STATE OF MICHIGAN

COURT OF APPEALS

KALKASKA COUNTY ROAD COMMISSIONERS,

Plaintiff/Counter-defendant/
Appellee,

v

MARTIN J. NOLAN II and AMY L. NOLAN,

Defendants/Counter-plaintiffs/
Appellants.

UNPUBLISHED
June 9, 1998

No. 197354
Kalkaska Circuit Court
LC No. 94-005086-CH

Before: Hood, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Defendants Martin and Amy Nolan appeal as of right from the trial court's order granting summary disposition to plaintiff and thereby recognizing a trail on defendants' property as part of a county road subject to plaintiff's jurisdiction. We reverse and remand for trial.

In 1993, defendant Martin Nolan discovered a county employee digging on an unpaved two-track road running through his property. He ordered the employee to restore the ground and leave the premises, which the employee did. Shortly thereafter, defendants constructed gates to block access to that road at each end where the road passed into their property. Plaintiff sought to enjoin defendants from maintaining those gates, claiming that the road in question was a public highway under plaintiff's jurisdiction. Defendants filed a counter-claim to quiet title.

Three portions of roadway are at issue. It is not disputed that Squaw Lake Road travels around Squaw Lake at the northwest end, heading east on the north side of the lake. This section of road is paved. The road then joins an unpaved two-track trail heading north, passing through defendants' property. This is the section of road in dispute. Beyond the junction, a section of unpaved roadway continues east along Squaw Lake and eventually comes to a dead end. Plaintiff maintains that Squaw Lake Road turns north and continues along the disputed trail and that the portion of roadway that continues east past that junction constitutes Batsen Road (spelled "Battsen" in some documents in

the record). Defendants maintain that Squaw Lake Road does not turn north, but only continues past the junction with the disputed trail to include the dead-end roadway that plaintiff calls Batsen Road. The trial court found that the disputed trail was a part of Squaw Lake Road because it satisfied the statutory elements of a "highway by user" and granted plaintiff's motion for summary disposition.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

Defendants first argue that the trial court erred in finding that the McNitt Act had transformed the disputed trail into a county highway. The Act, 283 PA 1909, provided a means by which counties could assume jurisdiction over public roads that had been under township stewardship. The McNitt Act itself is not a vehicle through which a county may take over a private road, although publication notice of a county's intent to assume control over a road pursuant to the Act is substantive evidence of the public nature of that road. *Pulleyblank v Mason Co Rd Comm*, 350 Mich 223, 230; 86 NW2d 309 (1957). Pursuant to this Act, plaintiff published notice in 1935 of an intention to assume jurisdiction over a roadway identified in the notice with general terms that comport with the location of the present-day disputed trail.

The trial court did not misapply the McNitt Act. Contrary to defendants' claim, the court did not state that the Act transformed a private trail into a public road, but simply and properly regarded the 1935 McNitt publication notice as substantive evidence that a roadway existed at the time in rough proximity to the disputed trail, and that this road was subject to open public use.

However, defendants next argue that the trial court erred in determining as a matter of law that the disputed trail was part of Squaw Lake Road and that it satisfied the elements for a highway by user. Here we agree.

First, the circuit court relied heavily on the opinion of plaintiff's surveyor, and on certain historical documents, in concluding that the disputed trail was part of Squaw Lake Road. However, other evidence in the record casts doubt on that conclusion. In deciding motions for summary disposition, a trial court may not make factual findings or weigh credibility. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Evidence (a) that some persons living on Batsen Road in fact regarded themselves as living on Squaw Lake Road; (b) that even some county employees have regarded the Batsen portion of roadway as a continuation of Squaw Lake Road; (c) that plaintiff's sign appearing at the beginning of the undisputed portion of Squaw Lake Road announced that the road came to a dead end; (d) that at least some of the historical maps on which plaintiff relies are clearly

inaccurate or have been altered previously by unknown hands; along with (e) the consideration that other historical maps exist indicating no roadway in proximity to the currently disputed trail, all create a genuine issue of fact regarding whether the disputed trail is part of Squaw Lake Road.

This does not end the inquiry, however. If, on the basis of undisputed facts, the disputed trail satisfies the requirements for a "highway by user," the trial court's finding to that effect may be upheld on appeal even if the court erred in concluding that the trail was part of Squaw Lake Road. See, e.g., *Porter v Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995). However, there is insufficient evidence in the instant case, in our judgment, that the disputed trail satisfies the elements for a "highway by user."

The "highway by user" statute provides, in pertinent part, as follows:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not . . . shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. [MCL 221.20; MSA 9.21.]

"The elements of a highway by user . . . require evidence of a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten . . . consecutive years without interruption, in a manner open, notorious, and exclusive." *Rigoni v Michigan Power Co*, 131 Mich App 336, 343; 345 NW2d 918 (1984). We do not find these elements satisfied in the present case on the basis of undisputed facts in the record.

First, infrequent and minor maintenance will not make a public highway out of a private road. *Keller v Locke*, 62 Mich App 591, 592-93; 233 NW2d 666 (1973). Evidence of public maintenance of the disputed trail consists of the posting of signs on either end of the trail *outside* defendants' property, of brush-cutting at the end of the trail closest to the undisputed portion of Squaw Lake Road, and of a single county record of a gravel patch being applied to Squaw Lake Road. Indeed, defendants plausibly argue that such patch may have actually been applied to the Batsen portion of the roadway, which some county employees routinely called Squaw Lake Road. Plaintiff's own secretary-clerk testified that no county records of work done on the disputed trail indicate clearly that the work was done on the portion that traverses defendants' land. However, even if this could be clearly shown, such evidence, considered in the light most favorable to defendants, indicates at best that county work done on the disputed trail was highly infrequent.

Second, trails and logging roads that are only used locally do not generally become public highways regardless of how long they have been used that way, but "where such trails have a direct public and useful destination and are used by the general public at large over a period of many years, to pass to and from such destinations, . . . they lose their character as private ways and become public roads . . . ." *Pulleyblank*, *supra* at 230, quoting *Roebuck v Mecosta Co Rd Comm*, 59 Mich App 128, 131; 229 NW2d 343 (1975). "The law does not fix the number who must travel upon a road in

order to determine whether it exists by user. . . . [I]t would be sufficient to constitute a highway by user if the road was traveled as much as the circumstances of the surrounding population, and their business, required." *Roebuck, supra*, at 131. Evidence of public use of the disputed trail consists of maps plus the McNitt notice indicating the existence of a roadway in at least rough proximity to the present-day trail, a Department of Natural Resources official's statement that he had observed members of the general public on the trail engaged in hunting and other recreational activities, and a statement from the owner of property near the junction of the undisputed portion of Squaw Lake Road and the disputed trail that he, along with family and friends, had, since 1972, used the trail for general recreational purposes several times per year.

However, the statements of other nearby landowners that they had always understood the disputed trail to be private property suggest that current public use of the disputed trail falls significantly short of the open, exclusive, and notorious nature required to find a "highway by user." Further, evidence that the area abounds with trails, some of which may run north and south and may have once drawn traffic from the undisputed portion of Squaw Lake Road, suggests that historical indications of public use of a trail in the vicinity of the disputed one may in fact point to a different trail, or indicate that the once-public nature of the disputed trail has been extinguished by abandonment over the years. Further, full evidentiary development of this question may conceivably show that the members of the general public that used the trail had defendants' permission to be on the trail, or that their use, along with that of the nearby landowner and his friends and family, add up to only minimal trespasses falling short of open, exclusive, and notorious public use. For these reasons, we also hold that a genuine issue of material fact exists regarding whether the disputed trail is a "highway by user."

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Peter D. O'Connell