STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY P. POLCYN, BARBARA A. POLCYN, WALTER A. SCHUELKE, MYRNA L. SCHUELKE, SYLVESTER GRABOWSKI, DOROTHY GRABOWSKI, JOSEPH E. MAY, WILLIAM GUNIA, THOMAS MORGAN, JR., CAROL A. MORGAN, ROBERT E. TOPEL, JOANNE M. TOPEL, CLYDE L. O'RORKE, DONNA M. O'RORKE, DARWIN C. MILARCH, CAROLINE A. MILARCH, KATHERINE E. NOVAK, WILLIAM A. LYNCH, RITA B. LYNCH, VERA LAFLEUR, JEROME K. DUMAS, ELEANORE S. DUMAS, PHILIP W. SIUDA, MARGARET J. KAI, FRED FRANTZ, JR., LINDA FRANTZ, JACK J. ADAMS, LINDA A. ADAMS, SERAPHINE DLUZEN, CARL L. STOEL, MARGRET ANN STOEL, MARK LANE STOEL, KATHRYN LYNN STOEL, HENRY G. YONKMAN, MARY ANN YONKMAN, NADINE BOYER REVOCABLE TRUST, JUNE E. LONG, SALLY KOON CONSERVATOR, CHESTER E. KREIFELDT, BERNADINE C. KREIFELDT, ALBERT B. PASCHKA, BERNICE M. PASCHKA, ALOYSIOUS P. TABACZKA, DELPHINE TABACZKA, ROBERT E. SCHULTZ, LOIS M. SCHULTZ, DONALD A. POLCYN, LORRAINE M. POLCYN, PETER JANKOWIAK, SHIRLEY E. JANKOWIAK, JOHN YATES, JEAN L. YATES, JOHN C. ECKOFF, SHIRLEY ECKOFF, LOREN H. HOWARD, KAREN E. HOWARD, ELLIOTT RALPH FREEMAN, LAWRENCE KENT FREEMAN, JANET JEAN HUDAK, DAVID PAUL YONKMAN, JILL THERESA YONKMAN, DREW AARON YONKMAN, JOSEPH A. BROOKS, BERTHA BROOKS, RICHARD LESLEY, SHARLENE M. LESLEY, EDWARD HERMAN HAHN, NANCY JEAN HAHN, ROBERT M. BUDDE, JR., CHARLOTTE SEIWART, JOHN S. STEC and KAY N. STEC,

UNPUBLISHED
May 9, 1997

Plaintiffs-Appellants,

v

No. 190624
Manistee Circuit Court
LC No. 92-006644-CH

MANISTEE COUNTY BOARD OF ROAD COMMISSIONERS,

Defendant-Appellee.

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiffs appeal a final judgment granting defendant's, and denying plaintiffs', motion for summary disposition. We affirm.[1]

In 1960, plaintiffs, the owners of lots in a subdivision in Manistee County, requested and agreed that defendant take by condemnation the streets and alleys in the subdivision without paying any compensation to plaintiffs so that defendant would maintain these streets and remove snow. In the early 1980s, oil in marketable quantities was found under the subdivision and all landowners, including defendant, subsequently received royalties on the oil extracted from under the subdivision. In 1992, plaintiffs filed a lawsuit seeking to quiet title to the land on which the streets and alleys were situated, claiming that defendant had not validly taken the land by condemnation and that, therefore, any oil revenues attributable to that land should go to the owners of lots abutting the streets and alleys. The trial court found that plaintiffs did not challenge the taking by condemnation at the time it was executed and could not collaterally attack the condemnation procedure used thirty years later. The trial court also ruled that defendant had taken fee title to the land and therefore was entitled to receive the royalty payments related to the oil extraction.

Plaintiffs first argue that the trial court erred in determining that they were precluded from collaterally attacking the condemnation procedure that was used in 1960. We disagree.

Initially, the trial court assumed, for purposes of making a ruling, that there were several procedural defects in the condemnation procedure as alleged by plaintiffs. On the basis of this conclusion, the trial court determined that plaintiffs were precluded from collaterally attacking the condemnation procedure because they had notice of it at the time it was commenced and could have attacked any procedural irregularities at that time, relying on *State Highway Comm'r v Newstead*, 337 Mich 233; 59 NW2d 269 (1953), and *Jacox v State Highway Comm'r*, 334 Mich 482; 54 NW2d 631 (1952). Plaintiffs argue that this ruling was erroneous because they cannot be deemed to have waived their right to challenge the condemnation procedure. Plaintiffs argue that the eminent domain statute is to be strictly construed and that its jurisdictional conditions must be established in fact and may not rest on technical waiver or estoppel. However, the cases cited by plaintiffs on this point involved direct review of the condemnation procedure, not a collateral attack instituted many years after

the fact. The trial court did not err in finding that *Jacox, supra,* and *Newsteadt, supra,* read in conjunction, support the conclusion that the condemnation procedure may not be collaterally attacked when all plaintiffs had notice of it at the time.

Plaintiffs also argue that the condemnation was invalid ab initio because they did not receive just compensation. Initially, we note that this argument is not preserved because it was not raised before the trial court. Further, at the time of the condemnation, the landowners signed an "Acknowledgment of Necessity, Etc. and Waiver of Compensation." Plaintiffs argue that the failure to pay just compensation was a defect in defendant's authority to condemn their property and that arguments attacking this defect cannot be waived. However, in this instance, it is not the argument that has been waived, but rather the compensation itself. Landowners may agree to waive their right to be compensated when the state takes their land and such a waiver is enforceable if stated explicitly. See *Church v State Highway Dep't*, 254 Mich 666, 669; 236 NW 900 (1931); and *Thom v State Highway Comm'r*, 376 Mich 608, 627; 138 NW2d 322 (1965).

Plaintiffs further argue that there was no condemnation and that what actually transpired was either a statutory or common-law dedication. Plaintiffs fail to cite any authority demonstrating that this was a statutory dedication. Further, at the time the plat was originally approved, that approval was conditioned on the express understanding that the streets and alleys would remain private. Thus, this argument is unpersuasive. Regarding plaintiffs' argument that a common-law dedication occurred, where plaintiffs asked defendant to take over the streets and alleys and defendant did so, the requirements for common-law dedication were apparently met. See *DeWitt v Roscommon Co Rd Comm*, 45 Mich App 579, 581; 207 NW2d 209 (1973). However, as we have already concluded that the trial court did not err in finding that plaintiffs are precluded from collaterally attacking the condemnation, this fact precludes a finding that only a common-law dedication, rather than an actual condemnation, occurred.

Plaintiffs also argue that the trial court erred in ruling that they were barred from recovery on the basis of laches. However, the trial court said it was not necessary to reach the issue of laches. Nevertheless, we agree with defendant that the thirty-year delay in bringing suit, during which time defendant expended considerable monies maintaining the roads and alleys, would have justified such a ruling.

Plaintiffs next argue that, even if defendant received a valid transfer of property interest through condemnation, the trial court erred in determining that defendant acquired the subsurface mineral rights because defendant only obtained a "base fee" as described in *Village of Kalkaska v Shell Oil Co*, 433 Mich 348; 446 NW2d 91 (1989). We disagree. The Court's reasoning in *Kalkaska* was based on its determination of the legislative intent evidenced in the Plat Acts of 1859, 1885 and 1887. Because those statutes are inapplicable here, the trial court did not err in concluding that *Kalkaska* did not control the issue at bar.

MCL 213.174; MSA 8.174 was amended in 1962 to specifically provide that fluid mineral and gas rights are deemed excluded from the property taken by condemnation unless specifically included. Prior to that amendment, there was no explicit reference to subsurface mineral rights in the statute. Statutory amendments are generally presumed to operate prospectively unless they are merely

procedural, or the Legislature indicates an intent to give retroactive effect. *Detroit v Walker*, 445 Mich 682, 704; 520 NW2d 135 (1994). Further, a law may not apply retroactively if it abrogates or impairs vested rights, creates new obligations or attaches new liabilities regarding transactions or considerations already past. *Karl v Bryant Air Conditioning*, 416 Mich 558, 572; 331 NW2d 456 (1982).

The "Acknowledgment of Necessity, Etc. and Waiver of Compensation" explicitly stated that defendant was taking the "fee title" interest. "[F]ee simple title includes oil, gas, and minerals in the soil; and as an incident of ownership, the right to sell or lease or use the property in any lawful way." *Winter v Michigan Highway Comm'r*, 376 Mich 11, 19; 135 NW2d 364 (1965). Therefore, when defendant took fee title interest, the subsurface mineral rights were included. Although the statutory provision was changed in 1962 to provide that such transfers did not include fluid mineral and gas rights unless specifically included, applying that statutory provision here would abrogate defendant's mineral rights. Consequently, the trial court did not err in determining that defendant had acquired title to the subsurface mineral rights.

Affirmed. Defendant being the prevailing party, it may tax costs pursuatn to MCR 7.219.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] Initially, we note that the parties and the trial court dealt with this case as a condemnation case. Because of this fact our opinion also does. However, we indicate that we believe the case may properly be analyzed and reviewed as an agreement that was entered into between the plaintiffs and defendant wherein plaintiffs conveyed the property to defendant in exchange for a promise to maintain the roads and alleys. Analyzed as such, we are satisfied that plaintiffs conveyed fee simple to defendant and this included the mineral rights. See *Emmons v City of Detroit*, 261 Mich 455; 246 NW2d 179 (1933); *Armstrong v City of Detroit*, 286 Mich 277; 282 NW2d 147 (1938). Thus, the trial court properly granted defendant summary disposition.