

STATE OF MICHIGAN
COURT OF APPEALS

EARLY DEWAIN DEAN and CATHERINE J.
DEAN,

Plaintiffs/Counterdefendants-
Appellees,

v

JACKSON COUNTY ROAD COMMISSION,

Defendant-Appellant,

and

LINDA TENGMAN and SALLY HATCHER,

Defendants/Counterplaintiffs.

EARLY DEWAIN DEAN and CATHERINE J.
DEAN,

Plaintiffs/Counterdefendants-
Appellees,

v

JACKSON COUNTY ROAD COMMISSION,

Defendant-Appellant,

and

LINDA TENGMAN and SALLY HATCHER,

Defendants/Counterplaintiffs.

UNPUBLISHED
June 20, 2006

No. 264063
Jackson Circuit Court
LC No. 04-004185-CH

No. 266355
Jackson Circuit Court
LC No. 04-004185-CH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this consolidated appeal, defendant, Jackson County Road Commission (Road Commission), appeals by right the trial court's order granting summary disposition in favor of plaintiffs in this action to quiet title.¹ We affirm.

I. Background

These cases arise out of a dispute over ownership of approximately a half mile of an unimproved, 66-foot right-of-way for Francisco Road in Jackson County. This right-of-way is in the form of a dirt, two-track roadway that winds through a wooded portion of plaintiffs' property.

According to Marlin J. Winchell, County Highway Engineering Assistant for the Road Commission, records show that Francisco Road includes the 0.54 mile right-of-way that meanders along the southern portion of plaintiffs' property. Francisco Road was a township road before September 1, 1933. On August 9, 1933, pursuant to resolution of the Road Commission under the McNitt Act, Francisco Road was adopted as a county road and included in the county road system as of September 1, 1934. Francisco Road in its entirety appeared on the "McNitt Road List" for Jackson. Moreover, the general highway map of Jackson County indicates that the approximately half mile of roadway at issue is an unimproved county road certified as of July 1, 1939. Similarly, the Michigan State Highway Department road map of Jackson County indicates that the same portion of roadway is a county road adopted into the county road system in 1934. Furthermore, public records demonstrate that the disputed portion of the roadway "was a certified county local road from 1934 to 1959 and under the jurisdiction of the Jackson County Road Commission." .

According to Robert Zenz, the Road Commission's chairperson, the portion of the subject roadway was "decertified" in 1960. Zenz averred that "decertification of a road means that the Jackson County Road Commission no longer maintains the road for public travel, but continues to have jurisdiction over the road right-of-way." Both Zenz and Winchell denied that the Road Commission ever abandoned the disputed portion of roadway.

In September 1984, plaintiffs purchased a piece of property located in Grass Lake Township, Jackson County, by land contract. The approximately half-mile section of roadway meanders through plaintiffs' property and has been used as a private drive for the individual defendants Tengman and Hatcher, who own property adjacent to plaintiffs' property. Plaintiffs developed plans to create several buildable lots on their property and obtained a permit to create a private road to provide access to these lots. Plaintiffs plan was to substitute the use of the new

¹ The Road Commission filed an application for leave to appeal the trial court's July 5, 2005, order granting summary disposition in favor of plaintiffs and denying the Road Commission's motion for summary disposition. Subsequently, the trial court entered a final order in this matter, and the Road Commission filed a claim of appeal as of right. This Court consolidated the two appeals.

private road for the private road now used by the individual defendants. According to plaintiffs, in response to this plan, the individual defendants asserted that the disputed portion of roadway was a public road which they were entitled to use to reach their property. Plaintiffs also alleged that the individual defendants used construction equipment to clear trees from plaintiffs' property where they believed the public road was located.

On July 14, 2004, plaintiffs filed a five-count complaint, alleging, in relevant part, that the Road Commission abandoned the subject section of Francisco Road.² Plaintiffs requested that the trial court quiet title in them in this portion of the roadway.

On May 24, 2005, the Road Commission filed a motion for summary disposition pursuant to MCR 2.116(C)(4), (7) and (10), contending, in part, that plaintiffs failed to establish a prima facie case of title to the roadway because the 0.54 mile section of the roadway was adopted as a county road pursuant to the McNitt Act of 1931, certified as a county road under the jurisdiction of the Road Commission from 1934 to 1959, and decertified in 1960, but remained under the jurisdiction of the Road Commission. The Road Commission further claimed that it had not abandoned the stretch of roadway and that the circuit court lacked jurisdiction over the proceedings to declare that the disputed portion of the roadway was abandoned.

Plaintiffs also moved for summary disposition, but pursuant to MCR 2.116(C)(9) and (10), asserting that the Road Commission failed to demonstrate that the disputed portion of roadway was ever a public road because it could not establish that the roadway was accepted for public use in a legally cognizable manner. Plaintiffs further asserted that, even if the Road Commission could prove that a public road once existed, the road was abandoned as late as 1960.

On June 17, 2005, the trial court heard oral arguments on the cross-motions and quieted title in the disputed section of Francisco Road in plaintiffs. The trial court reasoned:

Now, it's clear that at some point in time prior to 1993 [sic], Francisco Road at this area was an unimproved road, even though it appears it was generally restricted in its use by the predecessors to the individual Defendants, not to the general public, and the takeover of the township roads by the McNitt Act, it was specifically identified as being a county road, and as indicated, it was so certified for a number of years, and ultimately then decertified by the Road Commission, but that doesn't mean abandonment because this is verified by the affidavit of Mr. Zenz, chairperson of the Jackson County Road Commission, that there has never

² Plaintiffs also asserted that defendants' actions of trespass and damage to land entitled them to injunctive relief and treble damages and that they had a claim of right by record title and/or adverse possession of the premises. Individual defendants Tengman and Hatcher filed a countercomplaint, requesting that the trial court declare that they had an easement over the disputed portion of roadway. At the hearing on the cross-motions for summary disposition, plaintiffs withdrew their trespass claims, conceded that the individual defendants had an easement over the property, and stated that the only remaining issue was ownership of the road.

been any specific abandonment, and the statutory provisions exist with regard to abandonment, and these have never been satisfied by the Road Commission.

However, common law abandonment continues as a viable theory in Michigan per Aims (ph) versus Kalamazoo Road Commission, 255 Mich App 637 with leave denied by the Supreme Court 269 Mich 959, a 2003 case. And even since that case, there has been no revision of the statute as to abandonment, so that it continues to exist as a valid basis of abandonment even if the Road Commission itself has not sought to abandon something, and that the circuit court can determine if the Road Commission's conduct has caused the public roadway to abandon, as stated at 652 of that case: "A roadway established for public use may cease to be such by voluntary abandonment and non-use. It must be shown that there was an intent to relinquish the property and external acts putting that into effect," per the Aims case.

Aims also looked at then different factors: 1, there was a decertification by the Road Commission; 2, the Road Commission hasn't been maintaining it since decertification; and, 3, that there is attempted control by those whose property through whom the alleged right-of-way passes, and in that particular case by a gate. And at 658 the Court says; "No such current or frequent use by the public in general is alleged of the road at issue here, and nothing suggests intermittent public use of a roadway will preclude a finding of abandonment."

So, it seems to me that while it might be questionable as to whether this was a township road in the first instance, that was taken over by the McNitt Act.

Even if it was, it seems to me that there has been abandonment, a common law abandonment, by the Road Commission.

Now, there are no records that the Road Commission ever maintained the road after 1934, even though there may have been certification and they got money from the state from it. Obviously there is no title to the road with the Road Commission; there's been no general use by the public.

I'm satisfied under the affidavits that this has been in use by relatives of the individual Defendants with regards to moving cattle back and forth, or going back there to hunt or whatever.

The road was decertified in 1960. There certainly is appearance of disuse of the Road Commission by the pictures. There has been assertion of the privacy by various gates and signs. The utilities easement[s] certainly don't establish that there is a county roadway there. There [are] no rights being asserted here by the utilities, and to my mind, most importantly, since decertification in 1960, there has been absolutely no road maintenance by the Jackson County Road Commission, and when you look to the standards of the Aims case, this road has been abandoned and title had reverted to the landowners, and title is quieted in them, but for the easement by necessity . . . that exists to the Defendants . . . [M, pp 32-35.]

The trial court entered an order comporting with its ruling from the bench on July 5, 2005, and a final order on October 21, 2005.

II. Analysis

A. Abandonment

The only issue³ raised on appeal by the Road Commission is that the trial court erred in quieting title to plaintiffs because the Road Commission had not abandoned the disputed portion of the roadway.⁴ We disagree.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must consider the affidavits, depositions, admissions, or other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is appropriate when "[e]xcept as to the amount of damages, 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." MCR 2.116(C)(10); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). Plaintiffs' specific request to quiet title constitutes an action in equity, *McFerren v B & B Inv Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002), that we also review de novo. *Id.*

"A roadway established for public use may cease to be such by voluntary abandonment and nonuse." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424

³ Although MCR 7.212(C)(5) requires that the statement of issues presented be presented in a clear and concise manner, both parties to the appeal included argument in favor of their respective positions within the statements of issues presented. This was improper, and should not be repeated in the future.

⁴ Relying on *In re Petition of Wernicke*, 331 Mich 91; 49 NW2d 76 (1951), the Road Commission claims that, because the McNitt Act vests it with "sole and exclusive jurisdiction" over those roads that have been adopted into its road system, the trial court lacked jurisdiction to enter an order declaring the disputed roadway to be abandoned. Although the Road Commission failed to raise this issue in its statement of questions presented as required by MCR 7.212(C)(5), we nevertheless conclude that the jurisdictional claim lacks merit. A similar argument was rejected in *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637; 662 NW2d 424 (2003), where this Court held that, while *Wernicke* and *In re Petition of Miller*, 18 Mich App 480; 171 NW2d 473 (1969), stand for the proposition that the circuit courts lack jurisdiction to affirmatively vacate a road, "those courts nonetheless have the power to hear and decide claims in which it is alleged . . . that a county road commission has through its own conduct abandoned a public roadway." *Ambs, supra* at 651, citing, *Richey v Shephard*, 333 Mich 365; 53 NW2d 487 (1952), *Meyer v Meldrum*, 237 Mich 318; 211 NW 658 (1927), and *Roebuck v Mecosta Co Rd Comm*, 59 Mich App 128; 229 NW2d 343 (1975). Accordingly, we reject the Road Commission's jurisdictional claim.

(2003). To prove abandonment, “both an intent to relinquish the property and external acts putting that intention into effect must be shown by the party asserting abandonment.” *Id.* Mere nonuse is insufficient to prove abandonment. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 718; 583 NW2d 232 (1998).

The Road Commission’s specific argument is that the only evidence offered to show its intent to abandon was its nonuse of the road. Although, as noted, nonuse is insufficient by itself to prove abandonment, *Sparling, supra*, that is not the exclusive evidence relied on by the trial court in finding that the Road Commission abandoned the road. Instead, the trial court cited to evidence of decertification, the assertion of private interests through signs and gates, and the nonuse and non-maintenance by the Road Commission in support of its decision.

The trial court’s conclusion is amply supported by this Court’s decision in *Ambis, supra*, where we upheld the trial court’s conclusion of common law abandonment. There, as here, the commission argued that mere nonuse was insufficient to constitute abandonment. However, we concluded that the trial court based its findings on the “totality” of the defendants’ conduct, which included their failure to certify or maintain the disputed portion of roadway, the private interests asserted over the road through gates and plowing, and the county’s express denials concerning responsibility for and acquiescence to the plaintiffs’ assertion of dominion and control over the roadway. *Id.* at 653-654. We also noted that “infrequent and minor maintenance” was insufficient to show a continuous claim of jurisdiction by the defendants. *Id.* at 655.

As in *Ambis*, the trial court’s conclusion was not based solely on the failure to maintain the roadway. Rather, the trial court found an intent to abandon the property based on the Road Commission’s collective conduct. Specifically, the undisputed evidence established that in 1960, the Road Commission elected to remove the disputed section of roadway from the certification rolls submitted to the state. The consequence of “decertification” is a road commission is unable to expend money on the maintenance of an uncertified road without the consent of the board of supervisors. See MCL 224.20. Thus, in decertifying the disputed portion of roadway, the Road Commission effectively declared its intent that it would no longer maintain the road in reasonable repair. This declaration can be considered an affirmative act of relinquishment to control or right of the roadway.⁵ Moreover, unlike in *Villadsen v Mason Co Rd Comm*, 268 Mich App 287; 706 NW2d 897 (2005), on which the Road Commission relies, there was evidence that the Road Commission had not worked on the roadway in any capacity at least since decertification in 1960, as well as evidence that plaintiffs and their predecessors, not the county, installed gates across the disputed portion of roadway, at least one of which contained a sign stating, “no trespassing.” Finally, there was evidence that the individual defendants and their predecessors used the roadway in pursuit of outdoor activities.

⁵ See *Cheboygan Co Rd Comm v Crawford*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 1997 (Docket No. 185583) (holding that, by decertifying the road, “the county effectively proclaimed that it no longer assumed the duty to maintain the road in reasonable repair,” which was the “equivalent of relinquishing all control or rights to the road - - the essence of abandonment.”).

The Road Commission's "decertification" of the disputed section of roadway, its lack of maintenance, and its apparent acquiescence in the private landowners' assertion of dominion and control over the roadway constitute affirmative acts that, taken together, demonstrate an intent to relinquish jurisdiction. See *Amb's, supra* at 654. Based on the record, we do not believe a genuine issue of material fact existed for trial, and the trial court did not err in concluding that the Road Commission abandoned the disputed section of Francisco Road.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray