STATE OF MICHIGAN

COURT OF APPEALS

CARY ENTERPRISES, MAX HARRELL, LEONA HARRELL, LEON FOCKLER, LEROY FOCKLER, FRANK STIMSON, PATRICIA STIMSON, LARRY SCHNEPP, VICKY SCHNEPP, ROBERT McGILL, CLAIR O. WELCH, JR., CLOYCE APPLE, SR., VERA APPLE, CLOYCE APPLE, JR., ROBERT LAPAUGH, IRENE LAPAUGH, DONALD EVANS, MARY EVANS and RANDY HUBBARD,

Plaintiffs-Appellants,

v

CSX TRANSPORTATION, INC. and RAILS TO TRAILS CONSERVANCY,

Defendants-Appellees.

UNPUBLISHED
July 29, 1997

No. 195528
Gratiot Circuit Court
LC No. 95-003311-CH

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the grant of summary disposition to defendants CSX Transportation, Inc. (CSX) and Rails to Trails Conservancy (RTC). We affirm.

Plaintiffs brought suit to quiet title to a railroad easement adjoining their parcels and sought to have the transfer of the easement from CSX to RTC set aside. Plaintiffs claimed that title to the land reverted to them by operation of law when the Interstate Commerce Commission (ICC) issued a certificate of abandonment for the rail line in 1988 and CSX removed the tracks. Defendants denied any intent to abandon their interest in the easement. Both parties brought cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The circuit court entered judgment for defendants, finding that the ICC certificate was probative only of CSX's intent to discontinue rail service and that defendants' payment of the property taxes and attempts to sell portions of the right of way demonstrated their desire to preserve their property interests. The circuit court also found that the

recreational trail use of the land contemplated by RTC was consistent with the original public transportation purpose of the easement.

In rendering its judgment, the circuit court relied on *Strong v Detroit & Mackinac R Co*, 167 Mich App 562, 569; 423 NW2d 266 (1988), in which this Court held that a railroad's nonuse of an easement from which the tracks had been removed thirty years earlier was insufficient to show the company's intent to abandon its property interest in the right of way. *Id*. To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown. *Id.*; *Ludington & Northern R v The Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991). Nonuse, by itself, is insufficient to show abandonment. *Id.*

Plaintiffs now argue that *Strong*, *supra* is distinguishable on its facts because in *Strong* the railroad conducted monthly inspections while CSX conducted no inspections or maintenance on the subject property. However, there is no requirement under existing Michigan law that an easement holder inspect the property. In *Choals v Plummer*, 353 Mich 64, 72-73; 90 NW2d 851 (1958), our Supreme Court held that the plaintiff was entitled to compensation for encroachment on an easement despite the fact that she never called the defendant's attention to the easement, the easement had never been used, and the land was covered with shrubs and small trees. We find, therefore, that defendants' failure to maintain or inspect the easement in the present case is insufficient to establish abandonment.

Moreover, CSX's payment of taxes on the property, regardless of whether those taxes were billed or paid in error, is evidence demonstrating that it wanted to preserve its interest in the property. As the circuit court noted, "[h]ad defendants intended to abandon their property rights, they could have simply let the property go to tax sale without further loss." Plaintiffs' reliance on *Hawkins v Dillman*, 268 Mich 483, 489; 256 NW 492 (1934), for the proposition that "inclusion or omission of the property from the tax roll is not of very great probative value" in determining ownership, is misplaced. Because that case involved a defeasible grant that reverted by its own terms to the original owners when railway operations ceased, no issues regarding intent to abandon were ever raised. *Id*. at 486. Moreover, whether a property is taxed at all is a different question from the payment of taxes to preserve an interest.

Plaintiffs also argue that CSX's intent to abandon the easement is shown by the sales of portions of the railroad corridor to the east and west, which rendered use of this particular portion of the easement impossible. In *Boyne City v Crain*, 179 Mich App 738, 746; 446 NW2d 348 (1989), this Court held that a railroad easement that had become landlocked as a result of sales and development of surrounding land had been extinguished by reason of impossibility. However, in the present case, the circuit court's determination that the easement was not landlocked and was always accessible was conclusively shown in the parties' stipulated facts. As the party moving for summary disposition, plaintiffs have the burden of producing evidence sufficient to create an issue of material fact. *Skinner v Square D Co*, 445 Mich 153, 160-161; 516 NW2d 475 (1994). This they have failed to do, and we therefore reject this argument. Plaintiffs have cited no authority to support their contention that defendants' sales or leases of portions of other nearby easements are evidence of their intent to abandon this particular easement, and plaintiffs have thereby abandoned this issue. This Court will not

search for authority to sustain or reject a party's position. *Isagholian v Transamerica*, 208 Mich App 9, 14; 527 NW2d 14 (1994). Moreover, defendants' actions with regard to other easements is not probative of their intent with regard to the easement at issue. As the circuit court noted, the original grants were permanent and assignable, and CSX's conduct is evidence of its recognition that its property rights had value.

Finally, plaintiffs claim that the ICC certificate of abandonment is conclusive proof of CSX's intent to abandon its property interests. We disagree. The ICC regulates and approves abandonment; it "does not determine abandonment." *Vieux v East Bay Regional Park Dist*, 906 F2d 1330, 1339 (CA 9, 1990). ICC approval of abandonment "is only a determination that . . . cessation of service would not hinder ICC's purposes. It is not a determination that the railroad has abandoned its lines." *Id*. This conclusion is consistent with Michigan case law holding that mere nonuse is insufficient to show an intent to abandon. See *Strong*, *supra* at 567; *Ludington & Northern*, *supra* at 34; *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381, 393; 178 NW 274 (1920).

Plaintiffs cite *Penn Central Corp v United States R Vest Corp*, 955 F2d 1158 (CA 7, 1992), for the proposition that an ICC abandonment certificate automatically terminates an easement for a right of way. However, that case involved an Indiana statute that expressly provided that railroad rights of way terminated upon issuance of an ICC certificate of abandonment, regardless of the terms of the conveyance. *Id*. at 1160. Because Michigan has no such statute, the case is inapplicable. Therefore, the circuit court did not err when it determined that the ICC certificate was not probative of defendants' intent with regard to its property interest.

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald