STATE OF MICHIGAN

COURT OF APPEALS

B & P LARSON FAMILY LIMITED PARTNERSHIP,

Plaintiff/Counter-Defendant-Appellant,

v

IOSCO COUNTY ROAD COMMISSION,

Defendant/Counter-Plaintiff-Appellee,

and

PLAINFIELD TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
January 17, 2006

No. 263619
Iosco Circuit Court
LC No. 04-001098-CZ

Before: Fitzgerald, PJ. and O'Connell and Kelly, JJ.

PER CURIAM.

In this dispute over whether an unpaved roadway crossing plaintiff's land was a private or public road under the highway by user statute, MCL 221.20, plaintiff appeals as of right an order granting defendant road commission's motion for summary disposition. We affirm.

Plaintiff owns approximately one hundred and sixty acres of land traversed by Jose Lake Road, the roadway at issue. After receiving notice that the roadway would be graded to support logging on nearby forestry land, plaintiff sought to have the portion of the roadway crossing its property declared private. Plaintiff alleged that the roadway had always been private, that only plaintiff or its predecessors had maintained it, that there was never any formal dedication or conveyance to the county, and that there has only been sporadic public use except with plaintiff's permission.

After the trial court granted and then lifted a temporary restraining order against defendant road commission, the case was argued on cross-motions for summary disposition. With its brief, defendant road commission submitted 26 photographs of the roadway and excerpts from its records. The earliest excerpts are from 1935, and include a handwritten description of the roadway and a letter from the chairman of the board of defendant road

commission to the Michigan State Highway Department certifying that "all of the roads approved by your Department as the fourth twenty percent of the mileage to be taken over . . . have been duly taken over as county roads and proper notice by advertising and notification to the township highway commissions . . . has been complied with." Other exhibits show the county section map from 1935 through 2003, including annual maps beginning in 1957. The trial court heard argument on the cross-motions and ruled in favor of defendant road commission:

> [I]t appears to me that it's obvious that . . . Jose Lake Road was accepted by the Iosco County Road Commission under the McNitt Act[1] and has been continuously certified since then; as such, obviously it was used as a public road prior to that by the residents of Plainfield Township. The road has been used by members of the public. . . . Portions of the road have been maintained by the Iosco County Road Commission. It's my understanding that if you maintain a portion of the road[,] that goes to the whole road. The whole road's been listed in maps that I've reviewed; not just a portion of it. . . . As a result, I find that Jose Lake Road is a public road at this time and defendant's Motion for summary . . . disposition is granted; Plaintiff's Motion for Summary Disposition is denied for those reasons.

Plaintiff argues that the trial court erred in summarily dismissing its claim. We disagree. We review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review "de novo the legal requirements for establishing a highway by user, but review[] the trial court's factual findings for clear error. A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Villadsen v Mason Co Rd Comm*, ___ Mich App ___ ; ___ NW2d ___ (Docket No 255955, issued July 19, 2005), slip op 3 (citation omitted).

After reviewing the record, we conclude that the trial court did not clearly err in finding that the disputed roadway had been impliedly dedicated and then formally accepted into the county road system. The rules for designating a highway as public are well established:

> For a road to become public property, there generally must be a statutory dedication and an acceptance on behalf of the public, a common-law dedication and acceptance, or a finding of highway by public user. . . . Finally, establishing a public highway pursuant to the highway by user statute . . . requires (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,

---

[1] "The McNitt act, 1931 PA 130, repealed by 1951 PA 51, § 21, provided for the taking over by the county of township roads and roads specified as public in recorded plats. For the version of the law currently in effect, see MCL 247.669 . . . ." *Christiansen v Gerrish Twp*, 239 Mich App 380, 383 n 2; 608 NW2d 83 (2000).

> notorious, and exclusive public use. [*Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 554-555; 600 NW2d 698 (1999) (citations omitted).]

In *Appleton Trust*, this Court reversed a trial court's grant of summary disposition to the defendant road commissions because it was error for the trial court to "conclude as a matter of law that defendants hold a superior interest in the disputed strip of land when defendants have supplied no evidence establishing their interest." *Id.* at 555. The defendants conceded they "could not definitively establish that they had acquired ownership of the property pursuant to any of these accepted methods." *Id.* Rather, the defendants asserted that the historical evidence showed that the property in dispute was a public highway. *Id.* In support of this theory, the defendants relied on "historical maps, surveys, affidavits, and photographs regarding the condition and use of the disputed strip of property." *Id.* This Court noted that "[n]one of the maps, surveys, affidavits, or county records provided by defendants documents the creation of a public highway along the disputed strip of land." *Id.*

Conversely, defendant road commission's exhibits in this case show that Jose Lake Road was designated as a public highway under the McNitt Act since 1935. In *Christiansen, supra* at 384, the parties agreed there had been a dedication for public use via a plat, so the issue there was the effectiveness of the county road commission's acceptance. This Court surveyed the law on dedication and acceptance by a county and concluded that a McNitt Act resolution was sufficient to show that a road had been accepted into the county road system. *Id.* at 390.

Plaintiff argues that the controlling case is *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372; 53 NW2d 297 (1952). In *Missaukee Lakes*, the Court noted that "the McNitt act, and the later amendments, refer to the taking over of township roads and do not authorize the county road commission to take private roads into the county public highway system as public highways." *Id*. at 376. However, the facts distinguish *Missaukee Lakes* from this case. Most significantly, the plaintiff in *Missaukee Lakes* acquired the land in 1932, while the county did not certify the disputed roads under the McNitt Act until 1939. *Id.* at 378, 375. Additionally, because there was mixed testimony in *Missaukee Lakes* as to the whether the plaintiff had excluded the public, the Court concluded that implied dedication could not be found. *Id.* at 378. In this case, however, the roadway was certified as a public road and shown on section maps for almost two decades before plaintiff acquired the property. This supports defendant road commission's argument that plaintiff took title subject to the roadway.

Plaintiff also argues that the absence of an express dedication is fatal to defendant road commission's case. However, *Kentwood v Sommerdyke Estate*, 458 Mich 642; 581 NW2d 670 (1998), dictates otherwise:

> The first version of the highway-by-user statute was enacted in 1838, the year after Michigan became a state. 1838 RS, tit 6, ch 4, § 42. While the statutory period for retention of the property right has changed over the years, the statute has remained substantially similar to the one enacted as first written.
>
> * * *

> Highways by user are based on an implied dedication by the landowner. *Kruger v Le Blanc*, 70 Mich 76; 37 NW 880 (1888). Under the highway-by-user statute, a particular period, in this case ten years, creates a presumption of dedication to the public. One similarity between a common-law dedication and a dedication by user is that a presumption of dedication can be rebutted by evidence showing that the property owner intended to give the public less than the full width of the road. However, under common law, this determination was often difficult to make because there was no prescribed time frame in which to measure the extent of the dedication.
>
> * * *
>
> *In Michigan, the highway-by-user statute modified the common law. Statutes like this eliminated the need to prove a fictional event. Michigan's statute refines this concept by holding that a dedication is established during the ten-year period of limitation.* It is during that ten-year period that a property owner can present evidence that rebuts the existence and extent of a public highway. The statute creates consistency in the theory of implied dedication through a prescribed period as well as a specific width of four rods. This statutory presumption allows for the dedication of the entire four-rod width unless the evidence rebuts the presumption. [*Id.*, 650-654 (emphasis added).]

Thus, in this case, defendant road commission is not required to show an express dedication. As *Kentwood* underscored, the period in which the certification of the road as public could have been challenged under the highway by user statute ended in 1945, before plaintiff acquired the property. Moreoever, decades have passed since plaintiff acquired the land with the existing public roadway in place, and plaintiff only instituted a court action in 2004. Therefore, the trial court did not clearly err in finding that the roadway was public before plaintiff acquired it and continues to remain so.

A governmental agency asserting that a highway by user has been created bears the burden of proof when that claim is tested. *Cimock v Conklin*, 233 Mich App 79, 87 n 2; 592 NW2d 724 (1998). Thus, if defendant road commission were trying to add Jose Lake Trail to its county road system now, it would have to show that it met the four tests restated in *Appleton Trust*, *supra* at 554-555. But here, the statutory period for challenging whether defendant road commission had carried its burden passed long ago, and plaintiff's argument that defendant road commission had failed to establish highway by user is without merit. Finally, the trial court's finding that Jose Lake Road is a public road is a factual finding that is reviewed for clear error. Plaintiff has not shown that the trial court erred, much less clearly erred, in finding that the road was established as a public road before plaintiff acquired its property.

Finally, plaintiff argues that its claim was not properly dismissed as a matter of law under the various sections of the court rule governing summary disposition. However, appellate courts "will not disturb the decision of the lower court, which reached the right conclusion, regardless of the reasons it cites for reaching that conclusion." *Templin v Nottawa Twp*, 362 Mich 257, 261; 106 NW2d 825 (1961).

In sum, Jose Lake Road has been a public road since 1935, two decades before plaintiff acquired its parcel and seven decades before plaintiff filed a challenge to its status as a public road. The trial court did not clearly err in finding that the road was and remains a public highway and, hence, did not err in dismissing plaintiff's suit.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Peter D. O'Connell