

IN THE COURT OF APPEALS OF IOWA

No. 9-009 / 97-2076

Filed June 23, 1999

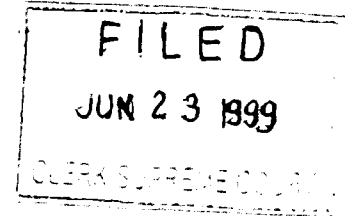
GAIL N. NEUMEYER and PATSY M. NEUMEYER,

Plaintiffs-Appellants,

vs.

**APPANOOSE COUNTY, IOWA, and
BOARD OF SUPERVISORS OF APPANOOSE COUNTY,**

Defendants-Appellees.



Appeal from the Iowa District Court for Appanoose County, Daniel P. Wilson,
Judge.

The plaintiffs appeal from an adverse ruling in their mandamus action.

AFFIRMED.

Marvin V. Colton of the Colton Law Firm, Albia, for appellants.

Jonathan Willier, Centerville, for appellees.

Considered by Vogel, P.J., Zimmer, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PETERSON, S.J.

The plaintiffs-appellants, Gail and Patsy Neumeyer, appeal from an adverse ruling in their mandamus action. They claim the district court erred in finding the road at issue is not a public road. They also claim the court erred in failing to order the county to maintain and improve the road. We affirm the district court.

The Neumeyers filed a petition for money damages and for a writ of mandamus concerning the Everett Jones Road (EJR), which runs through their property. The EJR is about one mile long, and intersects Appanoose County Road J5T. The road has been a point of controversy for years. Previous landowners have attempted to have the county improve and maintain the road, but the county never agreed to do so. Over the years, the county did perform some occasional work on the EJR such as grading, plowing snow, and installing a culvert. The Neumeyers wanted the county to provide maintenance of the road.

The Neumeyers filed an equity action for a writ of mandamus to require the county to maintain and improve the EJR. At trial the county argued all of the records indicate the road is not a public road: there is no record of an easement or conveyance, there has not been a dedication or acceptance of the road as a public right-of-way, and there is no evidence the EJR was removed from property tax rolls. Maps dating back to 1938 were presented to portray the various descriptions of the road over the years: in 1938 the road was described as “an unsurfaced road;” in 1952 it was described as a “graded and drained road;” and in 1997 the EJR was not shown as a roadway at all.

The Neumeyers presented evidence of prior owners and prior residents who used the EJR for access to their homes. Others sometimes used the road to visit those living along the road, for access to a wildlife preserve near Lake Rathbun, and for hunting. The Neumeyers testified the United States Corps of Engineers, the Department of Natural Resources (DNR), and the county were using the road to access land owned by the Corps which was located north of their property.

The court determined the Neumeyers failed to prove any damages were caused by the county and dismissed their claim for damages. Although the court noted there was a need for a public roadway to access the Corps' property, it determined the county never acquired the road by easement or by dedication and acceptance. It concluded the EJR was not an established public roadway either by statutory or common law principles.

Public or private road. Neumeyers expressly state they are *not* making a statutory claim or a claim of prescriptive dedication. Neumeyers claim the evidence "clearly shows a dedication by consent of the owners and acceptance by the public, . . . demonstrated by continued use of the road by the public." See *Dugan v. Zurmuehlen*, 203 Iowa 1114, 211 N.W. 986 (1927). They assert the intent to dedicate may be shown by circumstantial evidence and implied [sic] from the conduct of the owner. *Wensel v. Chicago, M & St. P. Ry. Co.*, 185 Iowa 680, 689, 170 N.W. 409, 413 (1919).

Testimony revealed the road has been used by adjoining landowners, people visiting them, an occasional hunter, and some DNR employees. It is a dead-end road,

serving only the families who lived along it. Families along the road did their own snow removal. Occasionally a county plow would help out if someone got stuck or stranded in the snow trying to get out to the public road. Adjoining landowners maintained and rocked the road. One past landowner fenced his land to prevent access to the road. Several times in the past some landowners have sought county maintenance of the road, but the county has refused since it is not a public road. The county did install a culvert in 1993. Neumeyers claim these actions demonstrate dedication by adjoining landowners and acceptance by the county.

The intent to dedicate must be unmistakable in its purpose, and the acts upon which the intent is predicated must be decisive in character. *Dugan v. Zurmuehlen*, 203 Iowa 1114, 1118, 211 N.W. 986, 988 (1927). Acceptance may be demonstrated by public use. However,

The theory of the law is where proof of dedication rests upon user that the essential intention existed at the beginning of the use, and continued through the whole period necessary to evince a conclusive dedication, and the user for the whole time of limitation must necessarily be of right. In other words, it must be something more than a mere license, or merely permissive. In determining the lack of acceptance of dedication by user, sparsity of population and infrequency of travel may be considered. While the uninterrupted use and enjoyment of land as a road or highway by a limited number of persons for a sufficient length of time may establish a private right of way, it is manifest that no dedication or public easement would arise from such user. In order to acquire a public easement, the user must be by the public at large.

Id., 203 Iowa at 1119, 211 N.W. at 989. The evidence presented suggests the usage of this road by other than the adjoining landowners was a license or permissive. Most of the cases cited by Neumeyers are inapposite because they concern individuals who

were trying to prove the road in question was not a public road. They do not concern situations in which the landowner was trying to support classifying the road as a public road.

One exception is *Wensel v. Chicago, M. & St. P. Ry. Co.*, in which a person was killed at a railroad crossing. The plaintiff demonstrated the long public use and maintenance was sufficient to show the road crossing the railroad was a public road, so the railroad was estopped from claiming it was private. *Id.*, 185 Iowa at 688, 170 N.W. at 413. The dirt road in the case *sub judice* received neither the public use nor maintenance received by the road in *Wensel*. The Iowa Supreme Court has stated:

The doctrine announced by our cases is that a dedication of lands for a public highway may not be predicated on anything short of deliberate, unequivocal, and decisive acts and declarations of the owner, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. * * * In order to constitute a dedication, the evidence must be clear, satisfactory, and convincing, and the acts proved must not be consistent with any other construction than that of dedication; and the same rule applies to the acceptance of the dedication. Mere permissive use of a way, no matter how long continued, will not amount to a dedication. The user is presumed to be permissive and not adverse.

Sioux City v. Tott, 244 Iowa 1285, 1294-95, 60 N.W.2d 510, 516 (Iowa 1953) (quoting *Culver v. Converse*, 207 Iowa 1173, 1173, 224 N.W. 834, 835 (1929)) (citations omitted). We conclude the evidence showing use by the public at large is insufficient to support an acceptance by the county.

Writ of Mandamus. Iowa Code chapter 601 governs writs of mandamus which are orders to perform some required act. A person seeking mandamus must prove (1) duty enjoined by law upon the defendant, in the performance of which the plaintiff,

if a private individual, has a personal interest; (2) a breach or non-performance of such duty by the defendant; (3) a legal right in the plaintiff to damages because of such non-performance; and (4) absence of any other adequate remedy in the ordinary course of the law. *Charles Gabus Ford, Inc. v. Iowa State Highway Commission*, 224 N.W.2d 639, 644 (Iowa 1974). The trial court ruled against the Neumeyers and dismissed their claim for damages. They did not appeal that ruling. Consequently, they cannot meet the requirement they have a legal right to damages. The Neumeyers have no right to mandamus. Even if they could demonstrate a right to damages, mandamus will lie to compel performance of an act which the law enjoins as a duty of public office, but cannot control discretion unless the official actor is shown to have acted arbitrarily or capriciously. Iowa Code §661.2; *Reed v. Gaylord*, 216 N.W.2d 327, 331 (Iowa 1974). The Neumeyers have not demonstrated the county acted arbitrarily or capriciously.

AFFIRMED.

No. 97-2076. [9-009] NEUMEYER v. APPANOOSE COUNTY

Appeal from the Iowa District Court for Appanoose County, Daniel P. Wilson, Judge. **AFFIRMED.** Considered by Vogel, P.J., Zimmer, J., and Peterson, S.J. Opinion by Peterson, S.J. (6 pages \$2.40)

The Neumeyers filed a petition for money damages and for a writ of mandamus concerning the Everett Jones Road (EJR), which runs through their property. The road has been a point of controversy for years. Previous landowners have attempted to have the county improve and maintain the road, but the county never agreed to do so. The Neumeyers wanted the county to provide maintenance of the road. The court determined the Neumeyers failed to prove any damages were caused by the county and dismissed their claim for damages. It determined the county never acquired the road by easement or by dedication and acceptance. It concluded the EJR was not an established public roadway either by statutory or common law principles. The evidence presented suggests the usage of this road by other than the adjoining landowners was a license or permissive. We conclude the evidence showing use by the public at large is insufficient to support an acceptance by the county. A person seeking mandamus must prove (1) duty enjoined by law upon the defendant, in the performance of which the plaintiff, if a private individual, has a personal interest; (2) a breach or non-performance of such duty by the defendant; (3) a legal right in the plaintiff to damages because of such non-performance; and (4) absence of any other adequate remedy in the ordinary course of the law. The trial court ruled against the Neumeyers and dismissed their claim for damages. They did not appeal that ruling. Consequently, they cannot meet the requirement they have a legal right to damages. The Neumeyers have no right to mandamus.