

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 25, 2002**

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. 01-1741  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-19**

**IN COURT OF APPEALS  
DISTRICT IV**

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**ROBERT DERKS AND JOANNE DERKS,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**TOWN OF SEVEN MILE CREEK,**

**DEFENDANT-RESPONDENT,**

**NEIL NEMITZ AND EUGENE RIDDLESTINE,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Juneau County:  
JOHN W. BRADY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM Robert and Joanne Derks appeal a judgment which directed a verdict against them on their claims for trespass, negligent destruction

of property, and a violation of their rights as landowners abutting a public highway under WIS. STAT. § 80.47 (1997-98).<sup>1</sup> The trial court concluded that the Derks had failed to present sufficient evidence on damages. For the reasons discussed below, we disagree and therefore reverse and remand for a new trial.

## BACKGROUND

¶2 This case involves Naughtin Road, an unrecorded, publicly-used dirt road which stretches a little over a mile across the Derk's wooded property in the Town of Seven Mile Creek. In the fall of 1999, the Town cut down a number of trees along the road to facilitate travel. The debris from the trees was left along the road, and the stumps were sprayed with chemicals to prevent regrowth.

¶3 The Derks sued to recover damages for the destruction of their trees. The Town contended that the trees were within its right-of-way, although any records which might have established the width of the road were lost in a fire in 1959. On cross-motions for summary judgment, the trial court ruled that: (1) the Town had failed to establish that it had formally "laid out" Naughtin Road as a town road, and was therefore not entitled to a presumption under WIS. STAT. § 80.01(2) that its right-of-way for the road was four rods wide (66 feet); (2) the Town was nonetheless entitled to a presumption under WIS. STAT. § 80.01(2) that its right-of-way for the road was four rods wide under the alternate theory that it had maintained the roadway for a period of ten years or more; (3) the Derks overcame the presumption that the town had a four-rod right-of-way by showing

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<sup>1</sup> The Derks also brought two claims of intentional torts by public employees, which were dismissed and have not been raised on appeal. All references in this opinion to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the existence of some old fence lines, as well as bluffs and trees at various points along the road within the four-rod parameter, thus limiting the Town's right-of-way to the actual width of road used by the public under *Threlfall v. Town of Muscoda*, 190 Wis. 2d 126, 527 N.W.2d 367 (Ct. App. 1994) and *Nicolai v. Wisconsin Power & Light Co.*, 227 Wis. 83, 277 N.W.2d 674 (1938); and (4) the Town failed to comply with statutory condemnation requirements protecting the rights of abutting land owners under WIS. STAT. § 80.47 before cutting the trees, meaning that the Derks would be entitled to damages if any of the trees cut were outside of the Town's right-of-way. The trial court concluded that there were disputed facts requiring trial on the material issues of the actual width of the road used by the public (and thus, which if any of the felled trees were outside of the town's right-of-way) and the amount of damages attributable to the lost trees.

¶4 At trial, Robert Derks testified that there were bluffs along most of one side of the road and trees along most of the other side of the road, and that a car could not be driven up on the bluffs or through the trees. He said that the roadbed was only wide enough for one car to travel at normal speed, and a Town patrolman agreed that the roadbed had been about sixteen feet wide, and that cars could not pass one another without slowing down to a crawl. The man who cleared the road on behalf of the Town testified that he had widened the roadbed from about fifteen or sixteen feet to seventeen feet in places, and said that he had cleared out two-foot-wide ditches on either side of the roadbed.

¶5 The Derks also presented a series of "before" and "after" photographs of the road and a five-page diagram depicting fence and bluff lines, the width of the road prior and subsequent to the bulldozing, and the location of all the trees the Derks claimed were cut. Robert Derks explained at length the observations upon which his diagram was based. Finally, the Derks provided

expert testimony from a forester and real estate appraiser regarding the diminution of his property's value from the loss of the trees and what it would cost to replace them.

¶6 At the close of the Derks' case, the respondents moved for a directed verdict. The trial court granted it, because it was not satisfied that the Derk's diagram and testimony "clearly established" the "actual width" of Naughtin Road.

### STANDARD OF REVIEW

¶7 We review judgments granting directed verdicts de novo. A directed verdict is appropriate only when "considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995); WIS. STAT. § 805.14(1).

### ANALYSIS

¶8 Given the trial court's ruling that the Derks had overcome the presumption that the Town had a right-of-way four rods wide, the issues to be determined at trial were: (1) what trees had the Town cut down outside of its right-of-way? and, (2) what damages did the Derks suffer as a result? In order to answer the first question, the Derks needed to present evidence regarding the public's use of Naughtin Road.

¶9 As both the parties and the trial court recognized, the width of a road created by public use is "determined by the limits of the user, including any area beyond the traveled track used for purposes of the highway," such as shoulders or ditches. *Threlfall*, 190 Wis. 2d at 128, 128 n.6, and 126. Contrary to the trial court's apparent understanding, however, it was not necessary for the Derks to

prove the “actual width” of the road in order to establish damages. All they needed to do was show that the trees for which they were claiming compensation lay outside of the Town’s right-of-way. *See id.* at 132 (although court acknowledged that actual road width could be narrower than boundary established by ancient fences, it concluded that there was “no reason” to remand for a determination of the precise boundary in order to calculate damages for trees which were clearly beyond the right-of-way).

¶10 It is well established that the existence of physical barriers is sufficient to prove the greatest possible width of the public use. *See id.* at 126 (right-of-way could be no wider than ancient fence lines); *Town of Polk v. Gilbert*, 258 Wis. 150, 45 N.W.2d 88 (1950) (land covered by trees and brush was excluded from Town’s right-of-way); *Nicolai*, 227 Wis. at 90 (public use was confined within the boundary of a knoll on the one side and a high embankment on the other side of the road); *Stricker v. Town of Reedsburg*, 101 Wis. 457, 462, 77 N.W. 897 (1899) (right-of-way could not have extended beyond trees on one side of the road and stump on other side). Therefore, in order to survive a motion for a directed verdict, the Derks needed to present evidence sufficient to enable a jury to reasonably conclude that the public had neither traveled nor used the area beyond the trees as part of the road. We are satisfied that they did so.

¶11 A jury could reasonably conclude based on the evidence the Derks presented that the traveled portion of the road was about sixteen feet in width, that there were no shoulders on either side, and that the grown-over ditches along the road were not used for purposes related to the road. There was sufficient evidence from which the jury could conclude that the public’s use of the road did not extend—indeed, could not have extended—beyond any of the trees, and thus, that all of the felled trees lay outside of the Town’s right-of-way. The Derks presented

alternate measures of damages from which the jury could have calculated an award. It was error to direct a verdict against the Derks. We therefore reverse the judgment of the trial court and remand for a new trial consistent with this opinion.<sup>2</sup>

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

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<sup>2</sup> See *Weiss v. United Fire and Cas. Co.*, 197 Wis. 2d 365, 376 n.2, 541 N.W.2d 753 (1995) (“In the interest of economizing scarce judicial resources, the [supreme] court has long encouraged circuit judges to reserve ruling on motions challenging the sufficiency of the evidence until after submitting the issue in dispute to the jury so that a remand for a new trial need not be made if the circuit court’s ruling is reversed.”).

