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

GATCHBY PROPERTIES, L.P.,

Plaintiff-Appellant,

v

ANTRIM COUNTY ROAD COMMISSION, HELENA TOWNSHIP, ASSOCIATION FOR THE PRESERVATION OF PUBLIC ACCESS, and MICHAEL CRAWFORD,

Defendants-Appellees,

and

ISABEL AMERSON

Defendant.

UNPUBLISHED
April 25, 2006

No. 258909
Antrim Circuit Court
LC No. 97-007232-CH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals as of right from a judgment for defendants following a bench trial. We affirm.

The basic facts in this case are straightforward. The parties dispute whether a parcel of property on Torch Lake in Antrim County belongs in the private or public domain. Plaintiff maintains that it owns the parcel, whereas defendants contend that the parcel is part of a public road providing access to Torch Lake for members of the general public. The dispute arose some years ago and has found itself in this Court twice in the past. In *Gatchby Properties, LP v Antrim Co Rd Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2000 (Docket No. 217417) (*Gatchby I*), this Court ruled that defendants were unable to show a valid condemnation of the property because there was no "presumption of regularity" with regard to the record requirements of the condemnation statute then in effect. *Id.,* slip op at 2-3. The Court held that the trial court should not have granted summary disposition to defendants with regard to the issue of condemnation and that *plaintiff* was entitled to summary disposition with respect to the issue. *Id.,* slip op at 2. The Court further held that "the trial court erred to the extent that it denied plaintiff's motion for summary disposition with regard to the affirmative defense of common law dedication and formal acceptance . . . [but it] properly denied the motion

with respect to the defense of common law dedication and informal acceptance." *Id.,* slip op at 4. The Court remanded the case to the trial court for further proceedings. *Id.,* slip op at 5.

After each side sought an appeal in the Supreme Court, that Court remanded the case to this Court and ordered that this Court

> address the question whether the trial court's grant of summary disposition [to defendants] must be affirmed because the plaintiff, on appeal, failed to challenge the rationale relied on by the trial court, that plaintiff was barred from challenging the regularity of the condemnation proceedings for the reasons set forth in *DeFlyer v Oceana Co Rd Comm'rs,* 374 Mich 397, 402; 132 NW2d 92 (1965).[1] [*Gatchby Properties, LP v Antrim Co Rd Comm'n,* 465 Mich 886, 886; 636 NW2d 138 (2001) (*Gatchby II*).]

This Court, on remand, ruled that "plaintiff has incurred no such procedural default requiring affirmance." *Gatchby Properties, LP v Antrim Co Rd Comm'n (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2002 (Docket No. 217417) (*Gatchby III)*, slip op at 2. However, the Court expanded the scope of its earlier remand, stating:

> In our initial opinion . . . we rejected the application of a presumption of regularity, and concluded that absent such a presumption, defendants were unable to show a valid condemnation, and therefore plaintiff was entitled to judgment on this affirmative defense. . . . *DeFlyer* raises a different issue -- whether plaintiff should be estopped from challenging the regularity or validity of the proceeding (with respect to the south half of the road) based on its predecessor signing the petition. The application of *DeFlyer's* estoppel doctrine rests on the premise that plaintiff's predecessor did in fact sign the petition. Plaintiff argues that this cannot be established without applying a presumption of regularity to the condemnation proceeding. We conclude, however, that while a condemnation proceeding that does not comply with the applicable statute on its face cannot be established based on a presumption of regularity, the Main document[2] may be

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[1] In *DeFlyer, supra* at 402, the Court stated:

> Furthermore, we hold that plaintiffs are not in a position to challenge the validity of the laying out proceedings in 1915 for lack of service of notice of hearing by the commissioner because the then owners of plaintiffs' land signed the application or petition therefor. Also, their action in that respect was the equivalent of at least a common law if not a statutory dedication of the strip for highway purposes, thus rebutting plaintiffs' complaint of lack of conveyance or dedication of the strip by the property owners. We agree with defendant that said section 20 of the act bars plaintiffs, after more than 8 years of use without objection by them, from now challenging the regularity of the 1915 proceedings.

[2] The "Main document" refers to an 1897 document signed by a former highway commissioner,
(continued…)

considered as evidence bearing on the question whether plaintiff's predecessor signed the application and *DeFlyer* applies. However, because the actual petition has not been presented, defendants cannot show that as a matter of law they are entitled to *DeFlyer* estoppel.

Thus, we expand the scope of our earlier remand. In addition to recognizing the existence of genuine issues of material fact relating to the defense of common-law dedication, we recognize the existence of a genuine issue relating to *DeFlyer* estoppel. *If the trier of fact concludes that plaintiff's predecessor in title to the south half of the alleged road signed the application, the circuit court shall grant judgment to defendants on the condemnation affirmative defense as to that portion of the property.* If the trier of fact does not so conclude, the circuit court shall grant judgment to plaintiff on the affirmative defense of condemnation. [*Gatchby III, supra,* slip op at 7 (emphasis added).]

The trial court, on remand, found that defendants were indeed entitled to the "33 feet of the road south of the section line[]." The court stated:

The evidence supporting that Jacob E. Decker and William Amerson [the 1897 owners of the southern half of the parcel] signed the application to lay out the road is Defendant's Exhibit 14, the record of the report of the Helena Township Highway Commissioner John F. Main. That record recites that various freeholders signed the application to lay out the road including specifically William Amerson and Jacob E. Decker.

The original of the application, which is said to accompany the report, is not in the record book . . . .

It is known, however, that this 1897 report by Mr. Main is bound in the record book and is at a chronologically appropriate location immediately between the reports of the Highway Commissioner, Mr. Main, laying out roads in the preceding and succeeding years. This tends to corroborate the genuineness of the Highway Commissioner's report in this case. The likelihood of it being an after-the-fact fabrication is minimal.

The likelihood of it being a fraud created at the time, in 1897, is also slim. It was in the official records of Helena Township and listed numerous local property owners as having petitioned for the road. If this was in fact fraudulently fabricated at the time, the risk of its detection, located in a public record maintained by the Township, would seem high. This makes it very likely that the facts recited in this report are true, i.e., Decker and Amerson were among the petitioners to lay out this road as recited in the Highway Commissioner's report.

(…continued)

John Main. In this document, Main indicated that the 1897 owners of the southern half of the disputed parcel were among those who petitioned for condemnation of the property.

> There was a suggestion that this Highway Commissioner's report was not genuine because it was not written by Mr. Main in his own hand. . . . I [find] that this was in fact a genuine official recorded copy of the Highway Commissioner's report. . . . It seems inescapable that in this township, prior to copy machines or even typewriters, the official record was in fact maintained in the possibly more legible hand of a clerk.

The court also found that Amerson acquired property north of the southern portion of the property and, in recording and platting the property, designated an area as "highway." The court stated, "This shows that William Amerson knew of the attempt to lay out the road and corroborates the authenticity of the Highway Commissioner's report, Defendants' Exhibit 14, and the statements therein." In summation, the court found that "[p]laintiff's attempt to contest the dedication and laying out of the 33 feet of the road lying south of the section line is barred by estoppel under *DeFlyer* . . . . The court stated, "Pursuant to the Court of Appeals remand and *DeFlyer, supra,* the Defendants are the owners in fee title of 33 feet south of the extended section line between sections 4 and 9."

Plaintiff argues that the Main document should not have been allowed into evidence because it was not properly authenticated and constituted inadmissible hearsay. The trial court concluded that the document was authenticated under MRE 901(b)(8) and (b)(7) and that it fell within multiple hearsay exceptions. We agree that the document was authenticated and that it fell within an exception to the rule excluding hearsay.

We review a trial court's decision to admit evidence for an abuse of discretion. *Campbell v Sullins,* 257 Mich App 179, 196; 667 NW2d 887 (2003).

MRE 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(b)(8) lists the following as an example of authentication conforming with the rule:

> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

MRE 901(b)(7) lists another example of proper authentication:

> Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

The document at issue was properly authenticated. With regard to MRE 901(b)(8), we note that the document was located in a place where, if authentic, it would likely be, i.e., in a bound volume of documents at the township hall. It was also "in such condition as to create no suspicion concerning its authenticity." MRE 901(b)(8). While plaintiff emphasizes that the Main document refers to attached documents that are not in fact attached and is followed by an

allegedly "suspicious" tear in the bound volume, the fact remains that, as stated by the trial court, the document was "bound in a volume between two other handwritten documents of the same type that are dated 1896 and 1898." This lent support to a finding of authenticity. As also noted by the trial court:

> If this was a fabrication, it must have been fabricated at about the time that the date reads, which is 1897. That is unlikely. The motive to fabricate those kinds of documents would seem to be more recent, when road ends become [sic] very valuable, and not in 1897, when they were a dime a dozen.

We agree with this sentiment. Moreover, we do not agree with plaintiff that the document cannot be authenticated because it was likely written in handwriting other than John Main's and signed by someone other than John Main. It is probable that a clerk or assistant transcribed the document at the direction of John Main. Indeed, a witness testified that transcribers were often used to prepare documents such as the Main document. Finally, the document had been in existence for twenty years or more at the time it was offered into evidence. MRE 901(b)(8). Thus, the trial court properly concluded that the Main document was properly authenticated in accordance with MRE 901(b)(8). Although we need not reach the issue, the document was also properly authenticated under MRE 901(b)(7), because it was "a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office" and was "from the public office where items of this nature are kept." The court rule does not require that such a document be signed. We find no basis for reversal with regard to this issue of authentication.

The document was also admissible under the hearsay court rules. Under MRE 802, "Hearsay is not admissible except as provided by these rules." "Hearsay" is defined under MRE 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(b) defines "declarant" as "a person who makes a statement." MRE 801(a) defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 805 states, "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Plaintiff contends that the Main document involves multiple levels of hearsay that do not fall within any exceptions to the rule excluding hearsay. We do not agree. The pertinent "matter asserted" in the main document is that Amerson and Decker signed an application for the laying out of a road. The declarant of this matter asserted was Main. Main made this declaration by way of a document that was authenticated, as discussed above, and that was in existence for twenty or more years. As noted in MRE 803(16), "[s]tatements in a document in existence twenty years or more the authenticity of which is established" are not excluded by the hearsay rule. Accordingly, Main's statement was admissible.[3] Plaintiff argues that another level of

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[3] The trial court concluded that the document was admissible under several hearsay rules, including MRE 803(16). We need not decide whether the additional rules cited by the trial court were applicable.

hearsay arises from the likely fact that, according to the available evidence, someone other than Main himself (such as a clerk or secretary) likely wrote and signed the Main document. We conclude, however, that this point is relevant to authenticity, not hearsay, and we have resolved the authenticity issue above.

Plaintiff also asserts that the alleged fact that Amerson and Decker signed the application to lay out the road was a statement in itself subject to the hearsay rule. In other words, plaintiff contends that even if Main's statement in the document was admissible under the ancient document exception, we must also resolve the admissibility of Amerson and Decker's "statement" (the signing of the application) that Main was discussing in the Main document. We conclude, however, that Main's statement about Amerson and Decker was akin to a personal observation and that there was no hearsay-within-hearsay situation in this case.

Plaintiff also argues that the Main document was inadmissible under MRE 1002, which states: "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." Plaintiff contends that, under this rule, defendants must produce the original application signed by Amerson and Decker. However, MRE 1005 states that "other evidence of the contents" of an official record "may be given" if a proper copy "cannot be obtained by the exercise of reasonable diligence." Given that the application was completed over one hundred years ago, we conclude that a copy "cannot be obtained by the exercise of reasonable diligence." *Id.* The Main document was sufficient to prove that Amerson and Decker signed the application.[4]

The trial court properly admitted the Main document into evidence; concluded that "plaintiff's predecessor in title to the south half of the alleged road signed the application" for the laying out of a public road; and properly, therefore, "grant[ed] judgment to defendants on the condemnation affirmative defense as to" the southern half of the disputed property. *Gatchby III, supra,* slip op at 7.

With regard to the northern half of the disputed property, the trial court found that defendants had an easement over it by way of common-law dedication and informal acceptance. We find no basis for reversal with regard to this finding.

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[4] The dissent states that we have "missed the point of . . . this Court's remand in *Gatchby III*." We respectfully disagree. We clearly set forth the pertinent language from the *Gatchby III* remand order earlier in this opinion: "If the trier of fact concludes that plaintiff's predecessor in title to the south half of the alleged road signed the application, the circuit court shall grant judgment to defendants . . . ." *Gatchby III, supra,* slip op at 7. As stated in footnote 2, *supra,* "[t]he 'Main document' refers to a 1897 document signed by a former highway commissioner, John Main. In this document, Main indicated that the 1897 owners of the southern half of the disputed parcel were among those who petitioned for condemnation of the property." By finding that the Main document was properly submitted into evidence, we are also concluding that there exists proper evidence that Amerson and Decker signed the application to lay out the road. Indeed, we fail to understand how Amerson and Decker could have "petitioned for condemnation of the property" – as stated by Main – without signing such an application. The signing of the petition is a necessary implication from Main's statement.

We review a trial court's factual findings for clear error. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55, 98; 535 NW2d 529 (1995).

As stated in *Bain v Fry,* 352 Mich 299, 305; 89 NW2d 485 (1958):

> In order to have a common law dedication there must be: (1) an intent by the owners of the property to offer it to the public for use; (2) there must be acceptance of this offer by the public officials and maintenance of the alley, street or highway by the public officials; (3) there must be a use by the public generally.

The trial court noted that, when William Amerson applied to lay out a public road on the southern half of the disputed property in 1897, "he had no interest in the property north of the section line." The court stated that, in 1904, William Amerson and his wife, Madge, "acquired the property north of the section line and in that same year laid out the plat of Maybloom Beach . . . which showed the 33 feet north of the section line as a 'highway.'" The court stated, "These facts are evidence of an informal offer of dedication of the 33 feet north of the section line as a public road."

Plaintiff argues that William Amerson and the "W.H. Amerson" who laid out the plat of Maybloom Beach were not the same person. Plaintiff points out that William Amerson took sole title to the southern tract in 1903, and then, in 1904, W.H. Amerson and Madge Amerson took title to the northern tract as husband and wife in a joint tenancy. Thereafter, "William Amerson, widower," transferred title to the southern tract, and, later, W.H. and Madge Amerson transferred title to the northern tract. Plaintiff contends that William and W.H. Amerson cannot be the same person because "it is a legal impossibility for the same person to be married to Madge in 1904, widowed as of 1916, and then married to Madge again in 1922." Plaintiff's argument is not persuasive. Indeed, it is entirely possible that William/W.H. Amerson had a wife who died before 1904 and that, when he transferred his ownership of the southern tract, he was referred to as a widower because of this deceased wife (even though he had subsequently married Madge). The court concluded that W.H. and William Amerson were the same person because subsequent entries in the abstract of title indicated that "W.H." was also "Wm. H." The court stated:

> It is unlikely that there would be a "William Amerson" and a "Wm. H. Amerson" owing [sic] adjoining parcels at the same time in the same small township in northern Michigan and being different people. I find that William Amerson who signed the application to lay out the road was in fact the "W.H. Amerson" who with his wife, Madge, platted the plat of Maybloom Beach."

Under the circumstances, we simply cannot conclude that the trial court committed clear error in coming to this conclusion. We are not left with "a definite and firm conviction that a mistake was made." *Hofmann, supra* at 99. The trial court did not clearly err in finding "an intent by the owners of the property to offer it to the public for use." *Bain, supra* at 305.

With regard to the acceptance of the offer, the court relied on Road Commission records showing that the Board of Road Commissioners adopted a resolution taking over "the final 20 percent of township roads" and that this final "20 percent" specifically included the property in question. This evidence did indeed demonstrate an acceptance of the offer of dedication. See,

e.g., *Christiansen v Gerrish Twp*, 239 Mich App 380; 608 NW2d 83 (2000), and *Kraus v Dep't of Commerce,* 451 Mich 420; 547 NW2d 870 (1996). We hold, contrary to plaintiff's argument, that the acceptance, albeit not totally precise in describing the parameters of the road, contained sufficient specificity to be valid, given that it was coupled with evidence that the county certified the road in its entirety for maintenance funding. Moreover, the trial court correctly found that ample evidence was presented at trial that public authorities spent time maintaining the road. Indeed, numerous individuals testified about maintenance that they performed on the parcel while working for the government. Under the circumstances, the trial court did not clearly err in finding that there had been "maintenance of the alley, street or highway by the public officials." *Bain, supra* at 305. We note that maintenance of part of a road can constitute an acceptance of the entire road, *DeFlyer, supra* at 401-402, and that constant maintenance need not be proven to establish an acceptance of a dedication. *Pulleyblank v Mason Co Rd Comm'n,* 350 Mich 223, 229; 86 NW2d 309 (1957).

The trial court also found that there had been "use [of the road] by the public generally." *Id.* This finding was not clearly erroneous because multiple witnesses testified at trial about using the road.

In sum, the trial court did not clearly err in finding that there had been a common-law dedication and informal acceptance with regard to the northern half of the disputed parcel.[5] The trial court was remarkably detail-oriented and conscientious in making its rulings in this case, and we find no basis to reverse its decision.

Affirmed.

/s/ Patrick M. Meter
/s/ Bill Schuette

[5] We find it unnecessary to decide whether a common-law dedication and informal acceptance occurred with respect to the southern half of the parcel, because, as noted above, defendants have prevailed with regard to their *DeFlyer* argument. We further note that we reject plaintiff's unsupported suggestion that defendants cannot prevail in this lawsuit because there is no evidence that the parcel was granted to defendants as one undivided piece of property.

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

GATCHBY PROPERTIES, L.P.,

Plaintiff-Appellant,

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ANTRIM COUNTY ROAD COMMISSION, HELENA TOWNSHIP, ASSOCIATION FOR THE PRESERVATION OF PUBLIC ACCESS, and MICHAEL CRAWFORD,

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Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent. The majority concludes that "the Main document" was authenticated and that it fell within an exception to the rule excluding hearsay. I agree with neither conclusion. More importantly, however, I conclude that the both majority and the trial court have missed the point of the Supreme Court's remand in *Gatchby II*[1] and of this Court's remand in *Gatchby III*.[2] I would therefore reverse and remand for entry of judgment for plaintiff on the affirmative defense of condemnation.

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[1] *Gatchby Properties, LP v Antrim Co Rd Comm'n*, 465 Mich 886; 636 NW2d 138 (2001).

[2] *Gatchby Properties, LP v Antrim Co Rd Comm'n* (*On Remand*), unpublished opinion per curiam of the Court of Appeals, issued March 5, 2002 (Docket No. 217417).

I. The Supreme Court's Remand In *Gatchby II*

A. *DeFlyer* Estoppel

The Supreme Court's remand in *Gatchby II* revolved around the possible application of "*DeFlyer* estoppel." *DeFlyer* involved a disputed piece of land in Oceana county known as the "stub road." In 1915, the plaintiffs' predecessors in interest signed and filed a written application to "lay out a highway" over the stub road.[3] However, the plaintiffs, by way of a 1921 deed, claimed ownership of the stub road while the defendant claimed it was part of the highway laid out in 1915.[4] In 1961, the defendant began doing work on the stub road, and the plaintiffs sued to enjoin that work. The trial court dismissed the complaint, and the plaintiffs appealed.[5]

The Supreme Court found that the trial court was correct in finding that there was sufficient use and expenditure "on the part of the road west of plaintiffs' premises . . . to constitute a full acceptance of the full length of the road . . . ."[6] The Supreme Court went on to hold that

> plaintiffs are not in a position to challenge the validity of the laying out proceedings in 1915 for lack of service of notice of hearing by the commissioner *because the then owners of plaintiffs' land signed the application or petition therefor*. Also, their action in that respect was the equivalent of at least a common-law if not a statutory dedication of the strip for highway purposes, thus rebutting plaintiffs' complaint of lack of conveyance or dedication of the strip by the property owners. We agree with the defendant that said section 20 of the act bars plaintiffs, after more than 8 years of user without objection by them, from now challenging the regularity of the 1915 proceedings. While the county road commissioners' action under the McNitt act could not deprive plaintiffs of title, it is indicative of the understanding by the township and county officials, at least, that the disputed strip was part of the township's highway system. This is precisely what plaintiffs' predecessors in title had wanted and asked for in their 1915 petition or application.[7]

Thus, there are two elements of *DeFlyer* estoppel. The first is the signature of plaintiffs' predecessor in interest on an application or petition. The second is the passage of time. The latter is not an issue in this case. The former most certainly is.

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[3] *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 398-399; 132 NW2d 92 (1965).

[4] *Id*. at 399.

[5] *Id*. at 400.

[6] *Id*. at 401.

[7] *Id*. at 402 (emphasis supplied, citations omitted).

B. The Language Of The Remand In *Gatchby II*

In its remand in *Gatchby II*, the Supreme Court asked us to address the question whether the trial court's original grant of summary disposition to the defendants must be affirmed. Specifically it asked us to consider whether plaintiff was barred from challenging the regularity of the condemnation proceedings "for the reasons set forth in *DeFlyer* . . . ."[8] Thus, on remand, this Court of necessity was required to consider whether there was a *signature* of plaintiff's predecessor in interest on the application at issue in this case.

II. This Court's Remand In *Gatchby III*

This Court's remand in *Gatchby III* first discussed *DeFlyer* estoppel and stated that it involved a different issue than that addressed in this Court's original opinion: "whether plaintiff should be estopped from challenging the regularity or validity of the proceeding (with respect to the south half of the road) based on its predecessor *signing* the petition."[9] This Court then concluded that "[t]he application of *DeFlyer's* estoppel doctrine rests on the premise that plaintiff's predecessor did in fact *sign* the petition."[10] Thus, this Court explicitly recognized that the *signature* of plaintiff's predecessor in interest on the petition is the central factual issue in this case.

Accordingly, this Court expanded the scope of its earlier remand. It concluded that there was a genuine issue relating to *DeFlyer* estoppel and instructed that:

> If the trier of fact concludes that plaintiff's predecessor in title to the south half of the alleged road *signed* the application, the circuit court shall grant judgment to defendants on the condemnation affirmative defense as to that portion of the property. If the trier of fact does not so conclude, the circuit court shall grant judgment to plaintiff on the affirmative defense of condemnation.[11]

Thus, this Court's instructions to the trial court were crystal clear: the trial court was to determine whether plaintiff's predecessor in interest *signed* the application in question.

III. The Trial Court's Opinion

The trial court begins its discussion of *DeFlyer* estoppel by stating that "[t]he evidence supporting that Jacob E. Decker and William Amerson signed the application to lay out the road is Defendants' Exhibit 14, the record of the report of the Helena Township Highway commissioner John F. Main. That record recites that various freeholders signed the application to lay out the road including specifically William Amerson and Jacob E. Decker."

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[8] *Gatchby II*, *supra* at 886.

[9] *Gatchby III*, *supra* at 7 (emphasis supplied).

[10] *Id*. (emphasis supplied).

[11] *Id*. (emphasis supplied).

However, the trial court then states that the application is not itself in the record book. (Indeed, as plaintiff points out, not only is the application itself entirely missing, so is any copy of the "written notice" to which the Main document refers as well as the affidavit of service to which it also refers). The trial court then goes on to note that the Main document is "bound in the record book and is at a chronologically appropriate location" and finds the likelihood of "it"—apparently referring to the Main document—"being an after-the-fact fabrication is minimal." The trial court goes on to conclude that the "likelihood of it"—again apparently referring to the Main document—"being a fraud created at the time, in 1897, is also slim." The trial court then states that "[t]his makes it very likely that the facts recited in this report are true, i.e. Decker and Amerson were among the petitioners to lay out this road as recited in [Main's report]."

The trial court turns to the question of whether the Main document was genuine because "it was not written by Mr. Main in his own hand" and states that "[i]t seems inescapable that in this township, prior to copy machines or even typewriters, the official record was in fact maintained in the possibly more legible hand of a clerk." The trial court then states that "[t]here is additional evidence which corroborates that William Amerson was a petitioner for laying out the road." This evidence was the fact that W.H. Amerson and spouse Madge Anderson acquired an adjoining property. The trial court concludes that it is unlikely that there would be a William Amerson and a W.H. Amerson owning adjoining parcels at the same time in the same small township in northern Michigan while being different people. On this basis, the trial court finds that the "William Amerson who signed the application to lay out the road was in fact the 'W.H. Amerson' who with his wife, Madge, platted" the adjoining property.

There is only one problem with this reasoning: there is no evidence whatsoever that William Amerson—or for that matter W.H. Amerson, whether the same or a different person—actually *signed* the application. As I have noted, the petition itself is entirely absent from the record. Further, the Main document only refers to "the application hereto attached of William Amerson [and others]." There is no reference in the Main document to a *signature* on that application.

Thus, it is readily apparent that the trial court did not—and could not—comply with this Court's remand in *Gatchby III*. Based on the record before it, the trial court could not determine whether plaintiff's predecessor in interest *signed* the application in question. The reason for this is straightforward: the application itself is nowhere in the record, and the Main document does not tell us whether Amerson actually signed the application. Therefore, *DeFlyer* estoppel could not apply because an essential element—a signature—is missing. Under such circumstances, the trial court could only take one action. By the explicit language of the *Gatchby III* remand, the trial court—since it could not conclude based on the evidence before it that Amerson actually signed the application—was required to grant judgment to plaintiff on the affirmative defense of condemnation. Its failure to do so was an abuse of discretion.

IV. The Majority's Opinion

The majority responds to this dissent by stating, "By finding that the Main document was properly submitted into evidence, we are also concluding that there exists *proper evidence* that Amerson and Decker signed the application to lay out the road."[12] There is no such evidence, proper or otherwise. Indeed, the Main document does not say that Amerson and Decker signed the application. The Main document, to the extent that it is legible, appears to refer to an "application hereto attached of William Amerson, Jacob C. Decker, [et al]."[13] There is no indication whatsoever that Amerson actually signed the application.

Notably, the majority then goes on to say that "The signing of the petition is a necessary implication from Main's statement." I think not. One could as easily infer that Amerson did *not* sign the application, but that Decker or someone else submitted it in his name, as well as the names of the others listed. In any event, an implication is not evidence. But it is on this, and apparently this alone, that the majority bases its decision as it relates to the signature requirement. This satisfies neither the Supreme Court's remand in *Gatchby II* nor this Court's remand in *Gatchby* III.

I would therefore reverse and remand with instructions to the trial court to grant judgment to plaintiff on the affirmative defense of condemnation.

/s/ William C. Whitbeck

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[12] *Ante* at___(emphasis supplied).

[13] *Id.*