STATE OF MICHIGAN

COURT OF APPEALS

KAREN J. DUNBAR, STEVEN DUNBAR, SCOTT SAGER, and PAMELA JANE SAGER,

Plaintiffs-Appellees,

v

CHEBOYGAN COUNTY BOARD OF ROAD COMMISSIONERS,

Defendant-Appellant.

UNPUBLISHED
October 23, 2012

No. 303213
Cheboygan Circuit Court
LC No. 07-007730-CZ

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

At issue in this appeal is whether King Road in Cheboygan County, which separates property owned by plaintiffs Karen and Steven Dunbar from property owned by plaintiffs Scott and Pamela Sager, terminates at a "road ends" sign located approximately 160 feet from Burt Lake, or continues as a public road to the water's edge. Following a bench trial, the trial court held that the public road ends at the "road ends" sign. In a prior appeal, this Court affirmed the trial court's decision with respect to the Dunbars' property, but reversed its decision with respect to the Sagers' property and remanded the case for further proceedings regarding whether defendant established a public road in the disputed area of the Sagers' property under either a highway-by-user or common-law dedication theory. *Dunbar v Cheboygan Co Bd of Rd Comm'rs*, unpublished opinion per curiam of the Court of Appeals, issued June 29, 2010 (Docket Nos. 289726 and 291665). On remand, the trial court issued supplemental findings and determined that (1) a public road was not established in the disputed area beyond the "road ends" sign on the Sagers' property under either a highway-by-user or common-law dedication theory and, alternatively, (2) any road that was established was abandoned by the Cheboygan County Road Commission. Defendant appeals as of right. For the reasons stated in this opinion, we affirm.

On remand, after giving the parties an opportunity to present their positions by briefs and through oral arguments, the trial court rejected defendant's claim that a highway-by-user was established pursuant to MCL 221.20, or that a deed executed in 1945 by the Sagers' predecessor in title, Amanda McConnell, formed a basis for finding that the property had been dedicated for public use. The trial court also ruled that to the extent a highway-by-user was established, its width was only 12 feet. However, the trial court also ruled that if a public road was established

under either a highway-by-user or common-law dedication theory, it was abandoned by the Cheboygan County Road Commission. On appeal, defendant challenges the trial court's findings with respect to both of its two theories for establishing a public road beyond the "road ends" sign.

We review a trial court's findings of fact for clear error and its conclusions of law de novo. *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 631; 774 NW2d 332 (2009). "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." *Id.* at 632.

Defendant first argues that the trial court clearly erred in concluding that a highway-by-user was not established. The highway-by-user statute, MCL 221.20, permits the establishment of a public highway under a theory of implied easement. *Villadsen v Mason Co Rd Comm*, 475 Mich 857; 713 NW2d 770 (2006). The burden of establishing a highway-by-user is on the governmental entity claiming the highway-by-user. *Cimock v Conklin*, 233 Mich App 79, 87 n 2; 592 NW2d 401 (1998). The elements are "(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); see also *Pine Bluffs Area Prop Owners Ass'n, Inc v DeWitt Landing & Dock Ass'n*, 287 Mich App 690, 723; 792 NW2d 18 (2010).

In the prior appeal, this Court determined that the trial court erred in its initial evaluation of whether a highway-by-user was established because it failed to recognize that a footpath may constitute a public road. *Dunbar*, unpub op at 4. Although the trial court expressed disagreement with that decision, the trial court was bound to follow it as the law of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000). Nonetheless, we are not persuaded that the trial court's criticism of that aspect of this Court's prior decision led to an erroneous decision on remand. With respect to the "defined line" element of a highway-by-user, *Kalkaska Co Bd of Co Rd Comm'rs*, 249 Mich App at 401, it is clear from the trial court's supplemental findings that it did not modify its earlier finding that a defined line of travel existed in the form of a footpath past the "road ends" sign on the Sagers' property. Rather, the trial court examined the remaining three elements to determine whether defendant satisfied its burden of proof of establishing a highway-by-user.

The second element of a highway-by-user is that "the road is used and worked on by public authorities." *Id.* at 402. This element essentially reflects a public authority's acceptance of a highway. *Boone v Antrim Co Bd of Rd Comm'rs*, 177 Mich App 688, 694; 442 NW2d 725 (1989). There must be acceptance by the public, "at least by taking over control and maintenance of some portion of such road." *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958).

The maintenance activities of the public authority must give the owner notice that title is being denied. *Trowbridge v State Hwy Comm'r*, 296 Mich 587, 599; 296 NW 689 (1941). The pertinent inquiry is not whether there is actual notice, but rather whether the property owner ought to have notice. *Id.* Consistent therewith, this Court has found that a mere "yearly trek"

over a road or trail to determine if it is passable is insufficient. *Maghielse v Crawford Co Rd Comm*, 47 Mich App 96, 98-99; 209 NW2d 330 (1973). But, as explained by our Supreme Court in *Pulleyblank v Mason Co Rd Comm*, 350 Mich 223, 229; 86 NW2d 309 (1957), "[w]ork 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." Even work that is sporadic in nature may be sufficient where a road is kept in a reasonably passable condition. *Id.* Further, it is not necessary that every part of a highway be worked upon or travelled in order to show the public authority's intention to accept the highway. *Indian Club v Lake Co Rd Comm'rs*, 370 Mich 87, 91; 120 NW2d 823 (1963); see also *Kalkaska Co Bd of Co Rd Comm'rs*, 249 Mich App at 402-403.

In this case, there is no dispute that the portion of King Road before the "road ends" sign is a public road. The disputed issue is whether the maintenance work done by public authorities between the sign and Burt Lake is sufficient to show that the road continued to the edge of the water. Defendant relies on evidence of maintenance activities undertaken by the Cheboygan County Road Commission beginning in the 1970s. The evidence showed sporadic maintenance and repairs by road commission employees in the disputed area past the "road ends" sign, with varying levels of passability. The brush-clearing activity that occurred in the early 1970s is evidence that the area had deteriorated to such an extent that, according to the testimony of road commission employee Harold Reynolds, chain saws were used to clear the pathway. But as indicated previously, the proper focus is on whether the maintenance was sufficient to keep the road in reasonably passable condition. *Indian Club*, 370 Mich at 91-93; *Pulleyblank*, 350 Mich at 229.

Because the trial court's approach in evaluating whether maintenance work would be apparent to a "reasonably observant person" does not establish that it was operating within the proper legal framework, its findings with respect to the second element cannot be sustained. Further, the trial court clearly erred in relying on plaintiff Scott Sager's testimony as support for a finding that the road commission was not sufficiently maintaining the disputed portion of King Road. Scott Sager's testimony that he did not see any evidence of maintenance when he visited the property logically follows from his testimony that he did not see a defined line, at least before the road improvement that took place after the Dunbars bought their property in 1999. But the testimony is inconsistent with the trial court's finding that a defined line existed even before the maintenance work in the 1970s on which defendant was relying to establish the second element of a highway-by-user.

Nonetheless, the third element of a highway-by-user requires proof of "public travel and use for ten consecutive years without interruption." *Kalkaska Co Bd of Co Rd Comm'rs*, 249 Mich App at 402. Further, the fourth element requires proof of "open, notorious, and exclusive public use." *Id.* Although some cases indicate that the use must be "hostile" instead of "exclusive," these terms have similar import. *Donaldson v Alcona Co Bd of Co Rd Comm'rs*, 219 Mich App 718, 724-725; 558 NW2d 232 (1996). "An action is 'exclusive' if it 'excludes' something, meaning that it 'shuts out,' 'bars,' or 'disregards' something. *The American Heritage Dictionary* (2nd College Ed, 1982). Similarly, an action is 'hostile' if it treats something in an 'antagonistic' manner. *Id.*" *Id.* at 725. An individual's permissive use of the road, even if the consent was implicit in nature, is insufficient. *Cimock*, 233 Mich App at 93. "[T]he use must be so open, notorious and hostile as to be notice to the landowner that his title is denied." *Bain*, 352 Mich at 305.

The trial court did not clearly err by finding that there was public use during the relevant time period for at least ten continuous years, but that defendant failed to establish that it was open, notorious, and hostile. Evidence supports the trial court's determination that Robert Sager was generous in allowing a large number of friends and neighbors to use the disputed area to access Burt Lake. While there was evidence that other individuals also used the disputed area, believing it to be a public access site, we find no clear error in the trial court's finding that defendant failed to establish that this use was so open, notorious, and hostile as to give notice that title to the property was being denied. Therefore, for the time period covering at least the 1970s until 1996, when Robert Sager died, we find no basis for disturbing the trial court's finding. And considering the evidence that Robert Sager's wife, Jean Sager, continued to live on the property pursuant to a life estate after Robert's death and also gave her consent, at least implicitly, to the use of the disputed area of King Road, defendant failed to establish any continuous ten-year period of open, notorious, and hostile use. Thus, the trial court did not clearly err in finding that the fourth element was not satisfied.

In light of our conclusion that a highway-by-user was not established, it unnecessary to address defendant's additional argument that the trial court erred by finding that the width of any public road established beyond the "road ends" sign was only 12 feet.

Defendant also argues that the trial court clearly erred by finding that defendant failed to establish a public road beyond the "road ends" sign under a common-law dedication theory. "A valid common-law dedication of land requires (a) intent by the property owner to offer the land for public use, (b) an acceptance by, and maintenance of the road by, public officials, and (c) use by the public generally." *2000 Baum Family Trust v Babel*, 488 Mich 136, 147; 793 NW2d 633 (2010).

Although McConnell's retention of a 33-foot wide strip of land along the section line of section 22 when conveying the property to Robert Sager and other nephews in 1945 is consistent with an intent to dedicate, even when considered in light of the photographic evidence of a fence running parallel to the roadway, it is not conclusive evidence of her intent to offer the land for public use. If McConnell had such an intent, it would be reasonable to expect that she would have taken some action to modify her previously executed will to express her intention, rather than to allow the retained 33-foot wide strip of land to be distributed as part of the residuary of her estate, without addressing any public right to use the land. Although a common-law dedication does not ordinarily convey a fee interest in land, it does subject the land to an easement for public use. *Id.* at 148-149. An intent to dedicate must be clear and unequivocal, as unequivocally demonstrated by the owners' actions. *Pine Bluffs Area Prop Owners Ass'n, Inc*, 287 Mich App at 719. Considering the evidence as a whole, the trial court did not clearly err by finding that McConnell did not clearly and equivocally intend to dedicate the retained 33-foot-wide strip for public use. Because we are affirming the trial court's finding that defendant failed to prove an intent to dedicate the land for public use, it is unnecessary to address the trial court's additional finding that any offer of the land by McConnell for public use was not accepted.

Finally, because we conclude that the trial court did not clearly err by finding that defendant failed to establish a public road in the disputed area of the Sagers' property under either a highway-by-user or common-law dedication theory, it is unnecessary to address the trial

court's alternative decision that any public road that had been established was abandoned by the Cheboygan County Road Commission.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra