STATE OF MICHIGAN

COURT OF APPEALS

THOMAS CAMP and VIRGINIA CAMP,

Plaintiffs/Counter-Defendants-Cross-Appellants,

v

MECOSTA COUNTY ROAD COMMISSION,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee/Cross-Appellee,

and

JEANNETTE WHITE, MALCOM WHITE, EARL CAMPBELL, PAMELA CAMPBELL, KEN JANSEN, LUPE JANSEN, BELVA HEWITT, HARRY WEAVER, ANNABELLE WEAVER, JIM BAHURA, NAJIB BAHURA, MARY BAHURA, and JAMES HARVEY

Third-Party Defendants,

and

JOHN CHAPUT,

Third-Party Defendant-Appellant.

UNPUBLISHED
February 9, 2010

No. 283183
Mecosta Circuit Court
LC No. 01-014440-CH

Before: Talbot, P.J., and Wilder and MJ Kelly, JJ.

PER CURIAM.

Third-party defendant John Chaput appeals as of right from a circuit court judgment in favor of defendant Mecosta County Road Commission ("defendant" or the "Road Commission"), following a bench trial. The court determined that a disputed roadway is a public roadway by virtue of the highway by user statute, MCL 221.20. Plaintiffs Thomas Camp and Virginia Camp cross appeal the same order. We affirm.

"This Court reviews de novo the legal requirements for establishing a highway by user, but reviews the trial court's factual findings for clear error." *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2002). Clear error exists if a reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

The highway by user statute, MCL 221.20, 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.

"'Highway by user' is a term 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, 86; 592 NW2d 401 (1998) (quotation marks and citation omitted). "Highways by user are based on an implied dedication by the landowner." *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 653; 581 NW2d 670 (1998). "Under the highway-by-user statute, a particular period, in this case ten years, creates a presumption of dedication to the public." *Id.* During the ten-year period, a property owner can present evidence rebutting the existence and extent of a public roadway. *Id.* at 654. If the property owner fails to rebut the presumption, the statute "allows for the dedication of the entire four-rod width[.]" *Id.*

In a prior appeal in this case, this Court recognized that "'[e]stablishing a public highway pursuant to the highway by user statute requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use.'" *Camp v Mecosta Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket No. 255154), slip op at 2-3, quoting *Nolan, supra*, 249 Mich App at 401-402. The burden of establishing a highway by user rests with the governmental entity claiming a highway by user. *Cimock, supra*, 233 Mich App at 87 n 2.

In *Camp, supra*, slip op at 6, this Court determined that defendant satisfied the "defined line" element. Thus, on remand, defendant was required to establish only the remaining three elements. Regarding the second element, "[a] party asserting a highway by user is required to show acceptance of the road in question; however, the degree of maintenance required to demonstrate such acceptance is merely enough to keep the road in a 'reasonably passable condition.'" *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 296; 706 NW2d 897 (2005), aff'd on other grounds 475 Mich 857 (2006), quoting *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 694; 442 NW2d 725 (1989). Although a public authority must engage in more than infrequent, minor maintenance, the nature of the road must also be considered in determining whether the evidence establishes this element. *Villadsen, supra,* 268 Mich App at 295. Further, the public authority must conduct its maintenance efforts on the road for the

statutory ten-year period. *Nolan, supra,* 249 Mich App at 403; *Cimock, supra,* 233 Mich App at 90. Consecutive years of work by public authorities, however, is not necessary as our Supreme Court recognized in *Pulleyblank v Mason Co Rd Comm,* 350 Mich 223, 229; 86 NW2d 309 (1957), in which it stated:

> The plaintiffs object that the examples of repair and upkeep testified to are sporadic, in effect that the instances given do not cover, consecutively, year after year. Such testimony is not necessary. Work on county roads reflects not only the state of the municipal treasury, but is adjusted also to the needs of local traffic and local inhabitants. It is clear that the work done, whatever it was, kept the road in a reasonably passable condition.

Here, the trial court did not clearly err in determining that the roadway was used and worked on by public authorities for the statutory ten-year period. The evidence showed that in conjunction with the development of Water Haven Estates in the 1980s, Timothy Roethlisberger performed work on the road, including reshaping the road, and defendant provided a motor grader and gravel to finish the project. Road Commission employee Charles Zimmerman testified that in the 1980s he drained water from water holes in the road and smoothed the roadway. Zimmerman's March 17, 1993, time card reflects that he performed winter maintenance on the roadway on that date. He also recalled performing work with a bulldozer and performing blading work on the roadway, but he could not recall when he conducted these activities.

Other Road Commission employees recalled working on the roadway in the 1980s and 1990s. Larry Erickson testified that, within the first few years after beginning his employment with defendant in 1984, he used motor graders to shape the roadway in the spring and fall as part of the normal maintenance schedule. He also hauled "pit-run" gravel to the roadway to fill mud and sand holes in the 1990s. He recalled snowplowing the intersection of 21 Mile Road and 100th Avenue in a manner that would allow vehicles to travel north of 21 Mile Road on 100th Avenue. It appears from David Erickson's April 12, 1993, time card that he checked the road for rough patches on that date. David Erickson also recalled plowing and sanding the intersection of 100th Avenue and 21 Mile Road and filling in gravel at the intersection. Michael Maneke testified that, in the 1990s, he directed Road Commission employees to haul "pit-run" to the roadway and fix water holes all the way to the lake. He also recalled that Zimmerman and a fellow employee used a bulldozer to cut down a steep hill. Further, David Wilson recalled repairing rough spots on the roadway, including the portion of the roadway between the clay hill and the lake.

The evidence further showed that, in 1996, in response to a request from Chippewa Township Clerk Shirley Austin, defendant graded the road to provide "access only" from 21 Mile Road to Pine Lake. Harry Weaver testified that defendant removed some trees, conducted extensive grading work, and widened the road in one location. Defendant also laid gravel on the road in March 2001 and performed grading work in April 2001. Accordingly, the evidence established that defendant used and maintained the roadway for the statutory ten-year period.

Plaintiffs argue that they filed this action only with respect to the 1,000 feet of roadway between the clay hill and the lake. They contend that defendant did not work on this section of roadway before 1996, and, as such, it cannot be considered a public highway under the highway

by user statute. Although the evidence shows that defendant performed work in this area, the evidence indicates only that such work was performed in the 1990s generally and does not provide a more definite date. In any event, a public authority need not work on every portion of a road in order to establish a public highway pursuant to the highway by user statute. *Pulleyblank, supra,* 350 Mich at 227; *Nolan, supra,* 249 Mich App at 402. Rather, it is sufficient if the evidence shows that portions of the roadway were worked for use in connection with those not worked. *Neal v Gilmore*, 141 Mich 519, 527; 104 NW 609 (1905).

Here, the evidence shows that the stretch of 100th Avenue between 21 Mile Road and the lake was primarily used for fishermen to access the lake. Edward Burch testified that there were no permanent residences along the roadway. Thus, even assuming that defendant performed no road work on the 1,000 feet of roadway between the clay hill and the lake, the evidence indicates that defendant worked on the remaining portion of the roadway in order to provide access to the lake. Thus, the trial court did not err by examining maintenance efforts with respect to the entire length of the roadway rather than focusing solely on the 1,000 feet of roadway immediately preceding the water's edge. See *Nolan, supra,* 249 Mich App at 402-403.

Further, the evidence shows that, although rough, the road was kept in reasonably passable condition. Several fishermen testified that the roadway was passable with a four-wheel-drive vehicle, and some even hauled boats, which they launched at the water's edge. Relying on case law from our Supreme Court, this Court opined in *Villadsen, supra,* 268 Mich App at 297, that "roadways are reasonably passable even when the weather renders the roadway temporarily impassable or when a detour is necessary to render a roadway passable." The evidence shows that the clay hill could become impassable if it was wet and that traffic veered onto neighboring land to avoid a water hole and sand covering the roadway. These factors, however, did not render the road impassable pursuant to *Villadsen, supra,* 268 Mich App at 297.[1] Rather, the evidence shows that four-wheel-drive vehicles and snowmobiles were able to traverse the roadway.

Regarding the third and fourth requirements to establish a highway by user, defendant was required to show "open, notorious, and exclusive public travel and use for ten consecutive years[.]" *Id.* at 298. "The public use element 'requires evidence of use of the roadway claimed to be a highway by user by members of the *general* public, not merely by employees of a governmental entity, on a repeated basis for the requisite ten-year period.'" *Id.*, quoting *Cimock, supra,* 233 Mich App at 87 (emphasis in *Cimock*). Constant or continuous use, however, is not required. *Villadsen, supra,* 268 Mich App at 298-299. Rather, "'it is sufficient if the road was traveled as much as the circumstances of the surrounding population and their business required.'" *Id.*, quoting *Nolan, supra,* 249 Mich App at 403. In *Villadsen, supra,* 268 Mich App at 299, this Court recognized that "a road used by the public for gaining access to areas for hunting and recreation may satisfy the public use requirement."

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[1] Although our Supreme Court affirmed this Court's decision in *Villadsen* on other grounds and deemed unnecessary this Court's analysis regarding the use and condition of the road at issue in that case, see 475 Mich 857 (2006), we find this Court's analysis in *Villadsen* persuasive based on the underlying Supreme Court case law cited therein.

The evidence established that several fishermen used the roadway on a regular basis to access Pine Lake during the winter and summer months. Some used the roadway as early as the 1960s and 1970s. In 1996, Burch agreed to grade the road "for access only" from 21 Mile Road to the lake because there were no permanent residences "up there." The fisherman often observed others accessing the lake and saw vehicles parked along the roadway or at the top of the hill closest to the water's edge. Some drove all the way to the water's edge. The testimony varied regarding the number of vehicles parked along the roadway. Gary LaLonde testified that, on a good fishing day, as many as 15 or 20 vehicles or snowmobiles were parked along the road. David Young, however, testified that he saw as many as three vehicles parked along the roadway. Bryce MacKersie maintained that, in the winter months, there was "a beaten path" to the lake along the roadway. Further, none of the fishermen asked permission to use the road and all testified that they believed the road to be a public road. Accordingly, the trial court did not err by concluding that the evidence revealed open, notorious, and exclusive public use and travel for ten consecutive years without interruption. See *Nolan, supra,* 249 Mich App at 401-402.

Third-party defendant Chaput also challenges the trial court's determination that the roadway is four rods in width. Because he failed to raise this issue in his statement of questions presented, however, he has abandoned appellate review of this issue. MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008). Nevertheless, the trial court's determination is not erroneous.

If the elements necessary to establish a highway by user are shown, MCL 221.20 raises a rebuttable presumption that the road is four rods, or 66 feet, wide. *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 231; 428 NW2d 353 (1988). "[T]his presumption may be rebutted if the landowner offers any evidence, such as the existence of a structure within the four-rod statutory width, or any other evidence, that the owner retained control of an area within the statutory width." *Id.* If the presumption is rebutted, "the highway cannot be wider than the zone of actual use[.]" *Id.*

Chaput argues that photographs of the road show that it is a narrow, two-track road less than four rods in width. This evidence, however, is insufficient to show that a property owner retained control of an area within the statutory width and is thus insufficient to rebut the presumption of a roadway four rods in width. *Sommerdyke Estate, supra,* 458 Mich at 659 n 6; *Hunting, supra,* 170 Mich App at 231. Pursuant to MCL 221.20, where highways established as highways by user "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." Because the road at issue is located on a section line, the trial court properly determined that the road is two rods in width to the east and the west of the section line.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly