STATE OF MICHIGAN

COURT OF APPEALS

SARAH RICHARDS and WILLIAM BURKE, Personal Representatives of the Estate of FAITH BURKE, Deceased,

Plaintiffs-Appellants,

v

LYN BELL and JACK TRIESTRAM,

Defendants-Appellees,

and

KALAMAZOO COUNTY ROAD COMMISSION,

Defendant.

UNPUBLISHED
December 11, 1998

No. 204695
Kalamazoo Circuit
LC No. 95-003110 NO

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal by right an order granting summary disposition in favor of defendants Bell and Triestram.[1] We affirm.

Plaintiffs represent the estate of Faith Burke, who was killed when the vehicle she was driving struck a tree lying across the road at the edge of defendants' property. Plaintiffs sought recovery from both the defendant landowners and the county road commission. The sole issue raised on appeal is whether defendant landowners owed a duty to maintain the tree.

The tree fell across VanKal Avenue from property jointly owned by defendants. Before it fell, the tree stood a short distance from the edge of the pavement, but within thirty-three feet of the center line of the road. Defendants purchased the property around 1990, at which time the tree was present in the same location. Subsequently, defendants did nothing to maintain or care for the tree. Defendants had, however, contacted the road commission and informed it about the deteriorating condition of the

tree. The road commission came out to the property and serviced the tree by "topping" it (trimming the tree above the top), but did not completely remove it.

The trial court ruled that the county road commission owned and maintained a thirty-three-foot easement over defendants' land and consequently granted summary disposition in favor of defendants Bell and Triestram. Although the trial court's decision was made at a time when the state of the law was unsettled, we affirm the grant of summary disposition under the now clearly controlling authority of *City of Kentwood v Sommerdyke Estate*, 458 Mich 642; 581 NW2d 670 (1998).

Summary disposition is appropriate in a negligence action if based on undisputed facts it is determined that, as a matter of law, the defendants did not owe a duty to the plaintiff. See *Smith v Kowalski*, 223 Mich App 610, 613; 567 NW2d 463, 465 (1997) (applying MCR 2.116(C)(8)). In the present case, the issue whether a duty was owed by defendants is governed by the highway-by-user statute, MCL 221.20; MSA 9.21, which provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

Under the statute and its construction in *Kentwood*, *supra*, a highway width of sixty-six feet is presumed. In the present case, defendants presented documentation attesting to their lack of care and maintenance of the tree, and plaintiffs introduced no evidence suggesting otherwise. Therefore, the presumption has not been rebutted. Because no genuine issue of fact was raised, we agree with the lower court that as a matter of law the county's easement extends thirty-three feet onto defendants' property.

Furthermore, even if we were to adopt plaintiffs' argument that the width of the easement is limited to its use, the county's easement would extend at least to the tree. Defendants presented testimony that they had called the road commission to inform the county about the deteriorating condition of the tree and that a neighbor had observed someone from the road commission performing work on the tree before the accident. In the lower court, plaintiffs failed to present any evidence disputing the road commission's work on the tree, and have not argued that this maintenance was insufficient in nature to demonstrate use. The road commission's maintenance of the tree is a use sufficient to put the landowners on notice that there is a claim adverse to their title. *Rigoni v Michigan Power Co*, 131 Mich App 336, 347; 345 NW2d 918 (1984). Therefore, even if limited to the extent of use, the VanKal Avenue right-of-way is at least as wide as the tree's location.

The second premise underlying the *Kentwood* decision was the Court's characterization of the effected transfer as an implied dedication resulting in the loss of all property rights. *Kentwood, supra* at 664. Although some of the cases discussed in *Kentwood* refer to the transferred interest as impliedly dedicated, others speak of the resulting public right-of-way as an easement. The result is the same whether the transfer is an easement or in fee.

Plaintiffs assert that the owners in fee of the property retain the duty to maintain the easement. However, in the present case defendants presented uncontested testimony that they made no efforts to possess or control the land and tree, and that upon recognizing the potential danger presented by the tree, they contacted the road commission, which they understood held possession and control. The undisputed testimony established that the road commission was the only party who exerted control and possession of the land and tree. Therefore, defendants owed no duty.

Prior to *Kentwood*, this Court has ruled that:

> Owners of land abutting a street are presumed to own the fee to the property all the way to the center of the street, subject to the easement of public way.
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> . . . The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights. . . . However, it is the owner of an easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." [*Morrow v Boldt*, 203 Mich App 324, 329-330; 512 NW2d 83 (1994)] [citations omitted].

Accordingly, even if the county's interest were classified as an easement, no duty to maintain the right-of-way would rest with defendants.

Finally, plaintiffs claim that despite the weight of precedent holding there to be no duty owed by the owners of a servient estate to maintain an easement in safe condition, public policy demands that the fee owners bear such responsibility. In light of *Kentwood*, we disagree and decline to create such a duty.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] All claims against the Kalamazoo County Road Commission were dismissed pursuant to a court-approved settlement.