

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELSIE C. KLOOTE,

Plaintiff-Cross-Appellee, Cross-  
Appellant,

and

ROBERT D. WAALKES, LAVERNE S.  
WAALKES, JEAN WEENER, DALE HULST, LOIS  
HULST, KATHY CUSIMANO, EDWARD D.  
KITA, LEON WITTEVEEN and HERMINA  
WITTEVEEN,

Plaintiffs-Appellants,

v

CITY OF HOLLAND,

Defendant-Appellee, Cross-Appellant,  
Cross-Appellee.

UNPUBLISHED  
April 30, 1999

No. 202691  
Ottawa Circuit Court  
LC No. 95-023513 CH

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Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Plaintiffs Robert D. Waalkes, Laverne S. Waalkes, Jean Weener, Dale Hulst, Lois Hulst, Kathy Cusimano, Edward D. Kita, Leon Witteveen and Hermina Witteveen appeal as of right the trial court's judgment which held that Beach Drive West, which runs in front of plaintiffs' homes, was a public right-of-way. Defendant cross appeals as of right the same judgment, which also held that the dedication of Beach Drive East, which runs in front of Plaintiff Elsie J. Kloote's home, was revoked. Plaintiff Kloote cross appeals as of right the trial court's order granting summary disposition on Count II of the original complaint. We affirm as to Beach Drive West and Beach Drive East, but reverse the order granting summary disposition as to Count II.

The subject of the underlying lawsuit is a dispute between defendant and plaintiffs concerning defendant's plans for a platted but largely undeveloped street, Beach Drive, which runs between plaintiffs' homes and Lake Macatawa, and a platted but undeveloped street end, Myrtle Avenue. All plaintiffs except Kloote live on Beach Drive West, which is bordered by Oak and Grove. Kloote lives on Beach Drive East, between Elm and Myrtle Avenue, with her property abutting Myrtle. This area was platted in 1890, with the dedication of the streets and alleys on the plat for "the use of the public." In 1959, defendant annexed this area and accepted the roads and highways listed in the resolution. In 1972, a sanitary sewer was installed in the Beach Drive West right-of-way. In 1994 and 1995, defendant passed resolutions to construct a sidewalk on the right-of-way and allocated funds for constructing an observation area at the end of Myrtle.

Plaintiffs filed a complaint seeking declaratory and injunctive relief on nine theories, one of which was a claim that the proposed use of Myrtle Avenue was outside the scope of the dedication. Defendant filed a motion for summary disposition, which was granted as to all but plaintiffs' claim that defendant untimely accepted the dedication. Plaintiffs filed an amended complaint; this included an allegation of improper use of Myrtle Avenue because it was outside the scope of the dedication.

Plaintiffs introduced evidence that a hedge and fence had run across the Beach Drive West right-of-way from 1926 to 1966. Kloote's father-in-law took the fence down in 1966 because it had deteriorated. He tried to re-erect the barricade in 1977, but had to cut a hole in a hedge when members of the public complained to defendant. He tried replanting some shrubs in 1992; defendant directed him to stop planting in the right-of-way.

As for Beach Drive West, plaintiffs introduced evidence that, although members of the public had walked on the right-of-way, there was no problem with their doing so. A tree had grown across the right-of-way. The public had never claimed Beach Drive West as public property. Defendant introduced evidence that it had been adamant in its position not to vacate rights-of-way near waterfronts.

Plaintiffs contend that the trial court erred in concluding that defendant accepted the 1890 dedication of Beach Drive West. We disagree. This Court reviews de novo trial court rulings regarding questions of law in declaratory judgment actions. *Herald Co v Ann Arbor Public Schools*, 224 Mich App 266, 271; 568 NW2d 411 (1997). Questions of fact are reviewed to determine whether they are clearly erroneous. MCR 2.613(C). The burden of proof to show that an offer of dedication has been accepted is on the public authority. *Kraus v Dep't of Commerce*, 451 Mich 420, 425; 547 NW2d 870 (1996). The acceptance of the public authority must be timely and disclosed through either a manifest act by the public authority confirming or accepting the dedication, and ordering the opening of the street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. *Id.*, 424; *Rice v Clare Co Rd Comm*, 346 Mich 658, 665; 78 NW2d 651 (1956). As long as the plat proprietor or his successor took no steps to withdraw the offer to dedicate, the offer will be treated as continuing. *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511, 519-520; 446 NW2d 161 (1989); *Marx v Dep't of Commerce*, 220 Mich App 66, 79; 558 NW2d 460 (1996). Whether an offer to dedicate lapses or continues depends on the circumstances of each case. *Kraus, supra*, 427. The outer limit for timely acceptance has not been set. *Id.*

Plaintiffs claim that Ottawa County, the governmental agency that first received the offer to dedicate, could not transfer jurisdiction to defendant without first accepting the dedication. A dedication that has remained in place for ten years is presumed accepted by the governmental authority. MCL 560.255b(1); MSA 26.430(255b)(1). This statute was originally enacted in 1967; however, the presumption applies to dedications made before the effective date of the statute. *Vivian, supra*, 521. We conclude that, given this presumption, any lack of affirmative evidence of Ottawa County's acceptance of the dedication is immaterial. We further reject plaintiffs' contention that the lack of development of Beach Drive West shows no acceptance. Once a dedication is accepted, it is not necessary to build in the right-of-way. *Kraus, supra*, 424. We also reject the claim that there was insufficient evidence of informal acceptance. The court expressly found formal acceptance; it was not necessary to show informal acceptance as well. See *id.*

In addition, we do not agree that the 1959 resolution is ambiguous because the road distances referenced in the resolution do not comport with the actual lengths of the rights-of-way. Dale Wyngarden, defendant's director of community services, testified that the road distances referenced in the 1959 resolution are only for improved portions of the road; these distances were listed for the purpose of receiving gas taxes. Plaintiffs complain that this evidence was inadmissible because no one has the right to introduce evidence of the construction of legislative enactments. This objection does not comport with the objection at trial, which was that Wyngarden was not qualified as an expert and that the resolution was unambiguous. Because the objection does not comport, nothing is preserved for appeal. *Thames v Thames*, 191 Mich App 299, 303-304; 477 NW2d 496 (1991).

Plaintiffs contend that the acceptance of the offer of dedication was untimely. However, an untimely challenge to an acceptance of dedication may bar property owners from challenging the timeliness of the dedication. *Kraus, supra*, 441. In this case, thirty-six years elapsed from the acceptance of dedication. We conclude that plaintiffs' challenge to timeliness is barred.

Defendant cross appeals against Kloote, claiming that the trial court erred in concluding that the offer of dedication for Beach Drive East was withdrawn by the planting of a hedge in 1926. The burden of proof was on Kloote to show the offer of dedication was withdrawn. *Id.*, 425. Defendant first contends that the trial court misallocated this burden of proof, as reflected in its opinion. We disagree. As long as it is clear from the record that the parties and the tribunal understand the allocation of the burden of proof, there is no error. See *Gillette Co v Treasury Dep't*, 198 Mich App 303, 318; 497 NW2d 595 (1993). Although the court did not expressly *articulate* who had the burden of proof, its discussion of the evidence clearly shows that it recognized that plaintiff had the burden of showing a withdrawal of the offer; it found that the offer had been withdrawn, citing Kloote's testimony.

Defendant contends that only manmade structures can be used to withdraw an offer to dedicate. Although many cases on withdrawal by inconsistent use deal with manmade structures, plantings can be used to show informal withdrawal. *Kraus, supra*, 451 Mich 431. Moreover, nothing in *In re Vacation of Cara Avenue*, 350 Mich 283, 287; 86 NW2d 319 (1957), cited by defendant, can reasonably be read as requiring manmade structures. Defendant argues that the hedge, planted in 1926, did not block the right-of-way because it was removed in 1978, and because it introduced evidence from two witnesses who testified that as children in the 1940s and 1950s, they walked along Beach

Drive East. Anything that occurred after the offer of dedication was withdrawn in 1926 is largely irrelevant. Once the offer to dedicate has been withdrawn, it cannot thereafter be accepted. *Vivian, supra*, 433 Mich 518.

Defendant also contends that there was insufficient evidence that Kloote's predecessors planted the hedge with the specific intent to withdraw the offer of dedication. An offer is considered withdrawn when landowners use the property in a way inconsistent with public ownership. *Kraus, supra*, 451 Mich 431; *Vivian, supra*, 433 Mich 518; *Lee v Lake*, 14 Mich 12, 18 (1865). These cases require intent to use the property as one's own; they do not require a specific intent to withdraw the offer of dedication. The trial court did not err in failing to require specific intent.

Finally, plaintiff Kloote cross appeals the grant of defendant's motion for summary disposition, claiming that she should have been allowed to present evidence as to her claim that the proposed use of Myrtle Avenue was inconsistent with the scope of dedication. We agree. When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must review the documentary evidence and determine whether a genuine issue of material fact exists. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to support his claim because of a defect that cannot be overcome. *Id.* The standard of review on a motion for summary disposition is de novo. *Id.*; *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

The issue of the scope of the dedication is one of the intent of the person making the dedication. *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 671; 502 NW2d 382 (1993). The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances. *Id.* A right-of-way ending at the water is presumed to have intended to provide access to the water. *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985). A dedication of streets and alleys "to the use of the public" does not, without other evidence of the intent of the dedicator, allow use of a right-of-way ending at the water's edge for shore activities, such as sunbathing, lounging, or picnicking. *Jacobs, supra*, 673.

In this case, the only evidence offered, other than the dedication itself, was three newspaper articles from 1898, 1901, and 1905, showing that automobiles had not yet been introduced into the area. Defendants argue that this necessarily would lead to the conclusion that a plat showing access to the water at Myrtle Avenue means that the dedication contemplates activities such as the building of an observation deck. We fail to see how the existence or nonexistence of cars is relevant to the issue of whether the scope of the dedication went beyond the normal presumption that a right-of-way that ends at a lake contemplates access to the lake and use of the lake. *Thies, supra*, 295. Further, the quantum of evidence offered in this case is substantially less than that offered in *Jacobs, supra*, 673, in which this Court found that a decision that lounging and picnicking were included in the scope of dedication was clearly erroneous. Summary disposition was improper in this case. At a minimum, Kloote should be allowed to introduce evidence on this issue. Defendant argues that Kloote was not prevented from introducing evidence on this issue. We disagree. Kloote's cause of action had been dismissed on summary disposition. She was precluded from offering evidence on her cause of action.

Affirmed as to the Beach Drive West and Beach Drive East judgment. Reversed as to the order granting summary disposition to defendant on Count II. Remanded for disposition of plaintiff Kloote's claim that defendant's proposed use of Myrtle Drive exceeds the scope of the dedication. We offer no opinion either as to the merits of this claim or to the procedure to be employed in disposing of this claim. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins