STATE OF MICHIGAN

COURT OF APPEALS

DAVID R. FARLOW, SANDRA M. FARLOW, DENNIS DIX, LAURA DIX, and MECOSTA COUNTY ROAD COMMISSION,

Plaintiffs/Counter Defendants-Appellees,

v

JAMES A. GRUNST and DIANE E. GRUNST,

Defendants/Counter Plaintiffs-Appellants,

and

STATE TREASURER,

Defendant-Appellee,

and

MARY E. EVERITT, DAVID A. EVERITT, JOHN C. EVERITT, ANNE E. EVERITT, BRENT D. YAGER, BRIAN M. YAGER, ELIZABETH M. KOCH, KEVIN W. KOCH, SUSAN C. KOCH, PETER D. ADOLF, CYNTHIA L. ADOLF, JOHN E. DEBRUIN, JR., LYNNE M. DEBRUIN, RALPH L. MOREY and LINDA L. MOREY, Trustees of the RALPH & LINDA MOREY TRUST, TOWNSHIP OF GRANT, MECOSTA COUNTY DRAIN COMMISSIONER, TRI-COUNTY ELECTRIC COOPERATIVE, and AT&T,

Defendants.

DAVID R. FARLOW, SANDRA M. FARLOW, DENNIS DIX, LAURA DIX, and MECOSTA COUNTY ROAD COMMISSION,

UNPUBLISHED
December 11, 2012

No. 307215
Mecosta Circuit Court
LC No. 09-019342-CH

Plaintiffs/Counter Defendants-
Appellees,

v

No. 307216
Mecosta Circuit Court
LC No. 10-019956-CH

JAMES A. GRUNST and DIANE E. GRUNST,

Defendants/Counter Plaintiffs-
Appellants,

and

STATE TREASURER,

Defendant-Appellee,

and

MARY E. EVERITT, DAVID A. EVERITT, JOHN C. EVERITT, ANNE E. EVERITT, BRENT D. YAGER, BRIAN M. YAGER, ELIZABETH M. KOCH, KEVIN W. KOCH, SUSAN C. KOCH, PETER D. ADOLF, CYNTHIA L. ADOLF, JEFFREY A. ABRAM, BARBARA J. ABRAM, RALPH L. MOREY and LINDA L. MOREY, Trustees of the RALPH & LINDA MOREY TRUST, TOWNSHIP OF GRANT, MECOSTA COUNTY DRAIN COMMISSIONER, TRI-COUNTY ELECTRIC COOPERATIVE, and AT&T,

Defendants.

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendants James and Diane Grunst[1] appeal by right the trial court's order establishing a public highway under the highway by user statute, MCL 221.20. We affirm.

I. FACTS AND PROCEEDINGS

[1] Unless the context indicates otherwise, "defendants" refers to James and Diane Grunst.

This case involves title to a disputed roadway that travels along part of Young's Lake. Young's Lake is bordered in relevant part by Young's Lake Resort Plat No. 1, Young's Lake Resort Plat No. 2, and an unplatted parcel of land known as Young's Lake Campground, which defendants own. Young's Lake Campground separates the two plats. Plat No. 1 is in the northwest, Young's Lake Campground is in the middle, and Plat No. 2 is in the southeast. A single roadway with three different names connects the three parcels of land. The road begins as a public road known as "Young's Lake Road," which ends at the southeast corner of Plat No. 1. The road then becomes a private "campground road," the informal name given to the road that passes through Young's Lake Campground. At the northwest corner of Plat No. 2, the road becomes James Avenue, a private road. Lot 50 is located on the northwest corner of Plat No. 2. Lot 50 is owned by defendants and acts as a "buffer" separating Young's Lake Campground and the residences of Plat No. 2. James Avenue ends at the southeast corner of Plat No. 2, where it becomes an unnamed easement that connects to Alma Lake Road, a public road.

On September 1, 2009, plaintiffs filed their complaint in LC No. 09-019342-CH (the 2009 case). Plaintiffs claimed the right to use the campground road and James Avenue through lots 60/89 of Plat No. 2 through the highway by user statute, MCL 221.20, or by means of prescriptive easement. A third count sought an amendment of the recorded plat if plaintiffs were ultimately successful on either the highway by user or prescriptive easement counts.

Six individual defendants were not properly served by plaintiffs before the summons expired on December 1, 2009. Thus, these six defendants were administratively dismissed without prejudice on February 3, 2010. A pretrial order dated March 16, 2010, allowed plaintiffs 14 days to file amended pleadings for a second attempt to properly serve the six defendants, and plaintiffs filed their first amended complaint on March 29, 2010. This complaint was identical to the first complaint, but the court rejected the summons forms for the six defendants because of "caption formatting concerns." Plaintiffs were unable to correct the formatting error before the end of the 14-day deadline provided in the pretrial order.

On August 18, 2010, plaintiffs filed a complaint for a plat amendment in LC No. 10-019956-CH (the 2010 case). The petition reflected the same allegations regarding the claim from the 2009 case and listed the same defendants as the first amended complaint from the 2009 case. Also on August 18, 2010, plaintiffs moved for consolidation of the 2009 case and the 2010 case. On August 19, 2010, plaintiffs filed nine separate notices of voluntary dismissal in the 2009 case. Defendants Grunst subsequently moved to nullify these dismissals because they did not stipulate to the dismissals. The trial court ruled that the dismissals were defective under MCR 2.504(A)(1), but it nevertheless ordered the dismissals under MCR 2.504(A)(2). The parties subsequently stipulated to the consolidation of the 2009 and the 2010 cases.

On May 20, 2011, plaintiffs filed a series of motions for summary disposition under MCR 2.116(C)(10). Defendants also filed several motions and a single brief in opposition to plaintiffs' requests for summary disposition. The trial court concluded that the disputed roadway was a public highway under the highway by user statute and accordingly granted plaintiffs' motions for summary disposition.

II. VOLUNTARY DISMISSAL

Defendants first argue that the trial court erroneously ordered voluntary dismissal of the nine plat amendment defendants under MCR 2.504(A)(2). We disagree. We review a trial court's decision to order voluntary dismissal for an abuse of discretion. *McKelvie v City of Mt Clemens*, 193 Mich App 81, 86; 483 NW2d 442 (1992).

MCR 2.504(A) reads as follows regarding voluntary dismissal:

> (1) Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff without an order of the court and on the payment of costs
>
> > (a) by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs; or
> >
> > (b) by filing a stipulation of dismissal signed by all the parties.
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim.
>
> (2) Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.
>
> > (a) If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the court shall not dismiss the action over the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.
> >
> > (b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.

In interpreting GCR 1963, 504.1(2), the previous version of MCR 2.504(A)(2), this Court explained that the purpose of the court rule "is to protect defendant from the abusive practice of dismissal after much time and effort has been put into a lawsuit." *African Methodist Episcopal Church v Shoulders*, 38 Mich App 210, 212; 196 NW2d 16 (1972). The Court opined that a motion for voluntary dismissal should be granted unless the defendant will be prejudiced as a result. *Id*. When a party's position in a case is "no worse" after the dismissal, there is no prejudice. *McKelvie*, 193 Mich App at 86. But when a party would be forced to incur additional expense in a second case after already having spent substantial time and money in a lawsuit, allowing voluntary dismissal might be inappropriate. See *Makuck v McMullin*, 87 Mich App 82, 86; 273 NW2d 595 (1978). Further, voluntary dismissal should only be granted "upon such terms and conditions as will place the parties in the same positions they occupied prior to the inception of [the original] suit." *Shoulders*, 38 Mich App at 213.

Defendants were not prejudiced by the trial court's dismissal of the nine plat amendment defendants pursuant to MCR 2.504(A)(2). While defendants were forced to defend a second

case, the two cases were consolidated within a short period of time. And the issues involved in both cases were identical.[2] In addition, the trial court's award of $300 to defendants was a reasonable attempt to place defendants in the same position they occupied before the order of dismissal. Further, the order of dismissal did not interfere with defendants' defenses and counterclaims against plaintiffs. Defendants' position was therefore "no worse" after the trial court's order of dismissal. *McKelvie*, 193 Mich App at 86.

Defendants argue that they were prejudiced because if the trial court had not ordered dismissal, the 2010 case would have been dismissed pursuant to their motion for summary disposition under MCR 2.116(C)(6) (another action has been initiated between the same parties involving the same claim). This motion was filed on September 22, 2010, and the order of dismissal was entered on October 21, 2010. The trial court observed that defendants' motion was rendered moot by its decision to order dismissals. Based on the parties' subsequent stipulation to consolidate the two cases, defendants have failed to establish they were prejudiced.

Although defendants argue that they were prejudiced because a notice of lis pendens was placed on their property, they do not explain how the notice of lis pendens relates to the trial court's order of dismissal or how it could have been avoided had the trial court not ordered dismissal. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

III. HIGHWAY BY USER

Next, defendants challenge the trial court's grant of summary disposition with respect to the highway by user statute. We review de novo a grant or denial of summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A trial court's application of the highway by user statute is also reviewed de novo. *Kalkaska Co Bd of Rd Comm'rs v Nolan*, 249 Mich App 399, 401; 643 NW2d 276 (2001).

The highway by user statute, MCL 221.20, provides as follows:

> 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

[2] In both cases, plaintiffs specifically sought amendment of Plat No. 2 to reflect the changed title of part of James Avenue. Importantly, however, even if the plat amendment count were dismissed with prejudice, plaintiffs would have only lost their right to seek relief with respect to part of James Avenue. Plaintiffs' claims for highway by user and prescriptive easement with respect to the campground road would have remained valid, and defendants would have been obligated to defend against them regardless of the trial court's decision to grant dismissals without prejudice. For this additional reason, defendants did not suffer significant prejudice as a result of the trial court's order of dismissal.

> shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

The highway by user statute is based on a landowner's implied dedication of private property to the public for use as a public highway. *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 653; 581 NW2d 670 (1998). "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, notorious, and exclusive public use." *Nolan*, 249 Mich App at 401-402. "If all four elements are established, MCL 221.20 raises a rebuttable presumption that the road is four rods, or 66 feet, wide." *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 292-293; 706 NW2d 897 (2005).

A. APPLICABILITY OF HIGHWAY BY USER STATUTE

Defendants argue that the highway by user statute is inapplicable to this case because the disputed roadway is private property, and the statute was not enacted to convert private property into a public highway. We disagree. The highway by user statute specifically addresses the issue of converting private property into a public highway when its elements are satisfied. See *Kentwood*, 458 Mich at 653 (explaining that the effect of the highway by user statute is to treat private property as impliedly dedicated to the state).

Defendants also argue that under *Stickley v Sodus Twp*, 131 Mich 510, 517; 91 NW 745 (1902), a private roadway may only be converted into a public highway if the owner consents to the change or is estopped from denying the change. This approach is inconsistent with judicial interpretation of the current version of the statute. See *Kentwood*, 458 Mich at 666 (explaining that the statute establishes a public highway when there is "a defined line of travel with definite boundaries, used and worked upon by public authorities, traveled upon by the public for ten consecutive years without interruption, in an open, notorious and exclusive manner").

Defendants argue that the disputed roadway was not certified as a county road under the McNitt Act.[3] The McNitt Act, in relevant part, provided a procedure that allowed a county board of road commissioners to convert township roads into county roads. See *Missaukee Lakes Land Co v Missaukee Co Rd Comm*, 333 Mich 372, 376; 53 NW2d 297 (1952); *Marx v Dep't of Commerce*, 220 Mich App 66, 70-72; 558 NW2d 460 (1996). Defendants argue that the disputed roadway cannot be converted into a public highway because it was never certified as a county road pursuant to the McNitt Act. But plaintiffs never argued that the disputed roadway became a public highway under the McNitt Act. The issue in this case implicates the highway by user statute and whether its elements have been satisfied. See *Nolan*, 249 Mich App at 401-402.

[3] 1931 PA 130, MCL 247.1 *et seq.*, repealed by 1951 PA 51.

B. ELEMENTS OF HIGHWAY BY USER STATUTE

Defendants argue that the trial court erroneously held that there was no genuine issue of material fact with respect to the elements of the highway by user statute. We agree in part.

"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, notorious, and exclusive public use." *Nolan*, 249 Mich App at 401-402; see also *Kentwood*, 458 Mich at 666.

In this case, the first element is not disputed because there is a defined line of travel that has definite boundaries. *Villadsen*, 268 Mich App at 294.

To establish the second element, "public authorities must engage in more than infrequent, minor maintenance . . . ." *Id.* at 295. But when the disputed road has only minimal traffic, public maintenance of the road necessary to satisfy this element need not be extensive. *Id*. at 295-296. In this case, the affidavits by employees of the Mecosta County Road Commission (MCRC) establish that there is no question of fact with respect to the second element.

To establish the third element, members of the general public must use the disputed road for a 10-year period. *Nolan*, 249 Mich App at 402. This means the road must be used by more than government employees and "not merely the friends and family of people living on the road." *Villadsen*, 268 Mich App at 298-299; see also *Cimock v Conklin*, 233 Mich App 79, 92-93; 592 NW2d 401 (1998) (explaining that family and friends use a private road with "implicit consent" or permission of persons living on the road). Defendants have conceded below and on appeal that the third element has been established.

To establish the fourth element, the public use must be "open, notorious, and exclusive." *Nolan*, 249 Mich App at 402. "Open" means "[m]anifest; apparent; . . . [v]isible;" or "exposed to public view; not clandestine." Black's Law Dictionary (9th ed). "Notorious" means "[g]enerally known and spoken of . . . ." *Id*. "An action is 'exclusive' if it 'excludes' something, meaning that it 'shuts out,' 'bars,' or 'disregards' something." *Donaldson v Alcona Co Bd of Rd Comm*, 219 Mich App 718, 725; 558 NW2d 232 (1996)(citation omitted). In other words, an action is "exclusive" when it diminishes or denies the property rights of the landowner. *Id*.

The trial court correctly held that there was no question of fact with respect to the "open" and "notorious" parts of the fourth element. Plaintiffs submitted several affidavits that indicated that the individual plaintiffs, their family and friends, and members of the general public have used the disputed roadway for several years. Taken together, these affidavits establish open and notorious use of the disputed roadway. Further, defendant James Grunst's affidavit indicates that he had knowledge that the general public used the disputed roadway. Thus, the public use was "open" and "notorious" with respect to defendants, the property owners of the disputed roadway.

Finally, defendants contend that the public's use of the disputed roadway was not "exclusive" because James Grunst granted permission to some but not all of the public that used the disputed roadway over the years. If members of the public used the disputed roadway only with defendants' permission, then the use was not "exclusive" and the fourth element is not

satisfied. See *Donaldson*, 219 Mich App at 724-725 (permissive use by the general public, however long, is insufficient to establish the element of "exclusive" use).

As indicated in James Grunst's affidavit, defendants may have given permission to residents of Plat No. 2, including the individual plaintiffs, to use the disputed roadway. If such permission was in fact given to the residents of Plat No. 2, following the rationale of *Cimock* and *Villadsen*, this permission extended to the family and friends of the residents of Plat No. 2. Even if this occurred, there are additional affidavits to support the fourth element. The trial court ruled that the evidence defendants submitted was too "speculative" to conclude that James Grunst had given permission to all users of the disputed roadway. Speculation is insufficient to satisfy a party's evidentiary burden on a motion for summary disposition to establish the existence of a genuine material issue of fact. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005). Further, the affidavits plaintiffs submitted identified specific uses of the disputed roadway that were contrary to the interests of defendants and that the affidavit of James Grunst did not contradict these affidavits. We conclude that the trial court correctly ruled that the evidence established the fourth element required for finding an implied dedication of the disputed roadway to the public for use as a public highway, the "open, notorious, and exclusive" use by the public for the requisite ten consecutive years. *Kentwood*, 458 Mich at 653, 666.

IV. ABANDONMENT

Finally, defendants argue that the trial court erroneously rejected their argument that the MCRC abandoned the disputed roadway. We disagree.

MCL 221.22 provides: "Every public highway already laid out, or hereafter to be laid out, no part of which shall have been opened and worked within 4 years after the time of its being so laid out, shall cease to be a road for any purpose whatever." Defendants' argument for statutory abandonment is meritless. Unlike the present case, where the dispute concerns whether private property may be converted into a public highway, the statute operates to convert an existing public highway into private property. See *Rice v Clare Co Rd Comm*, 346 Mich 658, 662-663; 78 NW2d 651 (1956) (explaining that MCL 221.22 applies to public highways "laid out" by statutory procedures).[4] To the extent that defendants argue for application of common-law abandonment, we simply note that the MCRC has maintained the disputed roadway for several decades, and regular maintenance is inconsistent with an intent to abandon or relinquish a road. See *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 622 NW2d 424 (2003)

[4] Additionally, the statute requires inactivity for four years before a "laid out" highway is deemed abandoned. *Kentwood*, 458 Mich at 660-661. Uncontroverted affidavits by MCRC employees establish that the MCRC maintained the disputed road until at least 2007, only two years before the instant lawsuit was filed in 2009. While James Grunst's affidavit indicates that at least some of the MCRC's maintenance was without permission, whether the MCRC maintained the disputed roadway with or without permission is irrelevant. The only relevant consideration is whether the MCRC abandoned the disputed roadway for a four-year period.

(common-law abandonment requires proving "both an intent to relinquish the property and external acts putting that intention into effect").

We affirm. As the prevailing party, plaintiffs may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray