STATE OF MICHIGAN

COURT OF APPEALS

GERALD G. ALBERS, and CAROLYN J. ALBERS,

Plaintiffs/Counterdefendants-Appellees/Cross-Appellants,

v

MACKINAC COUNTY ROAD COMMISSION,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF NATURAL RESOURCES, R. H. GOODIN, Trustee, ELIZABETH J. GOODIN, Trustee, MICHAEL R. GAHN, SUSAN GAHN, a/k/a SUSAN VANVOORHEES, a/k/a SUSAN BEGLE, F.L. VANVOORHEES, BARBARA L. VANVOORHEES, WILLIAM O. MITCHELL, ANGELINE R. MITCHELL, CITIZENS NATIONAL BANK, ANNA MARGARET DEVLIN, a/k/a ANNA DEVLIN, CARL WHITE, a/k/a CARL P. WHITE, ESTHER L. WHITE, MICHAEL J. WHITE, LANITA WHITE, MAURICE VICTOR DELOFF, PRESQUE ISLE ELECTRIC & GAS COOP, INC., ISLAND TELEPHONE COMPANY, and BOIS BLANC TOWNSHIP,

Third-Party Defendants.

UNPUBLISHED
July 14, 2000

No. 213478
Mackinac Circuit Court
LC No. 94-003695-CH

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

PER CURIAM.

Defendant/counterplaintiff, Mackinac County Road Commission (hereinafter defendant) appeals as of right, following a bench trial, from the trial court's judgment adjudicating disputed portions of a roadway designated as Sand Bay Road, a/k/a County Road 295, in Bois Blanc Township, Mackinac County. The court ruled that portions of Sand Bay Road were parts of a public roadway pursuant to the highway by user statute, MCL 221.20; MSA 9.21. On appeal, defendant argues that the trial court erred in determining that the width of the roadway would be limited to twenty-four feet. Plaintiffs/counterdefendants, Gerald Albers and Carolyn Albers (hereinafter plaintiffs), cross-appeal, challenging the trial court's determination that the elements for establishing a highway by user were satisfied. They also challenge the trial court's determination of the width of the roadway. We reverse and remand for a new trial.

Plaintiffs purchased a parcel of property in August 1993, from David A. Barnett. Plaintiffs alleged that there was an access road to their property as well as a private drive consisting of a one-hundred foot parcel that extended from the access road to the Straits of Mackinac. Plaintiffs requested injunctive relief to prevent defendant from maintaining and extending the private drive. Defendant filed a countercomplaint alleging that the private drive had become a highway by user. After two days of trial testimony, the trial court concluded that all necessary parties were not present for an adjudication. That is, if defendant was given its requested relief of the grant of a highway by user in accordance with the presumed width of four rods or sixty-six feet, the ordered roadway would require the use of property owned by neighboring landowners who were not named in the action. Accordingly, a third-party complaint was filed by defendants, and trial *resumed* a year and a half later. At the conclusion of trial, the court concluded that a roadway had been established by highway by user, MCL 221.20; MSA 9.21, but was limited to the fourteen feet of use with an additional five feet on either side for, essentially, safety purposes.

Plaintiff first argues that the trial court clearly erred in concluding that the defendant met its burden of proof regarding the elements of highway by user. We agree. While a trial court's findings of fact in a bench trial are reviewed for clear error, *Featherstone v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997), the trial court's conclusions of law are reviewed de novo for error. *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). Where an error of law has occurred in the proceedings, a new trial is appropriate. *Schellenberg v Rochester, Michigan, Lodge No. 2225*, 228 Mich App 20, 31; 577 NW2d 163 (1998). Highway by user describes how the public acquires title to a highway by a sort of prescription where no formal dedication has ever been made. *Rigoni v Michigan Power Co*, 131 Mich App 336, 343; 345 NW2d 918 (1984). The elements of highway by user are: (1) defined line of travel with definite boundaries; (2) use and maintenance by public authorities; (3) travel upon the road by the public; (4) for ten consecutive years without interruption; and (5) the use occurs in an open, notorious and exclusive manner. *Kent County Road Commission v Hunting*, 170 Mich App 222, 231; 428 NW2d 353 (1988). Once the elements are established, the statute operates to raise a rebuttable presumption that the road is four rods or sixty-six feet wide. *Id*. In the present case, the trial court held that there was a period of use for in excess of sixty years in light of the fact that mail delivery had been received along the private road asserted by plaintiffs. However, the trial court failed to delineate and the parties failed to present title of ownership for the parcels surrounding the private drive. That is, it would be inappropriate to deprive plaintiffs of the use of the property based on a period of time wherein there was no owner of the property adjoining

the private drive. Highway by user allows the public the use of another's property as a road because the owner acquiesces or donates the use of the land and cannot be heard to object later. *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 657; 581 NW2d 670 (1998), citing *Bumpus v Miller*, 4 Mich 159 (1856). If there was no property owner during a significant period of time during that sixty year period, there could be no acquiescence or donation of property by an owner. Rather, it seems that if defendant is relying on its use from a period of time prior to the existence an ownership interest, defendant should have condemned the property rather than deprive a later purchaser of a portion of property. *Kentwood, supra*.

While there was a period of ownership established, it was unclear whether that ownership involved the parcels neighboring the private drive in dispute. Barnett testified that he bought lakefront property in 1985 from Henry Caulkins. However, he did not specify whether this property involved the disputed property bordering the private drive. Rather, Barnett testified that he also purchased property in 1991, from two elderly women. In 1993, Barnett's properties were sold to plaintiffs. Because the trial's conclusion of law is based on the lack of clarity in the record regarding whether the property neighboring the private drive was held in ownership interest for a continuous ten year period wherein the owner had the ability to object to defendant's use, we must reverse and remand for a new trial. *Schellenberg, supra*.

Even assuming that the parties had presented sufficient evidence to satisfy the elements of highway by user, we note that it appears that additional third party defendants were denied procedural due process by being added to the trial after two days of testimony had taken place. Constitutional issues are reviewed de novo as questions of law. *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999). It is fundamental that both state and federal constitutions provide that no person shall be deprived of property without due process of law. *Rental Property Association v Grand Rapids*, 455 Mich 246, 271; 566 NW2d 514 (1997). Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf, supra* at 381-382. Procedural due process serves as a limitation on government action and requires it to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept that applies to any adjudication of important rights. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). It calls for procedural protections as the situation demands including fundamental fairness. *Id.* Fundamental fairness includes consideration of the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Id.*

In the present case, the denial of procedural due process precludes us from addressing defendant's issue on appeal. *Id.* at 515-516. The trial court concluded after two days of trial that highway by user *had been established* and the only issue in dispute was the width of the roadway. However, when the third-party defendants were added to the litigation, trial did not begin anew, but rather, was merely resumed. A third-party defendant, appearing in propria persona, asked for clarification regarding an issue that had been developed during the first part of trial and also asked for clarification regarding the exhibit representing the portions of the disputed road as divided into sections

A, B, and C. Counsel for the parties refused to answer the question because of a "procedural problem," although it is questionable whether counsel could have answered the question in light of the lack of specificity of the documentary evidence presented in the exhibit evidencing the disputed property.

Furthermore, while defendant seeks a reversal of the trial court's order awarding twenty-four feet for the roadway established by highway by user, defendant fails to cite authority in support of taking property belonging to third-parties who did not authorize public use. That is, defendant's request, that the highway by user be granted to the full extent of the presumptive four rods, fails to delineate how property may be taken from neighboring landowners who have not authorized public use of their property. A party may not leave it to this Court to search for authority to sustain or reject its position. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997).[1] Due to the lack of procedural due process afforded third-party plaintiffs by their addition midtrial, the trial court's conclusion prior to their addition that highway by user had been established, and the failure to cite authority that allows defendant's use of property within the four rods that does not belong to plaintiffs, we reverse and remand for a new trial.

However, we question the parties' motives for proceeding with this litigation. It seems common knowledge that the private drive was used by various residents and visitors to the island for years. In fact, plaintiff Geraldine Albers testified regarding her use of the private drive on visits to the island as a child. There is no indication that the common use of the private drive by residents required additional footage be added to the private drive. While defendant asserted at oral argument that additional footage was required because of maintenance vehicles, testimony regarding additional width for vehicles is not preserved in the record. By the same token, representatives of defendant indicated that they wished to reach an amicable settlement and did not need to extend the width of the roadway. Although original photographs were not preserved in the record on appeal, a black and white copy of a photograph contained at the end of a deposition provided in the record on appeal indicates that there are trees in an area nearby the private road. Additionally, there was testimony that alternative means of access were questionable because of nearby wetlands. The parties failed to specify whether a statutory presumption would cause the destruction of wetlands, while the photograph indicates that destruction or

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[1] In fact, 12 Michigan Civil Jurisprudence, Highways and Streets, §101, p 144, provides that a dedication, "when not expressly or impliedly restricted by the *owner*, is not confined to the mere track that is beaten by travelers in passing along, but includes and carries with it the four rods in width as provided by the statute." In *Kentwood*, *supra*, the Supreme Court, citing *Bumpus*, *supra*, explained the constitutionality of allowing property to be taken for public purposes that does not amount to a taking. Specifically, the court acknowledged that a taking does not occur where the "owner actually gives or dedicates his property to the public for their use, or where, from his long acquiescence in the use of it by the public, a donation or dedication is presumed by law …" In the present case, an award of the statutory presumption of four rods would extend onto the property of third party defendants. However, there is no indication in the record that third party defendants had knowledge that their property could be dedicated for public use allowed by a neighboring landowner. One could argue that, because there was no public dedication or donation by third party defendants, defendant's attempt to take the property via the presumptive four rods amounts to a taking of their property.

removal of the trees would be mandated by an order granting the statutory width. It might be prudent to consider settling this matter in lieu of suffering through another trial when the motivation appears to be based on vindication rather than use, convenience, or the common good.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell