**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 24, 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. 2010AP972** **Cir. Ct. Nos. 2009CV1268, 2009CV1318**

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

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**ANDREW J. VAN STELLE AND MICHELLE R. VAN STELLE,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**WISCONSIN DEPARTMENT OF TRANSPORTATION,**

**DEFENDANT-RESPONDENT.**

**----------**

**ROBERT M. SCHNELL AND DOROTHY J. SCHNELL,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**WISCONSIN DEPARTMENT OF TRANSPORTATION,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 LUNDSTEN, J. The Van Stelles and the Schnells challenge the Wisconsin Department of Transportation's condemnation of their land for highway exit and entrance ramps. They assert that the condemnation violates the constitutional "public use" requirement because the proposed ramps will rarely be open for public use. They also argue that summary judgment was improper because a factual issue remains about the genuineness of DOT's stated reason for the condemnation. We reject these arguments and affirm.

***Background***

¶2 The Wisconsin DOT sought condemnation of land in Sheboygan County to build an exit ramp for northbound traffic and an entrance ramp for southbound traffic. The ramps would connect Interstate 43 to a two-lane road, with the stated aim of reducing traffic congestion and related hazards on I-43 stemming from infrequent "national or international golf events" held at the Whistling Straits golf course owned by the Kohler Company. A past event at the golf course led to dangerous traffic backups on I-43 and, according to a study prepared for DOT, future golf events scheduled for the location will result in even greater traffic congestion.

¶3 As part of an agreement with the Federal Highway Administration, the ramps will be open for use only during the golf events; otherwise, the ramps will be closed to everyone to "maintain the rural characteristics of the surrounding land." Also, DOT entered into an agreement with the Kohler Company requiring

the company to share the costs of constructing the ramps. The agreement states that DOT will purchase and own all necessary real estate, own and operate the ramps, and, with the Federal Highway Administration, determine when the ramps are to be open or closed.

¶4 Andrew and Michelle Van Stelle brought suit under WIS. STAT. § 32.05(5),[1] seeking to prevent the condemnation of 4.36 acres of their property for the entrance ramp. Similarly, Robert and Dorothy Schnell sued to prevent condemnation of 3.87 acres of their property for the exit ramp. Their complaints both raised the same constitutional challenge based on the lack of a valid "public use," and the cases were consolidated.

¶5 DOT moved for summary judgment. The circuit court granted summary judgment in favor of DOT, concluding that the condemnation was for a proper public use. The Van Stelles and the Schnells jointly appeal.

## *Discussion*

¶6 The Van Stelles and the Schnells (collectively, the Van Stelles) make two arguments. First, they argue that, because the ramps are rarely open, they are not, as a matter of law, a "public use." Second, they contend that summary judgment was inappropriate because there remains a material factual dispute about whether DOT's asserted reason for the condemnation is a pretext. We reject both arguments.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

*A. Public Use*

¶7 Condemnation powers are constitutional in nature.[2] For the government's condemnation of private property to be constitutional, two requirements must be met: "(1) a public use has been determined; and, (2) just compensation is paid." ***Town of Beloit v. County of Rock***, 2003 WI 8, ¶43, 259 Wis. 2d 37, 657 N.W.2d 344. The Van Stelles' argument is directed solely at the "public use" requirement. They contend that this requirement is not met because the undisputed facts show that the ramps will be open an insufficient amount of time to qualify as a public use.

¶8 The Van Stelles acknowledge that they cite no direct support for their position that occasional public use is not "public use." Rather, the Van Stelles focus on various Wisconsin statutes and argue that these statutes demonstrate that a road that is seldom open to the public is not put to a public use.

¶9 Initially, we question whether it makes sense to analyze whether a use is, constitutionally speaking, a "public use" by reference to statutes. The Van Stelles do not explain the connection. But even if we assume, for the sake of argument, that statutes might shed light on whether the use here is, constitutionally speaking, a "public use," the statutory arguments made by the Van Stelles fall short.

[2] Article I, section 13 of the Wisconsin Constitution states: "The property of no person shall be taken for public use without just compensation therefor." As pertinent here, the Fifth Amendment to the United States Constitution states that "nor shall private property be taken for public use, without just compensation." *See* ***City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.***, 2009 WI 84, ¶35 n.14, 319 Wis. 2d 553, 768 N.W.2d 749 ("The Fifth Amendment Takings Clause is applicable to the states under the Fourteenth Amendment.").

¶10 The Van Stelles contend that certain statutes show that the ramp is not a public highway. It follows, according to the Van Stelles, that, if the ramps are not a public highway, they "become[] private, for which use eminent domain cannot be utilized." *See* ***Osborn v. Hart***, 24 Wis. 89, 91 (1869) (stating that "the legislature cannot authorize the taking of private property for a private road").

¶11 More specifically, the Van Stelles argue that the closing of a ramp removes it from the general definition of "highway" in WIS. STAT. § 990.01(12). That section states: "'Highway' includes all public ways and thoroughfares and all bridges upon the same." WIS. STAT. § 990.01(12). We understand the Van Stelles to suggest that if a "way" is not *always* open to the public, then it ceases to be a "highway." It is apparent, however, that this statutory definition contains no indication that "ways" must *always* or *at all times* be open to constitute a "highway."

¶12 Similarly, the Van Stelles point to another definition of "highway" found in WIS. STAT. § 340.01(22). This section states that a "highway" is "the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel … but does not include private roads or driveways as defined in sub. (46)." WIS. STAT. § 340.01(22). Here again, however, the statute contains no indication that a "way" must be open to the public *at all times* to constitute a public highway.[3]

[3] We note that the Van Stelles also cite two cases that are plainly inapposite. They cite ***Krueger v. Wisconsin Telephone Co.***, 106 Wis. 96, 101, 81 N.W. 1041 (1900) (addressing whether a street dedication included "the placing of telephone poles in a street" or whether this was "an additional servitude, as against the abutting [land]owner, not contemplated by the [street] dedication"), and ***Randall v. City of Milwaukee***, 212 Wis. 374, 249 N.W. 73 (1933) (also addressing a street dedication in light of the rights of an abutting landowner). The Van Stelles pick out a statement in ***Krueger*** about street dedications being "at all times … open and free for (continued)

¶13 Moreover, the Van Stelles' "private road" argument contains an obvious underlying flaw. The ramps in this case clearly do not fit the meaning of a "private road," as that term is used in WIS. STAT. § 340.01. Section 340.01(22) states that a highway "does not include private roads or driveways as defined in sub. (46)." Section 340.01(46), in turn, states that a "'[p]rivate road or driveway'" is "every way or place *in private ownership* and *used for vehicular travel only by the owner* and those having express or implied permission from the owner" (emphasis added). At least in terms of § 340.01, then, a highway may be distinguished from a private road based on a private road's private ownership and private control. Here, in contrast, it is undisputed that the ramps are publically owned and that public entities will control them. Thus, if anything, § 340.01 tends to undermine the Van Stelles' argument.

¶14 Accordingly, we reject the proposition that occasional public use converts the ramps' character to that of private roads. *See* ***David Jeffrey Co. v. City of Milwaukee***, 267 Wis. 559, 581, 66 N.W.2d 362 (1954) ("It is the character of the use and not its extent which determines the question of public use.").[4]

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public use as a highway." ***Krueger***, 106 Wis. at 102. The ***Randall*** decision quotes this language. ***Randall***, 212 Wis. at 378. These cases, however, do not purport to define what a highway is or is not, much less what constitutes "public use" for condemnation purposes.

[4] The Van Stelles may be arguing that the constitutional requirements for the exercise of condemnation powers have been statutorily narrowed and, under the more narrow statutory authority, DOT lacks authority to condemn their property. But this particular statutory argument hinges on a proposition that we have already rejected, namely, that the ramps are private roads rather than public highways. Further, although they cite WIS. STAT. § 84.09(1), the Van Stelles do not develop an argument about the scope of DOT's condemnation authority. *See* § 84.09(1) ("The department may acquire by … condemnation any lands for establishing … and maintaining highways and other transportation related facilities, or interests in lands in and about and along and leading to any or all of the same ...."). We therefore do not further address DOT's statutory condemnation authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

¶15 In the alternative, the Van Stelles argue that there is a "public use" problem because DOT is not statutorily authorized to close the ramps. The Van Stelles, however, do not explain why this argument matters. That is, they do not explain why, if DOT lacks the authority to close the ramps, the ramps will not be put to a "public use."

¶16 It may be that the Van Stelles are suggesting that, if DOT lacks the authority to close the ramps after they are built, DOT's plans for the ramps are illegal and, thus, its public use justification is invalid. If this is the Van Stelles' argument, it is counter-productive to their cause. If we suppose, for the sake of argument only, that DOT will lack the authority to close the ramps after they are built, then the ramps will remain open and, even under the Van Stelles' limited definition of "public use," the ramps would be put to a public use.

¶17 Finally, before moving on, we note that the Van Stelles have not developed their underlying premise: that DOT will not have the authority to close the ramps. DOT cites statutes that seemingly confer on DOT broad authority to control the use of highways. For example, DOT cites WIS. STAT. § 84.29(1) (assenting to federal laws regarding interstate highways in Wisconsin "to the full extent that it is necessary or desirable to secure any benefits under such acts" and authorizing "the department of transportation, to cooperate in the planning, development and construction of the national system of interstate highways"); § 84.29(2) (concerning "interstate highways, or any portion thereof, including the laying out, construction, maintenance and operation of any part thereof as a freeway or expressway," and stating that "*the department is empowered and it shall have full authority to* lay out, construct, *operate* and maintain *such highway* as a part of the state trunk highway system" (emphasis added)); and § 84.29(7) (stating that DOT's powers are to be liberally construed). The Van Stelles do not

deal with this authority, except to say that § 84.29 pertains to "highways," a possible reference to the Van Stelles' flawed assertion that the ramps are not highways because they are in use an insufficient amount of time.

¶18 For the reasons above, we reject the Van Stelles' argument that the constitutional "public use" requirement is not met.

*B. Pretext*

¶19 The Van Stelles argue that a factual dispute remains about whether the purported public benefit is the genuine reason for the condemnation. Specifically, the Van Stelles contend that DOT's public safety justification is a pretext, and the "real purpose" for the condemnation is to benefit a private entity, the Kohler Company. *See* ***Kelo v. City of New London***, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (noting that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause"). We conclude that the Van Stelles have not identified a material factual dispute that prevents summary judgment.

¶20 When responding to a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3). We have stated that "an opponent of summary judgment 'may not rely on a conjecture that evidence in support of the motion "may" not be accurate or reliable,' but must affirmatively 'counter with evidentiary materials demonstrating there is a dispute.'" ***Dawson v. Goldammer***, 2006 WI App 158, ¶31, 295 Wis. 2d 728, 722 N.W.2d 106 (citation omitted). "'It is not enough to

simply claim that the moving party's submission should be disbelieved or discounted.'" ***Id.*** (citation omitted).

¶21 We begin by observing that the Van Stelles have not rebutted DOT's factual assertions that DOT was motivated to alleviate a safety problem that occurs on I-43 during major golf tournaments at the Kohler Company golf course. One of DOT's submissions speaks directly to this topic. That submission asserts the need for action, stating that "[q]ueuing on the interstate mainline due to major event traffic is a significant safety concern." It also notes safety concerns for law enforcement officers attempting to direct the traffic. The submission anticipates that an "event-only interchange" will "eliminate queuing onto the interstate mainline and provide the associated improved highway safety." To achieve this result, it recommends the ramp locations at issue here, stating that they "provide[] the greatest improvement" and would "eliminate queuing on the freeway mainline."

¶22 The Van Stelles did not submit any information contradicting these assertions about safety. Instead, they submitted an affidavit from landowner Robert Schnell. Schnell averred that he has "not believed from the beginning of our discussion with the Department of Transportation that the project proposed by the Department of Transportation was truly for a public purpose. If this was a full on and off ramp … that was open all of the time, we would be more convinced that a legitimate public purpose was being fulfilled." Schnell continues that, given the plan to only open the ramp for limited periods, he "cannot figure out any direct benefit this conveys to the public" and that "[t]o build a road that will have such limited use cannot support a public purpose." These are nothing more than general and conclusory assertions that DOT's submissions "'should be disbelieved

or discounted.'" *See* ***id.*** (citation omitted). This is insufficient to support the existence of a "genuine issue for trial." *See* WIS. STAT. § 802.08(3).

¶23 Still, the Van Stelles may be arguing that motivation matters and that, if DOT was *primarily* motivated by a desire to benefit the Kohler Company, then DOT's safety justification is necessarily a pretext. If this is the Van Stelles' argument, they have not supported it with legal authority.

¶24 In particular, the Van Stelles do not point to authority for the proposition that, if a government is partly motivated by legitimate safety concerns, a simultaneous motivation to help a single private entity somehow overrides the public safety goal. And, for that matter, the Van Stelles have not presented evidence that DOT *was in fact* motivated by a desire to help the Kohler Company. Here, as the circuit court observed, it is undisputed that the Kohler Company had and would host major golf tournaments, regardless whether DOT builds the ramps. The Van Stelles do not direct our attention to any evidence showing that the company will make more money or have more successful tournaments if the ramps are built. The averment by Mr. Schnell reflects his mere suspicion of DOT's motive. Thus, the situation here falls squarely under a scenario that has been identified as insufficient to thwart a condemnation by a case the Van Stelles themselves rely on, ***County of Hawaii v. C & J Coupe Family Ltd. Partnership***, 198 P.3d 615 (Haw. 2008). In ***Hawaii***, the court observed that, although "under certain circumstances" it may be proper to "look behind" an asserted public purpose, courts have declined to do so where a pretext assertion is "'founded only on mere suspicion.'" *See* ***id.*** at 638, 642 (citation omitted).

¶25 Accordingly, we reject the Van Stelles' argument that a material factual dispute remains.

## *Conclusion*

¶26 For the reasons stated above, we conclude that summary judgment in favor of DOT was proper. We therefore affirm the circuit court.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.