COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2006

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.

Appeal No. 2005AP1962 **Cir. Ct. No. 2003CV146**

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

BRUCE GEBHART, A/K/A ROBERT BRUCE GEBHART, SHARON E. GEBHART, A/K/A SHARON P. GEBHART, MICHAEL E. KRAUSE, RICHARD N. KUTZ, CHARLES P. SAVOIE, RICHARD C. STELLMACHER, BARBARA E. STELLMACHER, BRIAN K. PRICE, AND CAROL L. PRICE,

PLAINTIFFS-APPELLANTS,

V.

GREEN LAKE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green Lake County: LEWIS R. MURACH, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Bruce and Sharon Gebhardt, Michael Krause, Richard Kutz, Charles Savoie, Richard and Barbara Stellmacher, and Brian and Carol Price (the property owners) are owners of real estate located along County Highway PP in Green Lake County (the County). In this action, the property owners sought to prevent the County from removing or destroying trees as part of a highway improvement project. The trial court dismissed two of the property owners' claims pursuant to a pretrial motion to dismiss filed by the County. It dismissed their remaining two claims after a trial to the court. We affirm the trial court's judgment.

¶2 WISCONSIN STAT. § 80.01(2)(a) (2001-02)[1] provides that, with some exceptions that are inapplicable here, "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." It is undisputed that this presumption applies to Highway PP. However, the property owners contend that the evidence presented by them rebutted the presumption that Highway PP is a four-rod road with a sixty-six-foot right-of-way. They contend that the judgment must be reversed and remanded with directions to the trial court to declare that Highway PP has a three-rod right-of-way, and to enjoin the County from cutting trees on their property outside of that right-of-way. Alternatively, if this court upholds the trial court's determination that Highway PP is a four-rod highway with a sixty-six-foot right-of-way, the property owners request that this court reinstate and reopen testimony on their third and fourth causes of action, which alleged that no reasonable public

[1] WISCONSIN STAT. § 80.01(2)(a) (2001-02) has been renumbered as WIS. STAT. § 82.31(2)(a) (2003-04). However, consistent with the parties' briefs, we will refer to § 80.01(2)(a) (2001-02). In all other citations, references to the Wisconsin Statutes are to the 2003-04 version.

necessity exists for the destruction of trees in the right-of-way and that such destruction constitutes waste.

¶3 The property owners' first argument is that the trial court "erred" in concluding that they failed to rebut the statutory presumption that Highway PP is four rods wide.[2] We conclude that the evidence supports the trial court's finding that Highway PP is a four-rod road and that no basis exists to disturb its determination that the property owners failed to rebut the presumption set forth in WIS. STAT. § 80.01(2)(a).

¶4 At trial, the property owners relied extensively on the testimony of Gerald M. Riske, a licensed surveyor retained by them to determine the width of Highway PP. Riske concluded that Highway PP is three rods wide. The factors relied upon by him in reaching this conclusion were detailed in his testimony and exhibits presented by the property owners at trial. On appeal, the property owners rely upon his testimony, as well as testimony from themselves and prior residents of the area regarding past maintenance practices of the County, and the location of fences, fence remnants, culverts, embankments, agricultural fields, trees, stumps,

[2] Counsel phrases all ten of the issues raised in the property owners' brief-in-chief as questions of whether the trial court "erred." However, many of the property owners' arguments are challenges to factual findings made by the trial court, including its finding that Highway PP is a four-rod road and its finding that encroachments in the right-of-way affect only twenty percent of the length of Highway PP. The standard of review applicable to such issues is whether the trial court's findings are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The property owners also challenge discretionary decisions by the trial court, including decisions regarding the admission of evidence and its denial of their request for a continuance to present the testimony of Ronald Becker. The applicable standard of review for such issues is whether the trial court erroneously exercised its discretion. We caution counsel to carefully consider the standard of review when phrasing issues and arguments and to state the issues fully and accurately in light of the correct standard of review.

utility poles, and an old barn and barn foundation. Based upon this evidence, they contend that they rebutted the presumption set forth in WIS. STAT. § 80.01(2)(a).

¶5 When trial is held to the court, the trial court's factual findings will not be reversed unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The trial court is the ultimate arbiter of the credibility of the witnesses. ***Id.*** at 644. This includes the testimony of expert witnesses. ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). Where more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. ***Noll***, 115 Wis. 2d at 644.

¶6 Viewing the testimony and other evidence presented in this case as a whole, the trial court found that the property owners failed to rebut the statutory presumption and that Highway PP constitutes a four-rod road with a sixty-six-foot right-of-way. Based upon our review of the record, we conclude that the trial court's finding is not clearly erroneous.

¶7 At trial, evidence indicated that Highway PP is three miles long, extending from County Highway F to Highway 23. Evidence indicated that fourteen previous survey maps by five different surveyors provided that Highway PP is a four-rod road with a sixty-six-foot right-of-way. In addition, evidence indicated that some of the property owners received deeds which provided that the portion of their property that abutted a side of Highway PP was subject to a thirty-

three-foot right-of-way highway easement.[3] Based upon the deeds, prior surveys, field observations, and the statutory presumption, Alan Shute, the county surveyor and land development director for Green Lake County, opined that Highway PP is a four-rod road.

¶8 Robert Podgorski, a Green Lake County highway commissioner, also testified that the County considers Highway PP to be a four-rod road.[4] He testified that only fifteen to twenty percent of the three-mile length of Highway PP contains encroachments, like fences or trees, within the sixty-six-foot right-of-way. He testified that the trees and fences are sporadic and do not appear to create a boundary line along the road or right-of-way. In addition, he testified that Highway PP has been maintained as a four-rod road.

¶9 Podgorski's testimony was consistent with that of the other witnesses presented by the County, who indicated that Highway PP is primarily surrounded by rural agricultural fields. Kathy Roeder and Joseph Draeger are property owners along Highway PP who did not join in this lawsuit. They estimated that eighty percent of the frontage on Highway PP is not subject to encroachment by trees or fences, and that the trees and fences are sporadic in the remaining twenty percent, forming no identifiable line or boundary. Similarly,

[3] We recognize that after this action was commenced, some of the property owners recorded affidavits to correct what they alleged was an erroneous reference to a thirty-three-foot right-of-way. While this was evidence to be considered by the trial court, it was not determinative as to the width of the right-of-way.

[4] Podgorski testified that the County maintains records in which it designates some, but not all, county roads by width of the right-of-way. While acknowledging that Highway PP is listed in the County's "black book" as "no width given" and "no description," he testified that the County deems it a four-rod road. He also testified that Dead End Road, which extends south of Highway PP where it ends at Highway 23 and is designated in the "black book" as a road of less than four rods, is not part of Highway PP.

Roeder testified that the tree stumps from trees removed from the Draeger property are staggered, forming no uniform boundary line.

¶10 The testimony of Podgorski regarding maintenance of the road and right-of-way was consistent with the testimony of three employees of the Green Lake County Highway Department, who testified that they have performed maintenance work on Highway PP and that the County maintains it as a four-rod road, handling it the same as other county highways. They testified that they mow grass and brush to four rods and mow around trees and stumps, getting as close to steep ditches as they can. Douglas Lichtenberg, a twenty-seven-year employee, testified that although he did not mow past fences and there had been more fences along the road in the past, he believed most were outside the four-rod right-of-way. Lichtenberg's testimony was corroborated by Charles Buss, who supervises maintenance on Highway PP and also indicated that the trees along the highway appeared to be random.

¶11 Based upon this evidence, no basis exists to disturb the trial court's determination that the property owners failed to rebut the presumption that Highway PP is a four-rod or sixty-six-foot wide road.[5] Consequently, the property

[5] In upholding the trial court's finding, we reject the property owners' contention that factual similarities between this case and ***Threlfall v. Town of Muscoda***, 190 Wis. 2d 121, 527 N.W.2d 367 (Ct. App. 1994), compel judgment in their favor. In ***Threlfall***, the appellate court relied on the existence of "ancient fences" (most of which were still in existence) to find that property owners rebutted the presumption that a gravel road bisecting their property for about a half-mile was four rods wide. ***Id.*** at 125, 128-29. However, each case must stand on its own facts. The facts in this case are detailed above and support the trial court's finding that the property owners failed to rebut the statutory presumption.

owners' request for a judgment declaring Highway PP to be a three-rod road was properly denied.[6]

¶12 The trial court also rejected the property owners' claim that removal of the trees within the four-rod right-of-way is unnecessary and will constitute waste. Waste is unreasonable conduct by the owner of a possessory estate that results in physical damage to the real estate and substantial diminution in the value of the estate in which others have an interest. ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 381, 254 N.W.2d 463 (1977).

¶13 The trial court allowed the property owners to present evidence in support of their claim of waste.[7] It ultimately found that they failed to prove that

[6] In a related argument, the property owners contend that the trial court made a clearly erroneous finding when it found that the encroachments claimed to exist by them involve less than twenty percent of the length of Highway PP. They contend that when considered in its entirety, the evidence establishes that more than fifty-five percent of the roadway had encroachments falling within a four-rod right-of-way. However, the trial court's finding that encroachments exist along less than twenty percent of the roadway is supported by testimony from Podgorski, Roeder, and Draeger and a statement in Riske's testimony. Even accepting that the totality of Riske's testimony does not support a finding that encroachments involve less than twenty percent of the roadway, the remaining evidence supports a determination that encroachments in the four-rod right-of-way are limited to twenty percent of the road's length.

[7] The trial court referred to the property owners' presentation of evidence on their claim of waste as an "offer of proof" because it was uncertain whether they were entitled to maintain such a claim if they failed to rebut the presumption in WIS. STAT. § 80.01(2)(a) and Highway PP was determined to be a four-rod road. However, after hearing the property owners' presentation of their case, it made findings of fact, including a finding that the County's intended conduct in its use of the land was not unreasonable. Because the trial court was the finder of fact in this case and its finding is supported by the evidence at trial, we uphold the trial court's dismissal of the claim for waste.

the County's anticipated use of the roadway was unreasonable.[8] The trial court's finding is supported by the evidence.[9]

¶14 At trial, Podgorski testified as to the need for the improvement project, as did Buss and Orrin Helmer, the chairman of the Green Lake County Board and highway committee. Podgorski testified that the project is needed to enlarge the narrow shoulders and poor drainage on Highway PP. He testified that the project will provide eleven-foot lanes with three-foot shoulders, new culverts, better ditches, and an improved road surface. He testified that use of the complete four-rod right-of-way was necessary to complete the work and that tree removal was necessary so that a motorist would not run off the road and hit a tree. Helmer corroborated Podgorski's testimony, indicating that ditches will be improved to drain water from the roadway, utilities will be moved back, and trees will be removed in the right-of-way. Podgorski, Buss and Helmer indicated that the safety of the public, now and in the future, was a factor in making the improvements and clearing obstructions in the right-of-way.

¶15 Based upon this evidence, no basis exists to disturb the trial court's finding that the property owners failed to show that the County's anticipated use of the four-rod right-of-way, including cutting trees in it, is unreasonable. Consequently, we uphold the dismissal of the property owners' cause of action

[8] For purposes of its decision, the trial court accepted the property owners' allegation that the County's four-rod right-of-way was a "possessory estate." We do the same for purposes of this decision.

[9] The property owners argue that the trial court merely found that the County's use of the road for roadway purposes is not unreasonable. However, the trial court was clearly aware that the property owners were challenging the County's decision to cut down trees within the right-of-way. Its finding that the County's anticipated use of the road is not unreasonable therefore clearly encompasses a determination that cutting the trees is not unreasonable.

alleging waste. Based upon the same evidence, we reject the property owners' challenge to the trial court's finding that the County established a need for a safe and efficient traffic path. The testimony of Podgorski, Helmer and Buss supported a finding that improving Highway PP, including removing trees in the right-of-way, would make the road safer and reduce the risk of serious injury to motorists. Evidence of a history of accidents on the road was not necessary to make such a finding.

¶16 The property owners also object to the trial court's pretrial dismissal of their third cause of action, as set forth in their second amended complaint. In that complaint, the property owners alleged that WIS. ADMIN. CODE § TRANS 205 (1996) "sets forth design standards for county highways." They further alleged that the County had no right or need to destroy trees within the right-of-way because the trees do not interfere with the use of Highway PP by the public and there is no reasonable public necessity for destroying them.

¶17 When a motion to dismiss a complaint is filed, the facts set forth in the complaint must be taken as true and the complaint dismissed only if it appears certain that no relief can be granted under any set of facts the plaintiff might prove in support of his or her allegations. ***Meyer v. The Laser Vision Inst.***, 2006 WI App 70, ¶3, __ Wis. 2d __, 714 N.W.2d 223, *review dismissed*, 2006 WI 108, __Wis. 2d __, 718 N.W.2d 728. The court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim. ***Id.*** Whether the complaint states a claim is a question of law that this court reviews de novo. ***Id.***

¶18 As noted by the trial court, nothing cited by the property owners in opposition to the motion to dismiss provided a basis to conclude that their

allegations established a cause of action against the County. Their argument on appeal similarly fails. They cite ***Lehmann v. Waukesha County Highway Comm'n***, 15 Wis. 2d 94, 97-98, 112 N.W.2d 127 (1961), but this case simply states that widening a highway is a lawful public purpose and that the plaintiffs could not challenge the County's determination of necessity except by establishing fraud, bad faith, or a gross abuse of discretion. Nothing in the property owners' allegations reaches this level. The third cause of action was therefore properly dismissed.[10]

¶19 The property owners next challenge the trial court's refusal to grant a continuance on the second day of trial to permit them to present the testimony of Ronald Becker, an employee of the Department of Transportation. A decision to grant or deny a continuance lies within the discretion of the trial court. ***Robertson-Ryan & Assocs. v. Pohlhammer***, 112 Wis. 2d 583, 587, 334 N.W.2d 246 (1983). This court will not disturb the trial court's decision absent an erroneous exercise of discretion. ***Schwab v. Baribeau Implement Co.***, 163 Wis. 2d 208, 216, 471 N.W.2d 244 (Ct. App. 1991). We will uphold the trial court's decision if the record shows that it in fact exercised discretion and there is a reasonable basis for its decision. ***Id.*** at 215.

¶20 We conclude that the trial court acted within the scope of its discretion in denying a continuance. The record reveals that counsel for the property owners subpoenaed Becker to appear and testify on the first day of trial. At trial, the trial court elected to first hear testimony on the claim that Highway PP

[10] As already stated, this claim was dismissed before trial. However, at trial, the trial court found that the County's decision to cut the trees was reasonable. It would follow that a reasonable public necessity also existed for cutting the trees.

was not a four-rod road, noting that resolution of that claim would impact the claim for waste. Because Becker's testimony related to the waste claim, counsel for the property owners elected to release him from the subpoena so that he could return to his office, stating that he should return the next day. However, before Becker left, the trial court also stated: "If you really want to testify, maybe we can find a way to work it out for you." Counsel merely replied, "Tomorrow afternoon," and proceeded to call a different witness.

¶21 When Becker did not return to testify on the second day of trial, counsel requested a continuance. The trial court denied the request, noting that counsel could have requested that Becker's testimony be taken out of order, but had not done so even when the trial court stated to counsel and Becker that something could possibly be worked out.

¶22 Neither the trial court nor the County was responsible for Becker's failure to return on the second day or for counsel's failure to issue a subpoena for the second day. Moreover, the trial court's decision to hear testimony on the first claim before proceeding to the issue of waste cannot be deemed unreasonable. Because counsel elected to release Becker from his subpoena without asking the trial court to take his testimony out of order on the original date, even when the trial court indicated that it would try to work it out, no basis exists to conclude that the trial court erroneously exercised its discretion by denying the continuance.

¶23 In their final arguments, the property owners contend that the trial court erred in concluding that they were required to show a diminution in value of their property in order to secure injunctive relief. They also object to the trial court's exclusion of evidence as to tree replacement costs and testimony from David Ryan as to the projected diminution in value of their property. However,

because we uphold the trial court's determinations that Highway PP is a four-rod road and removal of the trees does not constitute waste, we need not reach these issues.

By the Court.—Judgment affirmed.

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