

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**KEITH BARTHEL and DOROTHY  
BARTHEL, husband and wife,**

Plaintiffs,

vs.

**SWAN TOWNSHIP and DALE DOLITTLE,  
DALE MITCHELL, and BRYAN  
WOLCOTT, being the present members of  
the Swan Township Board of Holt County,  
Nebraska,**

Defendants.

Case No. CI00-82

**JUDGMENT**

**DATE OF TRIAL:** February 12, 2001 (deemed as submitted on February 13, 2001, pursuant to stipulation).

**DATE OF RENDITION:** February 28, 2001.

**DATE OF ENTRY:** Date of filing by court clerk per§ 25-1301(3).

**APPEARANCES:**

For plaintiffs: No appearance for receipt of stipulation in evidence; on brief, Richard E. Gee.

For defendants: No appearance for receipt of stipulation in evidence; on brief, James D. Gotschall, of Strope, Krotter & Gotschall, P.C.

**SUBJECT OF JUDGMENT:** Judgment upon written stipulation of facts.

**PROCEEDINGS:** See journal entry for February 12, 2001.

**MEMORANDUM:**

1. The plaintiffs seek a peremptory writ of mandamus to compel the defendant board members to repair and maintain a road. The individual defendants are the township board members of defendant Swan Township. The proper corporate name of that defendant is the Town of Swan. NEB. REV. STAT. § 23-219 (Reissue 1997). However, the parties refer to the corporate defendant as Swan Township, and for the sake of convenience, this court also does so. The County of Holt operates under

township organization. NEB. REV. STAT. § 23-201 (Reissue 1997). The county properly created Swan Township. NEB. REV. STAT. § 23-209 (Reissue 1997).

2. The parties submit the matter upon a written stipulation which appears in the court file. On the court's own motion, at a hearing not attended by the parties, the written stipulation was marked as Exhibit 1 and formally received in evidence. Various attachments to Exhibit 1 are also designated as "exhibits" with alphabetic designations, two of which duplicate the same letter and one of which has no letter designation. The official court reporter has sequentially numbered Exhibit 1 with all attachments, the entire exhibit consisting of 47 pages. Neb. Ct. R. of Prac. 5B(6)c (rev. 2000). This court will refer to the stipulation and attachments by the evidence exhibit number, i.e., E1, and the page number(s) thereof.

3. The road for which the plaintiffs seek the writ runs mainly across a private prescriptive easement over land belonging to two of plaintiffs' neighbors, from a county or township road on the east end and thence westerly to the boundary between the plaintiffs' land and the neighbors' land. From the boundary, the road runs a short distance further westerly over land belonging to the plaintiffs to the plaintiffs' residence. The plaintiffs obtained this easement by prescription, and the easement was legally recognized by a decree entered by this court on June 6, 1996, in Case No. 20004, entitled "Keith Barthel and Dorothy Barthel, husband and wife, plaintiffs, vs. Gene Liermann and Erna Liermann, husband and wife, defendants." E1 at 21-26 (attachment C). Neither Swan Township nor the County of Holt were parties to that case. The decree was modified in minor respects within term by an order entered on October 21, 1996. E1 at 27-30 (attachment D).

4. The plaintiffs originally paid for the road installation, incurring a considerable expense. E1 at 2 (¶ 6). When the plaintiffs built the road, Swan Township paid for three culverts and gravel for the road surface. E1 at 2 (¶ 8). After that time, Swan Township paid for most of the repairs and maintenance to the road. E1 at 2 (¶¶ 8-9). At some point, certainly prior to January 25, 2000, one of the plaintiffs' neighbors told the Holt County Board that a lawsuit would be filed if public money was used to repair the road. E1 at 2 (¶ 10). Thereafter, the township board has declined to repair the road. *Id.*

5. Swan Township has consistently and continually used taxpayer dollars to provide maintenance to all in-roads located in Swan Township which provide primarily access to the landowners'

residence and out-buildings. E1 at 3 (¶ 13). These have included both public roads, whether designated as mail roads or non-mail roads, and private roads. E1 at 4 (¶ 14).

6. Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000).

7. To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *Id.* Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.* In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

8. The last paragraph of the plaintiffs' brief asserts, for the first time, a constitutional claim of violation of equal protection. The plaintiffs' petition raises no such claim. The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what the adversary must meet. *In re Interest of Sabrienia B.*, 9 Neb. App. 888, \_\_\_ N.W.2d \_\_\_ (2001). The issues in a given case will be limited to those which are properly pled. *Id.* A court may not enter judgment on an issue not presented by the pleadings. *Id.* The pretrial order did not expand the issues, referring directly to the pleadings to identify the issues. *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995) (issue identified in pretrial order appropriate even where not raised in pleading). The law precludes this court from considering the equal protection argument.

9. The considerations of legal right and legal duty inherent in the mandamus analysis depend upon the nature of the powers and duties of the town and its board.

10. The Nebraska Constitution expressly contemplates township organization of local government. “The Legislature shall provide by general law for township organization . . . .” Neb. Const. art. IX, § 5.

11. In a county operating under township organization, the town is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature. *State v. Bone Creek Tp.*, 109 Neb. 202, 190 N.W. 586, *rehearing denied*, 109 Neb. 202, 193 N.W. 767 (1922). The distinguishing feature of township organization lies in the application of the principle of local self-government. *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895). It is the regulation of purely local affairs by the townships and the local officers thereof, and not the constitution of the county board, which distinguishes the township system. *Id.*

12. A township in counties under township organization is a municipal corporation within the meaning of article VIII, § 6, of the Nebraska Constitution. *Chicago, B. & Q. R.R. Co. v. Klein*, 52 Neb. 258, 71 N.W. 1069 (1897). It is an independent corporate entity, authorized by the constitution and vested by the legislature with power to assess taxes upon all the property therein for such purpose as the legislature has declared to be township purposes. *Id.* The determination of a township purpose is a matter for the legislature. *Id.*

13. A county has only such powers as are expressly conferred upon it by statutes and such as are incidentally indispensable to carry into effect those expressly granted it. *Shanahan v. Johnson*, 170 Neb. 399, 102 N.W.2d 858 (1960). A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county. *Id.* The same rule applies to the legislative power and authority delegated to a city to construct local improvements and levy assessments. *Id.* This court concludes that the same rule applies to towns in counties under township organization.

14. The county board is vested with general supervision and control of the public roads located in its county as provided in § 39-1402. *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979). The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in § 39-1402. *Id.* In counties operating under the township organization, the township board possesses the limited power of general supervision of road

and culvert work. *Id.* The granting of any type of interest in a county road or a township road is vested in the county board in which such public road is situated. *Id.*

15. Clearly, mandamus applies to compel the proper authorities to open a highway where the highway has been *legally established*. *Burkhardt v. Cihlar*, 149 Neb. 712, 32 N.W.2d 712 (1948). Mandamus also applies to compel public officers to perform their duty to take care of and keep in repair *public* highways and bridges and the like. *State ex rel. Draper v. Freese*, 147 Neb. 147, 22 N.W. 556 (1946).

16. The term “public roads” means “all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years.” NEB. REV. STAT. § 39-1401(2) (Reissue 1998). The stipulated evidence clearly demonstrates that the subject road has not been legally established as a public road. This court’s prior decree in Case No. 20004 recognized that the plaintiffs owned a *private* prescriptive easement across the neighbors’ land appurtenant to the plaintiffs’ real estate. As the defendants’ brief observed, the plaintiffs’ petition in that case did not claim that a public road existed. E1 at 8-9 (second attachment A at ¶¶ 5-11). The petition did not allege use by the public generally. *Id.* The prayer sought only establishment of a permanent and continuing easement by prescription, or alternatively by necessity or license. E1 at 13 (second attachment A at ¶¶ D-E). The pleadings limit the issues which the court may determine in a particular action. *In re Interest of Sabrienia B., supra*.

17. Moreover, the county would have been a necessary party to any action to determine the existence of a public prescriptive easement. The township might also have been a necessary party. The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *Taylor Oil Co., Inc. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998). A “necessary party” is one who may be compelled to respond to the prayer of the plaintiff’s petition, and where there is nothing such a one is called upon to do, or can be compelled to do as duty, that one is not a necessary party. *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995). Where “the public” has acquired rights by adverse prescriptive use of land as a road or highway, the appropriate corporate governmental unit holds title for

the benefit of the public. *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974). Clearly, once a road or highway is legally declared as a public road or highway, the responsible public authority may be compelled by mandamus to repair or maintain the road or highway. *Burkhardt v. Cihlar, supra*; *State ex rel. Draper v. Freese, supra*. Thus, that responsible public authority is a necessary party in any action to determine the existence of a public prescriptive easement. Neither the county nor the township was joined as a party defendant in the prior action. This court would not have had jurisdiction in that case, in the absence of such party or parties, to determine the existence of a public road; the court's jurisdiction in that case extended only to the determination of a private prescriptive easement.

18. The subject road does not lie on a section line. NEB. REV. STAT. § 39-1410 (Reissue 1998). Consequently, the declaration of § 39-1410 does not apply to this particular road.

19. This court concludes that the subject road is not a public road under § 39-1401(2) and consequently cannot be deemed a township road under *Art-Kraft Signs, Inc. v. County of Hall*. Thus, while the township board has a clear legal duty to maintain township roads, that duty by definition does not extend to a "non-township" road.

20. The court has carefully examined the township organization statutes. NEB. REV. STAT. § 23-201 *et seq.* (Reissue 1997). The court has also examined the statutes pertaining to roads in counties under township organization. NEB. REV. STAT. § 39-1519 *et seq.* (Reissue 1998). See also NEB. REV. STAT. § 39-1905 *et seq.* (Reissue 1998) (authorizing road tax and expenditure thereof "exclusively in constructing or improving the *public roads*") (emphasis supplied). The court finds no power or authority granted to townships by the legislature for repairs or maintenance of private roads. The parties cite no such authority in their respective briefs. The case cited by the plaintiffs, *Goes v. Gage County*, 67 Neb. 616, 93 N.W. 923 (1903), states that "in counties under township organization the county itself is no longer liable for the construction, maintenance and repair of the *public* highways within the several towns; that in such case the towns are chargeable with that duty, and are liable for its performance." *Id.* at 623, 93 N.W. at \_\_\_ (emphasis supplied). Thus, the parties cite, and the court finds, no statutory authority for a town to repair or maintain a private road.

21. As noted above, a duty enforceable by mandamus must be imposed by law. This court recognizes that the phrase "duty imposed by law" is not synonymous with "duty imposed by statute." *State*

*ex rel. Fick v. Miller*, 255 Neb. 387, 584 N.W.2d 809 (1998). There are sources of law other than statutes. *Id.* However, the duty must be imposed by law. For example, mandamus is not an appropriate remedy for the redress of private contract rights and the writ will not be granted to compel performance of a duty or obligation assumed by contract. *Id.* (citing 52 AM. JUR. 2D *Mandamus* § 75 at 397 (1970)). A duty assumed by a voluntary undertaking provides even less basis for argument. It obviously follows that mandamus will not compel a public officer to perform an act which furthers an unlawful purpose. 52 AM. JUR. 2D *Mandamus* § 57 at 325 (1970). The parties have not cited nor does this court discern any source of law imposing the duty which the plaintiffs claim exists.

22. The plaintiffs rely heavily on the road maintenance provided by the defendants to other private roads. The defendants cite no authority showing that such expenditures are authorized by any statute or other source of law. This court finds no authority granted by the legislature to a township to maintain or repair or to make expenditures regarding roads that are not public roads. Thus, the question becomes, can a past township action or practice which was not properly authorized by the legislature become the lawful source of a future duty to perform a similar action. It seems rather obvious to this court that it cannot. The principle that past performance of an ultra vires act by a public authority can become the basis for future legal authorization would completely circumvent and defeat the rule that a township has only those powers authorized and those duties imposed by the legislature.

23. Plainly, if the township is unlawfully expending public funds for the maintenance and repair of private roads, the remedy cannot be to expand the unlawful expenditures. The plaintiffs are not entitled to the remedy that they seek, and the writ of mandamus cannot issue to compel an expenditure for an unauthorized, i.e., an ultra vires, purpose.

24. Interestingly, at least one other county has faced such a dilemma and taken an interesting approach by obtaining easements and legally declaring and opening as public roads segments previously identified as private driveways to individual residences. Att’y Gen. Op. No. 00027 (June 2, 2000). “If a highway is open for use by all, it is a public use whether advantage is taken of it by few or many persons. . . . [A] highway may be a public use although a much greater benefit will accrue to private persons especially interested than to the public generally, or the proposed street would benefit one property owner more than another. . . .” *Id.* (citing 29A C.J.S. *Eminent Domain* § 30 at 152 (1992)).

25. Because the plaintiffs have the burden of proof and must show clearly and conclusively that they are entitled to the particular thing the plaintiffs ask and that the respondents are legally obligated to act, and have failed to meet that burden, the petition must be dismissed with prejudice at the plaintiffs' cost.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The petition for writ of mandamus is denied and dismissed with prejudice at the plaintiffs' cost.

2. Because there are no taxable costs incurred by the defendants shown by the clerk's records, there is no judgment for costs to be taxed.

3. All requests for attorneys' fees, express or implied, are denied.

Signed in chambers at Ainsworth, Nebraska, on February 28, 2001.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

• Mail a copy of this order to all counsel of record and to any pro se parties.

9 Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Enter judgment on the judgment record.

Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

• Mail postcard/notice required by § 25-1301.01 within 3 days (petition for writ of mandamus denied and dismissed with prejudice at plaintiffs' cost).

Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

• Note the decision on the trial docket as: [date of filing] Signed "Judgment" entered denying petition for writ of mandamus, and dismissing petition with prejudice at plaintiffs' cost.

Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge