

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 2, 1996**

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0210-FT

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**GARY SUTRICK and  
DEBORAH SUTRICK,**

**Plaintiffs-Respondents,**

**v.**

**MYLES WELLNITZ and  
DAWN WELLNITZ,**

**Defendants-Appellants.**

APPEAL from a judgment of the circuit court for Oconto County:  
LARRY JESKE, Judge. *Cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Myles and Dawn Wellnitz appeal a judgment awarding Gary and Deborah Sutrick an eight-and-one-fourth-foot-wide strip of land along the parties' boundaries.<sup>1</sup> The Wellnitzes argue that the trial court

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

erroneously concluded that § 80.01(2), STATS., sets up an un rebuttable presumption that an unrecorded road is four rods wide. Because the court's decision is ambiguous, we remand for specific findings.

The Wellnitzes' lot lies to the south of the Sutricks' lot. The Sutricks' lot is adjacent to the south line of Evergreen Road. Gary Sutrick drilled a well near the border of the two adjoining lots. A dispute arose whether the well was on the Sutricks' land or the Wellnitzes' property. The starting point for the legal descriptions of both lots is the south line of Evergreen Road. If Evergreen Road is a three-rod road, the well is on the Wellnitzes' property. If it is a four-rod road, the well is on the Sutrick parcel.

Kim Pritzlaff, a surveyor, testified as an expert. He stated that there were no records concerning the width of Evergreen Road. He based his measurements on field evidence, such as the center of the road and fence lines along the roadway path. He testified that a fence line was located along the south line of the road. He further testified that when no records are present, as here, a road is generally presumed to be four rods wide pursuant to ch. 80, STATS. However, the road as it was used was only three rods wide.

The trial court found that the county highway department has monumented Evergreen Road at three rods using steel right-of-way posts and signs. It also found that there is a record from 1912 indicating that a portion of Evergreen Road a half-mile to the east of the disputed area is laid out as a three-rod road. The court concluded, however, that although the road has been maintained by the county for more than thirty years, there is nothing recorded concerning its exact size in the disputed area and therefore § 80.01, STATS., governs. The court stated: "[T]he Court must follow the dictates of 80.01 Wis. Stats.<sup>2</sup> The statute uses the word 'presumption' that it is a four rod road. The statute does not say 'rebuttable presumption.'"

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<sup>2</sup> Section 80.01(2), STATS., provides in part: "All highways not recorded which have been worked as public highways 10 years or more are public highways, and are presumed to be 4 rods wide ...."

The presumption is rebuttable. The application of a statute to a particular set of facts is a question of law that we review de novo. *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146-47 (1979). The effect of a presumption is to compel the fact finder to reach a conclusion absent evidence to the contrary. *McCarty v. Weber*, 265 Wis. 70, 73, 60 N.W.2d 716, 718 (1953). Section 903.01, STATS., provides:

Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Upon proof of the "basic facts," § 903.01, STATS., shifts both the evidentiary burden of production and the burden of persuasion to the party against whom the presumption is directed. *In re M.A.V.* 149 Wis.2d 548, 553, 439 N.W.2d 829, 832 (Ct. App. 1989).

Here, the basic fact is that Evergreen Road is an unrecorded public highway worked for more than ten years. As a result, § 80.01, STATS., imposes on the Wellnitzes the burden of proving that it is more probable than not that Evergreen Road is less than four rods wide. The existence of ancient fences within the four-rod width has been held to rebut the statutory presumption that a road is four rods wide. *Threlfall v. Town of Muscoda*, 190 Wis.2d 121, 131, 527 N.W.2d 367, 371 (Ct. App. 1994).

The Wellnitzes argue that the trial court misapplied § 80.01, STATS., when it concluded, in effect, that § 80.01 was not rebuttable. We conclude it is ambiguous whether the trial court misapplied § 80.01. The trial court's opinion could be interpreted to say that the presumption is irrebuttable as a matter of law, or that the evidence is insufficient to rebut the presumption.

Because the Wellnitzes have offered evidence to rebut the four-rod presumption, the trial court must determine whether they have met their burden to prove whether it is more probable than not that the road is less than four rods. We therefore remand to the trial court to clarify this determination. The trial court may admit additional evidence in its discretion.

*By the Court.* – Cause remanded for further proceedings.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.