COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

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.

NOTICE

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

No. 94-1701

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

ALICE VOGEL,
and JAMES WEAVER,

Plaintiffs-Appellants,

v.

TOWN OF FARMINGTON,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Alice Vogel and James Weaver appeal from a judgment dismissing their complaint against the Town of Farmington. We conclude that the trial court properly dismissed the action and therefore affirm.

In 1934, the Town acquired, by quitclaim deed, a short road ending at what is now a public boat landing. Vogel's property borders the road on one side and Weaver's borders it on the other. In June 1993, Weaver presented the Town board with a petition to close the boat landing. He informed the board that users of the landing frequently trespassed, littered, vandalized and otherwise disrupted the neighborhood peace. After the board deferred a decision on the petition, Weaver and Vogel commenced this action three weeks later.

The first of three causes of action alleged that ownership of the road reverted to the adjacent landowners because the Town failed to open the strip of land for public travel within a reasonable time after 1934. The second cause of action alleged that Weaver and Vogel were entitled to ownership because the road and landing constituted a private nuisance requiring immediate abatement, and that they were entitled to damages for the alleged nuisance. The third cause of action alleged that Vogel owned part of the road by adverse possession.

On Weaver and Vogel's summary judgment motion, they submitted affidavits setting forth in detail the many problems they have experienced with landing users, adding that the road design caused erosion and flooding on their properties. They also pointed out that there were private boat landings in the immediate vicinity. The Town's opposing affidavit, by the Town board chairman, stated that the Town had never condoned, authorized or allowed the alleged activities at the landing. The chairman also noted that the Town's law enforcement capability was limited to parking and animal ordinance violations.

The trial court denied summary judgment and a trial to the court ensued. After hearing each side's evidence, the court found that Weaver and Vogel had a significant nuisance problem caused by "jerks" using the landing. However, the court also concluded that damages were premature, and refused to order the landing closed because the benefits of a public landing to its lawful users outweighed the plaintiffs' concerns. The court also found that within four years of the 1934 dedication, the Town accepted the dedication by use, and that Vogel had failed to establish her adverse possession claim.

The issues on appeal are whether Weaver and Vogel were entitled to summary judgment ordering the road closed, whether the court erred by dismissing their nuisance claim after the trial, whether the evidence showed that the road reverted to the adjacent land owners through non-use between 1934 and 1938, whether the court erred by dismissing Vogel's adverse possession claim, and whether Weaver and Vogel were entitled to damages under § 80.47, STATS., for those times when parked cars blocked access to their property.

The trial court properly denied summary judgment to Weaver and Vogel. Their affidavits provided undisputed evidence that users of the boat landing committed numerous acts that interfered with their property rights. However, to obtain relief on a nuisance claim, the plaintiff must not only prove the nuisance, but must show under the reasonable use doctrine that the harm outweighs the public benefit derived from the challenged conduct or use. *See* ***Prah v. Maretti***, 108 Wis.2d 223, 240-42, 321 N.W.2d 182, 191-92 (1982). Applying that reasonable use standard normally requires a full exposition of all underlying facts and circumstances. ***Id***. at 242, 321 N.W.2d at 192. Summary judgment is not the appropriate vehicle to resolve the issue. ***Id***.[1]

The trial court properly denied an injunction closing the road. We review a decision whether to grant injunctive relief for an erroneous exercise of discretion. ***Pure Milk Prods. Coop. v. National Farmers Org.***, 90 Wis.2d 781, 800, 280 N.W.2d 691, 700 (1979). To obtain an injunction, a plaintiff must show a sufficient probability that the defendant's future conduct will violate the plaintiff's rights and will irreparably injure the plaintiff. ***Bubolz v. Dane County***, 159 Wis.2d 284, 296, 464 N.W.2d 67, 72 (Ct. App. 1990). Here, Weaver and Vogel did not show irreparable injury if the landing and road remained open. As the trial court noted, what they described was primarily a law enforcement problem. The plaintiffs made no showing that increased enforcement at the landing would not solve or substantially reduce the problem. Additionally, the court reasonably concluded that the benefit from a public landing to its lawful users outweighed the plaintiffs' private concerns.

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[1] Weaver and Vogel also assert that they proved a nuisance claim under § 844.01, STATS., authorizing any person claiming interference with property rights to bring an action. In ***Shanak v. City of Waupaca***, 185 Wis.2d 568, 596, 518 N.W.2d 310, 320 (Ct. App. 1994), we held that § 844.01 creates no rights or duties, and does not create a cause of action because it is a remedial and procedural statute.

Weaver and Vogel also failed to prove a claim for damages. A possessor of land who fails to prevent a nuisance caused by activity on that land is liable only if the possessor knows or has reason to know of the nuisance-causing activity. RESTATEMENT (SECOND) OF TORTS § 838 (1979). Here, Weaver and Vogel conceded that they first notified the Town about their problems three weeks before commencing the lawsuit. They offered no evidence that the Town should have known the extent of the problem before then. In any event, the record indicates that Weaver and Vogel failed to comply with § 893.80, STATS., the notice of claim statute.

The court did not clearly err by finding that the Town accepted the dedication of the road. To be effective, the dedication must be accepted within four years. ***Mushel v. Town of Molitor***, 123 Wis.2d 136, 146, 365 N.W.2d 622, 627 (Ct. App. 1985). Public use of the road within four years constitutes an effective dedication. ***Id***. Here, evidence of use before 1938 was understandably minimal. However, there was evidence that the town maintained the road as early as 1933, even before the dedication. There was also evidence of consistent and frequent public use of the road back to 1950. The court could reasonably infer from that evidence that the road was considered public and used as such before 1938.

The trial court properly denied Vogel's adverse possession claim to part of the road. Vogel claimed that she and her predecessor in title adversely possessed a fenced-in strip of the road since 1952. Because the time for adversely possessing against public land was then forty years, Vogel's right to claim adverse possession would not have accrued until 1992. However, in 1983, the legislature enacted § 893.29(2)(c), STATS. (1983 Wis. Act 178, § 2, effective March 28, 1984), which eliminated the right to claim adverse possession of a highway as defined in § 340.01(22), STATS. Vogel's claim was therefore extinguished because the road in question satisfies that statutory definition of a highway. Vogel does not contend that § 893.29(2)(c) is inapplicable to claims in the process of maturing when it was enacted, and we therefore do not address that issue.

Weaver and Vogel's pleadings did not allege a claim for § 80.47, STATS., damages. They assert that the issue was tried by consent, but do not refer to the record to support that contention. We therefore decline to consider it. ***Keplin v. Hardware Mutual Casualty Co.***, 24 Wis.2d 319, 324, 129 N.W.2d

321, 323 (1964). Additionally, it appears that failure to comply with § 893.80, STATS., also blocks recovery under § 80.47.

By the Court.—Judgment affirmed.

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