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. 2010AP973

Cir. Ct. No. 2007CV216

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ROGER COOPER, LENORE COOPER, JOHN HURCKMAN
AND AMY HURCKMAN,

PLAINTIFFS-RESPONDENTS,

V.

VILLAGE OF EGG HARBOR AND PATRICIA C. GURESKI,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 LUNDSTEN, J. Landowners with property abutting a short stretch of road in the Village of Egg Harbor sought a declaration that the road is not public. The circuit court found in favor of the landowners, and the Village

appeals. The Village argues that the circuit court incorrectly determined that neither a prescriptive easement nor public maintenance made the road public. The Village also contends that equitable estoppel applies and should prevent the abutting landowners from denying that the road is public. We disagree and affirm.

Background

¶2 In September 2007, Roger and Lenore Cooper and John and Amy Hurckman sought a declaration that the Village of Egg Harbor did not own Shorewood Road and that the Village must remove a "public access" sign on the road. Shorewood Road is a 300-feet-long portion of unrecorded road located in the Village and dead-ending at the water's edge of Green Bay. The Coopers and the Hurckmans own land abutting opposite sides of Shorewood Road, but neither allege that they own the road.

¶3 The Village describes the land in question as "approximately 78 feet" wide with "a pavement width of approximately 12 feet, and a length of approximately 300 feet." The Coopers and the Hurckmans assert that the majority of the width is wooded, and note that the Village's evidence tends to be directed solely at the paved portion. In any event, both parties and the circuit court simply refer to the disputed land as "Shorewood Road," and we follow their lead.

¶4 The Coopers and the Hurckmans moved for summary judgment, arguing that there was no evidence of dedication to the Village. After the Village conceded that there was no statutory dedication, the circuit court granted summary judgment in favor of the Coopers and the Hurckmans on the issue of common law dedication. Thus, the starting point for further litigation was the assumption that the Village historically did not own the land.

¶5 The Village contended that it had either acquired a prescriptive easement or had rendered the road public through maintenance. After a bench trial in August 2009, the court rejected these claims. The Village appeals.

¶6 In the following discussion, we refer to the Coopers and the Hurckmans collectively as the Coopers, except where otherwise indicated.

Discussion

A. Prescriptive Easement

¶7 The Village argues that the circuit court incorrectly determined that public use of Shorewood Road was insufficient to create a prescriptive easement. The circuit court rejected the Village's argument because it concluded that the Village failed to show continuous use for any twenty-year period. We agree.

¶8 A prescriptive easement requires the following: "(1) adverse use that is hostile and inconsistent with the exercise of the titleholder's possessive rights (2) that is visible, open and notorious (3) under an open claim of right (4) and is continuous and uninterrupted for twenty years." ***County of Langlade v. Kaster***, 202 Wis. 2d 448, 457, 550 N.W.2d 722 (Ct. App. 1996). "A user must present positive evidence to establish a prescriptive easement, and every reasonable presumption must be made in favor of the landowner." ***Id.*** Also, the circuit court was the fact finder in this case, and we defer to its factual findings unless they are clearly erroneous. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

¶9 Neither the Coopers nor the Hurckmans claim to own Shorewood Road. So, a question might arise as to how the prescriptive easement analysis applies when there is no identified titleholder. Notably, the Village does not

address the issue. For that matter, the Village does not actually cite the elements of a prescriptive easement in the course of making its easement argument. The circuit court, however, expressly applied these elements when rejecting the Village's easement argument, and the Village does not develop an argument that the circuit court applied the incorrect law.[1] Thus, we note this peculiar situation, but discuss it no further.

¶10 Our review of the circuit court's application of the prescriptive easement elements to the facts begins with a summary of the evidence on which the Village relies.

¶11 The Village first points to testimony from the Coopers' and the Hurckmans' maintenance worker. The worker performed tasks on both properties throughout the year, beginning in approximately 1982 for the Coopers and in approximately 1992 for the Hurckmans. The worker testified that he had seen "the public" use Shorewood Road and, in particular, had seen people walking, biking, and driving down the road. The worker, however, gave no indication of when or how often this use occurred. The exception is his observation of people fishing during "the late [1980s] when the perch fishing was good." The worker then noted that "since the downfall of the perch fishing" he had not seen any people fishing.

¶12 The Village also highlights testimony from the Cooper and the Hurckman families. For example, Lenore Cooper testified that, prior to the

[1] It is possible that the Village is suggesting that there is a "common law rule" that is different than the analysis applied by the circuit court. But the argument is undeveloped, and we do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately developed).

"public access" sign's installation, apparently in 2004 or 2005, her neighbors used Shorewood Road. But, again, there is no indication of when or how often this use occurred. After the sign's installation, she suggested that use noticeably increased and that "[e]verybody and anybody" was using the road.

¶13 Similarly, Denelle Cooper testified that one neighbor "some years ago" walked a dog on the road and another neighbor would "come down and enjoy sunsets." She also stated that there were "occasional bicyclists" and people who appeared to be lost. And, she confirmed that more recently there was "a general increase in both pedestrian and automobile traffic," and that these recent users tended to stay longer and engage in more "extensive" activities. John Hurckman offered similar testimony.

¶14 The Village also points to the testimony of a former Village board president who said he had "seen a couple people walking on [the road], but not often." And, although the Village does not specifically rely on it, we note that another former Village board member stated that he spent "[a] couple [of] minutes at the most" on the road three or four times a year. Apparently, these visits were in the ten- to fifteen-year period prior to the trial in 2009, but this is not clear. The former Village board member also testified that he never saw anyone else using the road. And, finally, as we discuss below, the Village presented evidence of sporadic public maintenance, but the Village does not suggest that this maintenance is relevant to a prescriptive easement.

¶15 As the circuit court observed, the Village's "positive proof" of public use is limited. Because the Village presented testimony of sporadic use that did not plainly cover any continuous twenty-year period, we agree with the circuit court that the Village effectively asked the court to *infer* continuous public use for

twenty years based on limited evidence. But of course, as fact finder, the circuit court was not compelled to make that factual inference. And, similarly, the court was permitted to make its findings based on the actual evidence of limited public use. The Village does not seriously argue otherwise. Instead, its arguments to this court are the sort that should be directed to a fact finder. That is, the Village asks us to look at the same evidence that the circuit court did and infer greater public use. This we may not do.

¶16 The Village argues that, although the public use was "not frequent or common," it was "commensurate with Shorewood Road's function to provide access to the edge of the water." We agree that the nature of the road is relevant to determining whether use was continuous. *See* ***Widell v. Tollefson***, 158 Wis. 2d 674, 685, 462 N.W.2d 910 (Ct. App. 1990) (stating that "[c]ontinuity of use depends on the nature and character of the right claimed" and that "[s]uch use need not be constant, daily or weekly"). The Village, however, is unable to support its commensurate-use premise.

¶17 Instead, the evidence tends to support a more limited proposition, one which ultimately cuts against the Village. For example, testimony tended to show that public use of Shorewood Road increased markedly after the Village installed the "public access" sign in approximately 2004 or 2005. This suggests that only with the installation of the sign did the public understand the road to be "public" and use it according to its function. Conversely, the increased use suggests that the former, less-frequent usage was *not*, as the Village puts it, "commensurate with [the road's] function." Because the post-public-access-sign "commensurate" use spans at most five years, it falls well short of the required twenty years.

¶18 Finally, we note that the Village is not clear about what twenty-year time period of use supposedly satisfies the standard. The most promising twenty-year period would seem to be the twenty-year period immediately preceding the trial. But there is no basis on which to conclude that use during this time was continuous. For example, although there is evidence of fishing, likely sometime in the late 1980s, other testimony about people using the road for biking or walking does not include dates or even approximate dates. This leaves the Village with no specific example of public use for much of the 1990s.

¶19 Accordingly, we conclude that the circuit court properly rejected the Village's prescriptive easement argument because the Village failed to demonstrate continuous use for any twenty-year period.

B. Public Maintenance

¶20 The Village next argues that the road is public because the Village "worked" it for more than ten years. More specifically, the Village contends that road-maintenance-related activities, including paving and plowing, created a "public highway" during the ten years between 1983 to 1993 or 1987 to 1997. We disagree.

¶21 The Village relies on ***Ruchti v. Monroe***, 83 Wis. 2d 551, 266 N.W.2d 309 (1978), which applied a former version of WIS. STAT. § 82.31(2).[2] As pertinent here, § 82.31(2)(a) states: "[A]ny unrecorded highway that has been worked as a public highway for 10 years or more is a public highway …." The

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

Village then looks to WIS. STAT. § 82.01(11) for the definition of "worked": "regularly maintaining a highway for public use, including hauling gravel, grading, clearing or plowing, and any other maintenance by or on behalf of the town on the road." We note that § 82.01(11) refers to "action of the town," but both parties here assume, without explanation, that § 82.01(11) and § 82.31 are applicable to villages. We have not independently investigated this assumption, but instead go along with the assumption for purposes of this case only.

¶22 The Village has the burden of showing that the road has been "worked" for ten years. *See* ***Ruchti***, 83 Wis. 2d at 557. We have previously stated that "worked" suggests maintaining a road "in a manner that demonstrates ownership." *See* ***County of Langlade***, 202 Wis. 2d at 454 (applying a former version of WIS. STAT. § 82.31(2)). We have further stated that "continuous work on a road by a public entity is more likely to demonstrate ownership than sporadic work." ***Id.*** at 456.

¶23 The Village has not met its burden. Here, as with public use, the Village's evidence of maintenance is sporadic and often non-specific as to its time frame. And, here again, the Village's apparent premise is that, from this limited evidence, the circuit court should have inferred additional instances that would constitute continuous maintenance. Their argument is no more persuasive in this maintenance context.

¶24 First, we note that a significant portion of the evidence highlighted by the Village does not involve instances of maintenance. For example, the Village points to testimony that it "considered" the road to be public, that the Village included the road in the Village's comprehensive plan and on a Village map, and that the Village includes Shorewood Road in its annual certification to

the Department of Transportation, thereby receiving state aid for the road. Similarly, the Village points to testimony by a former Village board member that Shorewood Road was part of the board's annual road viewing. Apparently as a result of road viewings, the Village minutes from 1993 and 1994 reference Shorewood Road and the need for tree and brush maintenance.[3] At best, such evidence supports the view that the Village believed Shorewood Road was a Village road and the evidence is some indication of an intent to maintain it. But the question here is whether the Village actually maintained the road.

¶25 Moreover, to the extent the Village presented evidence of actual maintenance, that evidence does not show that the maintenance was continuous for any ten-year period.

¶26 The Village paved the road at some point in the 1980s, likely either in 1983 or 1987.[4] Other testimony indicated that the County Highway Department placed a "dead end" sign by the road, but it is not clear when this occurred. At some point, the Village put up a street identification sign and, somewhat recently, the Village added a "public access" sign.

¶27 There was evidence that the Village had a long-term contract with the County to plow Village roads and mow along at least some Village roads. The Village contends that the existence of this contract demonstrates that Shorewood

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[3] Notably, the former board member who testified about the need for tree and brush maintenance said it was possible that the abutting landowners did the work themselves.

[4] The Village asserts that paving occurred twice in the 1980s, suggesting that one of these occurrences related to sewer project repairs. The circuit court, however, found that paving likely occurred only once. The Village does not address this finding, and our own review of the record suggests that this finding was not clearly erroneous because, for example, there was testimony that the sewer project would not have been in the vicinity of Shorewood Road.

Road was actually and regularly maintained because Shorewood Road is on the Village map and, thus, was subject to the contract. Here, again, the Village effectively asked the circuit court to make a factual inference and here, again, the circuit court acted within its power to decline. Just because there is a contract does not mean that Shorewood Road was not overlooked by County workers. As described in the record, Shorewood Road could easily be overlooked. The road is abutted by woods and two residential lots, and it dead-ends at the waters of Green Bay. And, because we do not know when the road's street-name sign was installed, it is possible that, for much of the relevant time, the road did not even have a street-name sign. Understandably, then, the circuit court was interested in evidence that the County (or the Village for that matter) *actually* plowed or mowed Shorewood Road. Thus, we turn our attention to that evidence.

¶28 A Village witness gave vague testimony about having observed some unspecified "winter operations," stating that he may have been there "a couple of times" during such operations, including "[m]aybe a year ago during the winter." The only other evidence about road plowing came from a worker hired by the Coopers and the Hurckmans. He testified that, at times, he plowed the road. When asked, "Have you ever seen the Door County Highway Department plow Shorewood Road," he responded simply, "Yes, I have."

¶29 The evidence was even more sparse regarding public mowing: a Village witness testified to mowing alongside the road in 1978. And, notably, the witness stated that he initially "missed" Shorewood Road and had to be told to go back and mow it. This tends to support the notion that the road may have been often overlooked. In any event, beyond this single instance of mowing, there was no other specific evidence of public mowing. For example, the Village points to an instance where the Coopers' maintenance worker said he had seen evidence of

mowing. The worker, however, did not see the mowing and did not know whether the abutting landowners or the Village had done it. On the other hand, the Coopers' maintenance worker testified to mowing alongside the road, and members of the Cooper and the Hurckman households testified to mowing at other times.

¶30 Considering this evidence, the court noted both the limited "positive testimony" of public maintenance and the evidence of private maintenance. The court stated, "I cannot find … that any other [public] maintenance was actually performed, despite being contracted for." Given the limited direct evidence, we cannot say that this factual inference was clearly erroneous. *See* ***Royster-Clark***, 290 Wis. 2d 264, ¶11 (we defer to the circuit court's factual findings unless they are clearly erroneous).

¶31 The Village relies on ***Ruchti***, 83 Wis. 2d 551, but this case does not help the Village. In ***Ruchti***, the court concluded that a town "made a prima facie showing" that a road was worked for ten years where there was evidence of long-term maintenance by the town and the highway patrol, including grading, plowing, placing of gravel, and digging of ditches. *See* ***id.*** at 553, 558. The ***Ruchti*** court relied on the notion that the maintenance work was "done continuously over time as needed" for the requisite time period. ***Id.*** at 556. As we have just discussed, however, apart from one instance of paving, the facts here do not show other maintenance activities during the relevant time frame, much less that they were done continuously as needed.

¶32 In sum, we affirm the circuit court's findings and its conclusion that the Village failed to show that it "worked" the road for ten years or more.[5]

C. Equitable Estoppel

¶33 Finally, we address the Village's argument that equitable estoppel should apply to the Coopers. The Village believes it is legally significant that the Coopers and their predecessors accepted "public ownership and maintenance" of the road. The Village suggests that it follows that equitable estoppel should prevent the Coopers from now taking a position inconsistent with these past acts.[6] We are not persuaded.

¶34 Equitable estoppel requires proof of the following: "'(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.'" ***Nugent v. Slaght***, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594 (citation omitted). "Proof must be clear, satisfactory, and convincing and must not rest on mere inference or conjecture." ***Id.***

¶35 We begin by observing that the Village's equitable estoppel argument is poorly developed. The Village does not clearly explain how the facts

[5] Given our conclusion, we need not address the Coopers' suggestion that WIS. STAT. § 82.31(2)(c) provides an alternative ground to reject the Village's argument.

[6] The Coopers contend that the Village only made "a passing reference to estoppel at trial" and that, as a result, "the record on this issue has not been sufficiently developed." The Village, on the other hand, suggests that the issue was properly presented to the circuit court. We choose not to decide whether the estoppel argument has been waived, and instead exercise our authority to ignore waiver. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 437, 362 N.W.2d 439 (Ct. App. 1984) (application of the waiver rule is discretionary).

in this case satisfy each element of estoppel, and we are often left wondering about the import of statements the Village makes on this topic.

¶36 For example, the Village points to events related to the original subdividing of land in 1927 that encompassed Shorewood Road. The Village contends that, according to a statute, at the time of this subdivision Shorewood Road should have been dedicated to the public, but was not. The Village asserts that this occurred "because the predecessors in title of both Cooper and Hurckman violated the law by failing to prepare a proper plat with proper approval." We note that the Village does not provide a record citation for this assertion, and that the Coopers question its accuracy.

¶37 Regardless, the Village fails to explain why these alleged events matter. The Village seeks to apply equitable estoppel to the Coopers. As we have noted, however, equitable estoppel is applicable to "'action or non-action'" by the "'*one against whom estoppel is asserted*.'" *See* ***id.*** (citation omitted; emphasis added). The Village does not develop a legal argument explaining why the alleged acts by *other people* matter.

¶38 The Village also points to the Coopers' behavior. The Village asserts that the Coopers accepted and benefited from public maintenance of the road in the past. The Village then essentially argues that it would be unfair for the Coopers, having enjoyed these benefits, to now claim that the road is not public. The flaw with this argument is twofold. First, as we have seen, the Village has failed to demonstrate that it provided significant maintenance. Second, the Village does not connect the dots with respect to facts and the specific elements of equitable estoppel. In particular, the Village makes general allegations, but does not point to evidence showing a temporal connection between an "action or non-

action" by the Coopers and specific reliance by the Village. For example, the Village highlights the paving in the 1980s, suggesting that this should have caused the Coopers to speak up that the road was not public. But the Village does not explain what the Coopers did or did not do that the Village relied on in repaving the road. And, as we have noted, the Village does not show that meaningful post-paving maintenance occurred, much less in reliance on something the Coopers did or did not do.

¶39 In sum, we reject the Village's equitable estoppel argument because it is inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). At the same time, we note that it appears, based on the record before us, that there is no viable equitable estoppel claim.

Conclusion

¶40 For the reasons stated above, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.