STATE OF MICHIGAN

COURT OF APPEALS

ALFRED J. BURNS,

Plaintiff-Appellant,

V

CITY OF MANISTIQUE, ALAN HOUSLER, MARGARET ARNOLD, ROSEMARY SABLACK, CHRIS GAGNON, GREG MULLIGAN, and JOHN HOAG,

Defendants-Appellees.

UNPUBLISHED
October 19, 2001

No. 232315
Schoolcraft Circuit Court
LC No. 00-003048-NZ

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) with respect to defendants' claim that the road in question is a public road under MCL 221.20, and MCR 2.118(C)(8) with respect to defendants' claim that all defendants, except the City of Manistique, were entitled to governmental immunity because the allegations contained in plaintiff's complaint did not constitute gross negligence. We affirm.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants. We disagree. Although plaintiff's arguments below and on appeal are somewhat confusing, it appears that plaintiff is essentially asserting that Lakeside Road, which has been in existence for at least thirty years, is a public road, but that because of his complaints within the past six years, defendants have no authority to expand the road in width unless defendants compensate him for the trespass onto his property.

The trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court also reviews de novo the legal requirements for establishing a highway by user. *Cimock v Conklin*, 233 Mich App 79, 84; 592 NW2d 401 (1998).

MCL 221.20, the highway-by-user statute, 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.

The highway-by-user statute treats property subject to it as impliedly dedicated to the state for public use. *Kentwood v Sommerdyke Estate*, 458 Mich 642, 652; 581 NW2d 670 (1998), cert den 526 US 1003; 119 S Ct 1140; 143 L Ed 2d 208 (1999). 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 supra* at 86, quoting *Kent Co Rd Comm v Hunting*, 170 Mich App 222, 230; 428 NW2d 353 (1988). The elements of a highway by user requires 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, notorious and exclusive manner." *Kentwood, supra* at 666, quoting *Hunting, supra* at 231. Further, "[i]f the elements are established, the statute operates to raise the rebuttable presumption that the road is four rods, or sixty-six feet wide." *Kentwood, supra*, quoting *Hunting, supra*. It is during the ten-year period of limitation that a property owner can present evidence that rebuts the "existence and extent" of a public highway. *Kentwood, supra* at 654. The statutory presumption "allows for the dedication of the entire four-rod width unless the evidence rebuts the presumption." *Id.*

To the extent that plaintiff does not dispute the fact that Lakeside Road has become a public highway pursuant to MCL 221.20, but that defendants have no authority to widen the roadway, this argument is without merit. In *Kentwood, supra* at 649, the property owners did not contest the establishment of a highway by user, but rather, they contested the extent of the road to which the state was entitled. The property owners claimed that the state was entitled only to that portion of the highway actually used by the public. *Id*. The Supreme Court stated that MCL 221.20 allows the property owner to assert the right to the property "within ten years after the creation of the road as a public road by use." *Id*. at 662. The Court further stated that "[i]f ten years pass without a continuous assertion of right by the property owners, the law presumes that the owner intended to dedicate the entire four-rod width of the road." *Id*. The Court held that the road was dedicated to the full extent of the four-rod width because there was no evidence presented that the *original* property owners rebutted the presumption of dedication within the ten-year period. *Id.* at 665 (emphasis added).

There is no dispute in this case that the public has been using Lakeside Road, and that the road has been in existence since at least 1959. At the motion hearing, plaintiff stated that

defendant city deeded certain land to Jim Miller in 1959.[1] The deed stated that the west line of Lakeside Road was the east line of the property conveyed to Miller. According to plaintiff, his family has owned the land since 1969. As previously stated, the *Kentwood* Court held that the full extent of the four-rod width (i.e., sixty-six feet) would be deemed dedicated to the state if no evidence is presented that "the original property owners rebutted the presumption of dedication within the statutory ten-year period." *Id*. The Court in *Kentwood, supra* at 663, n7, stated that "[i]t is the person who owned the property when the highway was originally created by use who must assert his right to the property within the statutory period."

In this case, we do not know the exact time period of when the ten-year period began to run; however, assuming that the road was created by use in 1959 and not before that time, there is no evidence that Miller (assuming that Miller was a previous owner of plaintiff's property), plaintiff's family, or any owner in the interim from 1959 through 1969 rebutted the presumption of dedication. According to plaintiff, he did not contest the widening or use of the road until 1994, well after the initial ten-year period had ended. Plaintiff's attempt to use the last ten years while the road was being widened (as opposed to the initial ten years when the road was first created as a road for public use) as the ten-year statutory period under MCL 221.20 is without merit. Thus, because there was no contrary action taken within the statutory period, the full extent of the four-rod width is deemed dedicated to the state.

To the extent that plaintiff now disputes that the four elements listed *supra* have not been satisfied to establish a highway by user pursuant MCL 221.20, we disagree. First, the affidavit of Oliver Sholander stated that Lakeside Road had been maintained in its present location since 1982. Further, plaintiff conceded at the motion hearing that the deed transferring property as early as 1959 referenced the right-of-way of Lakeside Road as one of the boundaries. Thus, a defined line of travel establishing public usage of the road was established.

Next, Sholander's affidavit established that that the road had been maintained by defendants since at least 1982. Plaintiff does not dispute that defendants have maintained the road. Thus, the requirement that public authorities have maintained the road has been satisfied.

Further there is no dispute that the public has used the road. Although plaintiff disputes the ten-year requirement, this assertion is without merit as previously stated. Further, as to the requirement that the public's use be open, notorious, and exclusive, plaintiff never raised the argument below that the general public did not have the right to use Lakeside Road as it abuts his property nor did he assert that the public's use was anything other than open, notorious, and exclusive. Plaintiff's only argument before the trial court concerned defendants' authority to widen the road since 1994. Because the four elements to establish a highway by user were satisfied in this case, the trial court did not err in also finding that the requirements had been satisfied and that the road was a public highway pursuant to MCL 221.20.

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[1] The lower court record does not specifically state whether Miller was the previous owner of plaintiff's property before plaintiff's family owned the property in 1969 or whether Miller's property was in the vicinity of plaintiff's property. Defendants' brief refers to Miller's property as being "in the vicinity" of plaintiff's property.

Plaintiff also asserts that defendants' actions have resulted in an unconstitutional taking of his property without compensation. We disagree. This Court reviews constitutional issues de novo. *Mahaffey v Attorney Gen'l*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

Specifically, plaintiff asserts that he should be compensated for the portion of the road (approximately six feet) that has been expanded by defendants over the past six years. However, the Supreme Court in *Kentwood, supra* at 665, specifically stated that once a public highway has been established as a highway by user pursuant to MCL 221.20, the full extent of the four-rod width would be deemed dedicated to the state. Any additional expansion of the road to the full extent of four rods would not rise to the level of an unconstitutional taking without compensation. *Id*. at 663. Plaintiff does not assert that the widening of the road exceeds the four-rod width. Plaintiff overlooks the ruling in *Kentwood*, and his argument is meritless.

We also conclude that plaintiff's assertion that defendants had no authority to maintain and widen that portion of the road that was outside the city limits is without merit. The bottom line in this case is that the road in question was established as a public highway pursuant to MCL 221.20. Which state entity (e.g., the city, township, or county) maintains the road is irrelevant for purposes of MCL 221.20, and any dispute between the entities involving who has authority to maintain the road does not involve plaintiff.

In light of our conclusion that summary disposition was properly granted to all defendants because the road in question is a public highway pursuant to MCL 221.20 and as such, the entire four-rod width was dedicated because no evidence existed to the contrary, we need not address the issue regarding whether the individually named defendants were entitled to summary disposition on the basis of governmental immunity.

In conclusion, because the road in question has existed for many years beyond the time period necessary under MCL 221.20 to establish the road as a highway by user, the minimal widening of the road within the last six years remains within the right-of-way established under MCL 221.20. There has been no trespass on or any unconstitutional taking of plaintiff's property.

We affirm.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter