COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 12, 1996

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.

Nos. 95-1660
95-2130

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

ROBERT P. STUPAR AND TERRY L. STUPAR,

Plaintiffs-Appellants,

v.

TOWNSHIP OF PRESQUE ISLE, WISCONSIN, ROSE ZERWICK, JOHN S. WIMME, NANCY R. WIMME, DUANE A. KITTLESON, LINDA M. KITTLESON, LEROY S. FASSBENDER, BARBARA K. FASSBENDER, DALE I. KING, DORIS J. KING, ROBERT W. DILLON III, PATRICIA L. DILLON, ROBERT K. ADDICKS JOHNSON, LOUIS ADDICKS JOHNSON, ROBERT M. VON ZIRNGIBL and SALLY E. VON ZIRNGIBL,

Defendants-Respondents,

JAMES TAIT, d/b/a CENTURY 21, JIM TAIT REAL ESTATE and ERNIE ROSSOW,

Defendants,

PATRICK CHEREK and CHERYL L. CHEREK,

Defendants-Third-Party Plaintiffs-Respondents,

v.

JOSEPH KOLAR, SCHMIDT-HAUS REALTY, INC., JUDITH SCHMIDT-ARNOLD and SANDRA RILEY,

Third-Party Defendants,

MULLEADY, INC. REALTORS and MARY PETRIE,

Defendants-Third-Party Plaintiffs,

NORMA JEAN COLE, ROSEMARY PATTERSON and JOHN W. HIESTAND,

Defendants-Third-Party Defendants.

APPEAL from a judgment and an order of the circuit court for Vilas county: JAMES B. MOHR, Judge. *Affirmed in part and reversed in part.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Robert Stupar and his wife, Terry Stupar, appeal a judgment and an order against their claim for title to real estate.[1] This appeal concerns two pieces of real estate: (1) a road previously platted by the Township of Presque Isle, but never opened to travel, and (2) a small piece of a neighboring lot the Stupars use for access to their lot. Despite the general rule that a platted road cannot be abandoned without official town action before it is put into use, the Stupars argue that the Town abandoned the road in this case by building Deer Trap Road, a similar road to the platted road. The circuit court held that the Town did not abandon the platted road because the Stupars

[1] The Stupars appealed a dismissal order on June 13, 1995, appeal No. 95-1660. On June 29, 1995, the circuit court entered a judgment to the same effect as the order. On August 22, 1995, the Stupars appealed the judgment in appeal No. 95-2130. There is no challenge to the timeliness of the appeal. These cases were consolidated for appeal.

failed to present evidence that the Town built Deer Trap Road to meet the growth and development the platted road was intended to serve. As to the neighboring lot, the Stupars contend the circuit court erred by granting summary judgment against their claim because no party had moved for summary judgment on the issue.

Because the Stupars failed to present any evidence to support a finding that the Town replaced the platted road with Deer Trap Road, we affirm that part of the judgment and order granting summary judgment against the Stupars for their claim that the Town abandoned the platted road. However, we reverse the part of the order and judgment that grants summary judgment against the Stupars for an adverse possession claim that was not before the trial court on a motion.

The Stupars own Lot 16 in the Baskins Subdivision in the Town of Presque Isle, which abuts a platted, but unbuilt road. *See* appendix. Deer Trap Road first came into use at an unspecified time after the Town dedicated the platted road in 1925.[2] Although the platted road would have provided direct access to Lots 17, 18 and 19, Deer Trap Road does not.

The Stupars filed an action seeking, among other claims, title to the portion of the platted unopened road that adjoins Lot 16. The Chereks,[3] who opposed the Stupars' claim to the road, and the Stupars each moved for summary judgment on that issue. The circuit court granted the Chereks' motion on the grounds that a platted road cannot be abandoned until it has been put in use. The court also dismissed the Stupars' adverse possession or prescriptive easement claim against Duane and Linda Kittleson, owners of Lot 23, which the Stupars use for access to Deer Trap Road. *See* appendix. The Stupars appeal the grant of summary judgment on both issues.

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[2] Patrick and Cheryl Cherek, owners of Lot 17, argue that the Stupars failed to present any evidence that the Town constructed Deer Trap Road. Because we conclude that the Town did not abandon the platted road, we do not address this issue.

[3] The Chereks filed a brief contesting the Stupars' claim to the platted road, and the Town concurred. The Stupars argue in their reply brief that the Chereks do not have standing to challenge their action. We will not address this issue because the Stupars failed to raise it in their main brief. *See* ***In re Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981).

Our review of a decision to grant or deny summary judgment applies the same methodology as the circuit court and we decide the matter de novo. ***Crowbridge v. Egg Harbor***, 179 Wis.2d 565, 568, 508 N.W.2d 15, 21 (Ct. App. 1993). We grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08, STATS.

Section 80.32(2), STATS., states that "any highway which shall have been entirely abandoned as a route of travel, and on which no highway funds have been expended for 5 years, shall be discontinued."[4] As a general rule, however, a road cannot be discontinued or abandoned under this section until the municipality opens the road. ***Reilly v. City of Racine***, 51 Wis. 526, 529-30, 8 N.W. 417, 418 (1881). This rule allows municipalities a "chance of growth commensurate with the public necessity, which will not be lost by mere lapse of time ...." ***Id.*** However, when a municipality alters a road so that a portion of the old road is not included in the new road, the municipality automatically abandons the portion of the old road not included in the new road. ***Miller v. City of Wauwatosa***, 87 Wis.2d 676, 681, 275 N.W.2d 876, 878 (1979). In ***Heise v. Village of Pewaukee***, 92 Wis.2d 333, 352, 285 N.W.2d 859, 867 (1979), our supreme court explained why the ***Reilly*** rule does not apply when a road is altered as in ***Miller***: "It cannot be said that the portion of street discontinued in ***Miller*** would be needed for future growth and development, for it was just

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[4] Section 80.32(3), STATS., provides the consequences of abandoning a highway:

> When any highway shall be discontinued the same shall belong to the owner or owners of the adjoining lands; if it shall be located between the lands of different owners it shall be annexed to the lots to which it originally belonged if that can be ascertained; if not it shall be equally divided between the owners of the lands on each side thereof.

Alternatively, the Stupars argue that they gained title to the road through adverse possession. The Stupars concede that § 893.29(2), STATS., prevents them from obtaining title to the platted road through adverse possession if we conclude that the Town did not abandon the platted road. Because we conclude that the Town did not abandon the road, we do not address the Stupars' adverse possession argument.

such growth and development which caused the abandonment of that land in the first place."

The Stupars do not dispute that the platted road in this case was never put into use or altered. Nevertheless, they argue, there has been an abandonment because the Town will no longer need the platted road for future growth and development. This argument is premised on the contention that Deer Trap Road replaced the platted road.

The Stupars' premise is faulty because there is no evidence to show that the Town intended to replace the platted road with Deer Trap Road. Absent such evidence, the Town must be allowed to retain its platted, unbuilt road to afford it the opportunity to grow and develop to a degree where it needs both the platted road and Deer Trap Road. *See* ***id***. at 351-52, 285 N.W.2d at 867.

In cases such as ***Miller***, where a municipality alters an existing road, courts may infer that the old road has been abandoned. The record here does not provide such an inference. Deer Trap Road runs primarily north and south, whereas the portion of the platted road the Stupars claim runs east and west. Further, Deer Trap Road does not provide direct access to Lots 17, 18 or 19, while the platted road does.

The Stupars note that the town clerk indicated by letter that the Town has no interest in the platted road. If the Town chose to abandon the road, it was required to follow statutory procedures.[5] The clerk's letter is not a substitute for formal action by the Town's governing body. Rather, the letter merely draws an unsupported legal conclusion inconsistent with the law established in ***Reilly*** and ***Heise***. We conclude that the letter is not relevant evidence of abandonment and affirm the grant of summary judgment against the Stupars regarding their claim to the platted road.

[5] The requirements for formal town action are set forth in § 66.296, STATS. A town may also abandon a highway upon petition from six or more resident freeholders by following the procedures provided in §§ 80.02 and 80.05, STATS.

The Chereks argue that the Stupars' appeal of the abandonment issue was frivolous so that they are entitled to costs under § 809.25(3), STATS.[6] We conclude that the Stupars have presented a good faith argument for the modification of existing law. There is no basis to conclude that the Stupars brought their claim solely for the purposes of harassment. We therefore conclude that the Stupars' appeal was not frivolous.

Finally, the Stupars argue that the trial court erred as a matter of law by dismissing their separate cause of action for adverse possession or a prescriptive easement over a small triangular portion of the Kittlesons' Lot 23. The issue was not before the trial court on any summary judgment motion. The Kittlesons have not appeared on appeal, nor did the Chereks respond to this issue on appeal. The Kittlesons cannot complain if the Stupors' propositions are

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[6] Section 809.25(3), STATS., provides in part:

> (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section....
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> ....
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> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
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> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

taken as confessed when the Kittlesons do not undertake to refute them. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). We reverse the part of the order and judgment granting the Kittlesons summary judgment on this issue.

By the Court. – Judgment and order affirmed in part and reversed in part. Costs to the Chereks.

Not recommended for publication in the official reports.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

COURT OF APPEALS
OF WISCONSIN
ROOM 231, STATE CAPITOL EAST
POST OFFICE BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE: (608) 266-1880
FAX: (608) 267-0640

Marilyn L. Graves, Clerk
Court of Appeals