STATE OF MICHIGAN

COURT OF APPEALS

BRANCH COUNTY BOARD OF ROAD COMMISSIONERS,

Plaintiff/Counter-Defendant/Appellant,

v

ALLEN D. DOLSEN AND JAMIE A. DOLSEN,

Defendants/Counter-Plaintiffs/-Appellees.

UNPUBLISHED
September 29, 2009

No. 282842
Branch Circuit Court
LC No. 07-006341-CH

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants summary disposition. We reverse and remand for entry of judgment in favor plaintiff consistent with this opinion.

I. Basic Facts and Proceedings

This case stems from a property dispute over an alleged public access to Coldwater Lake ("lake"). The land in question is a 27.96-foot "two-track" located on the northern edge of defendants' property ("subject property"). The parties agree that the subject property would essentially be an undeveloped extension of Miller Road to the lake; had Miller Road continued straight and not merged with Lake Drive.

Defendants purchased their property on June 18, 2002, and on or around April 19, 2003, defendants erected a fence across the subject property. Initially, several nearby private landowners sued defendants to remove the fence and restore their ability to access the lake ("previous case"). The plaintiffs maintained that the subject property was a public highway that the general public used to access the lake. The plaintiffs also contended the subject property was a prescriptive easement. The defendants admitted that people used the subject property to access the lake, but they argued the subject property was never a highway and there was no prescriptive easement.

The trial court presided over a bench trial focusing on the use and maintenance of the subject property. On December 8, 2004, the trial court ruled that the property had never been a

highway. The trial court concluded that while many people used the subject property, they did not "do so as use of a highway." The trial court determined that according to the definition of a highway, MCL 257.20, the court was left with "no option but to determine that it was never a highway." The judgment granted defendants sole and exclusive ownership of the subject property.

The plaintiffs appealed to this Court. This Court issued an opinion on August 17, 2006. *Chendes v Dolson*, unpublished per curiam opinion of the Court of Appeal, entered August 17, 2006 (Docket No. 259967). This Court expressed agreement with the plaintiffs that the trial court erred in finding that "the northerly portion of the disputed property was never a highway." However, this Court held that the plaintiffs nonetheless lacked standing, and affirmed the trial court's order dismissing plaintiffs' complaint.

On June 13, 2007, plaintiff filed the instant complaint to quiet title to the subject property. Plaintiff's complaint essentially tracked the previous case's complaint, but noted that "[b]ased upon the evidence presented in a previous action brought against defendants by private individuals, the Michigan Court of Appeals determined as a matter of law that the [subject property] is a public "highway by user" under MCL 221.20."

On October 17, 2007 plaintiff moved for summary disposition. In support, plaintiff relied on the testimony presented in the previous case. At those hearings, plaintiff presented numerous witnesses that testified to observing the general public use the subject property to access the lake earlier than 1938. Plaintiff also presented evidence that public officials had, on very limited occasions, placed gravel on the subject property, plowed it in the winter, mowed the nearby grass and graded the subject property. Plaintiff also presented evidence of defendants' property abstracts, which in 1882 described the subject property as a road.

At a later hearing, defendants elicited evidence that the subject property had never been certified as a road. Defendants also elicited evidence that plaintiff had no records of maintaining the subject property.

After the hearing the trial court issued an opinion from the bench. The trial court acknowledged that, "at one point there may have been a township road for Ovid Township that included this parcel." The trial court also found the subject property was a "well-defined line of travel." However, the trial court concluded that,

> the second prong of the statute has not been met. The public authorities did not use and work on, maintain this property at least from the 1960s forward. There may have been evidence of some public use for ten consecutive years. I think, again that was the basis for the complaint filed previously and decided by this Court, and that it may have been open.

The trial court also held that the subject property was "not exclusive for public use." The trial court stated that:

> The fact is that the Dolsons and their predecessors in title had consented to the use. I don't think there ever was the need to have armed guards down there to either gain access or to remove people, but it appeared from this Court sitting

> through the testimony of the prior case that it was more as a courtesy that the boats were launched or people would go down to swim or to fish.

The trial court dismissed plaintiff's claim and this appeal ensued.

II. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Further, this Court reviews the legal requirements for establishing a highway by user de novo. *Hagerman v Gencorp Automotive*, 457 Mich 720, 727; 579 NW2d 347 (1998). However, we review a trial court's factual findings for clear error. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 269 Mich App 25, 40; 709 NW2d 174 (2005). A finding is clearly erroneous if the reviewing court is left with a definite conviction that a mistake was made. *Id*.

III. Analysis

We conclude that the trial court erred in concluding that a highway by user had not been established over the subject property. Despite acknowledging that the subject property had previously been a road, the trial court only relied on evidence that plaintiff had not maintained the subject property since the 1960's, which was after any highway by user had been established.

A road may become public property in three ways: (1) by statutory dedication and an acceptance on behalf of the public, (2) a common law dedication and acceptance, or (3) a finding of highway by user. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554; 600 NW2d 698 (1999). Here, there is no dispute that the subject property is not public property pursuant to (1) and (2). Thus, the only basis to conclude that the subject property is public property is "a finding of highway by user."

"'Highway by user" is a phrase that is used to describe how the public may acquire title to a highway by a sort of prescription where no formal dedication has ever been made." *Cimock v Conklin*, 233 Mich App 79, 87-88; 592 NW2d 401 (1998); K*ent Co Rd Comm v Hunting*, 170 Mich App 222, 230; 428 NW2d 353 (1988). The phrase originates from MCL 221.20, which provides that:

> 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.

To establish a highway by user under MCL 221.20, a plaintiff must show (1) a defined line of travel, (2) evidence that the road was used and worked on by public authorities, (3) evidence of public use for ten consecutive years, and (4) open, notorious and exclusive public use. *Cimock*, supra at 86-87.

The trial court concluded that plaintiff had failed to present sufficient evidence to establish that the subject property "was used and worked on by public authorities." The trial court essentially found that a highway by user had not been established because plaintiff had not since the 1960's taken action to maintain the subject property.

The trial court erred in relying only on evidence of plaintiff's use and maintenance of the subject property occurring after the 1960's. The case of *Villadsen v Mason County Road Com'n*, 268 Mich App 287; 706 NW2d 897 (2005) is instructive. In *Villadsen*, the plaintiffs owned real property that included a portion of an unpaved one-mile "two-track" or "trail," used by the general public. The plaintiffs filed suit to enjoin the general public from using the two-track. Defendant road commission filed a third-party complaint countering that the two-track was a highway by user. The parties presented substantial evidence concerning use and maintenance of the two-track. For instance, evidence was presented that the two-track had not always been passable, and that the county had performed minimal maintenance on the two-track. In addressing the public's use of the portion of road, the trial court found that "farming and recreational usage has been shown to have lasted from the 1930's until the present." *Id*. at 299.

The trial court concluded that the portion of land was a highway by user. This Court agreed with the trial court. By order, our Supreme Court agreed with the result, but for reasons different from the trial court and this Court. *Villadsen v Mason County Road* Com'n, 475 Mich 857; 713 NW2d 770 (2006). The Supreme Court stated that "[t]he parties and the lower courts were unnecessarily concerned with evidence regarding use and maintenance of the road *after* the time when it is clear a public road had been established." *Id*. The Supreme Court noted, "the strip of land at issue was, and is, one portion of a road that was an established public road in the 1930's." The Supreme Court continued, "evidence pertaining to the use and partial disrepair of the road after the public road was established was irrelevant to whether a highway was user was established." *Id*.

Similarly, the trial court here focused on evidence arising after any highway by user had been established over the subject property. The record is clear that government officials provided maintenance to the subject property before and during the 1960's. Witnesses able to recall use of the subject property previous to and during the 1960's generally testified that the public used the subject property to access the lake. One witness testified that her family used the subject property to access the lake before her father died in 1938. Another witness testified that he remembered the county pouring gravel over the subject property in 1939 or 1940. One witness testified that when he was in 8th grade, his grandfather had bought property abutting the subject property. He testified that the property housed a store named, "Moffitt's Landing," which rented fishing boats that would be launched from the subject property.

Further, there was evidence that a road existed over the subject property as early as 1882. Plaintiff presented evidence of defendants' property abstracts, which acknowledged a road over the subject property as of 1882. Also persuasive is evidence that in 1955 Ovid Township filed suit against a landowner adjoining the subject property that constructed posts near the subject property to prevent access to the lake. In that suit Ovid Township claimed to have maintained the subject property for over 40 years. The suit resulted in an order restraining the landowners from interfering "with the right of the public to use said claimed highway or right of the public to use said claimed highway or right of way for access to Coldwater Lake."

Here, the trial court recognized "that at one point there may have been a township road for Ovid Township that included this parcel." And although the trial court noted there was testimony suggesting that "township roads" did not exist in the 1940's, there is no dispute that the evidence indicated that a "two-track" existed over the subject property well before the 1960's. A highway by user need only be "reasonably passable." *Villadsen, supra* at 279-278. The trial court clearly erred in only considering evidence that plaintiff did not maintain the subject property after the 1960's.

The trial court also held that use of the subject property was not exclusive. Specifically, the trial court held:

> But the Court would further determine that it was not exclusive for public use. The fact is that the Dolsons and their predecessors in title had consented to the use. I don't think there ever was the need to have armed guards down there to either gain access or to remove people, but it appeared from this Court sitting through the testimony of the prior case that it was more as a courtesy that the boats were launched or people would go down to swim or to fish.

Although the trial court's opinion first states that the subject property was not exclusive for public use, the trial court's opinion only addresses whether there was permissive use.[1]

"Permissive use is not sufficient to establish a road by user." P*earl v Torch Lake Twp*, 71 Mich App 298, 306-307; 248 NW2d 242 (1976). Rather "the use must be so open, notorious and hostile as to be notice to the landowner that his title is denied." *Donaldson v Alcona County Bd of County Road Com'rs*, 219 Mich App 718, 724; 558 NW2d 232 (1996) (quotations omitted.)

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[1] Moreover, the use of the subject property was exclusively public. The term exclusive takes on a distinct meaning in this context. "[E]xclusive use or possession as an element of establishing a highway by user means that the roadway sought to be established must, for a period of ten years, be used exclusively for a public road. *City of St Ignace v McFarlane*, 45 Mich App 81, 85; 206 NW2d 226 (1973), citing *Indian Club v Lake County Road Commissioners*, 370 Mich 87, 89; 120 NW2d 823 (1963). Further "[e]xclusive refers to the use being made rather than the persons making use of the claimed roadway. *Id*. at 85-86, citing *Indian Club, supra*. Here, there was no evidence presented that the subject property was a private, as opposed to a public, road. Rather overwhelming evidence indicted that the subject property was used by the general public to access the lake.

The trial court's conclusion contradicts uncontested testimony from the previous owners that they did not believe they owned the subject property. In *Trowbridge v Van Wagoner*, 296 Mich 587, 599-600; 296 NW 689 (1941), our Supreme Court iterated "the well-known rule that actual notice to the owner is not required, if the user is such that he ought to have known of it, the court was in error in directing a verdict for defendant [based upon a holding against the establishment of a public way by user]." (Citation omitted; insertion in original). Clearer yet, the Court agreed that, "[w]e do not think that actual knowledge of the adverse holding is required where the circumstances are such that the contiguous holder ought to have known it." *Id*. at 600, quoting *Bird v Stark*, 66 Mich 654, 33 NW 754, 756 (1887). Thus, evidence that the landowner should have known that the general public was acting contrary to the landowner's property rights, evidences open, notorious and exclusive public use of the property.

Here, the record reflects that previous titleholders should have known that the general public was acting contrary to the their property rights. Each witness, except defendant Allen Dolsen, testified that the subject property was widely known to be a "public access," and that no permission was asked or given to use the subject property. The persons holding title prior to defendants for 18 years, Robert and Doris King, testified that they always believed the subject property was a public access. Robert also testified that he had bought the property from his sister, who had owned it for ten years. Robert testified that at one point he even sought to buy the public access and asked a township trustee the cost. Also, as mentioned, in 1955 Ovid Township filed suit against a landowner adjoining the subject property seeking to enjoin encroachment onto the subject property. Doris testified that she had called the township to complain about unruly behavior at the subject property. Thus, there is evidence that the use of the subject property was open, notorious and exclusive, and summary disposition was improperly granted.

Defendants argue alternatively that summary disposition was properly granted because there is no dispute that plaintiff abandoned the subject property. We disagree.

"A roadway established for public use may cease to be such by voluntary abandonment and nonuse." *Villadsen, supra* at 303, quoting *Ambs,* supra at 652. To prove abandonment, "both an intent to relinquish the property and external acts putting that intention into effect must be shown by the party asserting abandonment." *Id*. "Nonuse alone is insufficient to prove abandonment." *Id*., at 303-304, quoting *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998). "There must be coupled with the nonuser [sic] some clear and decisive act of the dominant owner, showing an intention to abandon and release his right." *Goodman v Brenner*, 219 Mich 55, 60; 188 NW 377 (1922).

Defendants argue that they are entitled to summary disposition because there is no record of plaintiff establishing the subject property as a highway by user and that plaintiff performed little to no maintenance on the subject property since the 1960's. However, as mentioned, there must be some "clear and decisive act" by plaintiff that shows an intention to abandon the subject property. Unlike the case upon which defendants rely, *Ambs v Kalamazoo County Road Com'n*, 255 Mich App 637, 653-655; 662 NW2d 424 (2003), there is no evidence that plaintiff acted with the intent to abandon the property. In *Ambs*, for instance, the road commission expressly denied responsibility for the disputed property and acquiesced to the landowners' assertion of dominion and control over the subject property. Here, defendants only rely on plaintiff's lack of action to establish abandonment, which, without some "decisive act," is insufficient. *Goodman,*

supra. Thus, we reject defendants claim that they are entitled to summary disposition on the issue of abandonment.

Last, we address an issue not raised in the parties' brief on appeal, but considered at oral argument; the scope of highway by user. MCL 221.20 provides in part that:

> . . . All highways that are or that may become such by time and use, shall be 4 rods in width [sixty six feet[2]], 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.

In *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 650; 581 NW2d 670 (1998), our Supreme Court stated that the above statute creates a rebuttable presumption that the public highway is sixty-six feet wide. A property owner may rebut the presumption by taking action within the statutory period that tends to give notice to the public that the width of the right-of-way has been restricted. *Id*. at 659 n 6. Here, there is no evidence that the property owner, at the time the highway was created, took action to restrict the road. However, there is no dispute that the instant two-track had never been wider than the 27.96 feet plaintiff alleges. Indeed, plaintiff only asks, "to restore the property to the condition it was in before the obstructions were placed there." Given plaintiff's concession that the road had never been sixty-six feet wide, we conclude that the public highway extends only27.96 feet onto defendants' property.

Reversed and remanded for entry of judgment in favor of plaintiff consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro

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[2] *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 650; 581 NW2d 670 (1998).