

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM D. HARRIS, ALLAN LEWIS, and
SUSAN H. LEWIS,

UNPUBLISHED
October 27, 1998

Plaintiffs-Appellants/Cross-Appellees,

v

No. 203453
Alger Circuit Court
LC No. 95-002753-CK

ATTORNEY GENERAL and DEPARTMENT OF
NATURAL RESOURCES,

Defendants-Appellees/Cross-
Appellants,

and

ALGER COUNTY ROAD COMMISSION,

Defendant-Appellee.

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Summary disposition was granted to defendants pursuant to MCR 2.116(c)(10) after the trial court determined that there was no genuine issue of material fact regarding whether the disputed road was a public road. Plaintiffs appeal the grant of summary disposition as of right. Defendants Attorney General and the Michigan Department of Natural Resources (MDNR) cross-appeal, challenging an earlier order of the trial court, which denied defendants summary disposition based on collateral estoppel. We affirm the trial court's grant of summary disposition in favor of defendants.

On appeal, this Court reviews a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(c)(10) tests the factual support for the plaintiff's claim. *Id.* Such a motion must be supported by affidavits, depositions, admissions, or other documentary evidence; and the "adverse party may not rest

upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial.” *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Our de novo review of the record leads to the conclusion that defendants were entitled to judgment as a matter of law.

A public highway may be established in one of two ways. It may become a public highway by user or by a dedication of the landowner and an acceptance on behalf of the public. *Neal v Gilmore*, 141 Mich 519, 522; 104 NW 609 (1905); *Village of Bellaire v Pankop*, 37 Mich App 50, 54; 194 NW2d 379 (1971). See also *Brown v Byron Twp*, 189 Mich 584; 155 NW 544 (1915). The application of freeholders, requesting creation or the laying out of a road, constitutes a common-law dedication. *Pankop*, *supra* at 55. In order for the road to become public after such a dedication, there must be evidence that there was an acceptance by public authorities. *Id.* Evidence of acceptance appears to include action by the public authorities on the application of the freeholders, i.e. agreeing to lay out the road, *id.* at 52, 55-56, and the "doing of work thereon by public authorities." *Neal*, *supra* at 521, 523. MCL 221.22; MSA 9.23 , and its predecessors, including 1897 CL 4063, provide:

Every public highway already laid out, or hereafter to be laid out, no part of which shall have been opened and worked within four years after the time of its being so laid out, shall cease to be a road for any purpose whatever.

See *Rice v Claire Co Rd Comm*, 346 Mich 658, 662; 78 NW2d 651 (1956). We also note that if a highway is properly laid out, but not properly recorded, it is still a public highway if it has been used by the public for more than eight years. See MCL 221.20; MSA 9.21, and its predecessors, including 1897 CL 4061.

Defendants produced documentary evidence that in 1914 Rock River Township laid out the road pursuant to the application of at least seven freeholders and that the road was thereafter opened and worked. Those documents included: an unsigned order, allegedly based upon the petition of at least seven freeholders, found in the record of roads, which ordered a one-mile north-south road be laid out through plaintiff's property and connected to a previously existing county road; handwritten minutes from an August 1914 township board meeting, which evidence that a bid of \$782 was made to build a road at the same location as that noted in the unsigned order; evidence, although not specific to this road, that fifteen road bonds were authorized for township road construction in October 1914; a 1921 plat book showing that the road at issue existed; July 22, 1931 meeting minutes, which appear to indicate that the Alger County Road Commission was going to acquire Rock River Township's roads; and the 1934 road commission meeting minutes, which gave "notice of taking township roads into county road system" in 1934. The last document specifically indicated that the road at issue was being taken from the township and assimilated into the county system¹.

Plaintiffs argued that the documentary evidence presented by defendant's was lacking and did not establish that the road was laid out, dedicated or accepted pursuant to law. Specifically, plaintiffs point out that the existing road is not in the exact same place as the road set out in the unsigned order; that there is no specific evidence that the road was worked between 1914 and 1918; that the unsigned order laying out the road was not trustworthy because, although it was purportedly based on the

application of at least seven freeholders, defendants failed to produce the freeholders' petition; that there are no meeting minutes reflecting that the road was to be laid out or that it was ever created or constructed; that the order laying the road out was unsigned; and that there is no record that any predecessors in title to the property were compensated for the road or that a right-of-way was ever recorded. Plaintiffs also point out that some of their predecessors in interest divided the property during a divorce in the 1950s and the husband kept an easement to access some of his property. They argue that if there was a public road crossing the property, he would not have needed an easement. They produced documents showing the aforementioned transaction. Significantly, plaintiffs also note that their abstract of title does not refer to a public road or right-of-way as being on the property.

Viewing the evidence as a whole and in favor of plaintiffs, the non-moving party, we find that a question of fact was presented as to whether the road was dedicated and accepted as a public road by the township. Specifically, there is a question of fact as to whether the unsigned order is credible evidence of a common-law dedication and whether the road was opened and worked within four years. We do not believe that defendants' documentation conclusively established that the road was a public road such that they were entitled to judgment as a matter of law. Our finding in this regard, however, does not necessitate reversal of the trial court's grant of summary disposition. Summary disposition was still appropriate because there was sufficient evidence to demonstrate that the road became a public road by user.

“‘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.” *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 230; 428 NW2d 353 (1988) (citation omitted). The elements of highway by user are as follows:

evidence of a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten consecutive years without interruption, in an open and notorious and exclusive manner. [*Id.* at 231.]

In this case, the first element of highway by user, the definite boundaries of the road, is clearly established and undisputed. As to the second element, use and work by public authorities, defendants submitted the deposition testimony of the superintendent manager of the Alger County Road Commission. He testified that there were records showing that work had been performed on the road during the years he had been with the commission. Although the disputed portion of the road at issue was generally for seasonal use, there was testimony that the entire road, including that portion, had been maintained by the road commission in passable condition for years. This evidence was not rebutted by plaintiffs.

With regard to the third element, defendants needed to establish that the road was traveled on by the public for ten consecutive years in an open, notorious and exclusive manner, and that use by the public was “accompanied by some act on the part of the . . . authorities”, which was so open, notorious and hostile as to be notice to the landowner that his title was denied. *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 379; 53 NW2d 297 (1952). “A mere permissive use of a

private road by the general public, however long continued, will not make it a public highway.” *Id.* at 378. There was sufficient, unrefuted evidence that the public had used the road for well over ten years. In fact, plaintiffs acknowledged that there were cottages to the south of their property and that the cottage owners used the road to access their cottages. There was also evidence presented by defendants that the road commission had maintained the entire road in a passable condition. We find that the maintenance of the road was open, notorious and hostile, and should have given notice to the land owner. Although the evidence demonstrated that northern half of the road underwent extensive work whereas the south portion, which plaintiffs claim is private, was only maintained to make it passable, it was not necessary to show continuous, major upkeep of the entire road. *Indian Club v Lake Co Rd Comm's*, 370 Mich 87, 91; 120 NW2d 823 (1963):

The plaintiffs object that the examples of repair and upkeep testified to are sporadic, in effect that the instances given do not come, 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. [*Id.*, citing *Pulleyblank v Mason Co Rd Comm*, 350 Mich 223, 227; 86 NW2d 309 (1957).]

Moreover, “it is not essential that every part of the highway, in length or width, should be worked and traveled in order to show the intention of the public to accept the entire highway.” *Id.*

Based on all the evidence presented by defendants and plaintiffs' complete inability to rebut the evidence that the entire road, including the portion in dispute, was kept in passable condition and used by the public for more than ten years, we conclude that summary disposition was properly granted to defendant. The road at issue was a public road by virtue of the "highway by user" doctrine.

Because we affirm the trial court's grant of summary disposition, we find it unnecessary to resolve the issue raised on cross-appeal².

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Roman S. Gribbs

¹ The McNitt Act, formerly 1948 CL 247.1 *et seq.*, required township roads to become county roads over a period of five years. The road at issue was designated as a township road by Rock River Township and was taken over by the county pursuant to the Act. Plaintiffs claim that the road could not have been taken over under the Act because it was never a township road.

² Plaintiff Harris was issued a citation after constructing a gate across the road. He was found guilty of a civil infraction for blocking a public highway without authority. After he filed the current civil action to declare the road a private road, defendants moved for summary disposition on collateral estoppel

grounds, claiming that the issue had been adjudicated within the context of the civil infraction. The trial court denied the motion. Defendants Attorney General and MDNR's cross-appeal contests this ruling.