

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY M. MITCHELL and SUSAN MARIE
MITCHELL,

UNPUBLISHED
June 9, 1998

Plaintiffs-Appellees,

v

No. 201988
Roscommon Circuit Court
LC No. 94-006744 CZ

ROSCOMMON COUNTY ROAD COMMISSION,

Defendant-Appellant.

Before: Wahls, P.J., and Jansen and Gage, JJ.

MEMORANDUM.

In this quiet title action, the circuit court, after trial to the bench, concluded that the efforts of defendant road commission's purported predecessor, the township, to establish a road from a certain point on M-55, running along the section line between sections thirteen and fourteen of Township 22, Range 4 North, to Houghton Lake were ineffective due to failure to open and work the road within four years of its establishment, MCL 221.22; MSA 9.23, but that the seal coating of this right-of-way sometime in the 1950's did establish a highway by user. However, the highway by user as found to exist by the circuit court exists, with a limited exception not here in dispute, only East of the section line, and the circuit court therefore concluded that plaintiffs' property, which is West of the section line, is unencumbered by any public rights-of-way.

Defendant appeals that determination as of right. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

As trier of fact, the trial court had wide discretion in its determination of the facts concerning the use of the roadway which had allegedly become a public highway by virtue of public user. This Court will not substitute its judgment on such questions of fact unless the facts clearly preponderated in a different direction. *Keller v Locke*, 62 Mich App 591; 233 NW2d 666 (1975). Given conflicting testimony, no such contrary preponderance exists, and the trial court's findings of fact must be deemed other than clearly erroneous.

Although by statute all roads, including those established by user, are four rods or 66 feet in width, MCL 221.20; MSA 9.21, constitutional prohibitions against the taking of private property without just compensation preclude application of the statute to a highway by user so as to create a public way greater than such actual user. *Eager v State Highway Commissioner*, 376 Mich 148, 154; 136 NW2d 16 (1965). Since the trial court found that the highway by user existed essentially exclusively East of the section line, and therefore nowhere on plaintiffs' property, the conclusion that the public has no prescriptive rights-of-way over plaintiffs' property is a proper legal conclusion.

As already noted, the circuit court also committed no legal error in concluding that, given that proceedings to establish a highway by dedication or acquisition in 1913 and 1933 were ineffective by virtue of MCL 221.22; MSA 9.23, for failure to both work and open the highway within four years of any such official resolutions, no highway was established other than by user. *Roebuck v Mecosta Road Commission*, 59 Mich App 128, 131; 229 NW2d 343 (1975).

Affirmed.

/s/ Myron H. Wahls

/s/ Kathleen Jansen

/s/ Hilda R. Gage