STATE OF MICHIGAN

COURT OF APPEALS

CHARLES E. CAPLE and JANE S. CAPLE,

Plaintiffs-Appellants,

v

OTSEGO COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
March 17, 2000

No. 215462
Otsego Circuit Court
LC No. 96-006911-CZ

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment holding that a road running through plaintiffs' property is a highway by user with a sixty-six-foot-wide right-of-way. We reverse.

Plaintiffs' action alleged that defendant Otsego County Road Commission violated both their private property rights and a 1992 agreement wherein defendant road commission agreed not to widen, straighten, or otherwise improve Old Alba Road, but retained the right to do ordinary maintenance and repair. In its countercomplaint, defendant road commission alleged that the road was a highway by user pursuant to MCL 221.20; MSA 9.21,[1] and that the roadway was therefore sixty-six feet wide.

Standard of Review

This Court reviews the legal requirements for establishing a highway by user de novo. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998). The trial court's factual findings are reviewed for clear error. *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 232-233; 428 NW2d 353 (1988). A finding of fact is clearly erroneous if this Court "is left with a definite and firm conviction that a mistake has been made." *Id*. at 233.

The Trial Court's Decision and the Applicable Law

A roadway can be dedicated to public use either expressly or impliedly. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554;

600 NW2d 698 (1999). The trial court concluded that the disputed portion of Old Alba Road was never formally dedicated to the public. Additionally, the road commission has not contended, and the evidence did not establish, that there was an intentional dedication of Old Alba Road to the public. Instead, the road commission contended, and the trial court agreed, that pursuant to the highway-by-user statute, MCL 221.20; MSA 9.21, Old Alba Road was impliedly dedicated to the public.

A highway by user is a roadway in which the public has acquired an interest despite the absence of a formal dedication. *Cimock, supra* at 86-87; *Rigoni v Michigan Power Co*, 131 Mich App 336, 343; 345 NW2d 918 (1984). The highway-by-user statute treats these roads as "impliedly dedicated to the state for public use." *Kentwood v Sommerdyke Estate*, 458 Mich 642, 652; 581 NW2d 670 (1998). To establish a public highway pursuant to the highway-by-user statute,[2] the public body must show (1) a defined line of travel, (2) that public authorities maintained the road, (3) that the public has traveled on and used the road for ten consecutive years without interruption, and (4) that the public's use was open, notorious and exclusive.[3] *Beulah Hoagland, supra* at 554-555; *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Kent Co Rd Comm, supra* at 230-231. A plaintiff "establishe[s] at least a prima facie case to claim private ownership by proving title and possession." *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 378; 53 NW2d 297 (1952).

The burden of proving a highway by user is on the governmental entity making the claim. *Cimock, supra* at 87 n 2. The burden of rebutting the presumption that a highway by user is sixty-six feet wide is on the landowner. *Eyde Bros Development Co v Eaton Co Drain Comm'r*, 427 Mich 271, 298; 398 NW2d 297 (1986).

The trial court concluded that Old Alba Road had become a public road under the highway-by-user statute based on: (1) acceptance of the road by the county under the McNitt Act,[4] (2) continued use by the public, (3) plaintiffs' 1995 application for designation of the road as a Natural Beauty Road under MCL 247.381 *et seq.*; MSA 9.195(61) *et seq.*[5] (which requires that the road be a "county local road"), and (4) a 1992 agreement between the parties that stated that Old Alba Road was a public road.

The Effect of Acceptance of the Road Under the McNitt Act

The road commission contends that this Court's recent opinion in *Christiansen v Gerrish Twp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211216, issued January 11, 2000), supports its claim (and the trial court's conclusion) that Old Alba Road became a public highway when it was accepted by the road commission in 1933 pursuant to the McNitt Act. We disagree. The *Christiansen* decision concerns a road that was expressly dedicated to public use in the original subdivision plat. The question was whether the county had failed to accept the dedication, and thus whether the landowner could rescind the dedication. This Court concluded that specific identification of a previously dedicated road in a McNitt Act resolution could function as acceptance of the *express* dedication of the road. *Christiansen, supra*, slip op at 4-5. However, in this case there is no evidence that Old Alba Road was ever expressly dedicated to the county.

The road commission would have this Court conclude that a McNitt resolution can absorb a private, *undedicated* road into the county road system. We refuse to accept such an expansive interpretation of *Christiansen*. As this Court stated in *Beulah Hoagland, supra* at 556-557, use of a McNitt resolution to transform a private road into a public highway is inconsistent with the fundamental principle of private property. See also *Pearl v Torch Lake Twp,* 71 Mich App 298, 308; 248 NW2d 242 (1976) ("[T]he McNitt Act did not authorize the County Road Commission to take private roads into the public highway system."). "[M]ere certification of the road as a public highway [cannot] affect the actual status. If such a 'boot-strap' method were effective to create a highway, condemnation would be obsolete." *Maghielse v Crawford Co Rd Comm,* 47 Mich App 96, 99; 209 NW2d 330 (1973). Therefore, a county may not acquire private property without just compensation unless the property is expressly or impliedly dedicated to the county. Because we find no express dedication, we reject the road commission's reliance on *Christiansen* and the trial court's conclusion that Old Alba Road was a highway by user as a result of its acceptance by the county under the McNitt Act. An analysis of the elements necessary to support an implied dedication under the highway-by-user statute is therefore required.

Analysis of the Highway by User Elements

A highway by user must have a defined and visible route. *Rigoni, supra* at 343-344; *Watson v Bd of Co Rd Comm'rs of Montmorency Co,* 52 Mich App 258, 260-261; 217 NW2d 129 (1974). One of the road commission's witnesses testified that Old Alba Road was a two-track lane in the 1940s, but that by the 1980s the road had become a more conventional dirt road. Plaintiff[6] acknowledged that by 1980 the road was no longer a two-track. Further, several witnesses testified about the width of the traveled portion of the road, indicating that the line of the road was visible and defined. Aerial photographs that were submitted as exhibits in the trial court indicate that the track of Old Alba Road follows a natural route between Alba Road and Hayes Tower Road. There was also testimony that the road follows the section line. We conclude that Old Alba Road has a sufficiently definite and visible route.

The second element used to determine the existence of a highway by user requires the public body to show control over the road in question. *Keller v Locke,* 62 Mich App 591, 592; 233 NW2d 666 (1975); *Maghielse, supra* at 98-99. The degree of maintenance required to demonstrate such control is merely enough to keep the road in a "reasonably passable condition." *Boone v Antrim Co Bd of Rd Comm'rs,* 177 Mich App 688, 694; 442 NW2d 725 (1989); see also *Indian Club v Lake Co Rd Comm'rs,* 370 Mich 87, 91; 120 NW2d 823 (1963). However, infrequent maintenance and repairs by the county do not make it a public road. *Keller, supra* at 592-593.

According to the road commission, its maintenance of the road began in 1933 when the commission accepted responsibility for the road. However, there was no testimony about any work being done on the road before 1947 when the county bladed the road and set up a schedule of repeating that procedure every seven years. According to Jane Gray, a resident on Old Alba Road and the daughter of the one of the men who owned the subject property from 1937 to 1957, the road commission began to maintain the road regularly in 1980, although she acknowledged that the road commission may have bladed the road once a year beginning in 1967. Donald Huff, a member of the

road commission, stated that the road had been widened and improved since approximately 1976. Lawrence Bowers, Michael Roper, and Eugene Fleming (the first two witnesses were employees of the road commission and the latter witness was a road commissioner), testified that the road commission maintained the road over the years by trucking in gravel and clay to patch holes, taking down trees and branches for safety and blading the road several times a year to keep it smooth. Fleming described the maintenance as "very minimal" and stated that it consisted of cutting down a few trees for the safety of the traveling public, blading the road every year, and using gravel for spot repairs. Roper agreed with Fleming's description of the maintenance. Bowers testified that the road was bladed occasionally and that if trees fell across the road, they were removed. Plaintiff acknowledged that the road remained in the same condition from 1980 until 1990, and that the only maintenance consisted of the road commission blading the road once or twice a year.

The road commission's intermittent maintenance before 1980 cannot be deemed sufficient to establish this element of the highway-by-user statute. In *Missaukee Lakes Land Co*, *supra* at 378, our Supreme Court held that the road commission's actions of limited maintenance in 1937 and 1945 to 1947 were not sufficient to establish a highway by user. Here, the evidence demonstrated that the road commission began continuous and regular maintenance on the road in 1980. In light of the limited numbers of residences in the area, this limited but regular maintenance is sufficient to establish the second element of the highway-by-user test. We therefore conclude that the road commission established that it had continuously maintained Old Alba Road from 1980. However, "the performance of maintenance work by a public authority is a necessary, *but not a sufficient*, condition for the finding of a highway by user." *Cimock, supra* at 91; emphasis in original.

The next factor that must be considered is whether the public used the road without obstruction for ten consecutive years. *Cimock, supra* at 86-87. The law does not fix the number of people who must travel upon a road in order to determine whether it exists by user. *Roebuck v Mecosta Co Rd Comm*, 59 Mich App 128, 131; 229 NW2d 343 (1975). It is sufficient if the road was traveled as much as the circumstances of the surrounding population, and their business, required. *Id*., citing *Grandville v Jenison*, 84 Mich 54, 68; 47 NW 600, 603 (1890). A road used by the public for accessing areas for hunting and recreation may be deemed a highway-by-user. *Roebuck, supra* at 131. However, as *Cimock, supra* at 87 and 93, emphasizes, this element of the highway-by-user test requires a showing that the road is used by members of the general public and not merely the friends and family of people living on the road. Based on the evidence considered above regarding the initial year of regular maintenance, we conclude that the applicable ten-year period to be examined is from 1980 to 1990.

At trial, plaintiff acknowledged public use of the road but stated it was sporadic from 1980 to 1990. However, he acknowledged that in the winter strangers driving on the road sometimes got stuck and then needed a tow. Testimony established the road was also used by oil and gas workers to access wells, but according to plaintiff, this occurred because he had an agreement with the oil and gas company and he received some compensation. Permissive use of the road does not serve to establish a highway by user because such use is not hostile to the owner's property interest. *Missaukee Lakes, supra* at 378-379; *Cimock, supra* at 93. There was some testimony that local residents used the road

as a short cut, but "[t]he mere fact that a portion of the public traveled along this strip . . . for the purpose of passing from there by a short cut over private property to reach a public highway . . . does not, standing alone, make it a public highway." *Murphey v Lee Twp*, 239 Mich 551, 560; 214 NW 957 (1927). Three of the road commission's witnesses testified that they had driven on the road, but they did not indicate how frequently they did so and the trial court made no findings in this regard. Gray testified that from 1963 to 1990 the primary public use of the road was by hunters or people who wanted to visit the locations of former logging camps; she claimed that other than this there was very little traffic. Plaintiff also testified that public traffic on the road was sporadic. We conclude that this showing was insufficient to establish a highway by user.

Finally, the road commission had to show that the public use of the road was "open, notorious, and exclusive." *Alton v Meeuwenberg*,108 Mich 629, 636; 66 NW 571 (1896). Our Supreme Court affirmed the trial court's explanation in *Alton, supra*, that the public travel

> must be open; it must be notorious; it must be accepted by the public generally; it must be traveled upon as a public highway, and the possession of the public must be exclusive, so that, if any person entered upon the premises and sought to use it in a manner other than as a public highway, the public authorities would have an action against such person for trespass upon the road. [*Id*.]

Plaintiff and Gray testified that the property surrounding Old Alba Road, and the road itself, were used for cattle grazing. Cattle guards were installed in the road at the east and west entrances to plaintiffs' property. The road commission's witnesses acknowledged that this was the only road in the county that had cattle guards. Plaintiff testified that he closed the roadway several times a year by blocking it with trucks so that he could drive his cattle from pasture on one side of the road to the other. Huff acknowledged that it was not unusual for cattle to be on the road, and Fleming testified that he assumed the cattle crossed the road at will. Plaintiff stated that he traveled the road to maintain the fences alongside the roadway. Plaintiff also testified that in the winters during the period prior to 1990 (before the county began to plow the road), he sometimes had to assist people whose cars became stuck in the snow when they attempted to traverse Old Alba Road. To prevent people from using the road during the winter, plaintiff cut down trees to block the road. Subsequently, however, the road commission provided him with signs (at his expense) that he could use to block access to the road during the winter. Plaintiff also claimed that he owned the property and that he paid taxes on the roadway.

Huff asserted that the road was a county road because of the McNitt Act resolution in 1933 and the subsequent certification by the road commission in 1953. Huff acknowledged that if there was no objection by a property owner, the road commission would conduct improvements to roadways without bothering to condemn the land. Huff and Fleming acknowledged that plaintiff objected to any action taken by the road commission, be it adding gravel to the road surface or cutting down trees that were growing next to the roadway. Michael Roper, the managing director for the road commission, testified that the speed limit on county roads such as Old Alba Road is fifty-five miles per hour; however, he acknowledged that it would be unsafe to drive on the road at that speed, so no speed limit signs were posted in the hope that travelers would therefore drive at a speed suitable to the condition of

the road. Roper acknowledged that plaintiff placed his own speed limit signs (setting a speed limit of fifteen miles per hour) near the cattle guards; Roper stated that he permitted these "advisory" signs to remain in the interest of public safety because it was not safe to drive over the cattle guards in excess of that speed. Gray testified that the road was bumpy and it was unsafe to drive in excess of fifteen miles per hour.

This Court concludes from its de novo review of the record that the road commission failed to establish that Old Alba Road had become a highway by user because there was insufficient evidence of regular and continuous public use and, more importantly, there was insufficient evidence that the public use was hostile to or exclusive of plaintiffs' property rights. Moreover, there was unrebutted evidence that plaintiffs continued to treat the road as a private thoroughfare by shutting down the road to move their cattle across it and by permitting the cattle to move freely across the road on their own. We also find that plaintiffs' use of cattle guards in the road at the entrances to their property evidenced their continued assertion of their private property rights in the section of Old Alba Road that crossed their property. The road commission's witnesses acknowledged that this was the only road in the county that had cattle guards.

Unlike the trial court, we are not impressed by the road commission's claim that plaintiffs' 1995 petition for designation of the road as a Natural Beauty Road, or their participation in the 1992 agreement, demonstrated their acknowledgment that Old Alba Road was a public road. Plaintiff testified that he sought the Natural Beauty Road designation on the advice of one of the road commissioners who suggested to him that "most of the problems would go away if it were designated a natural beauty road." Likewise, the fact that plaintiffs signed an agreement in 1992 (after the ten-year period had run) that contained the statement that Old Alba Road was a public road is not persuasive on the issue of whether the road became a public road by 1990 pursuant to operation of the highway-by-user statute. To declare Old Alba Road a public road, the road commission had to satisfy the requirements imposed by the highway-by-user statute; where the road commission did not satisfy those prerequisites, the deficiency could not be supplied by plaintiffs' after-the-fact "admissions."

Remaining Issues

Because of our disposition of this issue, it is unnecessary for this Court to address at length the other claims raised in this appeal. Given that we have concluded that the road commission failed to establish that Old Alba Road was a highway by user, there is no need to determine if the width of the road was the statutorily presumed sixty-six feet. The trial court did not abuse its discretion by denying plaintiffs' request for a preliminary injunction to prevent the road commission from cutting down trees near the roadway. The cutting down of young trees in an area where such trees abound does not establish an irreparable injury, and plaintiffs had an adequate remedy at law that afforded them appropriate relief. *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998) ("Economic injuries are not irreparable because they can be remedied by damages at law.").

Finally, in light of its conclusion that Old Alba Road was a highway by user, the trial court did not address plaintiffs' claim that the removal of trees from next to the roadway constituted a taking of property without compensation for which they were entitled to treble damages under MCL

600.2919(1); MSA 27A.2919(1). Pursuant to this statute, a landowner has a cause of action and a right to treble damages when a person intentionally trespasses and harms property. The general measure of damages in a trespass action is the land's diminution in value if the injury is permanent or irreparable. *O'Donnell v Oliver Iron Mining Co*, 262 Mich 470, 477; 247 NW 720 (1933). Further, if the trespass was intentional, an award of treble damages is permitted. A trespass that is merely negligent will not suffice for the imposition of treble damages. MCL 600.2919(1)(c); MSA 27A.2919(1)(c); *Iacobelli Construction Co, Inc v Western Casualty & Surety Co*, 130 Mich App 255, 262; 343 NW2d 517 (1983). Because the trial court did not address whether an intentional trespass occurred, and, if so, whether treble damages should be awarded, this question should be considered by the trial court on remand. *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 571; 596 NW2d 915 (1999).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] This statute provides:

> 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, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

[2] The trial court did not consider the four elements of the highway-by-user test and instead concluded that "the focus of the statute is on the use by the public, not maintenance by either the property owner or the Road Commission." This conclusion is at odds with well-established case law interpreting the highway-by-user statute and we therefore reject the trial court's formulation.

[3] Some other cases have substituted the word "hostile" for the word "exclusive" in this definition. See *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958); *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 379; 53 NW2d 297 (1952); *Murphey v Lee Twp*, 239 Mich 551, 560-561; 214 NW 957 (1927). However, in *Donaldson v Alcona Co Bd of Co Rd Comm'rs*, 219 Mich App 718, 725-726; 558 NW2d 232 (1996), this Court concluded that these two terms were used interchangeably to require the same thing; specifically, that the public use must be "hostile" to the private rights of landowners, meaning that those rights are being "excluded" or denied. *Id*. at 275 n 1.

[4] 1931 PA 130, repealed by 1951 PA 51.

[5] Now MCL 324.35701 *et seq.*; MSA 13A.35701 *et seq*.

[6] Plaintiff Charles Caple testified at the evidentiary hearing held below, but his wife did not. Therefore, reference in this opinion to the singular "plaintiff" is intended to refer to Charles Caple's testimony.