

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GATCHBY PROPERTIES, L.P.,

Plaintiff-Appellant,

v

ANTRIM COUNTY ROAD COMMISSION,  
TOWNSHIP OF HELENA, ASSOCIATION FOR  
THE PRESERVATION OF PUBLIC ACCESS,  
and MICHAEL CRAWFORD,

Defendants-Appellees,

and

ISABEL AMERSON,

Defendant.

UNPUBLISHED

March 5, 2002

No. 217417

Antrim Circuit Court

LC No. 97-007232-CH

ON REMAND

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Before: White, P.J., and Murphy<sup>1</sup> and Talbot, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. The single issue presented is, as stated by the Supreme Court:

Whether the trial court's grant of summary disposition must be affirmed because the plaintiff, on appeal, failed to challenge the rationale relied on by the trial court, that plaintiff was barred from challenging the regularity of the condemnation proceedings for the reasons set forth in *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 402 [; 132 NW2d 92] (1965).

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<sup>1</sup> Judge Murphy has been substituted for Retired Judge Danhof on remand.

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We conclude that plaintiff has incurred no such procedural default requiring affirmance, but that our earlier remand should be expanded to allow defendants to continue to pursue an estoppel defense based on *DeFlyer, supra*.

## I

The circuit court's decision was based on the conclusion that "a presumption of regularity" applied. The circuit court relied on two Michigan cases and a New York case in support of this conclusion, *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994), *Edel v Filer Township*, 49 Mich App 210; 211 NW2d 547 (1973), and *Clark v New York*, 246 NYS2d 53; 41 Misc 2d 714 (Ct Cl, 1963). The circuit court identified two issues - - "the lack of paperwork to support compliance with the technicalities of the Michigan condemnation law that applied in 1897," and "questions of proof about whether the road was opened and worked within four years of 1897 as required by the law at that time." The first issue was decided in defendant's favor based on a presumption of regularity. The second issue, although also involving *DeFlyer*, is not implicated on remand.<sup>2</sup>

After ruling that there was a presumption of regularity that had not been adequately rebutted, and after discussing *DeFlyer* in the context of the open and worked requirement, the circuit court went on to discuss *DeFlyer* further:

Now, *DeFlyer*, which was a condemnation case, also held that the plaintiffs in that case who were successors to the owners who applied for the condemnation originally, the condemnation of the road in question in *DeFlyer*, that those plaintiffs as successors to the original petitioners for condemnation were not permitted, or able to challenge the validity of the laying out proceedings connected with the condemnation.

The circuit court then quoted from *DeFlyer, supra* at 402:

Furthermore, we hold that plaintiffs are not in a position to challenge the validity of the laying out proceedings in 1915 for lack of service and notice of hearing by the commissioner because the then owners of plaintiffs' land signed the application or petition therefor. Also, their action in that respect was the equivalent of at least a common-law if not a statutory dedication of the strip for highway purposes, thus rebutting plaintiffs' complaint of lack of conveyance or

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<sup>2</sup> In addressing the second issue, the court again concluded that a presumption of regularity applied. The court discussed the available evidence regarding the opened and worked requirement, and concluded that it did not overcome the presumption of regularity. Thus, the court found that based on the presumption of regularity the road had been opened and worked within four years of 1897, "at least as to much or most of the way from Torch Lake Drive west, down to the lake. However, there is [nothing] that really shows that it was worked all the way down to the lake." The court then relied on *DeFlyer, supra*, for the proposition that opening and expending funds on part of the road was sufficient to constitute an acceptance of the full length of the road.

dedication of the strip by the property owners. We agree with defendant that said section 20 of the act bars plaintiffs, after more than 8 years of user without objection by them, from now challenging the regularity of the 1915 proceedings. See *Potter v. Safford*, 50 Mich 46. While the county road commissioners' action under the McNitt act could not deprive plaintiffs of title, [citation omitted], it is indicative of the understanding of the township and county officials, at least, that the disputed strip was part of the township's highway system. This is precisely what plaintiffs' predecessors in title had wanted and asked for in their 1915 petition or application. Of this fact, plaintiffs could have taken some notice by reason of the gap in description of the premises in the deed on which their rights depend, indicating a probable intent to except the usual 2 rods along a section line for highway purposes.

The circuit court continued:

Now, interestingly in *DeFlyer*, the plaintiffs there, the court held had some notice that there was probably a road here, because there was a two rod hole in their description which seemed to fit with what the highway - - half of the highway on their property would have been. But that would require some thought if you're looking at the description to understand that.

In our case, the notice of the road to plaintiffs, when they bought their property was clear. Right in the plat it explicitly says that the plat of the property, they are buying lot 1, the plat that describes and defines lot 1, says right in it, adjacent to lot 1 it labels that property as a county road. So there was no ambiguity that the lot plaintiffs bought did not include the county road. So it's an even stronger case in that respect in [sic] *DeFlyer*.

Now, in fairness, the law that applied, the condemnation law in *DeFlyer* is somewhat different. This was in 1915, and there are some differences in the law from the one that applied to this case in 1897. But the principle that when you take from someone who is in on, or petition[s] for the condemnation, that you are barred from challenging the procedures by which the condemnation is laid out, I think applies as well here.

Now, in our case, the south half of the road in question, which is in section 9, back in 1897 was owned by Decker and Amerson. The document by the highway commissioner, Mr. Main, recites that they were among the petitioners who petitioned for condemnation. There is no evidence presented that Decker and Amerson were not among, and this is William Amerson, were not among the petitioners who petitioned for condemnation. So there's no fact question about that point.

Plaintiff, with respect to the south part of the road, which is in section 9, plaintiff is a successor to - - in title to Decker and Amerson. So plaintiff, under the theory of *DeFlyer*, is barred from contesting the condemnation of this part of the road.

Now, with respect to the north part of the road, which is in section 4, it was owned by persons in 1897, who may not have been petitioning for the road condemnation. The names of the people who did petition is [sic] set forth in the Main document, and depending upon how things work out, there might be, I mean, Charlie Coy might be indeed the owner, or others, but some of them may not have been.

And it does say in the Main document, after naming a number of the petitioners, that there were others who were then not named. But assuming that the north half was not owned by persons, or at least we can't be sure that it was owned by persons who petitioned for the condemnation of the road, it is clear that in 1904 when the plat of Maybloom Beach was - - occurred, the platter was William Amerson and his wife, and William Amerson is one of the petitioners. That's explicitly set forth in the Main document. And indeed, he was, at the time of the condemnation, was one of the owners of the property to the south in section 9.

So by 1904, he and his wife were the owners of the property to the north, section 4. And in 1904 they platted Maybloom Beach. And they explicitly had the south edge of the plat in leaving this highway in place, And they explicitly in the platting documents show the property just to the south of that plat, and just to the south of those lots as highway.

So we have in 1904, only seven years after the condemnation in question, one of the petitioners for the condemnation owning the property platting it, and clearly showing the existence of this highway.

Now, to the extent the plaintiffs have an interest in the north part of that highway, the section 4 part, their interest comes as ownership that comes down through William Amerson and his wife. And consequently plaintiff's interest in the north part, which derives from William Amerson, and therefore under DeFlyer the same principle would apply to show that plaintiff is not able to challenge the condemnation with respect to the north part of the road either.

## II

Plaintiff's first argument on appeal was couched as follows:

THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON THE AFFIRMATIVE DEFENSE THERE WAS A VALID CONDEMNATION

### A. Defendants' Burden of Proof Under the Statute Was Not Met

1. Defendants Cannot Prove a Valid Condemnation
2. Defendants Cannot Establish That The Road Was Opened and Worked

## B. The Presumption of Regularity is Inapplicable to Condemnation Proceedings

In its statement of facts and argument sections relating to this issue, plaintiff asserted that certain required documents do not exist, including the purported application by the ten freeholders. Plaintiff argued that because the documents do not exist, defendants were not entitled to an evidentiary presumption that the requirements of the condemnation act were met. Plaintiff argued that there is no “presumption of regularity” applicable to condemnation proceedings where the requirements of the statute are not established. Plaintiff discussed the three cases relied on by the circuit court in support of its conclusion that a presumption of regularity applied. Plaintiff also asserted that the owner of the north half of the property at the time of the condemnation is not listed as either joining in the application or receiving the written notice. Plaintiff also argued that there was no evidence that the road was opened and worked within the required four-year period. With regard to the issue of dedication, plaintiff asserted that the McNitt resolution did not explicitly refer to the purported road. As to the plats, plaintiff asserted that although the road is shown on the plats, the road is outside the plats and the plats did not serve to dedicate the roads. Plaintiff did not mention the *DeFlyer* case or the circuit court’s discussion of it.

Defendant’s brief mentioned *DeFlyer* in connection with the common-law dedication issue, and once in connection with the presumption of regularity issue in a footnote stating:

Importantly, in situations where a road was opened and worked within four years of its condemnation, title holders whose predecessors in title applied for condemnation are prohibited by statute to challenge the condemnation. See Howell’s § 1314, *DeFlyer v Board of County Road Commission of Oceana County*, 374 Mich 397; 132 NW2d 92 (1965); *Page v Boehmer*, 154 Mich 693 (1908). As such, if the presumption of regularity applies to the open and work issue, Appellants are likely included [sic] from challenging the condemnation action at all.

Defendants did not mention the circuit court’s discussion of *DeFlyer*, and did not argue that the circuit must be affirmed because plaintiff failed to address this aspect of the circuit court’s decision.

## III

The circuit court’s decision on the condemnation defense was based on a presumption of regularity. Plaintiff challenged this ruling on appeal. The court went on to discuss the *DeFlyer* case in the context of working a part of the road being sufficient respecting the entire road,<sup>3</sup> and in the context of an estoppel to challenge the regularity of the condemnation proceedings.

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<sup>3</sup> With regard to this first issue, notwithstanding its discussion of *DeFlyer*, the court still relied on a presumption of regularity in determining that, as a matter of law, part of the road was opened, and there was insufficient evidence to rebut the presumption. By challenging the application of  
(continued...)

With regard to the second issue, although the circuit court quoted extensively from *DeFlyer*, apparently drawing analogies, it is unclear to what extent the court actually relied on *DeFlyer* in granting summary disposition on the condemnation issue, as the court discussed multiple aspects of the *DeFlyer* decision. The discussion of common law dedication seems to be irrelevant to the condemnation issue. Similarly, it is not argued that section 20 of the act applies. With respect to the circuit court's discussion of the plat and the notice it afforded plaintiff, plaintiff's brief on appeal adequately points out that although the plats showed the road, they did not include the road, and therefore did not operate to dedicate the road under the statute. The plats are relevant to the issue of common-law dedication to be addressed on remand, but not the issue whether there was a valid condemnation proceeding.

Thus, we focus on the aspect of the court's reliance on *DeFlyer* that concluded that plaintiff could not object to irregularities in the condemnation proceeding because its predecessor in title signed the application or petition. In its brief on appeal, plaintiff points out that this is an accurate statement only as to the south portion of the alleged road. In the absence of any argument by defendant in its brief on appeal that plaintiff failed to adequately challenge the circuit court's decision by failing to discuss *DeFlyer*, plaintiff's argument that the Main document does not indicate that the application to lay out the road was signed by the owner of the north half of the road adequately challenged the circuit court's reliance on *DeFlyer* as to the north half of the road.

The circuit court applied the *DeFlyer* rationale to the north half of the road as well as the south half based on the reasoning that one of the applicants later appeared in the chain of title to the north half of the road, and also executed a plat that indicated his recognition of the road. While these facts may have evidentiary significance, it is an unwarranted extension of *DeFlyer* to apply its estoppel rationale to retroactively excuse a failure to give notice to the owner of a particular portion of the land on which the road is to be laid out based on the notice imputed to the applicants for the road, where one of those applicants later acquires an interest in the portion as to which there is no evidence of notice.

As to the south half of the road, plaintiff's brief on appeal did not explain why *DeFlyer* would not apply. In its supplemental brief on remand from the Supreme Court, plaintiff explains that it did not separately address the *DeFlyer* case because it broadly challenged the application of a presumption of regularity to the purported condemnation proceedings, and if there is no presumption of regularity, *DeFlyer* cannot be applied because the actual application or petition is not part of the record. Thus, while in *DeFlyer* it was established that the plaintiffs' predecessors in title signed the application, here there is no such evidence, unless one applies a presumption of regularity to the Main document. Plaintiff argues that by successfully challenging the application of a presumption of regularity to the condemnation proceedings, it successfully undermined the circuit court's reliance on *DeFlyer*.

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(...continued)

the presumption, plaintiff adequately addressed this aspect of the circuit court's reliance on *DeFlyer*.

In our initial opinion, *Gatchby Properties v Antrim Cty Rd Comm*, unpublished opinion, issued 10/13/00 (Docket No. 217417), we rejected the application of a presumption of regularity, and concluded that absent such a presumption, defendants were unable to show a valid condemnation, and therefore plaintiff was entitled to judgment on this affirmative defense.<sup>4</sup> *DeFlyer* raises a different issue - - whether plaintiff should be estopped from challenging the regularity or validity of the proceeding (with respect to the south half of the road) based on its predecessor signing the petition. The application of *DeFlyer*'s estoppel doctrine rests on the premise that plaintiff's predecessor did in fact sign the petition. Plaintiff argues that this cannot be established without applying a presumption of regularity to the condemnation proceeding. We conclude, however, that while a condemnation proceeding that does not comply with the applicable statute on its face cannot be established based on a presumption of regularity, the Main document may be considered as evidence bearing on the question whether plaintiff's predecessor signed the application and *DeFlyer* applies. However, because the actual petition has not been presented, defendants cannot show that as a matter of law they are entitled to *DeFlyer* estoppel.

Thus, we expand the scope of our earlier remand. In addition to recognizing the existence of genuine issues of material fact relating to the defense of common-law dedication, we recognize the existence of a genuine issue relating to *DeFlyer* estoppel. If the trier of fact concludes that plaintiff's predecessor in title to the south half of the alleged road signed the application, the circuit court shall grant judgment to defendants on the condemnation affirmative defense as to that portion of the property. If the trier of fact does not so conclude, the circuit court shall grant judgment to plaintiff on the affirmative defense of condemnation.

Remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ William B. Murphy  
/s/ Michael J. Talbot

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<sup>4</sup> Judge White dissented from the conclusion that plaintiff was entitled to judgment on the issue, instead concluding that while insufficient to conclusively establish compliance with the statute, the evidence, including the Main document, raised a question of fact whether a valid condemnation had taken place.