S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ANN A. SARKA,

Plaintiff-Appellant,

v

MARK P. CHURCHILL AND JILL CHURCHILL,

Defendants,

and

MARQUETTE COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
October 25, 1996

No. 174761
LC No. 92-27815-CZ

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

This is a dispute over whether a small road on plaintiff's property is publicly or privately owned. Plaintiff appeals on leave granted an order of the circuit court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (10). We reverse and remand.

On plaintiff's Marquette County property there exists a narrow two-track dirt road. At the northwest corner of plaintiff's property line, the road abuts a paved county road known as either Laine Road or County Road N.E. Although the pavement ends abruptly at plaintiff's property line, the road continues across plaintiff's land for approximately 9/10ths of a mile. In 1933, the Marquette County Board of Commissioners (commission) resolved under the McNitt act, 1931 PA 130, MCL 247.1-247.13; MSA 9.141-9.153, repealed by 1951 PA 51, to declare the road part of the county road system as part and parcel of County Road N.E.

There exists no record evidence that the county, the commission, or any other governmental entity improved, maintained, or otherwise expended funds on the primitive road. Plaintiff testified at her deposition that although she sometimes permits neighbors or emergency vehicles to use the road, she

put up "No Trespassing" and "Private Property" signs alongside the road and at the point where the road entered plaintiff's property. Nevertheless, some neighbors still thought the road was public, and the road was occasionally used by hunters, berry pickers, teenage beer drinkers, and those wishing to dump trash on plaintiff's land.

On July 7, 1992, the commission issued defendant Mark Churchill a permit to, in effect, pave the road and improve it to a standard width of four rods (66 feet). When the Churchills began clearing trees, removing brush, and bringing in grading machinery in pursuit of the permit, plaintiff filed suit for declaration that the road is private and an order enjoining the Churchills against improving the road. Specifically, plaintiff's first amended complaint averred that, "Laine Road was dedicated as County Road NE by resolution of the Board of County Road Commissioners dated April, 1, 1993" and contended that "the portion of County Road NE that extends through the Plaintiff's property has been discontinued by non use [see MCL 221.22; MSA 9.23] or in the alternative the easement of right of way has been extinguished by percription [sic]."

Defendants moved for summary disposition on the basis that the public cannot obtain dedicated roads by prescription. Moreover, defendants claimed MCL 221.22; MSA 9.23 inapplicable due to county use of the road. In her responsive brief, plaintiff argued that, despite the McNitt act designation, the road never became public because it was never dedicated for public use, either expressly or by user. At a hearing where defense counsel emphasized plaintiff's apparent concession that the road had been "dedicated" in 1933, plaintiff's counsel orally requested leave to amend the complaint because he had mistakenly used the word "dedicated" where he meant to say the road was "designated" under the McNitt act. Without articulating the basis for its ruling, the trial court issued an order denying plaintiff leave to amend the complaint, granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10), and declaring that the road in question "has been a county road since its dedication in 1933 and still is." We granted leave to appeal.

Plaintiff contends that the trial court erred in denying plaintiff leave to amend her complaint and granting summary disposition for defendants. We agree. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; all well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Simko v Blake,* 448 Mich 648, 654; 532 NW2d 842 (1995); *Marcelletti v Bathani,* 198 Mich App 655, 658; 500 NW2d 124 (1993). The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dep't of Corrections,* 439 Mich 158, 163; 483 NW2d 26 (1992); *Peters v Dep't of Corrections,* 215 Mich App 485, 487; 546 NW2d 668 (1996). We review the trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo to determine whether the pleadings or the uncontroverted documentary evidence establish that defendant is entitled to judgment as a matter of law. MCR 2.116(I)(1); *Kennedy v Auto Club of Michigan,* 215 Mich App 264, 266; 544 NW2d 750 (1996). The existence of either circumstance merits a grant of summary disposition. *Kennedy, supra* at 266.

Where summary disposition is based on subrule (C)(8) or (10), the court "shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). Though we review a trial court's decision whether to grant leave to amend for an abuse of discretion, *Horn v Dep't of Corrections,* 216 Mich App 58, 65; 548 NW2d 660 (1996), this Court held in *Noyd v Claxton, Morgan, Flockhart & VanLiere,* 186 Mich App 333, 340; 463 NW2d 268 (1990), that

> [l]eave to amend should only be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile.

In the present case, the trial court declared the road a county road and granted summary disposition for defendants, ostensibly because plaintiff failed to establish that the county lost its rights in the road. In reaching this result, it appears that the trial court concluded that the county owns the road because of plaintiff's apparent admission that the road was "dedicated" under the McNitt act. However, even to the extent that plaintiff's alleged misstatement regarding the road's dedication could be regarded as an admission, the parties are not free to stipulate to an erroneous interpretation of the law. *Wilson v Gauck,* 167 Mich App 90, 95; 421 NW2d 582 (1988); *Greaves v Greaves,* 148 Mich App 643, 647; 384 NW2d 830 (1986). The McNitt act did not authorize a county road commission to take private roads into the public highway system. *Kraus v Dep't of Commerce,* 451 Mich 420, 429; 547 NW2d 870 (1996); *Missaukee Lakes Land Co v Missaukee Co Rd Comm,* 333 Mich 372, 376; 53 NW2d 297 (1952); *Pearl v Torch Lake Twp,* 71 Mich App 298, 308; 248 NW2d 242 (1976). Further, viewing the evidence in the light most favorable to plaintiff, the evidence is conflicting on whether the road was dedicated to and accepted for public use. See *Indian Club v Lake Co Rd Comm'rs,* 370 Mich 87, 89; 120 NW2d 823 (1963); *Rice v Clare Co Rd Comm,* 346 Mich 658, 664; 78 NW2d 651 (1956); *Kraus v Gerrish Twp,* 205 Mich App 25, 37-38; 517 NW2d 756 (1994), affirmed in part and reversed in part on different grounds 451 Mich 420; 547 NW2d 870 (1996); *Village of Bellaire v Pankop,* 37 Mich App 50, 55; 194 NW2d 379 (1971). For these reasons, we conclude that the trial court abused its discretion in denying plaintiff leave to amend her complaint and erred by granting summary disposition in favor of defendants.

In view of our resolution of this issue, we need not address plaintiff's remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin