

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

January 4, 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.

**No. 95-2131-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**IIW ENGINEERS & SURVEYORS,**

**Plaintiff,**

**v.**

**ALBERT RICHTER,**

**Defendant-Third Party Plaintiff-Appellant,**

**AMERICAN ENVIRONMENTAL AND INDUSTRIAL  
SERVICES, INC.,**

**Defendant-Third Party Plaintiff,**

**VILLAGE OF CASSVILLE,  
a Municipal Corporation,**

**Third Party Defendant-Respondent.**

APPEAL from an order of the circuit court for Grant County:  
GEORGE S. CURRY, Judge. *Reversed.*

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

PER CURIAM. Albert Richter appeals from an order granting the Village of Cassville's summary judgment motion. The issue is whether the Village showed a *prima facie* defense to Richter's claim. We conclude it did not. We reverse.<sup>1</sup>

This lawsuit has involved numerous claims and several parties. However, the only part of the litigation at issue in this appeal is the claim by Richter against the Village. Richter's complaint alleged that he is the former owner of certain lots in the Village which he had sold by land contract. During June 1993, the purchaser advised Richter that underground storage tanks had been discovered during construction on Amelia Street, the road abutting the lots. Officials from the Village and the "State Highway Department" claimed the tanks were on the Richter property and must be removed immediately. Richter arranged for removal of the tanks. After completion of the job, Richter's contractor informed him that the tanks were not on his lots, but entirely within the limits of Amelia Street. The complaint alleged that the expense of tank removal is imposed on the owner of the land on which the tanks are situated, and that the Village, as owner of Amelia Street, is responsible for those costs. The Village's answer denied the complaint. The Village moved for summary judgment. The trial court granted the motion.

The parties agree that these tanks were not in use, and that the removal is the responsibility of the "owners" of the land pursuant to WIS. ADM. CODE § ILHR 10.732. "Owner" means, in the case of any underground storage tank system not in use, "the person owning the property" on which the tank system is located. WIS. ADM. CODE § ILHR 10.01(65)(b).

Summary judgment methodology is well established, and need not be repeated here. See *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). A moving defendant must show a defense which would defeat the plaintiff. *Id.* We turn to the Village's motion. The Village argues it is not the owner of Amelia Street because case law establishes that the abutting landowner owns the land to the middle of the street, while the Village holds only an easement. The Village cites several cases that so state, including *Johnston v. Lonstorf*, 128 Wis. 17, 22, 107 N.W. 459, 461 (1906) and *Thorndike v.*

---

<sup>1</sup> This appeal is expedited under RULE 809.17, STATS.

*Milwaukee Auditorium Co.*, 143 Wis. 1, 15, 126 N.W. 881, 886 (1910). It appears these cases ultimately trace their lineage back to *Kimball v. City of Kenosha*, 4 Wis. 336 [\*321] (1855).

However, while that may be the general rule, there are also other cases showing it is not true that the abutting owner *always* owns to the middle of the street, or that villages are entirely precluded from owning a street. For example, the court said in *Pettibone v. Hamilton*, 40 Wis. 402 (1876):

In *Kimball* ..., it was held that the grantee of a lot bounded by a public street in a recorded town plat ... takes to the center of such street, subject only to the public easement, *unless the street is expressly excluded from the grant by something appearing upon the plat, or by the terms of the conveyance.*

*Id.* at 410-11 (emphasis added).

In *Walker v. Green Lake County*, 269 Wis. 103, 69 N.W.2d 252 (1955), the court quoted with approval from Am. Jur.:

In the absence of a statute expressly providing for the acquisition of the fee, *or of a deed from the owner expressly conveying the fee*, when a highway is established by dedication ... the public acquires merely an easement of passage, the fee title remaining in the landowner.

*Id.* at 111, 69 N.W.2d at 257 (emphasis added).

In *Heise v. Village of Pewaukee*, 92 Wis.2d 333, 285 N.W.2d 859 (1979), *cert. denied*, 449 U.S. 992 (1980), the opinion states there was no dispute that the recording of a plat in 1887 was a statutory dedication of Lake Street to the village. *Id.* at 342-43, 285 N.W.2d at 863. The opinion goes on to describe the village as "owning" Lake Street. *Id.* at 343, 345, 285 N.W.2d at 863, 864.

Therefore, we conclude it is not solely a question of law whether Richter owns to the middle of Amelia Street. Rather, the question is partially one of fact which depends on the history of the property and relevant conveyances.<sup>2</sup> Although the Village asserts it was granted only an easement by the plat,<sup>3</sup> it did not submit affidavits regarding the plat or the history of the property.<sup>4</sup> Because the Village did not provide such information, it failed to show a *prima facie* defense. Its motion should not have been granted. Therefore, we reverse.

---

<sup>2</sup> The trial court was aware of the potential relevance of the nature of the dedication: "[T]he Village may have had more than just an easement. But, upon reviewing the file, the affidavits and supporting documents did not show the original grantor's intent." (Apparently the trial court misspoke in referring to affidavits, since it appears none were filed.)

The court later stated:

In this case, there hasn't been any showing that the Village is a holder of more than an easement. In other words, I don't know what the grantor intended when the deed was originally given to the Village. I don't know if the Village obtained the land patent in the first place.

So since there wasn't any showing of the grantor's intent to give more than an easement, which might have possibly resulted in a different decision by me, and since there wasn't any showing that the land patent ran directly to the Village[,] which may have also resulted in a different decision by me, I have concluded that, based on the current status of the record ... the owner [is Richter].

<sup>3</sup> The Village's brief states: "[T]he Village, as trustee for the public, holds only a 60 foot easement where the [tanks] are located. This easement was dedicated by plat as Amelia Street...."

<sup>4</sup> We noted that the record included no affidavits, and we ordered the circuit court clerk to make a supplemental return of all affidavits, memoranda, briefs or other papers supporting or opposing the summary judgment motion. We received trial court briefs, but no affidavits.

*By the Court.* – Order reversed.

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