# STATE OF MICHIGAN

# COURT OF APPEALS

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| KAREN J. DUNBAR, STEVEN DUNBAR, SCOTT SAGER, and PAMELA JANE SAGER,<br><br>Plaintiffs-Appellees, | UNPUBLISHED<br>June 29, 2010 |
| v | Nos. 289726; 291665<br>Cheboygan Circuit Court |
| CHEBOYGAN COUNTY BOARD OF ROAD COMMISSIONERS,<br><br>Defendant-Appellant. | LC No. 07-007730-CZ |

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

At issue in this case is whether King Road in Cheboygan County, which separates property owned by plaintiffs Karen and Steven Dunbar on one side and plaintiffs Scott and Pamela Sager on the other side, terminates at a "road ends" sign located approximately 160 feet from Burt Lake, or continues as a public road all the way to the water's edge. In Docket No. 289726, defendant Cheboygan County Board of Road Commissioners appeals as of right from the trial court's judgment, following a bench trial, declaring that King Road road ends at the "road ends" sign. In Docket No. 291665, defendant appeals as of right from the trial court's postjudgment order affirming costs taxed by the court clerk in favor of plaintiffs. We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

## I. BACKGROUND

The disputed area of King Road is located at the north line of section 27 in Tuscarora Township in Cheboygan County. Plaintiffs Karen and Steven Dunbar, who are married, claimed ownership of the property to the south of King Road in section 27. They acquired their property interest through a deed from Richard Currey and his wife in 1999. Their chain of title also includes a deed executed by Amanda McConnell, her husband Charles McConnell, and her sister Grace Parke, to Catharine Harrington in 1933.

Amanda McConnell is also within the 1930s chain of title for the property located to the north of the section line in section 22, for which plaintiffs Scott Sager and his sister Pamela claim an interest. After Amanda McConnell's husband died in 1945, she conveyed the property to three nephews, including Robert Sager, the father of plaintiffs Scott and Pamela Sager, but the legal description in the deed described property beginning 33 feet north of the section line.

Robert Sager and three other nephews received the residue of Amanda McConnell's estate after she died in 1948. Robert Sager had sole ownership of the property in 1975, when he conveyed it to plaintiffs Scott and Pamela Sager, but retained a life estate. The now-deceased Robert Sager continued to live on the property until 1996. Plaintiffs Scott and Pamela Sager thereafter granted a life estate to their stepmother, who also lived on the property.

Defendant's interest in King Road first arose in the 1930s, when it took over certain township roads based on the McNitt Act.[1] But the record contains no factual development regarding why Tuscarora Township claimed that any part of King Road was a public road at that time. The disputed area is approximately 160 feet in length and is situated between a "road ends" sign, which was installed on an unknown date at the crest of a hill on King Road, and Burt Lake. After a public access sign was installed in 2007, plaintiffs filed this action, seeking a declaration that King Road ends at the "road ends" sign and a determination of their respective interests in the disputed property. Following a bench trial, the trial court rejected defendant's claim that a highway by user was established pursuant to MCL 211.20. It also found that a common-law dedication was not established.

After defendant filed its claim of appeal in Docket No. 289726 from the trial court's judgment, the court clerk taxed costs in favor of plaintiffs, over defendant's objection that costs should not be awarded because a public question was involved. The trial court declined to consider defendant's objections because it determined that it was not permitted to change its judgment allowing costs because an appeal had been filed. Accordingly, it affirmed the clerk's taxation of costs.

## II. DOCKET NO. 289726

Defendant challenges the trial court's findings with respect to both the statutory and common-law claims that it pursued to establish that the disputed area past the "road ends" sign on King Road was a public road.

This Court reviews a trial court's findings of fact at a bench trial for clear error and reviews its conclusions of law de novo. *Heritage Resources, Inc v Caterpillar Financial Services Corp,* 284 Mich App 617, 631; 774 NW2d 332 (2009). Equitable rulings in an action to quiet title and issues of statutory construction are also both reviewed de novo. *Id.* at 632; *Jonkers v Summit Twp,* 278 Mich App 263, 265; 747 NW2d 901 (2008). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Heritage Resources, Inc,* 284 Mich App at 631-632. Deference is given to the trial court's special opportunity to judge the credibility of witnesses. MCR 2.613(C); *Ambs v Kalamazoo Co Rd Comm,* 255 Mich App 637, 652; 662 NW2d 424 (2003).

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[1] The McNitt Act, 1931 PA 130, MCL 247.1 *et seq.*, was repealed by 1951 PA 51. It provided for the county to take over township roads specified as public in recorded plats. See *Christiansen v Gerrish Twp,* 239 Mich App 380, 383 n 2; 608 NW2d 83 (2000). The current version of the law is in MCL 247.669. *Id.*

We first address defendant's challenges to the trial court's findings with respect to its highway by user theory. MCL 211.20 provides that all roads used as such for ten or more years shall be deemed public highways. The first version of the statute was enacted in 1838, the year after Michigan became a state. The statute has remained substantially similar since then. *City of Kentwood v Sommerdyke Estate,* 458 Mich 642, 650; 581 NW2d 670 (1998). The statute allows highways to be established under a theory of implied dedication. *Villadsen v Mason Co Rd Comm,* 475 Mich 857; 713 NW2d 770 (2006). Essentially, it modified the common law regarding implied dedications, which had no fixed time period to justify an inference of dedication, by creating consistency through a prescribed period, as well as a specific width of four rods (66 feet). *City of Kentwood,* 458 Mich at 650, 654. "This statutory presumption allows for the dedication of the entire four-rod width unless the evidence rebuts the presumption." *Id.* at 654; see also *Eyde Bros Dev Co v Eaton Co Drain Comm'r,* 427 Mich 271, 298-299; 398 NW2d 297 (1986). The presumption must be rebutted within the statutory period. *City of Kentwood,* 458 Mich at 659-660.

The burden of proof to establish a highway by user rests with the government agency claiming a highway by user. *Cimock v Conklin,* 233 Mich App 79, 87 n 2; 592 NW2d 401 (1998). The government agency must show "(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." *Kalkaska Co Bd of Co Rd Comm'rs v Nolan,* 249 Mich App 399, 401-402; 643 NW2d 276 (2001).

In this case, the trial court determined that defendant could not establish a highway by user because the evidence showed that the disputed property was used only as a footpath that did not accommodate vehicular traffic. The court concluded that "[t]he statute requires that the property be used as a road and a road has to accommodate the travel of vehicles." We agree with defendant that the trial court erred as a matter of law in holding that MCL 211.20 requires that a pathway accommodate the travel of vehicles in order to qualify as a public road. A footpath constitutes a contemplated use of a roadway. *In re Petition of Carson,* 362 Mich 409, 412; 107 NW2d 902 (1961). Further, it is clear that the trial court's legal error affected its decision that the disputed area was not a public road. The court found that "[t]he proofs do not establish that the Dunbar property was used in any fashion but on the Sager property there was a well worn footpath to access the shores of Burt Lake exclusive of vehicular traffic."

Plaintiffs argue that reversal is not required because there are alternative grounds for affirming its decision. This Court will not reverse a trial court's decision when the right result is reached, even if for the wrong reason. *Scherer v Hellstrom,* 270 Mich App 458, 464; 716 NW2d 307 (2006). Further, an appellee need not file a cross appeal to argue alternative grounds for affirmance. *Middlebrooks v Wayne Co,* 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

We conclude that plaintiffs have only established grounds for affirming the trial court's decision with respect to the disputed area in section 27 involving the Dunbars' property. We reject plaintiffs' argument that the trial court did not find the requisite defined line. Although a defined line must have definite boundaries, *Cimock,* 233 Mich App at 86, the trial court's decision indicates that it found a defined line in the area comprised of a gravel drive to the water's edge. Although that drive was further developed by a contractor in 2000 or 2001 when boulders were brought in to construct a retaining wall on the Dunbars' property, the trial court found that there had been a defined line of travel consisting of a footpath over that area, which

"was used by various members of the general public from at least as far back as the early 1960s" to access Burt Lake.

While there was also testimony by Clement Parke and other witnesses regarding a secondary path over the years, which veered to the north onto the property now owned by plaintiffs Scott and Pamela Sager, the trial court did not consider that path in determining a defined line for a public road. Indeed, the court rendered no findings regarding the boundaries of any public road or whether the statutory width of four rods was rebutted. And while the trial court recognized that only a ten-year period was required to establish a highway by user, it rendered findings with respect to the footpath, including the maintenance performed by defendant, which spanned a period from the 1950s through the 1990s. The relevant time period for evaluating maintenance and other relevant factors is the ten-year period before the highway by user is established. See *Villadsen,* 475 Mich at 857. The character of the road is also considered in assessing the adequacy of maintenance. *Pulleyblank v Mason Co Rd Comm,* 350 Mich 223, 229-230; 86 NW2d 309 (1957). "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." *Id.* at 229.

The trial court's error in failing to recognize that a footpath may constitute a public road permeated its entire decision with respect to whether a highway by user was established on the property now owned by plaintiffs Scott and Pamela Sager over the disputed area past the "road ends" sign. Because the trial court's findings are insufficient to conclude that either defendant or the Sagers would be entitled to judgment as a matter of law but for this error, we remand for further proceedings with respect to defendant's claim that a highway by user was established over the disputed area of the Sagers' property and, if so, the width of the highway. However, defendant has not established any clear error in the trial court's finding that "[t]he proofs do not establish that [the disputed area of] the Dunbar property was used in any fashion." Accordingly, we affirm the trial court's determination that a highway by user was not established with respect to the disputed area of their property. Absent evidence that the disputed area in section 22 and 27 of the Dunbars' property had common ownership during the relevant time period, we agree with plaintiffs that the nonuse precludes a finding of a highway by user.

Defendant next challenges the trial court's finding that it failed to prove a common-law dedication of the disputed area of King Road. Defendant argues that the trial court ignored evidence implying an intent to dedicate. Although there is some merit to defendant's argument with respect to the property now owned by plaintiffs Scott and Pamela Sager, we conclude that it is premature to address this issue. Contrary to what defendant argues on appeal, a determination whether the elements of common-law dedication were established is not purely a question of law. Common-law dedication provides a means for a fee owner to create an easement in the public. *Boone v Antrim Co Bd of Rd Comm'rs,* 177 Mich App 688, 693; 442 NW2d 725 (1989). A valid common-law dedication for a public purpose requires proof of "(1) an intent by the owners of the property to offer it to the public for use; (2) there must be acceptance of this offer by the public officials and maintenance of the alley, street or highway by the public officials; (3) there must be a use by the public generally." *Bain v* Fry, 352 Mich 299, 305; 89 NW2d 485 (1958). An owner's intent to dedicate may be gathered from the circumstances. *DeWitt v Roscommon Co Rd Comm,* 45 Mich App 579, 581; 207 NW2d 209 (1973). But "there must be a clear and positive intent to dedicate, as unequivocally demonstrated by the actions of the

owners." *Boone*, 177 Mich App at 693. If the fee owner's intent is established, the public authority must, by express declaration or some acts, indicate its acceptance. *Id.* The acceptance must occur before the offer is withdrawn or lapses. See generally *Kraus v Dep't of Commerce*, 451 Mich 420, 427; 547 NW2d 870 (1996); *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511, 523 n 31; 446 NW2d 161 (1989) (offer may be considered withdrawn under the common law where an adjoining owner's use is inconsistent with a continuation of the offer); *Bd of Supervisors of Cass Co v Banks*, 44 Mich 467, 476; 7 NW 49 (1880) (offer may lapse if it is not accepted within a reasonable time).

There is merit to defendant's claim that Amanda McConnell's retention of a 33-foot-wide strip of land along the section line when executing a 1945 deed conveying the property in section 22 to Robert Sager and two other nephews is evidence of an intention to dedicate it for public use. *Sharkey v Petoskey*, 30 Mich App 640, 644; 186 NW2d 744 (1971). Such evidence may also provide notice to a successor in interest of the probable intent to except land for highway purposes. *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 402; 132 NW2d 92 (1965). Likewise, there is merit to defendant's argument that this inference was bolstered by a photograph depicting a fence running along King Road in 1941, and that this evidence was the basis of defendant's common-law claim presented to the trial court.

And while the trial court's preliminary opinion indicates that it considered plaintiffs Scott and Pamela Sager's chain of title in deciding that they had standing to claim title to the disputed area of section 22, we agree with defendant that the trial court failed to consider its theory that the deed executed by Amanda McConnell in 1945 could be used to establish an intent to dedicate under the common law. Instead, the trial court considered whether Robert Sager, who had a mere life estate[2] beginning in 1975, had an intent to dedicate, and whether, even assuming that Robert Sager had such an intent, it had been accepted.

A trial court must make brief, definite, and pertinent findings and conclusions on contested matters. MCR 2.517(A)(2). Because the trial court's decision does not reveal that it was aware of defendant's common-law theory or properly applied the law, and the theory presented is not purely one of law, it is necessary to remand this case to the trial court for further proceedings regarding defendant's claim. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). We express no opinion regarding whether Amanda McConnell's death in 1948, or the probate court order assigning the residue of her estate to Robert Sager and three other nephews in 1949, affects the continuation of any intent to dedicate possessed by Amanda McConnell. Further, we express no opinion regarding whether it could be determined from the evidence that a common-law dedication was perfected before or after Amanda McConnell's death.

We reach a different conclusion with respect to defendant's challenge to the trial court's determination that the proofs failed to establish a common-law dedication in the disputed area of the Dunbars' property. We agree with plaintiffs that the trial court's finding of nonuse of the

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[2] A life estate entitles the holder of this interest to possession and enjoyment of the property during his or her life. *Wengel v Wengel*, 270 Mich App 86, 99; 714 NW2d 371 (2006).

disputed area is dispositive of this claim. Common-law dedication requires public use of the property. *Bain*, 352 Mich at 305. Therefore, even assuming that the trial court ignored evidence regarding the fence and iron rod on the disputed property as defendant argues, there is no basis for reversal. The trial court reached the right result in finding that no common-law dedication was proven with respect to the disputed area of the Dunbars' property past the "road ends" sign. *Scherer*, 270 Mich App at 464.

We decline to consider plaintiffs' argument that the trial court's decision may be affirmed on the alternative ground that the Cheboygan County Road Commission abandoned the road past the "road ends" sign. Although plaintiffs were not required to file a cross appeal to raise this alternative ground for affirmance, *Middelbrooks*, 446 Mich at 166 n 41, the issue was not decided by the trial court and, therefore, is not properly before this Court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, we are not persuaded that the issue of abandonment may be resolved as a question of law. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). A person asserting abandonment bears the burden of proving "both an intent to relinquish the property and external acts putting the intention into effect . . . ." Ambs, 255 Mich App at 652.

In any event, because we are remanding the case for further proceedings regarding whether defendant established a public road in the disputed area of the Sagers' property under a highway by user or common-law dedication theory, any consideration of whether a public road was abandoned would be premature. On remand, plaintiffs Scott and Pamela Sager remain free to pursue the issue of abandonment in the event the trial court finds a public road over the disputed area of section 22.

We note, however, that the trial court incorrectly treated certain evidence on which plaintiffs rely in support of their claim of abandonment as a binding admission. Although the trial court found that the Cheboygan County Road Commission was bound by a statement made by its former manager in 1999 that King Road does not extend to the water's edge, evidentiary admissions are not conclusive. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 421; 551 NW2d 698 (1996). Therefore, on remand, the trial court should be mindful that the evidence of the former manager's admission may be subject to contradiction and explanation. *Id.*

## III. DOCKET NO. 291665

Defendant argues that the trial court abused its discretion by refusing to rule on its objection to the court clerk's taxation of prevailing-party costs under MCR 2.625, after it filed its claim of appeal in Docket No. 289726 from the December 18, 2008, judgment. A trial court's decision regarding a motion for costs by a prevailing party under MCR 2.625 is generally reviewed for an abuse of discretion. *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009). But we review jurisdictional issues de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

The trial court erred in determining that it lacked authority to consider defendant's objections to costs after the claim of appeal was filed in Docket No. 289726. MCR 7.208(I) expressly provides that a "trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals orders otherwise." The fact that the December 18, 2008, judgment contained an order allowing plaintiffs to tax costs

did not deprive the trial court of jurisdiction because no determination had been made with respect to the amount of costs. To be an appealable final order, the trial court must determine the amount of costs. *John J Fannon Co v Fannon Products, LLC,* 269 Mich App 162, 165-166; 712 NW2d 731 (2005).

Contrary to plaintiffs' argument on appeal, the procedures in MCR 2.612(C) are not applicable to defendant's objections to the court clerk's taxation of costs under MCR 2.625(F)(4). MCR 2.612(C)(1) expressly applies to a "final judgment, order, or proceeding." There was no final judgment or order in this case with respect to costs until the trial court affirmed the clerk's taxation of costs on April 6, 2009. As a postjudgment order awarding costs under MCR 2.625, the April 6, 2009, order was independently appealable as of right to this Court. MCR 7.202(6)(iv); MCR 7.203(A). The scope of this Court's review is "limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A).

Because the trial court acted under a misconception of the law when it affirmed the clerk's taxation of costs, we remand for further proceedings regarding this issue consistent with this opinion. We express no opinion whether it would be appropriate for the trial court to deny costs based on the existence of a public question. The mere fact that a case involves a public question does not remove the decision to grant or deny costs from the discretion of the trial court. *Village Green of Lansing v Bd of Water & Light,* 145 Mich App 379, 395; 377 NW2d 401 (1985). But considering that the underlying basis for an award of costs was plaintiffs' status as prevailing parties, and that we are remanding the case to the trial court for further proceedings regarding the disputed area of the Sagers' property, any award in favor of plaintiffs should be vacated on remand to the extent that the Sagers are no longer prevailing parties. See MCR 2.625(B)(2).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck