

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH HUTCHINSON,

Plaintiff-Appellant,

v

CHEBOYGAN COUNTY ROAD
COMMISSION,

Defendant-Appellee.

UNPUBLISHED

December 20, 2002

No. 232851

Cheboygan Circuit Court

LC No. 99-006630-CH

Before: Hood, P.J., and Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Plaintiff Deborah Hutchinson appeals as of right from a judgment entered in favor defendant Cheboygan County Road Commission (CCRC) following a bench trial. We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

This case arises from a dispute concerning easements on land near the Pigeon River in Kohler Township in Cheboygan County. Part of the dispute is related to Ostrander Road, which is a seasonal roadway. Before 1938, Ostrander Road allowed vehicular traffic to cross a portion of property, which Hutchinson now owns, to reach a bridge located on the banks of the Pigeon River. Because its infrastructure was deteriorating, however, the bridge was closed to vehicles in 1938, and was later removed. After the bridge was closed, an earthen berm was placed across Ostrander Road at a point approximately 322 feet east of the river’s shoreline.¹ The roadway beyond the berm has since fallen into disrepair and is currently accessible only to pedestrian traffic along a footpath leading to the river.

Hutchinson acquired title to the property at issue in June 1997. In November 1999, Hutchinson filed the instant suit. She asked the trial court to declare that the portion of Ostrander Road located west of the earthen berm stretching to the banks of the Pigeon River had been abandoned. If the trial court had granted Hutchinson the relief she sought, ownership of the

¹ The record is unclear with respect to the width of the disputed strip, but it appears to be approximately 150 feet.

property would have reverted to her as the adjoining property owner and successor of the original easement grantor, Consumers Power Company. Hutchinson also sought reverter of an easement of flowage granting Cheboygan County the right to divert the waters of the Pigeon River across her property to develop water power. Cheboygan County transferred this easement along with all its other rights to this property to the CCRC in January 2000.

Following a bench trial, the trial court found that the property west of the earthen berm on Ostrander Road was a highway by user and had not been abandoned, thus reverter was not possible. The trial court also concluded that it was unable to extinguish the easement of flowage because Cheboygan County had been dismissed as a party to the case, and thus no proofs were taken on the issue. Thus, the trial court entered judgment in favor of the CCRC.

II. Highway By User

A. Standard Of Review

Hutchinson first argues that the trial court erred in ruling that the disputed portion of the roadway was an established highway by user. 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.² A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made.³

B. Analysis

The law treats property meeting the requirements of the highway-by-user statute⁴ as impliedly dedicated to the state for public use.⁵ This allows the public to acquire title to a highway even if no formal dedication was ever made.⁶ For the public to acquire an interest in a piece of property in the absence of a formal dedication, the highway-by-user statute requires evidence that (1) there was a defined line of travel, (2) 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.⁷ The burden of proof rests with the governmental agency claiming highway by user.⁸

In finding that a highway by user had been established, the trial court relied on evidence concerning how the road had been used before the bridge closed in 1938, as well as the roadway's incorporation into the county system under the McNitt Act⁹ in 1936. We agree with

² *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2002).

³ *Id.*

⁴ MCL 221.20.

⁵ *Kalkaska*, *supra* at 401.

⁶ *Cimock v Conklin*, 233 Mich App 79, 86; 592 NW2d 401 (1998).

⁷ *Kalsaka*, *supra* at 401-402.

⁸ *Cimock*, *supra* at 87, n 2.

⁹ 1931 PA 130, repealed by 1951 PA 51, § 21.

Hutchinson that the historical evidence concerning the age and nature of the bridge's use while still intact was far too attenuated to establish a highway by user¹⁰ and that mere certification under the McNitt Act is insufficient to itself establish a highway by user.¹¹

Nevertheless, there was competent evidence on the record that, since Ostrander Road was incorporated into the county road network under the McNitt Act in 1936, each of the factors necessary to establish a highway by user existed.¹² With respect to a defined line of travel, Hutchinson herself introduced photographs depicting the well-worn foot path used by pedestrians to access the river from the point where Ostrander Road ended at the earthen berm. There was evidence that this area was used and maintained by public authorities, and had served as a basis for public travel for a period of at least ten years. Harold Reynolds testified that, as part of his duties as CCRC supervisor, he would intermittently check the footpath leading to the river and, when necessary, would clear the path. Timothy Calloway also testified that he and a number of other canoeists had openly used the path for access to the river each year since approximately 1970. Michigan Supreme Court precedent also makes clear that an “area used as a footpath constitute[s] a contemplated use as a roadway”¹³ for the purpose of the highway-by-user test, even in the absence of evidence that any sort of vehicular traffic uses the path.¹⁴ Considering that the pedestrian use of the disputed area is sufficient to constitute use as a roadway, the trial court correctly concluded that the disputed area was an established highway by user, even if it used incorrect reasoning to reach this result.¹⁵

III. Abandonment Of The Right Of Way

A. Standard Of Review

Hutchinson next argues that, even if a highway by user had been established, the CCRC demonstrated an intent to abandon the disputed portion of Ostrander Road by placing the earthen berm across the roadway and subsequently failing to maintain the disputed portion of the roadway. An action to quiet title is equitable in nature, and therefore we review the trial court's findings for clear error and apply review de novo to its legal conclusions.¹⁶

B. Analysis

In order to establish abandonment of a public way, the party asserting abandonment must offer proof showing both an intent to relinquish the subject property and an external act putting

¹⁰ See *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Road Comm*, 236 Mich App 546, 556; 600 NW2d 698 (1999).

¹¹ *Maghielse v Crawford Co Road Comm*, 47 Mich App 96, 98-99; 209 NW2d 330 (1973).

¹² See *Kalkaska*, *supra*.

¹³ *In re Petition of Carson*, 362 Mich 409, 412; 107 NW2d 902 (1961).

¹⁴ See *id.* at 411 (“There was no denial that the road was not open to vehicular travel . . .”).

¹⁵ *Washtenaw Co Health Dep't v T & M Chevrolet Inc*, 406 Mich 518, 520, n 1; 280 NW2d 822 (1979).

¹⁶ See *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

that intention into effect.¹⁷ Moreover, “[t]he burden of proving abandonment is upon the party asserting it, and abandonment occurs only when the use for which the property is dedicated wholly fails.”¹⁸

The record lacks any evidence that CCRC intended to relinquish the disputed property. Nor can we conclude that the use for which the property was dedicated totally failed.¹⁹ Evidence offered at trial established that the CCRC maintained the entirety of Ostrander Road, albeit seasonably and with greater emphasis on the portion east of the berm. This was sufficient to establish its intent to accept and maintain the entire roadway.²⁰ Moreover, the easement was granted to provide public access to, and presumably across, the Pigeon River. While the public may no longer use Ostrander Road to cross the Pigeon River, canoeists and other members of the public still use it to access the banks of the river. Accordingly, there was insufficient evidence that CCRC intended to relinquish title or any external act that demonstrated an intent to abandon the land to contradict the trial court’s findings.²¹

IV. Easement of Flowage

A. Standard Of Review

In her final argument, Hutchinson contends that the trial court erred when concluding that she was not entitled to have title quieted to her for the portion of her property affected by the flowage easement. We again review factual findings for clear error and examine de novo questions of law.²²

B. Analysis

The relevant language found in the quitclaim deed between Consumers Power Company and Cheboygan County states:

That first party [Consumers Power Company], for and in consideration of the sum of One Dollar (\$1.00) and other valuable considerations to it paid by second party [County of Cheboygan], the receipt whereof is hereby confessed and acknowledged, does by these presents CONVEY AND QUIT-CLAIM Unto the said second party and to its successors and assigns, FOREVER, the easement and right to divert the waters of the Pigeon River on, over and along pieces or parcels of land situate in the Township of Koehler, County of Cheboygan and State of Michigan, described as follows, to-wit:

¹⁷ See *Roebuck v Mecosta County Rd Comm*, 59 Mich App 128, 132; 229 NW2d 343 (1975).

¹⁸ *Kirchen v Remenga*, 291 Mich 94, 113; 288 NW 344 (1939).

¹⁹ See *Roebuck, supra*; *Kirchen, supra*.

²⁰ See *Kalkaska, supra* at 402.

²¹ See *Roebuck, supra*.

²² See, generally, *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

* * *

This conveyance is made subject to the express conditions, exceptions and reservations, to-wit:

1. That the easement hereby conveyed shall be used for the purpose of *changing the channel of the Pigeon River*, and in case such use shall cease and terminate, that the title hereby conveyed shall revert to said first party, its successors and assigns.

2. It is expressly understood that said first party owns said premises and those adjacent thereto *for water power purposes and for water power development* of said Pigeon River. Said first party, its successors and assigns, hereby expressly reserves the right to raise and lower the waters of said Pigeon River and its tributaries by the erection, operation and use of any *dam or dams* across said Pigeon River, now erected or hereafter erected above or below the lands herein described. And said Grantee hereby releases said first party, its successors and assigns, and shall save it harmless from any claims or liabilities on account of damage to any highway, bridge or other improvement hereafter made or constructed by second party or by the Board of County Road Commissioners by reason of said *diversion*, growing out of the exercise by first party of the rights hereby reserved, including damage caused by percolation, saturation, or sloughing off of soil or other supports, and second party agrees to hold first party, its successors or assigns, harmless from any claims on account of damages to other persons by reason of said diversion.

3. This grant is made upon the further condition that said first party, its successors or assigns, may at any time *alter the stage or channel of said Pigeon River* when necessary in connection with the *construction, operation, or maintenance of any dam or dams across said river*, now or hereafter erected.^[23]

In Count III, Hutchinson claimed that the flowage easement created in this deed had failed in its purposes. This was essentially an argument that the easement had been extinguished by non-use. The trial court, however, found that it could not consider whether this easement was now invalid because Cheboygan County, which had quitclaimed the property to the CCRC in January 2000, was no longer a party to the action²⁴ and there was no evidence relevant to this claim.

This is, to say the least, a somewhat arcane property law issue. However, contrary to the trial court's findings, there was evidence in the record concerning Hutchinson's claim that Cheboygan County had extinguished the flowage easement. For instance, the parties presented

²³ Emphasis added.

²⁴ The trial court did not explain why Cheboygan County had to be a party when determining whether the transfer to the CCRC extinguished the flowage easement. Neither party to this appeal has developed an argument concerning this portion of the trial court's ruling, so we do not address it.

to the trial court all the relevant documents concerning the property transfers between Consumers Power, Cheboygan County, and the CCRC. Further, the record was undisputed that the flowage easement had never been used.

According to the First Restatement of Property, the common law holds that an easement may be extinguished if there is an intent to abandon the easement and “conduct respecting the use authorized” by the easement,²⁵ explaining:

An intentional relinquishment of an easement indicated by conduct respecting the use authorized by it constitutes an abandonment of the easement. The intention required in the abandonment of an easement is the intention not to make in the future the uses authorized by it. The benefit of an easement lies in the privilege of use of the land subject to it. There is no abandonment unless there is a giving up of that use. The giving up must be evidenced by conduct respecting the use of such a character as to *indicate an intention to give up the use for the future as well as for the present. Conduct, when inconsistent with the continuance of the use, indicates an intention to give it up. . . .*^[26]

Critical to this case, the First Restatement explains that

[c]onduct from which an intention to abandon an easement may be inferred may consist in a failure to make the use authorized. Non-use does not of itself produce an abandonment no matter how long continued. It but evidences the necessary intention. Its effectiveness as evidence is dependent upon the circumstances. Under some circumstances a relatively short period of non-use may be sufficient to give rise to the necessary inference; under other circumstances a relatively long period may be insufficient. The duration of the period of non-use, though never conclusive as to the intention to abandon, is ordinarily admissible for the purpose of showing intention in that regard.^[27]

²⁵ First Restatement of Property, § 504, p 3076; see also 2 Third Restatement of Property, § 7.4, p 352 (“A servitude of benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by a servitude.”).

²⁶ First Restatement, *supra* at 3077-3078 (emphasis added); see also Third Restatement, *supra* at 352 (“A finding of abandonment is usually based on circumstantial evidence rather than on direct expressions of intent because a servitude beneficiary who deliberately sets about divesting him or herself of a servitude interest normally uses a release).

²⁷ First Restatement, *supra* at 3079; see also Third Restatement, *supra* at 354 (“Failure to take advantage of a servitude benefit, even for a lengthy period, is seldom sufficient to persuade a court that abandonment has occurred. Some additional action on the part of the beneficiary inconsistent with continued existence of the servitude is normally required, although the amount of additional evidence required tends to diminish as the period of nonuse grows longer. In cases where a very long period of time has passed, abandonment may be found even without other evidence of intent.”).

Michigan case law follows the common law, holding that a failure to use the easement is insufficient to extinguish the easement “in the absence of ‘evidence establishing an intention to release the servient estate and extinguish the easement.’”²⁸

In this case, however, we believe that Hutchinson provided sufficient evidence that Cheboygan County intended to abandon the easement by failing to alter the Pigeon River in any way in furtherance of the explicit purpose of the easement, which was “for water power purposes and for water power development of said Pigeon River.” This non-use was for more than sixty years, which is a substantial period. While sixty years of non-use, alone, may be insufficient to prove an intent to abandon, Cheboygan County made clear its intention to give up its present and future ability to make use of the easement and develop water power by diverting or otherwise altering the Pigeon River when it quitclaimed its interest in the property to the CCRC. A county road commission is authorized by statute to “grade, drain, construct, gravel, shale, or macadamize a road under its control, make an improvement in the road, and may extend and enlarge an improvement, “ as well as “construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts.”²⁹ None of the sections of the general highway law³⁰ grants a county road commission or its board the legal authority to construct dams, raise, lower, or divert navigable waterways, or develop water as a power source. Rather, Const 1963, art 7, § 12, grants this authority to build dams across navigable water like the Pigeon River, and thereby alter its course, to the “board of supervisors of the county. . . .”³¹

Overall, the record conclusively established that Cheboygan County (1) had the legal authority to divert navigable waterways under its constitutional authority to build dams, (2) had the right to divert the Pigeon River pursuant to the easement, (3) chose never to use its rights to alter the Pigeon River to develop and use water power for more than half a century, and (4) transferred all its rights to the property, including its rights under the flowage easement, to a governmental entity that, as a matter of law, lacked the authority to develop and use water power. Taken together, this evidence on the record demonstrated that Cheboygan County intentionally took overt steps to extinguish the easement, releasing Hutchinson’s servient estate. Thus, the trial court erred when it refused to quiet title to the portion of Hutchinson’s property affected by the easement in the deed recorded on June 6, 1939, at liber 117, page 236.

We affirm in part, reverse in part, and remand for the trial court to quiet title to the property affected by the flowage easement in the deed recorded on June 6, 1939, at liber 117, page 236 in Hutchinson. When amending the judgment order to grant Hutchinson this relief, the trial court shall also correct or clarify what appears to be a typographical error on the first page

²⁸ *Kraft v Miller*, 314 Mich 390, 401; 22 NW2d 857 (1946), quoting *Greve v Caron*, 233 Mich 261, 266; 206 NW 334 (1925).

²⁹ MCL 224.19(1).

³⁰ See MCL 220.1 *et seq.*

³¹ See also MCL 46.21.

of the order referring to the “33 foot strip along the southern boundary of Section 22,” as opposed to the 322 foot strip in dispute in this case. We do not retain jurisdiction.

/s/ Harold Hood

/s/ William C. Whitbeck