse and remand for further proceedings.

BACKGROUND

¶5 Regarding the creation and maintenance of School Road, the District submitted evidence that included the following. Curt Bisarek, the District's administrator, averred that the school grounds, including School Road, were constructed by the District in 1965. Randy Darcy, who has worked on maintenance for the District since 1986, averred that School Road has only one use, namely, "to access the high school parking lot," and that "the District has always permitted the public to use it for that purpose." Based on this and other evidence, the circuit court characterized School Road as "a driveway connecting the highway [State Highway 33/82, known in the City as Lake Street] to the school parking lot."

¶6 A former president of the school board, Francis Denman, averred that the District "resurfaced" the school parking lot in 1992 and 2001, and his best memory was that, at least in 1992, the resurfacing extended along School Road.

¶7 Darcy averred that, since he began performing maintenance at the District in 1986, "I have plowed School Road many times, each winter…. The City sometimes plows the road. At other times, when it has not, or I have determined that the school staff could not wait, I have plowed the road each year …." Darcy also averred, "[F]rom 1989 on, I have plowed School Road … four to five times each winter." In addition, he averred that he at least occasionally supplemented patching and gravel placement on School Road done by the City: "I have patched potholes and placed gravel on the road or shoulders about once every three or four years."[3]

¶8 On the same topic of work on School Road, the City submitted evidence that included the following. Greg Kubarski, the Mayor of Hillsboro, has resided near School Road his entire life (with memories dating from "the mid-1970s"), and has served as an alder or mayor every year since 1992. Kubarski averred that, throughout his life, while he had seen City trucks plowing School Road, "I have never seen nor heard of any [District] maintenance personnel doing any work on School Road." Kubarski further averred, "Throughout my time as a City official, … the City has always maintained [School Road] as a city street by plowing it, filling in gravel along the shoulders, and otherwise doing the regular maintenance required on city streets." Kubarski averred that, in his capacity as alder and mayor, "I am not aware of there ever being any agreement between the School District and the City … regarding maintenance of School Road."

[3] One particular averment by Randy Darcy is problematic, namely, that "[d]uring the time that I have been head of maintenance for the District, every summer I have trimmed brush and trees along [School Road]." The affidavit never states when Darcy became head of maintenance for the District. We do not consider this averment to stand for anything more than that Darcy trimmed brush and trees along the road over the course of two recent years.

¶9 In a similar vein, but covering a shorter time period, Terry Revels, an employee of the City's street department, averred that, at least since his employment with the City in 2001, he had "performed the same type of road maintenance on School Road … as the City performs on other city streets," including: asphalt patchwork; trimming trees and brush along both sides of the street as needed; adding gravel to the shoulder areas at least once a year, and sometimes more often than that; and plowing snow. In contrast, "I have never seen nor heard of any [District] maintenance personnel doing any work on School Road similar to what I have described above," and "I have not seen any results of any other maintenance work other than the work that the [City] does on School Road."

¶10 The circuit court characterized the above affidavit evidence as showing that "[b]etween 1965 and 2010 the parties shared responsibilities and expenses for road maintenance on an informal, cooperative basis," albeit with the City shouldering a heavier relative burden.

¶11 In August 2010, a City representative made a presentation to the District on a School Road improvement project. The president of the District's board of education, Robert Stekel, averred that the District did not consent to the project before, during, or after the meeting. In October 2010, Stekel further averred, he read a letter to the City's common council stating the District's opposition to the improvement project and asserting that the City was proposing "unauthorized improvements on property not owned by the city."

¶12 In November 2010, the City's common council adopted a resolution authorizing the project, aiming "to improve the storm water drainage and management" in a drainage way near the high school, "including installation of

asphalt concrete pavement, base course, curb & gutter, and all related appurtenant work along School [Road]." The City proceeded to have the improvement project designed, bid out, and constructed, and then levied a special assessment of $56,575.02 against District property abutting the road.

¶13 District Administrator Bisarek averred that the City initiated communications with the District in 2010 regarding a proposed "Service Exchange Agreement" between the two entities, which the parties entered into in December 2010. This agreement addressed, on a going-forward basis, snow plowing of School Road and lawn care in the area.

¶14 The District filed its complaint against the City pursuant to WIS. STAT. § 66.0703(12)(a), which authorizes property owners to challenge special assessments in circuit court. As indicated above, both parties moved for summary judgment. The court issued a written decision and order, followed by a final judgment, granting the City's motion for summary judgment, denying the District's motion for summary judgment, dismissing the District's challenge to the special assessment, and confirming the special assessment. The District appeals.

DISCUSSION

¶15 "We review de novo the grant of summary judgment, employing the same methodology as the circuit court. A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2)." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citations omitted).

¶16 Under summary judgment procedure, the court first examines the complaint to determine if it sets forth a claim for relief, and if it does, the court examines the answer to determine if it joins issue. ***Butler v. Advanced Drainage Sys., Inc.***, 2006 WI 102, ¶18, 294 Wis. 2d 397, 717 N.W.2d 760. If issue is joined, the court examines "the moving party's affidavits to determine whether they establish a prima facie case for summary judgment." ***Id.*** If so, "we review the opposing party's affidavits to determine whether there are any material facts in dispute, or inferences from undisputed material facts, that would entitle the opposing party to a trial." ***Id.***

¶17 Summary judgment is not appropriate if submissions on a material fact are subject to conflicting interpretations where reasonable people might differ as to their significance. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). Every reasonable inference must be drawn in favor of the party opposing the motion for summary judgment. ***Id.***

I. School Road as a Public Highway Under WIS. STAT. § 82.31(2)(a)

¶18 There is no dispute that the District's complaint sets forth a claim for relief and that the City's answer joins issue. Therefore we proceed to the question of whether the City's affidavits establish a prima facie case for summary judgment. The City rests entirely on proof that, in the City's view, supports its argument that School Road became a public highway owned by the City before the 2010 improvement project, by operation of WIS. STAT. § 82.31(2)(a). In other words, the City relies on evidence that, in the City's view, shows that the City "worked" School Road "as a public highway" for more than ten years before 2010. The City's position is that, if it satisfies the "worked" requirement under the

statute, its ownership of School Road defeats any claim by the District that the City could not levy the special assessment.

¶19 As we now explain, assuming without deciding that the City has made a prima facie case for summary judgment, we conclude that the District submitted evidence raising a material factual dispute, given prior court interpretations of the phrase "worked as a public highway" under the statute. This is because the District presents evidence that, at a minimum, supports a reasonable inference that the City's work on School Road began with permission from the District, and the City fails to point to evidence showing that the only reasonable inference arising from evidence of subsequent events is that the City, through unequivocal conduct, signaled to the District that it was taking an action "hostile" to the District's use and ownership of the road.

¶20 From the state's earliest days, the Wisconsin legislature has provided alternative statutory methods for creating a public road. *See* ***Mushel v. Town of Molitor***, 123 Wis. 2d 136, 142-43, 365 N.W.2d 622 (Ct. App. 1985) (addressing two statutory methods and citing 1937 state statutes); ***Blute v. Scribner***, 23 Wis. 357, 358 (1868) (citing revised statutes of 1858).

¶21 The current relevant language is found in WIS. STAT. § 82.31, which is entitled "Validation of highways," found within a subchapter headed "EXISTING HIGHWAYS." As most relevant here, § 82.31(2)(a) provides that "any unrecorded highway that has been worked as a public highway for 10 years or more is a public highway."

¶22 The legislature provided a definition of the type of "work" in this context: "'Worked' means action of the town[4] in regularly maintaining a highway[5] for public use, including hauling gravel, grading, clearing or plowing, and any other maintenance by or on behalf of the town on the road." WIS. STAT. § 82.01(11). This case turns on what it means for the City to have "regularly maintain[ed] a highway for public use," as that concept has been interpreted in case law.

¶23 There is no doubt that, as the circuit court concluded, the City submitted proof, not rebutted by the District, demonstrating that the City performed work on School Road through such activities as hauling gravel, plowing, and other maintenance for more than ten years before the City undertook the School Road project.

¶24 However, the District points to case law establishing that a government body claiming ownership of a road as a result of having "worked" it as a public highway for the requisite ten years "does not acquire prescriptive rights in the road if [that government body's] use of the road was merely permissive."

---

[4] The City contends that, even though WIS. STAT. ch. 82 is entitled "Town Highways," and WIS. STAT. § 82.01(11) speaks in terms of "action of the town," WIS. STAT. § 82.31(2)(a) may apply to a highway alleged to have become the public highway of a city, as opposed to a town. This point, which the circuit court resolved in the City's favor, is not contested by the District on appeal, and support exists for the City's position. *See* ***City of Prescott v. Holmgren***, 2006 WI App 172, ¶¶9-10, 295 Wis. 2d 627, 721 N.W.2d 153 (addressing § 82.31 in the context of a city street). Therefore, we take the District to have conceded the City's position on this point.

[5] The District does not contend that School Road is not a "highway" for purposes of WIS. STAT. § 82.31(2)(a), and in any case such a contention would appear to be without merit. *See* WIS. STAT. § 340.01(22) (defining "highway" to include "all public ways and thoroughfares," including "roads or driveways upon the grounds of public schools, as defined in s. 115.01(1)").

Ruchti v. Monroe, 83 Wis. 2d 551, 556, 266 N.W.2d 309 (1978).[6] The court in ***Ruchti*** used the following terms to explain this potential bar to prescriptive rights:

> Generally, unexplained use of an easement over enclosed, improved or occupied lands for 20 years is presumed to be adverse. ***Bino v. City of Hurley***, [14 Wis. 2d 101, 109 N.W.2d 544 (1961)]; ***Shellow v. Hagen***, 9 Wis. 2d 506, 510, 101 N.W.2d 694 (1960). Likewise, under sec. 80.01(2), Stats., where work has been done and public money expended on a road under the direction of public officials, there is sufficient public use to establish it as a highway. ***Blute v. Scribner***, 23 Wis. 357 (1868). Thus, upon a showing by the town of use by the public for more than 20 years or maintenance by the town for 10 years, *the landowner has the burden of proving permissive use under some license[,] indulgence[,] or special contract*. ***Shellow v. Hagen***, *supra*; ***Carlson v. Craig***, 264 Wis. 632, 60 N.W.2d 395 (1953).

Id. at 557 (emphasis added) (inserted commas appear in ***Shellow v. Hagen***, 9 Wis. 2d 101, 109 N.W.2d 644 (1961), and in the opinion ***Shellow*** quotes for this proposition). ***Ruchti*** did not address the question of what might constitute proof of "merely permissive" use in this context, because in ***Ruchti*** the averments of the property owner on this topic were "purely conclusory." ***Id.*** at 558. Nonetheless, it is clear under ***Ruchti*** that, if the District can prove permissive use, then the City's argument that it acquired prescriptive rights by "work[ing]" the road "as a public highway" would be defeated.

¶25 We pause to underscore that ***Ruchti***'s discussion regarding permissive use in the context of the statutory "worked" concept is an interpretation

[6] The court in ***Ruchti v. Monroe***, 83 Wis. 2d 551, 266 N.W.2d 309 (1978), addressed permissive use in the context of a former version of WIS. STAT. § 82.31(2)(a). The relevant language of that version, WIS. STAT. § 80.01(2) (1973), matched the current language: "All highways not recorded which have been worked as public highways 10 years or more are public highways." Neither party in this case contends that any aspect of ***Ruchti*** does not apply to this case because of statutory revisions since then.

of the language of the statute that is based, or at least was originally based, on the common law. That is, the "permissive use" bar to the "worked" method of creating a public highway under the statute is not apparent from the language of WIS. STAT. § 82.31(2)(a) or definitional provisions in WIS. STAT. ch. 82. While ***Ruchti*** itself involved application of the statute, both the ***Shellow*** and ***Carlson*** cases, on which ***Ruchti*** relies for these propositions, were prescriptive easement cases that did not involve the statute. *See* ***Shellow***, 9 Wis. 2d at 510-15; ***Carlson v. Craig***, 264 Wis. 632, 633-37, 60 N.W.2d 395 (1953). Regardless, we are bound by ***Ruchti***, which stands as a directive from our supreme court that courts must interpret the statute to allow a property owner to avoid a prescriptive easement if the pertinent work was done with the property owner's permission.

¶26 Given ***Ruchti*** and summary judgment methodology, we conclude that the dispositive question is whether the District submitted any evidence from which the fact finder could reasonably infer permissive use. As we have indicated, it cannot be disputed that the City performed the requisite type of work on School Road for ten years. The question is whether there is a reasonable inference that the work was done with the District's permission.

¶27 The City argues that the District failed to submit any evidence of District permission. We conclude that there are two fatal defects in the City's argument.

¶28 First, as the District points out, in this context, a "use that is permissive in the beginning can be changed into one that is hostile *only by the most unequivocal conduct on the part of the user*." ***County of Langlade v. Kaster***,

202 Wis. 2d 448, 455, 550 N.W.2d 722 (Ct. App. 1996) (emphasis added) (citing ***Lindokken v. Paulson***, 224 Wis. 470, 475, 272 N.W. 453 (1937)).[7] The City suggests no reason why this common law rule from ***County of Langlade*** should not apply here. Rather, the City argues there is no proof of initial permission by the District. Indeed, the City relies on ***County of Langlade*** for some of its arguments. Moreover, the application of ***County of Langlade***'s common law rule in the context of the ten-year "town worked" statute is consistent with the approach in ***Ruchti***.

[7] The passage from ***Lindokken v. Paulson***, 224 Wis. 470, 272 N.W. 453 (1937), cited in ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 455, 550 N.W.2d 722 (Ct. App. 1996), for this proposition, is written in unqualified terms:

> The law is very rigid with respect to the fact that a use permissive in the beginning can be changed into one which is hostile and adverse only by the most unequivocal conduct on the part of the user. The rule is that the evidence of adverse possession must be positive, must be strictly construed against the person claiming a prescriptive right, and that every reasonable intendment should be made in favor of the true owner.

Lindokken, 224 Wis. at 475 (citing Wisconsin, Minnesota, and Connecticut precedents). The rationale for this rule in this context may be found in this statement of our supreme court, albeit a statement made in the context of "wild" and "unoccupied" land:

> The law affords ample opportunity for the establishment of highways where needed. It is not necessary to penalize a considerate owner who has permitted travel over his uninclosed lands in order that the neighborhood may have highways. The town authorities are clothed with power to lay out highways wherever public necessity requires. While it may involve some public expense, moral considerations require that such expense be borne by the public rather than that fanciful considerations be invoked to impose a burden upon a landowner by reason merely of his neighborly indulgence.

State v. Town Bd. of Tomahawk Lake, 192 Wis. 186, 195, 212 N.W. 249 (1927).

¶29 In ***County of Langlade***, the presumption that an initial permissive use remains permissive was applied to wooded land used by snowmobilers, based on proof that the owner of the property "invited the public to use the road at will." ***Id.*** at 455. Thereafter, the county worked the road by replacing a bridge on the road and by, on multiple occasions, requiring loggers to restore the road to the condition it had been in before the loggers used it. ***Id.*** at 454. This court concluded that the county's requirement that the loggers restore the road "is not unequivocal evidence of a claim of ownership on the part of the County," in part because the county had a financial interest in keeping the road in good condition. ***Id.*** at 456. "Improving the road to efficiently log these areas and returning the road to its preexisting state is at least as consistent with a permissive use of the road as it is with a hostile claim of ownership." ***Id.***

¶30 As the District suggests, the requirement explained in ***County of Langlade*** means in this case that: (1) if there is evidence in the summary judgment materials to support a finding or reasonable inference that the City's work was permitted by the District when first begun, then (2) to prevail on summary judgment, the City would be required to show that the only reasonable inference from the submissions is that, sometime after beginning the work, the City engaged in "unequivocal conduct" signaling "hostile" use of School Road.

¶31 Addressing the first point, evidence of initial permissive work, there is support in the affidavits for, at a minimum, a reasonable inference that the City's work was permitted by the District when it began. While our review of the record is de novo, we conclude that the circuit court's conclusion, based on the affidavits, is one reasonable inference, namely, that, from the time the District constructed School Road in 1965 until 2010, the District and the City "shared responsibilities for road maintenance on an informal, cooperative basis." That is,

there is a reasonable inference that the District, like the property owner in ***County of Langlade***, "invited the public to use the road at will," including the City and its work crews. *See* ***id.*** at 455.

¶32 It is true that the District has not produced a document or averment that, in itself, reveals or represents an explicit grant of permission for the City to begin working School Road. The District relies instead on reasonable inferences from averments suggesting a cooperative relationship between the District and City regarding maintenance and use of a road that was apparently open to the public, including to City workers, from the time of its construction. The District's affidavits from Curt Bisarek, Francis Denman, and Randy Darcy create a contested factual issue regarding initial permission; they allow for a reasonable inference that initial work was allowed by the District.[8]

¶33 More specifically, evidence that includes the following supports a reasonable inference that there was an informal or implicit long-standing agreement between the District and City that the two entities would share aspects of maintenance on School Road. As referenced above, communications between District and City officials in November and December 2010, culminated in a "Service Exchange Agreement" between the two entities addressing plowing of School Road and lawn care in the area on a going-forward basis. We disagree with the City's various arguments that the discussions and agreement came too

[8] To confusing effect, in the course of discussing the permission issue, the District raises a conceptually distinct argument that a municipality cannot rely on WIS. STAT. § 82.31(2)(a) to create a public highway "on property of another governmental body," such as a school district. This appears to be part of an argument that the District alludes to several times, but fails to adequately develop, referenced in the second section of our discussion below, and does not rise to the level of a clear legal argument supported by authority in any location in its briefing.

late to be relevant and must be construed as being completely off point, and instead conclude that they support at least the inference of a long-standing agreement to share maintenance duties on the road.

¶34 To cite another example of relevant proof, the City administrator stated in one communication that "the City and School District have historically shared services relating to plowing and lawn care." "Historically" could be interpreted to mean from the beginning of the road's use. This interpretation would be at least consistent with the implication, from the averments of District maintenance worker Darcy and former school board president Denman, that the District and the City shared plowing and surface maintenance tasks from at least 1986 to the present, including complete resurfacing of the road by the District, not by the City, in 1992.

¶35 Turning to the second point, conclusive proof of "unequivocal conduct" signaling "hostile" use of School Road, the City not only fails to explain how the only reasonable inference from the affidavits is that it engaged in "unequivocal conduct" signaling "hostile" use, it fails to point to *any* evidence that could support such a conclusion. This implicitly concedes the point.

¶36 To clarify, "hostile" in this context does not necessarily require "an unfriendly intent and does not mean a controversy or a manifestation of ill will. An act is hostile when it is inconsistent with the right of the owner and not done in subordination thereto." ***Shellow***, 9 Wis. 2d at 511; *see also* ***Lindokken***, 224 Wis. at 475 ("It does not appear from the evidence that any use made by the plaintiff of the way in question *in any way impaired the rights* of the defendant in the enjoyment of his rights as the owner of the servient estate.") (emphasis added); ***id.*** at 473-74 (question presented is whether use of way by plaintiff "for purposes

other than those specified in the grant of itself *operated to bring home to the defendant the fact that the plaintiff was claiming a right to do so in hostility to the interests of the defendant*") (emphasis added). Thus, the type of relevant evidence that the City fails to point to could include evidence of conduct by the City inconsistent with the right of the District to own and use School Road, that impaired the District's rights, or that brought home to the District that the City was claiming use or ownership of the road beyond an agreed shared maintenance with the District. The City does not point to any such evidence.

¶37 In addition, following the logic of ***County of Langlade***, we note that there is a reasonable inference based on the record that, in helping to keep School Road drivable and clear, the City was very likely at least in part motivated by its own interests. The only reasonable possibility is that City residents would consider Hillsboro a considerably less attractive place to reside and pay taxes if they or others routinely encountered problems travelling on the roadway to and from one of the community's main public schools.

¶38 The second defect in the City's argument is that the City appears to operate from an unsupported assumption about the meaning of the phrase "license[,] indulgence[,] or special contract." Focusing exclusively on the first and last terms in the series, the City appears to suggest that, in order to prove permission, the District must point to an agreement in the form of a license or a contract. Indeed, at one point in the City's argument, the term "indulgence" drops out entirely, even though the complete phrase appears repeatedly in the case law. However, logic and faithfulness to precedent dictate that we start with the assumption that indulgence means something in this context and that it does not mean precisely the same thing as either license or special contract. The parties do not direct us to any definition of the term indulgence in this context, and we do not

locate one on our own in such authority as BLACK'S LAW DICTIONARY. The most relevant definition contained in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) appears to be the following: "a favor granted or an instance of forbearance."

¶39 Turning again to the circuit court's accurate characterization of the summary judgment record, there is a reasonable inference that, for forty-five years after construction of School Road, the District and the City maintained School Road on an informal and cooperative basis. We conclude that this fact, at a minimum, allows for a reasonable inference of "a favor granted or an instance of forbearance." The City fails to explain why such an informal, cooperative sharing of tasks to keep the road drivable and in repair would be insufficient to show "a favor granted or an instance of forbearance" by the District related to work on School Road.

¶40 The City points to a number of pieces of evidence that it argues demonstrate that District and City officials considered School Road to be a city street during the 1990's or 2000's. These include: a May 2007 letter from the District's then superintendent to the City's then mayor, referring to School Road as a "city road;" District requests for City attention to erosion issues around the high school parking lot; and inventories of local roads submitted by the City to the state department of transportation in 1994 and 1995, which included School Road. However, the City fails to develop an argument why we should conclude that any of these individual pieces of evidence, considered alone or in any combination, either (1) preclude a reasonable inference of initial permission or (2) preclude a reasonable inference that the City did not unequivocally signal hostility regarding use or ownership of the road. Some or all of the pieces of evidence cited by the

City may be relevant at trial to shed light on one or both of these topics, but the evidence is not dispositive on either topic in the summary judgment context.

¶41 In sum, neither party presented the circuit court with proof sufficient to merit summary judgment in its favor based on the terms of WIS. STAT. § 82.31(2)(a), as construed in the case law.

II. Balance of Arguments

¶42 We now briefly address arguments by the parties that form a second set of purported additional issues. While not entirely clear to us, it appears that, in the main, the District intends in these arguments only to bolster its position that the City has no statutory authority to levy the special assessment at issue in this case *unless* the City prevails on the WIS. STAT. § 82.31(2)(a) issue discussed above. If that is all that the District means to argue, we do not construe the City to be arguing to the contrary. Therefore, we do not consider this appeal to present the issue of whether there is some basis, other than § 82.31(2)(a), upon which the City could have authority to levy the special assessment against the District.

¶43 However, in places in its briefing, the District may be suggesting one or more positions to the effect that: (1) WIS. STAT. § 82.31(2)(a) applies only to highways originally owned by private property owners (as opposed to those owned by governmental units, such as school districts), or that (2) for some other or additional reasons, the City cannot levy the assessment on the District, even if School Road became a public highway under § 82.31(2)(a). If the District intends to make any such argument, we reject it as inadequately briefed and undeveloped. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997); ***State v. Pettit***, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

¶44 The City's responses to these District arguments are also confusing. In any case, we do not consider the City to have presented, at least in this appeal, an adequately briefed or developed argument that, if the District were to prevail at trial on the WIS. STAT. § 82.31(2)(a) argument discussed above, the City nonetheless has legal authority to levy the special assessment for these improvements on some other grounds.

CONCLUSION

¶45 For these reasons, we reverse the circuit court's grant of summary judgment to the City of Hillsboro and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.