STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BENNINGHOFF, LAURIE BENNINGHOFF, KRIS KALLEMBACH, DERMOT PUTNAM, GAIL KAPLAN, and FRIENDS OF 121ST AVENUE,

Plaintiffs-Appellants,

and

GANGES TOWNSHIP,

Plaintiff/Counter-Defendant-Appellant,

v

JOHN D TILTON, MARY E TILTON and HAROLD A STEGE and SUZANNE B STEGE, as trustees of the HAROLD A STEGE TRUST,

Defendants/Counter-Plaintiffs-Appellees,

and

ALLEGAN COUNTY ROAD COMMISSION,

Defendant.

UNPUBLISHED
November 12, 2009

No. 284637
Allegan Circuit Court
LC No. 06-039595-CH

MICHAEL BENNINGHOFF, LAURIE BENNINGHOFF, KRIS KALLEMBACH, DERMOT PUTNAM, GAIL KAPLAN, and FRIENDS OF 121ST AVENUE,

Plaintiffs-Appellees,

and

GANGES TOWNSHIP,

Plaintiff/Counter-Defendant-
Appellee,

v

No. 284736
Allegan Circuit Court
LC No. 06-039595-CH

JOHN D TILTON, MARY E TILTON and HAROLD A STEGE and SUZANNE B STEGE, as trustees of the HAROLD A STEGE TRUST,

Defendants/Counter-Plaintiffs-
Appellants,

and

ALLEGAN COUNTY ROAD COMMISSION,

Defendant.

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

In this real property dispute, both plaintiffs and defendants appeal as of right various actions taken by the trial court. On appeal, the primary issues are whether the general public can obtain a prescriptive right to use private land as a public park or beach and whether the public has in fact established the right to use the land at the point where 121st Avenue intersects Lake Michigan as a public beach.[1] We conclude that, under Michigan law, the general public can obtain prescriptive rights to use private land as a public beach. However, in this case, we conclude that there are questions of fact as to whether and when the public might have established a prescriptive right to use the end of 121st Avenue as a public beach. For that reason, we conclude that the trial court erroneously granted summary disposition on this claim. Similarly, because there are questions of fact as to whether and when the public might have obtained such a prescriptive right, the trial court erred to the extent that it concluded that defendants' inverse condemnation claim was untimely. The timeliness of defendants' inverse condemnation claim cannot be ascertained absent resolution of these fact questions. Accordingly, we reverse in part, affirm in part, and remand for further proceedings.

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[1] Throughout this opinion, we shall use the phrase "prescriptive rights" to refer to the property rights accompanying an easement established by prescription. See, e.g., *Hoag v Place*, 93 Mich 450, 458; 53 NW 617 (1892) (referring to the property rights obtained as prescriptive rights and stating the elements for obtaining a prescriptive "right or easement in the lands" of another).

I. Basic Facts and Procedural History

A. The Land at Issue and the Parties

This case involves a dispute over the public's right to use the beach at the point where 121st Avenue intersects with Lake Michigan in Allegan County, Ganges Township. In the late nineteenth century, 121st Avenue, which was then called Plummerville Road, led up to the shoreline and then turned south to cross a creek that currently sits on the north end of the property owned by Defendants/Counter-Plaintiffs John D. Tilton and Mary E. Tilton. The road then proceeded into the small logging community of Plummerville. After the area was completely logged, the people of Plummerville abandoned the town. The bridge over the creek was eventually lost and Plummerville Road was thereafter shown to end in Lake Michigan. Eventually, the owners of the land on either side of 121st Avenue erected private residences.

The disputed road end was formerly under the jurisdiction of defendant Allegan County Road Commission (the Road Commission).[2] However, during the course of this litigation, the Road Commission transferred jurisdiction to Ganges Township.

Defendants/Counter-Plaintiffs John D. Tilton, Mary E. Tilton, and the Harold A. Stege Trust (the Stege Trust) own properties adjacent to the point where 121st Avenue ends at the Lake Michigan shoreline. John and Mary Tilton own the property immediately south of 121st Avenue on Lake Michigan. At the north end of the Tilton's property there is a creek—called Plummerville Creek—that flows into Lake Michigan. The Stege Trust owns the roughly triangular shaped property to the north of 121st Avenue. Harold A. Stege and Suzanne B. Stege are the trustees for the Stege Trust. The Stege Trust's property narrows as it approaches Lake Michigan. As a result, the Stege Trust's property contains a very narrow strip of shoreline.[3]

The following map depicts the Tilton property—including the position of Plummerville Creek—and the Stege Trust property in relation to each other and 121st Avenue:

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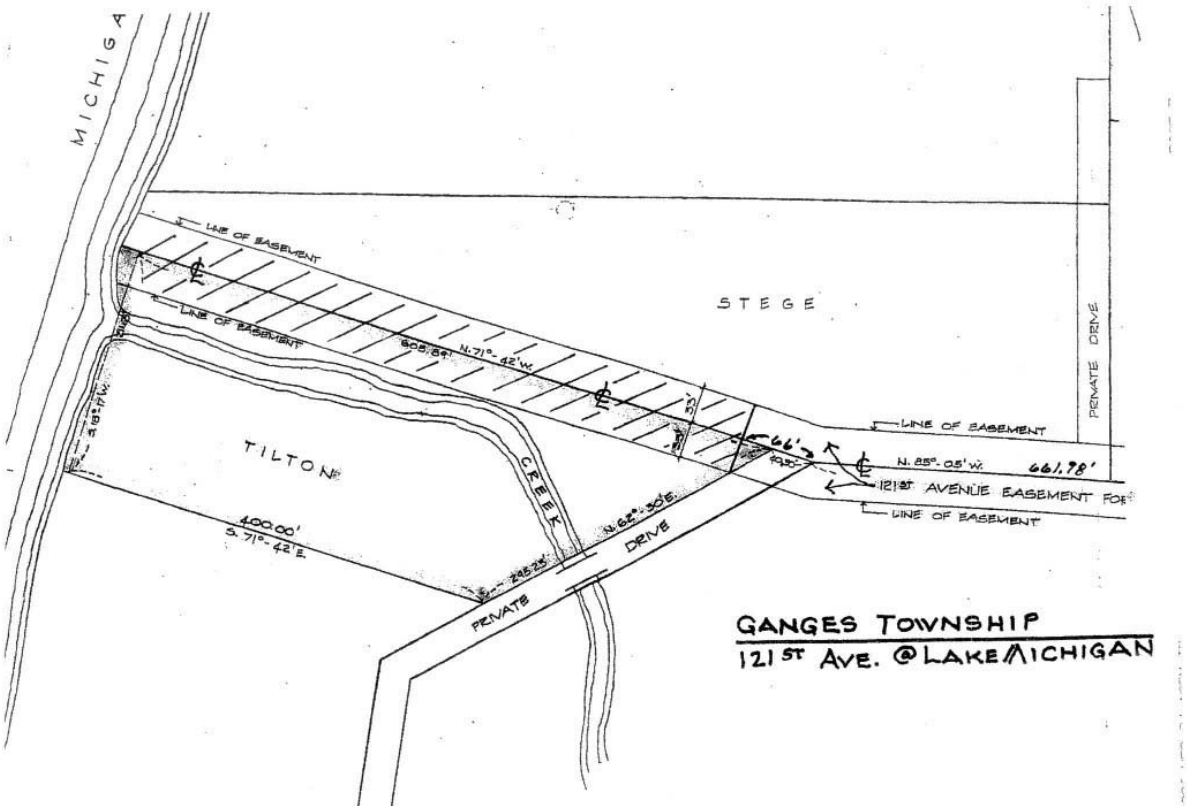
[2] The Road Commission is not a party to this appeal.

[3] We shall collectively refer to John and Mary Tilton, the Harold A. Stege Trust, and Harold and Suzanne Stege as defendants.



Plaintiffs Michael Benninghoff, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, and Gail Kaplan are owners of lots near the disputed area of shoreline. They do not have direct access to Lake Michigan. As a result, they and their lessees use the beach at the end of 121st Avenue for swimming, picnicking and general recreation. Friends of 121st Avenue is an organization formed during the course of this litigation to support the general public's right to use the beach at the end of 121st Avenue for swimming, picnicking and general recreation.[4]

B. *Marshall v Ganges Township*

Although the suit underlying this litigation began in 2006, this is not the first time that the public's use of the end of 121st avenue resulted in litigation. In June 1962, Kenneth and Teresa Marshall sued Ganges Township, the Road Commission, and various private persons over the public's use of 121st Avenue.[5] The case was assigned to Judge Raymond Smith.

In their complaint, the Marshalls alleged that they purchased the land that was to the north of the creek that is currently on the Tilton's property and which included the end of 121st

[4] We shall refer to Michael Benninghoff, Laurie Benninghoff, Kris Kallembach, Dermot Putnam, Gail Kaplan, Friends of 121st Avenue, and Ganges Township collectively as plaintiffs.

[5] For ease of reference, we shall refer to this as the *Marshall* litigation. The Marshalls' suit was joined with a companion case.

Avenue. The Marshals further alleged that, in the Spring of 1960, Ganges Township or the Road Commission cleared 121st Avenue westward from the point where it turned south all the way to the beach and made a parking area right in front of the Marshalls' home. The Marshalls stated that the general public used the road and parking area to access the beach and as a "lover's lane." The Marshalls also indicated that they complained to law enforcement agencies, but stated that such complaints proved "no deterrent to drinking parties in plaintiffs' front yard and on their beach during daylight hours and evenings into the wee hours of the morning."

The Marshalls also alleged that, because neither Ganges Township nor the Allegan County Road Commission maintained the "road" in the preceding thirty years, the disputed section was not a public road. For that reason, the Marshalls asked the trial court to decree that the portion of 121st Avenue west of the point where the road turns south is private property and that neither Ganges Township nor the Road Commission has any right or title to the property. The Marshalls explained that a contrary ruling would undermine their enjoyment of their land:

> That the value of land purchased by plaintiffs is of little value if the road is a public one from the point where [the] road turns south across the creek west to the beach, as the beach in front of plaintiffs' house would be public beach with no privacy for plaintiffs, and the home built by plaintiffs will have little value as a summer home.

In his March 15, 1963 opinion, Judge Smith noted that whether the disputed portion of 121st Avenue was a public road depended on whether it had been impliedly dedicated to the public. Judge Smith noted that dedication must first be implied by public use:

> The dedication, if any, must be implied from the public use of the property under [MCL 221.20]. The record discloses that the public used the road to travel to Plummerville and later to the fish house which remained for a number of years before it was destroyed by fire. There is also evidence that the public used the road to haul gravel from the beach, to launch their boats, and to fish for smelt in the early Spring. A somewhat more extensive use was made by the public to provide access to the beach for picnics, outings and bathing. For these purposes the public used the beach which would have been the extension of the road in a straight line westerly. That notice was made of public use of the road is evidenced by the attempts to discourage such use and the persistence of public officials to keep the road open. Naturally the road was not intended for year around use so that the work that was done on it was only commensurate with its limited use, until 1960, when it appears that the Township of Ganges desired to dispel all doubt and ordered the work which resulted in these suits. In the opinion of the court the public use was sufficient to put private interests on notice.

Judge Smith then explained that, since at least 1946, the Allegan County Road Commission had worked the road section at issue. Judge Smith stated that the work done on the road was to "allow access to the beach," which he noted was the "desired goal of the public users." Because the public had used the road and the Road Commission had accepted the road through improvements and maintenance, Judge Smith concluded that the road was dedicated to the public by use.

On March 27, 1963, Judge Smith signed a partial judgment in favor of Ganges Township and the Allegan County Road Commission. The judgment dismissed the Marshalls' suit against Ganges Township and the Road Commission and decreed that "the road commonly referred to as Plummerville Road is a public highway" through "to Lake Michigan."

C. The Present Litigation

1. Origins and Nature of the Complaint

The present litigation has its origins in the efforts by the Tiltons and Steges to limit the public's use of the beach at the end of 121st Avenue. The Tiltons and Steges have acknowledged that 121st Avenue is a public highway that ends in Lake Michigan and have recognized that this gives the general public the right of ingress and egress to Lake Michigan. However, the Tiltons and Steges have also sought the help of municipal authorities in restraining the public from using the beach for purposes other than ingress and egress to Lake Michigan. The Tilton and Stege families do not want the general public to use the road end for bathing, picnicking, camping, partying or any other recreational activities, which they believe exceed the scope of the public's right to use the road end for ingress and egress to Lake Michigan.[6] Indeed, defendants contend that members of the general public routinely engage in dangerous, unsanitary and obnoxious behaviors on the beach area at the end of 121st Avenue. These alleged activities include: driving down to the water's edge, starting open fires on the beach, having sex, permitting unleashed dogs on the beach, public urinating and defecating, overnight camping, theft and vandalism, among others.

The Tiltons and Steges were unsuccessful in gaining the help of Ganges Township in preventing the conduct about which they complained. As a result, the Tiltons and Steges turned to the Road Commission and the county sheriff. The Road Commission agreed that the public's right to use the road end was limited and placed signage at the road end warning the public about those limits. The sign warned: "121st Avenue Right of Way For Ingress & Egress Only Other Uses Constitute Recreational Trespassing." This statement originated from the prohibition found in the recreational trespass act (RTA), see MCL 324.73101, *et seq*. The Tiltons and Steges also prevailed on the Allegan County Sheriff to increase its efforts to enforce the limitations.

In May 2006, plaintiffs—with the exception of Friends of 121st Avenue, which did not yet exist—sued the Tiltons, the Stege Trust and the Steges, as the Stege Trust's trustees, to protect the general public's right to use the road end as a public beach. In their complaint, plaintiffs alleged that, since the late 1980s, the Tiltons have "led a campaign to close public access to the beach" and that the Steges support that effort. Plaintiffs alleged that the Tiltons' efforts included writing letters to municipal officials, calling the police, harassing beach users, and inducing the Road Commission to post signage limiting the uses of the road end. Plaintiffs asserted that the Tiltons' efforts were contrary to Judge Smith's opinion in the *Marshall*

[6] For ease of reference, we will henceforth refer to these uses as public beach uses in order to differentiate those uses from the more limited use for ingress and egress to and from Lake Michigan.

litigation, which clearly settled the public's right to use the beach at the end of 121st Avenue for general recreational activities.

Plaintiffs' complaint stated four claims. In Count I plaintiffs asked the trial court to declare that Judge Smith's opinion in the *Marshall* litigation established that "the 121st Avenue Road End and Beach is open to the public for all historical uses including swimming, sunbathing, lounging, picnicking, and other common beach uses." In Count II plaintiffs asked the trial court to declare that the RTA does not apply to the end of 121st Avenue. In Count III plaintiffs alleged that the public had used the end of 121st Avenue for normal beach activities for as many as 150 years and that Ganges Township and the Road Commission had maintained the road end for those uses. These actions, plaintiffs alleged, established a prescriptive right for the public's use of the road end for normal beach activities. Plaintiffs also alleged that Judge Smith's opinion in the *Marshall* litigation also effectively "held that a prescriptive right to recreational public use exists at the 121st Avenue Beach." For these reasons, plaintiffs asked the trial court to order that the public has a prescriptive right to use the road end as a public beach. In Count IV plaintiffs stated allegations substantially similar to those in Count III, but asserted that the facts establish the public's right to a prescriptive easement over the road end for use as a public beach.

In their answer to plaintiffs' initial complaint, defendants alleged, as an affirmative defense, that Ganges Township's "claims constitute inverse condemnation and a taking of Defendants' lawful property rights in violation of the Constitution of the State of Michigan." Defendants also filed a counter-complaint against Ganges Township, which contained three counts.

In Count I, defendants alleged that Ganges Township's actions in participating in the suit constitute an attempt to "take" defendants' property for a public purpose without conducting formal condemnation proceedings. Plaintiffs also alleged that Ganges Township has "for many years, fostered and encouraged the use of the 121st Avenue Road End for uses and purposes beyond the scope of a highway by user under state law." For these reasons, defendants asked the trial court to enjoin Ganges Township from interfering with defendants' property rights and award damages for the losses occasioned by Ganges Township's interference. In Count II, defendants alleged that, based on its efforts to encourage the public to exceed the scope of the public's right to use the road end, Ganges Township should be held responsible for any damages caused by the general public under the RTA. Finally, in Count III, defendants asked the trial court to declare that Ganges Township's attempt to assert rights to the road end were beyond the scope of its governmental purpose.

In July 2006, defendants moved to join the Road Commission as a necessary party to the litigation. The trial court granted the motion on August 15, 2006. In December 2006, the Road Commission informed the trial court that it had relinquished control of the road end at issue to Ganges Township. In February 2007, the Road Commission moved for its dismissal from the case. The trial court granted the Road Commission's request on March 8, 2007.

In September 2006, plaintiffs, which at that point included the Friends of 121st Avenue, filed an amended complaint. The amended complaint stated four counts substantially similar to the counts in plaintiffs' original complaint.

2. Summary Disposition Before Judge Benson

Judge Beach initially presided over plaintiffs' suit. However, by February 2007, the case had been transferred to Judge Benson.

In February 2007, defendants moved for summary disposition of plaintiffs' claims. Defendants argued that the individual plaintiffs and the Friends of 121st Avenue lacked standing to assert the claims at issue because they did not have any rights greater than the general public in the disputed road end and individuals may not normally assert the rights of the general public. As for Ganges Township, defendants argued that Judge Smith's opinion in the *Marshall* litigation had no independent legal significance because courts speak through their judgments and Judge Smith's judgment only established that 121st Avenue was a public highway through to Lake Michigan. Defendants also argue that the highway-by-user statute cannot be used to establish a public park, rather it is limited to road uses. Because Michigan law clearly limits the public's ability to use roads that end in navigable water for purposes of ingress and egress only, defendants further argued that the trial court should dismiss plaintiffs' request for a declaration that Judge Smith's opinion gave the public rights to use the road end for sunbathing, picnicking, and other recreational uses. Likewise, defendants contended that Ganges Township could not otherwise obtain greater rights than those accompanying an implied dedication of a highway-by-user through a prescriptive easement or adverse possession.

Defendants also asked the trial court to dismiss plaintiffs' claim asking for a declaration that the RTA did not apply. Defendants contended that the RTA did apply because it prohibits persons from entering or remaining on the land of a another to engage in recreational activities without permission and the public did not have permission to use the road end for anything other than access to the public trust and Lake Michigan.

In February 2007, Ganges Township moved for summary disposition of defendants' counter claims. Ganges Township first argued that the implied dedication of 121st Avenue transferred the fee simple to the disputed road end to the Road Commission and then Ganges Township as the Road Commission's successor. For that reason, Ganges Township argued, defendants do not have any interest in the road end at issue and cannot, therefore, assert that Ganges Township has unlawfully permitted the general public to exceed the scope of any easement. In the same vein, Ganges Township also argued that the Tiltons' deed did not purport to convey the land under the road and, therefore, the Tiltons had no right to contest the use of the road end.

Ganges Township also argued that defendants' inverse condemnation claim must be dismissed because Ganges Township already owns the road end in fee and, therefore, defendants would not be entitled to compensation for property rights that had already lapsed. Further, Ganges Township argued that it was not attempting to "take" property rights with its suit, but rather was asking the trial court to recognize and declare the nature and extent of Ganges Township's existing rights. Finally, Ganges Township argued that it has exercised its rights to the road end for far more than the six-year period of limitations applicable to inverse condemnation actions. As such, it argued that defendants' inverse condemnation claim was untimely.

Ganges Township argued that the trial court should also dismiss defendants counter-claim under the RTA because Ganges Township owned the fee under the road and had given the general public the right to use the road end for recreational activities. Ganges Township also argued that this claim was invalid because there was no longer a sign conspicuously prohibiting access and was otherwise untimely.

Finally, Ganges Township argued that its actions to assert and preserve its property interests in the road end are within the scope of its municipal authority. For that reason, Ganges Township asked the trial court to dismiss defendants' counter-claim based on public purpose.

In March 2007, plaintiffs moved for summary disposition in their favor on their claims. Plaintiffs argued that summary disposition in their favor was appropriate because Judge Smith's opinion in the *Marshall* litigation established that the public's right to use the road end for picnicking, sunbathing, swimming and other recreational uses was embodied in the dedication of the road. Thus, based on Judge Smith's opinion, defendants were estopped from relitigating whether the public could use the road end for general recreational purposes.

In the alternative, plaintiffs argued that the undisputed evidence established that longstanding public use and control of the road end for those purposes vested the public with prescriptive rights to continue using the road end in those ways. In support of its argument, plaintiffs submitted the minutes of several meetings of the Board of Ganges Township. The minutes revealed that Ganges Township regularly considered and acted on requests concerning the road end and beach area, which was often referred to as "streamland." The requests included the removal of tires from the wooded area and creek, removal of trees from the beach, the placement of a gate, the placement of a sign prohibiting overnight camping, and requests to regulate open fires on the beach.

On April 13, 2007, Judge Benson heard oral arguments on the parties' competing motions for summary disposition. On May 3, 2007, Judge Benson issued his opinion and order concerning the motions for summary disposition.

Judge Benson first determined that the individual plaintiffs and the Friends of 121st Avenue had standing to bring the claims at issue. Judge Benson then determined that an implied dedication under the highway-by-user statute is limited to contemplated road uses, which did not include use of the highway as a "beach." For that reason, he granted defendants' motion as to plaintiffs' claim premised on Judge Smith's opinion and judgment in the *Marshall* litigation.

Judge Benson next addressed plaintiffs' claim that the public obtained a prescriptive right to use the road end for recreational purposes. He noted that this area of the law was not well-developed, but that to the extent that the public could obtain recreational rights through prescription, plaintiffs had to present evidence that the government took action to facilitate and control the recreational use. Judge Benson noted that it was undisputed that the general public used the road end for recreational purposes. However, he concluded that there was no evidence that any public entity took steps to facilitate and control the public's recreational uses. He explained that Judge Smith's opinion in the *Marshall* litigation and the other evidence cited by the parties only referred to governmental actions that were consistent with the government's regulation of the road as a road—that is, the governmental actions did not implicate the use of

the road end as a public park. For that reason, Judge Benson also granted defendants' motion as to plaintiffs' count for a public prescriptive right.

Likewise, Judge Benson rejected the notion that the individual plaintiffs had established a prescriptive easement.[7] Because plaintiffs right to use the road end depended on the right of the public as a whole, Judge Benson determined that plaintiffs could not meet the exclusivity requirement for a prescriptive easement. For that reason, he also granted defendants' motion as to plaintiffs' count for a prescriptive easement.

Finally, Judge Benson also determined that the RTA does apply to persons whose use of the road end exceeded the scope of the implied dedication by user. For that reason, defendants were entitled to invoke that act to prohibit those uses. Consequently, he also granted defendants' motion as to plaintiffs' request for a declaration that the RTA did not apply to the public's use of the road end.

After having determined that each of plaintiffs' claims must be dismissed, Judge Benson turned to defendants' counter-claims against Ganges Township. He first determined that the public only has an easement for 121st Avenue and that the language in the Tiltons' deed did transfer the fee underlying the southern 33 feet of the easement. For those reasons, he concluded that defendants did have standing to raise their claims.

Judge Benson also determined that Ganges Township's recent actions attempting to authorize the public to use the road end as a beach exceeded the scope of the dedication to the public. Because Ganges Township's actions occurred within six years, he also concluded that the period of limitations did not bar defendants' claim for inverse condemnation. Therefore, he denied Ganges Township's motion to dismiss that claim.

Judge Benson also determined that Ganges Township could properly participate in the present case in order to protect the public's interest in the road end, but that it could also be liable for damages caused by its actions under the RTA. For those reasons, Judge Benson denied Ganges Township's motion to dismiss defendants' claim based on the RTA and granted its motion as to defendants' "public purpose" claim.

On May 17, 2007, Ganges Township moved for reconsideration of Judge Bensons' opinion and order denying Ganges Township's motion for summary disposition as to defendants' claims for inverse condemnation and damages under the RTA. Judge Benson denied the motion in an opinion and order entered May 30, 2007.

In June 2007, the Supreme Court Administrative Office assigned the case to Judge Kolenda.

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[7] Although Judge Benson addressed whether the individual plaintiffs had established a private prescriptive right, it does not appear that plaintiffs alleged a claim that they individually or collectively had a private prescriptive right to use the road end as a beach. Instead, plaintiffs apparently relied solely on the general public's longstanding use of the road end as a beach.

3. Summary Disposition Before Judge Kolenda

On January 13, 2008, Ganges Township moved for summary disposition of defendants' remaining counter-claims. In its motion, Ganges Township again argued that defendants' claim for inverse condemnation should be dismissed. Ganges Township noted that our Supreme Court had rejected the continuing wrong doctrine and that the public's use of the road end for recreational purposes had been going on for more than fifteen years. Consequently, Ganges Township contended, defendants' inverse condemnation claim was time-barred. Ganges Township also argued that any harm to defendants' property values occurred as a result of the longstanding public use of the road end before Ganges Township asserted any rights to the road end. For that reason, Ganges Township argued that defendants' could not establish the harm element of an inverse condemnation claim. Finally, Ganges Township also argued that use of the road end as a public beach was consistent with the implied dedication. For all these reasons, Ganges Township asked Judge Kolenda to dismiss defendants' inverse condemnation claim.

Ganges Township also argued that it was not a person within the meaning of the RTA and, therefore, could not be liable under that act. In the alternative, it argued that it had governmental immunity and that any acts giving rise to liability occurred more than three years before defendants filed their counter-claims and, as a result, the claim premised on the RTA was untimely. For these reasons, Ganges Township asked Judge Kolenda to dismiss defendants' claim under the RTA as well.

On March 17, 2008, Judge Kolenda issued his opinion and order on Ganges Township's second motion for summary disposition. Benninghoff Exhibit 3. Judge Kolenda first noted that a government takes property when an encroachment onto private property has progressed to the point that its permanent nature is evident. He then determined that the evidence clearly demonstrated that any taking of private property for public use occurred long ago: "The Tiltons' letter of August, 1987, to counter-defendant township makes plain that, at least by then, it was transparent that the use of the 'road end' about which the counterclaim complains had existed for years, had become permanent, and was of the same extent it is today." Further, he determined that, when the Road Commission transferred jurisdiction to Ganges Township, the transfer included the "taken use." Therefore, Judge Kolenda concluded, defendants' claim for inverse condemnation was untimely and must be dismissed.

Judge Kolenda also concluded that defendants' claim premised on the RTA must also be dismissed. He explained that the complained-of uses are within the scope of Ganges Township's interest in the road end and, for that reason, are by definition not unauthorized.

For the reasons stated, Judge Kolenda dismissed defendants' remaining counter-claims. Although Judge Kolenda did not explicitly state that he was revising Judge Benson's earlier order, he explained that he could properly do so:

> Because Judge Benson's earlier denial of a similar motion did not terminate this action, his order "is subject to revision," MCR 2.604(A), not only by him, but also by the undersigned. Inapplicable is the prohibition in MCR 2.613(B) on one judge setting aside another judge's orders or judgments. That prohibition is not absolute; there is an exception when the original judge is "absent or unable to act." Because Judge Benson was a retired, visiting judge, the

> lapse of his assignment triggers that exception, which means that this Court is free to revisit and revise any and all of his orders in this case. *People v Herbert*, 444 Mich 466, 471-471 (1993).

On the basis of these statements, Judge Kolenda's opinion could be understood to have determined that the Road Commission had at some point more than fifteen years ago acquired the right to use the end of 121st Avenue as a public beach and transferred that right to Ganges Township.

4. Post Summary Disposition Proceedings

On April 4, 2008, plaintiffs appealed as of right. This Court assigned plaintiffs' appeal docket number 284637. On April 7, 2008, defendants appealed as of right. This Court assigned docket number 284736 to defendants' appeal. This Court then ordered the appeals consolidated. See *Benninghoff v Tilton*, unpublished order of the Court of Appeals, entered May 16, 2008 (Docket Nos. 284637; 284736).

On May 29, 2008, defendants moved for a stay of Judge Kolenda's opinion and order and enforcement of Judge Benson's opinion and order during the pending appeal. Defendants explained that Ganges Township has interpreted Judge Kolenda's opinion and order to overrule Judge Benson's opinion and order and even adopted a resolution directing the township supervisor to take action to maintain, enable, and enhance the road end for all beach purposes. Defendants argued that Ganges Township's actions will harm them and that the trial court should stay enforcement of Judge Kolenda's opinion and order and enjoin Ganges Township from taking any action pending the present appeals.

On June 25, 2008, Judge Dewane of Berrien County heard oral arguments on defendants' motion for a stay pending appeal. On June 27, 2008, Judge Dewane entered his opinion and order concerning the motion for a stay. In his opinion, Judge Dewane stated that Judge Kolenda's opinion impliedly vacated Judge Benson's order and that he did not have the authority to revive Judge Benson's order. Judge Dewane agreed, however, that the status quo should be preserved. For that reason, he ordered the replacement of the sign referring to the RTA and stayed implementation of Ganges Township's resolution.

On July 11, 2008, plaintiffs moved for clarification or reconsideration of the stay. On July 30, 2008, Judge Dewane signed an order clarifying what constituted the status quo, but otherwise denying reconsideration of the stay. On August 8, 2008, defendants moved for clarification or reconsideration of Judge Dewane's order of June 30, 2008, which clarified the status quo requirement of the stay. On August 14, 2008, Judge Dewane denied defendants' motion.

These appeals followed.

II. The Public's Right to Use the Road End as a Beach

A. Standard of Review

Because this issue directly affects the proper resolution of the parties' remaining claims of error, we shall first determine whether the trial court properly granted summary disposition of plaintiffs' claim that the general public had obtained a prescriptive right to use the end of 121st Avenue as a public beach. On appeal, plaintiffs recognize that Judge Benson dismissed their claims based on a public prescriptive right and public prescriptive easement,[8] but argue that Judge Kolenda vacated Judge Benson's opinion and order and impliedly determined that plaintiffs had established that the public had a prescriptive right to use the road end as a beach. In the alternative, plaintiffs contend that Judge Benson erred when he dismissed their claim based on a public prescriptive right. Defendants argue that Judge Kolenda's opinion did not alter Judge Benson's earlier dismissal and Judge Benson properly dismissed plaintiffs' claim after plaintiffs failed to present evidence establishing that a governmental entity took actions to control or facilitate the public's use of the road end as a beach.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *AutoAlliance Int'l, Inc v Dep't of Treasury*, 282 Mich App 492, 498-499; 766 NW2d 1 (2009). A trial court properly grants summary disposition under MCR 2.116(C)(10) when, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Whether the doctrine of collateral estoppel applies to a particular issue is a question of law that this Court also reviews de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

B. Waiver of Appeal

As a preliminary matter, we must address plaintiffs' contention that defendants have waived their right to appeal Judge Kolenda's opinion and order. On appeal, plaintiffs contend that, in his ruling on defendants' motion for a stay, Judge Dewane construed Judge Kolenda's opinion and determined that Judge Kolenda vacated Judge Benson's earlier opinion, which had earlier dismissed plaintiffs' claims. In order to properly challenge Judge Kolenda's decision to vacate Judge Benson's opinion and order, plaintiffs further argue, defendants had to appeal Judge Dewane's ruling, which they did not do. By failing to appeal Judge Dewane's ruling, plaintiffs argue that defendants waived their right to challenge whether Judge Kolenda's opinion vacated Judge Benson's opinion. This Court reviews de novo questions of law, such as the scope of this Court's jurisdiction, the proper interpretation of court rules, and whether issue preclusion applies. See *Chen v Wayne State University*, 284 Mich App 172, 191; 771 NW2d 820 (2009); *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

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[8] We note that, as alleged, plaintiffs' counts three and four are nearly identical. Therefore, we shall treat these counts as a single claim alleging that the general public's longstanding use had vested into a prescriptive right to continue using the road end as a public beach.

Typically, a party may challenge any order leading up to the final judgment or order from which that party has appealed. *People v Torres*, 452 Mich 43, 57 n 14; 549 NW2d 540 (1996). For that reason, defendants were not required to specifically appeal each and every order issued by the lower court in order to preserve their appeal. In any event, Judge Kolenda's opinion and order was the final order in this case, see MCR 7.202(6)(a)(i), and defendants appealed that order as of right. Once defendants appealed that order, this Court had jurisdiction to consider the propriety of that order. MCR 7.203(A)(1). Likewise, defendants' appeal of Judge Kolenda's order effectively deprived the trial court of the authority to set aside or modify that order. MCR 7.208(A). Accordingly, even if Judge Dewane purported to make a binding interpretation of Judge Kolenda's opinion and order, Judge Dewane did not have the authority to do so. Finally, although the trial court could properly enter a stay after defendants' appeal, see MCR 7.208(F) and MCR 7.209(E), such stays are subject to review by this Court even without a direct appeal, MCR 7.209(D). Thus, defendants would not have had to directly appeal Judge Dewane's stay in order to challenge it on appeal. Consequently, defendants have not waived their right to challenge the propriety of Judge Kolenda's opinion and order by failing to appeal Judge Dewane's stay.

C. Public Prescriptive Easement

It is well established in Michigan that a public entity can directly acquire title to property from a private owner through adverse possession or obtain a prescriptive easement in the same way that a private party can. See, e.g., *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008) (holding that township acquired the land occupied by a boat launch through adverse possession); *Village of Manchester v Blaess*, 258 Mich 652; 242 NW 798 (1932) (holding that the village failed to establish that it acquired a prescriptive easement over the land at issue as a highway or as a parking lot); *Bachus v West Traverse Twp*, 107 Mich App 743; 310 NW2d 1 (1981) (indicating that township failed to establish adverse possession to a park), remanded to circuit court 412 Mich 870, remanded to Court of Appeals 413 Mich 914 (1982); *Bachus v West Traverse Twp (On Remand)*, 122 Mich App 557; 332 NW2d 535 (1983); see also Restatement 3d, Property, Servitudes, § 2.18. Similarly, the general public may acquire a prescriptive easement over private land for recreational purposes. *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976). However, use by the general public alone cannot establish such an easement. *Id.* at 343-344. Instead, the general public's use must culminate in governmental action to control and facilitate the public's use. *Id.*

In the present case, plaintiffs contend that the public has acquired a prescriptive right to use the beach at the end of 121st Avenue for general recreation—that is, as a public beach—under three theories. First, plaintiffs contend that Judge Smith actually determined that the public had a prescriptive right to use the road end as a public beach. Second, plaintiffs argue that, even if Judge Smith's opinion and order did not determine that the public had acquired such a prescriptive right, the scope of the dedication under the highway-by-user statute is determined by the nature of the uses that supported the public's use during the statutory period, which included use of the road end as a beach. Because the public's use included use of the road end as a public beach, the scope of the dedication found under the highway-by-user statute in the *Marshall* litigation includes use of the road end as a public beach. Finally, plaintiffs contend that the undisputed evidence demonstrates that the general public has acquired a prescriptive right to use the road end as a public beach. Defendants disagree with each of these contentions.

1. Judge Smith's Opinion in the *Marshall* Litigation

Plaintiffs' contention that Judge Smith's opinion in the *Marshall* litigation actually settled this question implicates the preclusion doctrine of collateral estoppel. "The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v Department of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). "Generally, '[f]or collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.'" *Id.* at 542, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

As noted above, defendants' predecessors in interest, the Marshalls, sued Ganges Township and the Road Commission, among others, in 1962. In the *Marshall* litigation, the Marhsalls requested a declaration that the end of 121st Avenue was private property. Although the Marshalls made allegations that suggested that the general public used the road end as a public beach, the public's use of the road end as a beach was not the focus of the litigation. Instead, the Marshalls argued that the road end was private property because neither Ganges Township nor the Road Commission had maintained *the road* in the past thirty years. That is, the Marshalls argued that the road end was not dedicated to the public—as a road—because Ganges Township and the Road Commission had not accepted it. Thus, although the Marshalls lamented that a ruling that the road end was public would certainly result in the general public continuing to use the beach, the sole issue presented by the Marshalls—as to Ganges Township and the Road Commission—was whether the road end had in fact been impliedly dedicated to the public and accepted by Ganges Township or the Road Commission. Similarly, the answer filed by Ganges Township and the Road Commission focused on whether the road end had been accepted *as a road*. Finally, and not surprisingly, Judge Smith's opinion and judgment also focused on whether the road end was dedicated to the public.

In his opinion and order concerning the road end, Judge Smith clearly focused on whether the road end had been impliedly dedicated to the public under MCL 221.20. To that end he considered the elements necessary to establish a dedication under MCL 221.20. Based on the public's use of the road end and the efforts by the Road Commission to maintain and improve the road end, Judge Smith determined that the elements necessary to establish an implied dedication had been met. He did not, however, address the scope of the easement that accompanies a dedication under MCL 221.20; the scope of the dedication was simply not at issue. Understood in this context, Judge Smith's finding that the general public used the beach area for general recreation was proffered as support for his determination that 121st Avenue was accepted through to the point where it intersected Lake Michigan—it was not intended to settle the scope of the permitted activities for the road end. Likewise, Judge Smith's judgment makes it clear that he only decided one issue: that 121st Avenue was a public highway through to Lake Michigan. Judge Smith's opinion and judgment did not decide the scope of the public's easement or otherwise determine that the public could, consistent with the implied dedication, use the road end as a public beach. Because the parties to the Marshall litigation did not litigate the scope of the easement granted to the public under MCL 221.20 and the trial court did not address that issue or enter a judgment granting relief other than a determination that the road at

issue was dedicated under MCL 221.20, collateral estoppel does not preclude a determination that the public's rights in the road end are limited to ingress and egress. *Nummer*, 448 Mich at 542.

2. Scope of the Dedication Under MCL 221.20

At no point during the *Marshall* litigation did any party raise the possibility that the general public had acquired a fee simple interest in the land underlying 121st Avenue through adverse possession. Instead, the *Marshall* litigation centered on whether the road section at issue had been impliedly dedicated to the public under MCL 221.20. Under MCL 221.20, the Legislature declared that three types of roads shall be deemed public highways:

> 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.

Further, the statute provided that those highways that are or become highways through use "shall be 4 rods in width . . . ." *Id.* With the enactment of the statute now codified at MCL 221.20, the Legislature modified the common law with regard to how the public can obtain title to a highway through prescription. *Kentwood v Sommerdyke*, 458 Mich 642, 654; 581 NW2d 670 (1998) (noting that, with the enactment of MCL 221.20, the Legislature modified the common law by eliminating the need to prove a fictional event—an actual dedication by the landowner); *Rigoni v Michigan Power Co*, 131 Mich App 336, 343; 345 NW2d 918 (1984) (noting that MCL 221.20 is a form of prescriptive easement for public use).

Generally, the establishment of a highway through prescription conveys only an easement for highway purposes.[9] *US Gypsum Co v Christenson*, 226 Mich 347, 350; 197 NW 497 (1924) ("The township did not have the fee of the land. The public had the usual easement for highway

[9] Relying on *Kentwood*, 458 Mich at 663-665, plaintiffs argue that the establishment of a highway-by-user under MCL 221.20 conveys all title in the affected property to the governmental entity—not just an easement. However, as recently as 1986, our Supreme Court reiterated that a dedication implied by user under MCL 221.20 conveys only an easement and not a fee. See *Eyde Bros v Easton Co Drain Comm'r*, 427 Mich 271, 281 n 4, 282; 398 NW2d 297 (1986) (noting that a statutory dedication transfers a fee, but an implied dedication by user conveys only an easement for use as a highway). While we question whether our Supreme Court intended to make a sweeping and dramatic change to over 100 years of settled law with its decision in *Kentwood*, whatever the effect of that decision, see, e.g., *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 49; 700 NW2d 364 (2005) (approvingly quoting *Eyde Bros* for the proposition that the establishment of a highway-by-user conveys a public easement for use as a highway), at the time of the *Marshall* litigation, the establishment of a highway-by-user conveyed only an easement. Consequently, defendants retained the fee underlying the property at issue.

purposes, no more."). And the public's prescriptive right is limited to those uses understood to accompany a right of way. See *Eyde Bros Dev Co v Easton Co Drain Comm'r*, 427 Mich 271, 286; 398 NW2d 297 (1986) (holding that a public easement in a highway established by user includes all proper and contemplated uses for the easement); *Robinson v Flint & PMR Co*, 79 Mich 323, 327; 44 NW 779 (1890) (noting that the common law governs the extent of the public's right to use a highway and that, although the owner of cattle could drive his cattle along a highway, he could not use the highway as a pasture because such use was not an incident of travel); *Platt v Ingham County Road Commission*, 40 Mich App 438, 440; 198 NW2d 893 (1972) (stating that the right of way includes those uses that are necessary to make the easement effective). Where a road ends in a navigable body of water, the public's right-of-way includes the right to access the surface of the water to engage in the activities normally permitted to the general public on navigable waters—that is, transportation, boating, swimming, and fishing. *Thies v Howland*, 424 Mich 282, 288, 295-296; 380 NW2d 463 (1985); *Backus v Detroit*, 49 Mich 110, 115, 120; 13 NW 380 (1882) (holding that a common law dedication of a road conveyed a right to use the road for mere passage and, because the road at issue ended in a navigable river, the public also had the right of access from the "highway by land to the highway by water"); *Jacobs v Lyon Twp*, 199 Mich App 667, 671; 502 NW2d 382 (1993). However, the public's easement for a right-of-way does not generally include riparian rights—even when the right-of-way ends at a body of water. As such, where a right-of-way ends in a privately owned body of water that is not navigable, the general public will have no right to enter into and use the private body of water. *Pigorsh v Fahner*, 22 Mich App 108, 116; 177 NW2d 466 (1970) (holding that the public would have no right to use the lake at issue even if the public had established a highway-by-user that intersected with the lake because the uplands surrounding the lake were privately owned and there were no navigable inlets or outlets to the lake), affirmed 386 Mich 508 (1972). And, even where the right-of-way ends in a navigable body of water, the scope of the easement generally does not include the right to sunbathe, picnic, camp, grill, or use the road end for other park or recreational activities. See *Higgins Lake Property Owners v Gerrish Twp*, 255 Mich App 83, 103-104; 662 NW2d 387 (2003) (stating that, where a road end provides access only, lounging, sunbathing, and picnicking would exceed the scope of the uses). Notwithstanding these limitations, plaintiffs contend that the scope of the easement actually conveyed under MCL 221.20 will vary depending on the public use during the prescriptive period.

A plain reading of this statute makes it clear that it applies only to the establishment of rights-of-way; indeed, the statute states that it applies to "all roads that shall have been used *as such*" for the requisite period of time. MCL 221.20 (emphasis added). Further, our Supreme Court has long recognized that this statute was intended to remedy defects in the establishment and recording of highways. To that end, the statute establishes the criteria after which a private landowner will be estopped from asserting any rights inconsistent with the public's use of the land as a road. See *Stickley v Sodus Twp*, 131 Mich 510, 519; 91 NW 745 (1902). Thus, establishing a public highway by user requires proof that the road was used by the public *as a road* and maintained by a governmental entity *as a road*. See *Comstock v Wheelock*, 63 Mich App 195, 201; 234 NW2d 448 (1975) (stating that, because MCL 221.20 applies to highways, the plaintiffs had to show that the land at issue was used as a highway); *Cimock v Conklin*, 233 Mich App 79, 87-88; 592 NW2d 401 (1998) (holding that the highway-by-user statute requires a road to be used as a highway). If these conditions are met, the public gains a prescriptive right to continue using the road *as a highway*. *Comstock*, 63 Mich App at 198-200 (noting that the trial

court determined that plaintiffs only asserted a public right to continue using the property at issue for recreational purposes under MCL 221.20 and citing authority for the proposition that the public can have no prescriptive right in the property for recreational uses under the highway-by-user statute). It does not follow that use of the road as something other than a road—even when accompanied by use of the road as a road—will nevertheless convey a prescriptive right to those extra uses under MCL 221.20. Rather, MCL 221.20 only establishes the public's right to use a road as a public highway. Even if one were to conclude that the statutory language could be read to permit a more expansive easement, because MCL 221.20 alters the common law applicable to the public's ability to obtain a highway by user, it must be narrowly construed. *Summers v Hoffman*, 341 Mich 686, 694; 69 NW2d 198 (1955). Therefore, MCL 221.20 must be limited to its apparent purpose: establishing a prescriptive right in the public to use land as a right of way. All prescriptive rights differing in character from those normally accompanying a right of way must be established under the common law applicable to adverse possession or prescriptive easements. Accordingly, those rights beyond those accompanying a right-of-way must be established through open, notorious, adverse and continuous use for a period of fifteen years. *Higgins Lake Property Owners*, 255 Mich App at 118. And, in cases involving use by the general public—as opposed to direct use by a specific public entity—a public entity must take steps to assert control over the public's use before the public's use can vest into a prescriptive right. *Kempf*, 69 Mich at 343.

Although there is nothing to prevent the public from establishing both a prescriptive right to a right-of-way under MCL 221.20 and a prescriptive right to use the end of that right-of-way as a public beach during the same litigation, it is clear from the record that the *Marshall* litigation involved only whether 121st Avenue was a highway-by-user under MCL 221.20. For that reason, the trial court's determination that 121st Avenue was a public highway conveyed only a public easement for a right of way over the disputed section of road. Any additional prescriptive rights in excess of those typically conveyed under MCL 221.20 would have to have been separately established under the common law, which was not done.

3. Prescriptive Rights for Recreational Use

Although defendants are apparently correct when they state that there is no appellate opinion that has determined that the public actually established a prescriptive right to use land for recreational uses, we disagree with defendants' implied assertion that Michigan law does not recognize such a possibility. As noted above, there are cases establishing that a public entity can acquire interests in property through adverse possession and prescriptive easements. It is also well established that the general public can obtain a prescriptive easement for a right-of-way. See MCL 221.20. And, although the right was often framed as an implied dedication to the public, it has existed since the state's founding. See *Kentwood*, 458 Mich at 650 (noting that the first version of the highway-by-user statute was enacted in 1838). There is also no authority or public policy that directly prohibits the public from obtaining a prescriptive right to use land for something other than a highway, such as for public parks or beaches. Indeed, this Court implicitly recognized that the general public can obtain a prescriptive right to use land for recreational purposes in *Kempf*, 69 Mich App at 342-344.

In *Kempf*, this Court examined—in relevant part—whether the trial court properly determined that front lot owners had riparian rights in Higgins Lake and that the public had not established the right to use the front lot owners' property for recreational purposes. *Id.* at 340-

342. In examining the issue, this Court first determined that the back lot owners had not established that the dedicated boulevard conveyed anything other than the right typically accompanying a roadway. *Id.* at 342. The Court then turned to the trial court's determination that the public had not established "rights to use the waterfront area by prescription." *Id.* at 343.

Before turning to the facts adduced at the trial court level, this Court first held that the public cannot establish a prescriptive right without some action by the representatives of the public:

> We think it safe to say that unless there has been some action by representatives of the public, i.e. the government, a "public" easement cannot be established by prescription. Recreational use of an area by various individuals over a period of years is insufficient to establish a public easement.
>
> "Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number of bathers gives rise to a prescriptive right in the public to use privately owned beaches.
>
> "There are many beaches along our entire shoreline that area [*sic*] resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches." *City of Daytona Beach v Tona-Rama, Inc*, 271 So 2d 765, 770 (Fla App, 1972). [*Kempf*, 69 Mich App at 343.]

The Court determined that this requirement was comparable to the requirement that there be proof that the public has accepted a roadway through some action to control and maintain the roadway before the public can establish a prescriptive right under the highway-by-user statute. *Id.* The Court then concluded that there was no proof of public acceptance in the case before it: "We believe that establishment of public recreation rights by prescription requires at a minimum governmental action to facilitate and control recreational use. It does not appear that the public has established by prescription any recreational easement over the area in question." *Id.* at 343-344. For that reason, the Court affirmed the trial court to the extent that it had ruled that the public did not "have recreation rights inconsistent with the front lot owner's riparian rights." *Id.* at 344.

The analysis in *Kempf* was not hypothetical; this Court determined that, in order to establish a public prescriptive right, there must be proof—at a minimum—of governmental actions to control and facilitate the recreational use. *Id.* at 343-344. Thus, the Court in *Kempf* determined that the general public could have, but failed, to establish a prescriptive right. This Court has since applied *Kempf* to additional claims that the general public has acquired a prescriptive right to use an otherwise private beach for public recreation. See *Higgins Lake Property Owners*, 255 Mich App at 119-120. Accordingly, Michigan courts have recognized that the general public may obtain prescriptive rights to beaches as well as highways.

In the present case, Judge Benson determined that plaintiffs' claim that the public had obtained a prescriptive right to continue using the end of 121st Avenue as a public beach failed as a matter of law because there was no evidence from which a fact-finder could conclude that either Ganges Township or the Road Commission had taken the necessary governmental action to facilitate or control the public's use of the beach. He came to this conclusion because the only evidence cited by plaintiffs involved actions by Ganges Township and the Road Commission that were consistent with the use of 121st Avenue as a road. In contrast, Judge Kolenda apparently determined that there was no factual dispute that Ganges Township or the Road Commission had in fact "taken" defendants' property at some point in the past and that the public now had the right to use the end of 121st Avenue as a public beach. For that reason, he concluded that the public was not trespassing on the road end within the meaning of the RTA. We disagree with both judges' conclusions.

Since before the *Marshall* litigation, both Ganges Township and the Road Commission have taken various actions with regard to both the improved portion of 121st Avenue and the unimproved portion at the point where 121st Avenue intersects with Lake Michigan. As Judge Smith found in his opinion, the Road Commission has graded, improved and cleared 121st Avenue since at least 1946. He also noted that the Road Commission modified the end of the improved portion of 121st Avenue to include space for parking and that the public made use of the area for picnics, outings and bathing. Further, there is evidence that either Ganges Township or the Road Commission erected barriers to control vehicle access to the portion of 121st Avenue between the improved portion and Lake Michigan. Although this evidence is consistent with the use of 121st Avenue as a right-of-way for ingress and egress alone, a fact finder could also infer that these actions were taken to facilitate or control the public's use of the end of 121st Avenue as a public beach. Where facts are capable of multiple inferences, it is for the jury to determine what inferences may be fairly drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Therefore, Judge Benson erred when he determined that these acts could not support plaintiffs' claim premised on a public prescriptive right. Further, there is also significant evidence that Ganges Township entertained requests by the general public concerning the public's use of the area at the end of 121st Avenue as a public beach and acted to control or facilitate such use.

At summary disposition, plaintiffs submitted the minutes of various meetings by the Board of Trustees for Ganges Township from 1987 to 2004. These minutes demonstrate that the Board frequently considered the maintenance and improvement of the disputed end of 121st Avenue, including questions about the installation of a gate, parking at the end of the road, tree removal, and the regulation of activities on the beach. It is also significant that the board's minutes often refer to the point where 121st Avenue meets Lake Michigan as "streamland." This appellation suggests that the public and board thought of the area as a park space rather than a right-of-way; this in turn permits an inference that the board's actions were taken for the purpose of maintaining and controlling the area as a park space rather than as a right-of-way. The minutes also show that the Board used public funds and public employees to collect and dispose of tires in the area of the beach and may have erected signs to regulate the use of the beach area. Again, although these actions could be consistent with use of the right-of-way to access Lake Michigan, these actions also support an inference that Ganges Township or the Road Commission acted to control the public's use of the road end as a public beach open for general recreation. Therefore, given the totality of the evidence, we conclude that there is a question of

fact as to whether and when the public established a prescriptive right to use the end of 121st Avenue as a public beach.

III. Period of Limitations and Inverse Condemnation

A. Standard of Review

We shall next address defendants argument that Judge Kolenda erred when he dismissed their counterclaim for inverse condemnation as untimely. This Court reviews de novo a trial court's decision to grant summary disposition. *AutoAlliance*, 282 Mich App at 498-499. Whether a statute of limitations bars a particular cause of action is a question of law that this Court reviews de novo. *Moll v Abbott Laboratories*, 444 Mich 1, 26-28; 506 NW2d 816 (1993).

B. The Applicable Period of Limitations

As already noted, there is a question of fact as to whether and when the public might have established a prescriptive right to use the end of 121st Avenue as a public beach. Accordingly, we agree with defendants' contention that Judge Kolenda erred to the extent that he dismissed defendants' claim for inverse condemnation as untimely; whether defendants' inverse condemnation claim is untimely will ultimately depend on the findings after a trial on the merits. Therefore, to the extent that Judge Kolenda determined that there was no question of fact as to the timeliness of defendants' inverse condemnation claim, he erred. Nevertheless, we elect to address the period of limitations applicable to defendants' claim for inverse condemnation. We do this despite the fact that the parties agree that the applicable period is six years. It is well settled that it is the exclusive province of the courts to state what the law is. *Marbury v Madison*, 5 US (1 Cranch) 137, 177-180; 2 L Ed 60 (1803). And it is equally well settled that the parties' stipulations as to the applicable law cannot bind this Court or the lower court. *In re Finlay Estate*, 430 Mich 590, 595; 424 NW2d 272 (1988). Because this issue will directly affect the proceedings on remand, we now clarify the applicable period of limitations.

The seminal Michigan case dealing with the period of limitations applicable to an inverse condemnation claim is *Hart v Detroit*, 416 Mich 488; 331 NW2d 438 (1982). In *Hart*, our Supreme Court had to determine whether a claim for inverse condemnation could be constitutionally barred by a period of limitation and, if it could, whether the applicable period was three years under the statute now codified at MCL 600.5805(10), six years under MCL 600.5813, or fifteen years under MCL 600.5801. *Id.* at 496-497. The Court first determined that the Legislature may constitutionally limit a claim based on inverse condemnation through a period of limitations. *Id.* at 494-496. The Court then turned to the applicable period.

The Court examined whether the fifteen-year period applicable to actions for the recovery of land applied to the facts in *Hart*. *Id.* at 497. The Court explained that there were fundamental differences between an action for compensation based on inverse condemnation and actions premised on adverse possession: inverse condemnation is "a taking of private property for a public use without the commencement of condemnation proceedings." *Id.* at 494. Where such a taking has occurred, the person whose property has been taken is entitled to compensation. *Id.* Further, with an inverse condemnation action, the party instituting the action usually concedes that the condemnor has taken the property without formal condemnation proceedings. *Id.* at 497. In contrast, the passage of the fifteen-year period under MCL 600.5801 for the recovery of land

establishes the point at which the title of those who slept on their rights terminates and "vests . . . in the party claiming adverse possession"; *Gorte v Dep't Transportation*, 202 Mich App 161, 168; 507 NW2d 797 (1993), and, unlike cases involving inverse condemnation, "if title to the property is secured by the adverse possessor, the original owner is not entitled to payment." *Hart*, 416 Mich at 498; see also *Bumpus v Miller*, 4 Mich 159, 162-163 (1856) (noting that the constitutional provision requiring compensation for property taken for public use does not apply to cases "where the owner actually gives or dedicates his property to the public use, or where, from his long acquiescence in the use of it by the public, a donation or dedication is presumed by law.").[10] This is because the loss of an interest in property through adverse possession by the public—whether characterized as an implied dedication or otherwise—does not constitute a governmental taking; rather, it is the property owner's failure to assert his or her rights in the face of public use that resulted in the lapse of the property interest. *Texaco, Inc v Short*, 454 US 516, 530; 102 S Ct 781; 70 L Ed 2d 738 (1982) ("In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect."); see also *Kentwood*, 458 Mich at 663 (stating that a lapse under the highway-by-user statute, MCL 221.20, is the result of the property owner's failure to assert his rights rather than the result of state action and, therefore, there is no taking that requires compensation); see also *id.* at 671 (Taylor, J., concurring in part and dissenting in part) (concluding that "because the right of way, as a prescriptive easement, would not have attained status as a highway by user but

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[10] The majority of courts that have considered the issue have concluded that a state does not have to pay compensation for property interests that it acquired through adverse possession or prescription. See *Des Plaines v Redella*, 365 Ill App 3d 68; 847 NE2d 732 (2006); *Gainesville v Morrison Fertilizer, Inc*, 158 SW3d 872, 876 (Mo App, 2005) (holding that a "public entity's acquisition of private property for a public use by adverse possession extinguishes the former owner's constitutional right to receive just compensation."); *Algermissen v Sutin*, 133 NM 50, 59; 61 P3d 176 (NM, 2002) ("The general rule is that acquisition of an easement by prescription is not a taking and does not require compensation to the landowner."); *Stickney v City of Saco*, 770 A2d 592, 603 (Me, 2001) (noting that the owner's takings claim expires upon the passage of the period of limitations for a prescriptive easement); *Rogers v Marlin*, 754 So 2d 1267, 1273 (Miss App, 1999) ("Similarly, damages are never a part of adverse possession, which is what a prescriptive easement is. Unlike eminent domain . . . the original owner of the property over which the prescriptive easement in question runs has long since forfeited his right to demand payment for the easement over his property."); *Weidner v Alaska*, 860 P2d 1205, 1212 (Ala, 1993) (holding that the passage of the prescriptive period extinguished the owner's right to compensation); *State ex rel A.A.A. Investments v City of Columbus*, 17 Ohio St 3d 151; 478 NE2d 773 (Ohio, 1985); *Board of County Commissioners of Saguache County v Flickinger*, 687 P2d 975, 983-985 (Colo, 1984); *Petersen v Port of Seattle*, 94 Wash 2d 479; 618 P2d 67 (Wash, 1980); *City of Ashland v Hardesty*, 23 Or App 523; 543 P2d 41 (1975); *Dunnick v Stockgrowers Bank of Marmouth*, 191 Neb 370; 215 NW2d 93 (1974); *Kentucky v Stephens*, 407 SW2d 711 (Ky, 1966). Only one court has concluded that a property owner may seek compensation even after title has transferred to the state through adverse possession. See *Pascoag Reservoir & Dam, LLC v Rhode Island*, 217 F Supp 2d 206 (District RI, 2002), affirmed on other grounds 337 F3d 87 (CA 1, 2003).

for the abutting land-owner's acquiescence in the use of a portion of his land as a highway, the landowner's acquiescence precludes any finding of a taking.").

After noting the distinctions between adverse possession and inverse condemnation, the Court in *Hart* concluded that the fifteen-year period under MCL 600.5801 did not apply to the facts before it:

> However, plaintiffs here lost all title and interest to the properties upon the expiration of the period of redemption following the sale of the properties for nonpayment of taxes. When the present action was commenced, plaintiffs had no ownership rights in the properties, legal or equitable. Under such circumstances, there is no foundation to apply a 15-year limitation period that is predicated upon plaintiff having continual ownership rights. [*Hart*, 416 Mich at 499 (citation omitted).]

However, the Court did not foreclose the possibility that the fifteen-year period might apply to some inverse condemnation actions such as where "a plaintiff retains ownership rights in the property when suit is brought. . . ." *Id.* In such a case, the analogy to an action premised on adverse possession may be applied. *Id.* The Court then concluded by determining that the six-year period stated under MCL 600.5813 applied to the facts of its case. *Id.* at 503.

Thus, based on the analysis in *Hart*, where a government entity has taken property for a public purpose, but where the owner retains ownership rights in the property, the owner's action for inverse condemnation would be subject to the fifteen-year period of limitations. See, e.g., *Difronzo v Port Sanilac*, 166 Mich App 148, 153; 419 NW2d 756 (1988). This is consistent with the fact that, after the passage of fifteen years, the adversely held property right vests in the adverse holder. *Gorte*, 202 Mich App at 168. As such, the underlying owner must bring suit within the fifteen-year period to either eject the government—and presumably obtain compensation for the temporary taking—or force the government to properly condemn the property. This was precisely the situation in *Difronzo*.

In *Difronzo*, the plaintiff sued for inverse condemnation after the defendant constructed a walkway and harbor facilities on his property. *Difronzo*, 166 Mich App at 151-152. Defendant moved for summary disposition on the grounds that plaintiff's complaint, which was filed fourteen years after the encroachments, was untimely under the six-year period stated under *Hart*. *Id.* at 150, 153. The trial court agreed with the defendant's claim that the six-year period applied, but this Court disagreed. *Id.* at 153-154. This Court held that the fifteen-year period applicable to adverse possession applied because the plaintiff still held a present interest in the lake frontage and riparian rights. *Id.*

The Court in *Difronzo* correctly concluded that the fifteen-year period applied; the encroachments had not yet vested title in the defendant and, for that reason, the plaintiff still held the affected property rights even though the defendant had clearly interfered with his ownership through its encroachments. If the six-year period had been applied, the plaintiff presumably could have sued to eject the defendant, but could not have received compensation for the temporary taking. And, in the event that the trial court refused to order the removal of the encroachments, see *Etherington v Bailiff*, 334 Mich 543, 555; 55 NW2d 86 (1952) (explaining that, under certain circumstances, a trial court may permit an encroaching party to keep the land

by paying compensation to the actual land owner), the plaintiff would have been left without either the property taken or compensation. Under such circumstances, the public entity would essentially have the power to adversely possess private property in six years rather than the fifteen years applicable to ordinary citizens. By applying the fifteen-year period under such circumstances, courts ensure that the property owner will have the full panoply of remedies available.

In contrast, where the plaintiff has completely lost his or her ownership interest in the property through government action other than through adverse possession, as was the case with the tax sale in *Hart*, the divested owner will nevertheless have six-years from the date he or she lost his or her property in order to seek compensation. See *Hart*, 416 Mich at 498 (explaining that, under the facts of that case, compensation was the only viable alternative). Finally, it bears repeating that, where the owner has lost an interest in property as a result of adverse possession or through the vesting of a prescriptive easement, there is no taking for which compensation must be made, *Kentwood*, 458 Mich at 663; *Hart*, 416 Mich at 498; as such, an inverse condemnation claim premised on a vested adverse possession or prescriptive easement is necessarily untimely.

In this case, the relevant period of limitation is the fifteen-year period applicable to actions for the recovery of land. MCL 600.5801(4); *Difronzo*, 166 Mich App at 153. As alleged, the facts indicate that the general public has been exceeding the scope of the easement applicable to the stretch of 121st Avenue between the improved highway and Lake Michigan for more than 50 years. And, to the extent that a governmental entity has intervened to facilitate and control the public's use of the affected land, it has essentially asserted to the whole world that it has the right to determine who may use the land and in what manner they may use it. See *Missaukee Lakes Land Co v Missaukee County Rd Comm'n*, 333 Mich 372, 379; 53 NW2d 297 (1952) (explaining that potentially permissive use by the public is insufficient to establish a highway-by-user, the public's use must be accompanied by some act on the part of the governmental entity that is so open, notorious, and hostile that it places the landowner on notice that his title is denied). Such an assertion is no less an encroachment than the construction of a walkway and harbor facilities on private land. See *Difronzo*, 166 Mich App at 151-152. For that reason, defendants had fifteen years from the date they were on notice that the government was asserting its right to facilitate and control the public's continued use of the road end as a public beach to either oust the governmental entity and seek damages for a temporary taking or demand that the governmental entity institute proper condemnation proceedings. See *Cimock*, 233 Mich App at 87-88 (noting that there was evidence that the governmental entity had maintained the road at issue for the statutory period, but that there must also be evidence that public at large used the road as a road during the same period). Consequently, if the general public obtained a vested prescriptive right to use the road end as a beach, defendants' inverse condemnation claim would fail as a matter of law; defendants would not be entitled to compensation for the loss in property rights and Ganges Township's actions thereafter to control and facilitate the public's use of the road end as a beach would not be inconsistent with defendants' remaining property rights. *Kentwood*, 458 Mich at 663. If, however, the public had not acquired a prescriptive right to use the road end as a beach prior to the present suit, defendants would still own the underlying

property rights and could proceed with their inverse condemnation action and seek damages for any actions by Ganges Township that amounted to a temporary taking.[11] *Difronzo*, 166 Mich App at 153-154.

IV. Recreational Trespass Act

A. Standard of Review

Finally, we shall address the parties' competing claims about whether the RTA applies to the land at issue. This Court reviews de novo the proper interpretation of statutes such as the RTA. *AutoAlliance*, 282 Mich App at 499.

B. Analysis

1. General Application of the Recreational Trespass Act

The RTA provides for the punishment of persons who enter onto the land of another without permission to engage in recreational activities. See MCL 324.73101 *et seq.* Under the statute, a person is prohibited from entering or remaining "upon the property of another person" in order "to engage in any recreational activity . . . without the consent of the owner" if the property is "fenced or enclosed" or "posted in a conspicuous manner against entry." MCL 324.73102(1). The statute also provides that a property owner may give oral or written consent for a person to enter or remain on the property, may orally revoke or amend the permission and may place conditions for entering or remaining on the property. MCL 324.73102(5). County prosecutors or municipal attorneys may prosecute violations of the RTA, MCL 324.73108, and a "peace officer may seize property and otherwise enforce this part upon complaint of the landowner or his or her lessee or agent." MCL 324.73106(2). Likewise, a property owner may bring civil suit against a person who commits a recreational trespass. MCL 324.73109.

Because the statute prohibits persons from entering or remaining on the "property of another" person, MCL 324.73102(1), it necessarily does not apply to one's own property. Similarly, the statute does not apply where the person entering or remaining on the property of another has permission to enter or remain on the property. *Id.* An easement is an interest in property that gives the easement holder the right to use the property of another for a specific purpose, *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 270; 739 NW2d 373 (2007)—that is, although the easement holder does not own the underlying fee, the easement

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[11] Contrary to plaintiffs' contention on appeal, an inverse condemnation action seeks compensation for a completed invasion of a property interest—it does not itself result in a transfer of property rights. *Hart*, 416 Mich at 498. Indeed, as already noted, a property owner may seek compensation under an inverse condemnation action where the taking was temporary, and may even seek compensation for an invasion that did not result in the transfer of any property right at all, such as for regulations that excessively burden the property. See *Brown v Legal Foundation of Washington*, 538 US 216, 233-234; 123 S Ct 1406; 155 L Ed 2d 376 (2003); *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302; 122 S Ct 1465; 152 L Ed 2d 517 (2002).

holder nevertheless has an enforceable property right in the use of the underlying fee. See *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 378-379; 699 NW2d 272 (2005). Therefore, to the extent that an easement holder's actions in entering onto or remaining on the underlying fee are within the scope of the easement, the easement holder is not entering onto or remaining on "the property of another." MCL 324.73102(1). Instead, the easement holder is exercising his or her own property right. *Carmody-Lahti Real Estate, Inc*, 472 Mich at 378-379. Therefore, even though the land underlying 121st Avenue belongs to defendants, the RTA does not apply to the general public's use of 121st Avenue as long as that use is within the scope of the public's easement. However, Michigan law has long recognized that it is a trespass for an easement holder to exceed the scope of his or her easement. *Schadewald v Brule*, 225 Mich App 26, 40; 570 NW2d 788 (1997). The same applies to members of the general public who exceed the scope of the rights held under the public trust doctrine. See *Glass v Goeckel*, 473 Mich 667, 697-698; 703 NW2d 58 (2005) ("The public trust doctrine cannot serve to justify trespass on private property."). Thus, the RTA applies to easement holders who exceed the scope of their easement—that is, trespass on the underlying fee—for recreational purposes. Consequently, whether the RTA applies in this case depends on the nature and extent of the general public's easement at the point where 121st Avenue intersects with Lake Michigan, which must be determined on remand after a trial on the merits.

2. Application to Ganges Township

On appeal, Ganges Township argues that defendants' counterclaim premised on the RTA must be dismissed. Ganges Township relies in part on the argument that the act cannot apply to the road end at issue because its own actions fall within the scope of its property right in the road end. As noted above, there is a question of fact as to nature and extent of any interest in the road end held by Ganges Township on behalf of the public beyond that normally accompanying an easement for a highway-by-user. Nevertheless, Ganges Township also argues that the counterclaim must be dismissed for three additional reasons. First, Ganges Township argues that defendants' do not own a property interest in the road end and, therefore, do not have standing to bring an action under the RTA. Second, Ganges Township argues that it is not a person within the meaning of the RTA. And, lastly, Ganges Township argues that defendants' are barred under governmental immunity from asserting any claim against it under the RTA.

We agree that defendants cannot sue Ganges Township under the RTA because the statute does not create an exception to governmental immunity.[12] Actions for trespass are distinct from inverse condemnation actions premised on a takings. *Peterman v Dep't Nat Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994). And there is generally no exception for actions premised on trespass to the immunity provided under MCL 691.1407(1). *Pohutski v City of Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002). Likewise, governmental immunity applies even when the relief sought is injunctive rather than monetary. See *Jackson County Drain Commissioner v Village of Stockbridge*, 270 Mich App 273, 284-285; 717 NW2d 391 (2006). Hence, under MCL 691.1407(1), Ganges Township would be entitled to

[12] For that reason, we decline to address Ganges Township's standing argument.

governmental immunity as long as it were engaged in a governmental function and none of the statutory exceptions applied.

In this case, the statutory exceptions clearly do not apply and Ganges Township's actions to regulate and protect the public's right to use township property are clearly governmental functions. Consequently, Ganges Township would be entitled to governmental immunity for violations of the RTA under MCL 691.1407(1) unless the RTA itself established an exception to governmental immunity. See *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 485; 722 NW2d 906 (2006) (noting that the Legislature may create exceptions to governmental immunity outside the governmental tort liability act). In order to waive governmental immunity, the statute must expressly create an exception or the exception must follow by necessary inference. *Id.*

Under the RTA, there is no express exception to the application of governmental immunity. Accordingly, any exception must follow by necessary inference from the imposition of liability within the statute. The RTA imposes liability on persons; and it does not define persons to include governmental entities. Further, the references to persons in the RTA implicate individuals rather than public entities. See, e.g., MCL 324.73102(4) (stating that a "person other than a person possessing a firearm may . . . enter on foot upon the property of another person for the sole person of retrieving a hunting dog.") and MCL 324.73103(1) (stating that a "person shall not discharge a firearm . . . ."). Accordingly, one cannot necessarily infer that the Legislature intended to create an exception for governmental immunity when it subjected a "person" to liability under MCL 324.73109. *State Farm Fire & Casualty Co*, 271 Mich App at 485. Because there is no exception to governmental immunity for claims under the RTA, Ganges Township was entitled to summary disposition of that claim on the basis of governmental immunity.

V. Conclusion

Judge Smith's opinion and order in the *Marshall* litigation did not establish the public's right to use the land at the point where 121st Avenue intersects Lake Michigan for any purposes beyond those normally conveyed under MCL 221.20. Further, the scope of a dedication under MCL 221.20 does not vary based on the nature of the public uses giving rise to the dedication. Accordingly, the *Marshall* litigation only established the public's right to use 121st Avenue for ingress and egress to and from Lake Michigan. Therefore, the trial court properly dismissed plaintiffs' claims to the extent that they were premised on the preclusive effect of Judge Smith's opinion and order.

However, Judge Smith's findings are evidence concerning the public's use of the road end and concerning the actions taken by the governmental entities to assert control over 121st Avenue. Based on Judge Smith's findings from the *Marshall* litigation and the other submissions on the motions for summary disposition, there were questions of fact as to whether and when Ganges Township or the Road Commission took actions to facilitate and control the public's use of the road end *as a public beach*. Because there were questions of fact on these

issues, the trial court erred to the extent that it dismissed plaintiffs' claim based on a public prescriptive right and to the extent that it dismissed defendants' inverse condemnation claim as untimely.[13]

Finally, to the extent that the trial court determined that the RTA *could* apply to persons who exceed the scope of the public's right to use 121st Avenue, it did not err. Moreover, because the RTA does not establish an exception to governmental immunity, the trial court also did not err when it dismissed defendants' claim against Ganges Township based on the RTA, even though it did so for different reasons. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

For these reasons, in docket number 284637, we affirm the trial court to the extent that it dismissed plaintiffs' claims other than their claim premised on a public prescriptive right to use the end of 121st Avenue as a public beach. Likewise, in docket number 284736, we affirm the trial court to the extent that it dismissed defendants' claims other than its claim for inverse condemnation. Because there are questions of fact as to whether and when a governmental entity might have taken actions to facilitate and control the public's use of the road end as a public beach sufficient to begin the running of the applicable period of limitations, we reverse the trial court's decision to dismiss plaintiffs' claim premised on a public prescriptive right to use the road end as a public beach in docket number 284637, and reverse the trial court's decision to dismiss defendants' counterclaim for inverse condemnation in docket number 284736. These claims cannot be resolved absent findings concerning the nature of any public entities' actions to facilitate and control the public's use of the road end and the timing of those actions. Therefore, these claims must be tried on the merits.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro

[13] Given our resolution of the issues, we decline to address whether and to what extent Judge Kolenda's opinion and order modified Judge Benson's earlier opinion and order.