STATE OF MICHIGAN

COURT OF APPEALS

LINDA SMIERTKA and GERALD R. SABO,

Plaintiff-Appellants/
Cross-Appellees,

and

COLIN CLARKE, ELSA CLARKE, CLARK REVOCABLE TRUST, JAMES F. MILLER II, MARLENE MILLER, KEVIN WILLIAM DEANE, ALEX S. SABO, JOHANNA H. SABO and KERRY G. FLEURY,

Plaintiffs,

v

HURON COUNTY BOARD OF ROAD COMMISSIONERS, JOHN MARTIN and STEVEN P. ROMZEK,

Defendants-Appellees/
Cross-Appellants

and

HURON COUNTY,

Defendant-Appellee.

UNPUBLISHED
June 7, 1996

No. 177761
LC No. 93-008299-CH

Before: Hoekstra, P.J., and Michael J. Kelly and J.M. Graves, Jr.,* JJ.

PER CURIAM.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal as of right the trial court order granting defendants' motion for summary disposition. Defendants cross appeal as of right the court's denial of their motion for sanctions. We affirm.

This suit involves a park road which plaintiffs used for many years to get to and from their property. In 1978, defendants notified plaintiffs or their predecessors that the park road would be terminated for their use in August of 1979. However, the road was not closed and plaintiffs continued to use the road, with defendants providing keys to access the road when the gate was locked in the winter. Defendants were trying to placate plaintiffs by allowing them more time to develop a 30 foot easement plaintiffs owned which would provide alternate access. This situation endured for some years. Although the Huron County Prosecutor again advised plaintiffs in 1986 that the previously granted permission to use the road was withdrawn, and that defendants intended to erect a fence which would cut off their access, defendants again expressly allowed plaintiffs to use the park routes with the proviso that plaintiffs would work toward developing their easement. In April of 1992, defendant Romzek, noting that the easement had not been developed, again advised that permission to use the road was withdrawn and that a fence would be erected to prevent ingress and egress. On December 1, 1992, defendants finally changed the locks on the road gates and completed the fence across the road, cutting off plaintiffs' access.

Plaintiffs first contend that the park road is a public highway and that defendants failed to comply with the statutory procedures for closing it. Plaintiffs also argue that the trial court's findings with respect to the layout and maintenance of the road were clearly erroneous. We disagree. "Highway by user" is the term given to describe how the public can acquire title to a highway by a sort of prescription where there is no formal dedication. *Rigoni v Michigan Power Co*, 131 Mich App 336, 343; 345 NW2d 918 (1984). In determining whether a road is a public highway, relevant factors include whether the public considers the road public, whether the road has been accepted as part of the county road system or whether the township has done any upkeep on the road, particularly to keep it in reasonably passable condition. *Indian Club v Lake Co Rd Comm'rs*, 370 Mich 87, 90-92; 120 NW2d 823 (1963); *Dryfoos v Maple Grove Twp*, 363 Mich 252, 254-255; 109 NW2d 811 (1961); *Bain v Fry*, 352 Mich 299, 303-304; 89 NW2d 485 (1958). A finding of highway by user requires evidence of a defined line of travel with determined boundaries, used and worked upon by public authorities, traveled upon by the public for the statutory period without interruption, in a manner open, notorious, and exclusive. *Rigoni, supra*, 131 Mich App 343. However, permissive use, no matter how long continued, defeats a claim of highway by user. *Rigoni, supra*, 131 Mich App 344; *Pearl v Torch Lake Twp*, 71 Mich App 298, 306-307; 248 NW2d 242 (1976).

In this case, plaintiffs' claim of highway by user fails because the record establishes that their use was permissive. Defendants repeatedly informed plaintiffs that their use was permissive and only allowed the use to continue while plaintiffs made efforts to develop their own easement for access. Furthermore, the road was not traveled upon by the general public without interruption because the road was closed in the winter. The road is not part of the county road system nor are road commission funds expended on park roads. These facts indicate that the park road is not a public highway. Finally,

we reject plaintiffs' claim that the trial court's findings regarding the layout and maintenance of the road were clearly erroneous, as there was sufficient evidence supporting the court's conclusions.

Next, we reject plaintiffs' contention that defendants' actions in closing the road constituted an unconstitutional taking of their property. While it is true that denying an abutting landowner access to a public road will be considered a taking, *Thom v State Highway Comm'r*, 376 Mich 608, 618-619; 138 NW2d 322 (1965), as discussed above, this case does not concern a public road. Therefore, plaintiffs' claim fails. Because plaintiffs have no established property rights in the park road, we also reject plaintiffs' contention that their due process rights were violated.

On cross-appeal, defendants contend that they are entitled to sanctions pursuant to MCR 2.114(E) and MCL 600.2591; MSA 27A.2591, and appellate sanctions pursuant to MCR 7.216(C). The trial court's decision whether to impose sanctions is reviewed for clear error. *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995). In this case, there is no indication that plaintiffs' claim was brought for an improper purpose, or that their claims were frivolous within the meaning of the statute. The trial court did not clearly err in refusing to grant sanctions, and defendants are not awarded appellate sanctions.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.