

STATE OF MICHIGAN
COURT OF APPEALS

KATHY S. BARRIER,

Plaintiff-Appellee,

v

INGHAM COUNTY BOARD OF ROAD
COMMISSIONERS,

Defendant-Appellant.

UNPUBLISHED
November 6, 1998

No. 191770, 193883
Ingham Circuit Court
LC No. 95-081262-CH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting plaintiff a permanent injunction precluding defendant from entering her property to complete a proposed widening of Dobie Road in Ingham County. Defendant also appeals by leave granted the trial court's subsequent award of \$16,500 in attorney fees pursuant to the Uniform Condemnation Procedures Act, MCL 213.51 *et. seq.*; MSA 8.265(1) *et. seq.* We reverse and remand.

Defendant planned to widen Dobie Road and thereby increase the area that it encroached onto plaintiff's property. Plaintiff brought suit for injunctive relief claiming that defendant did not have a sufficiently wide easement pursuant to the highway by user statute to accommodate the construction. Defendant claimed that under the highway-by-user statute it had a presumed thirty-three foot wide easement over plaintiff's property and that this would accommodate the new construction. Plaintiff argued that defendant did not have a presumed thirty-three foot wide easement and instead only had an easement limited to the portion of her property actually used by defendant, i.e., the asphalt portion of Dobie road and its gravel shoulder. The trial court ruled that defendant did not have a presumed thirty-three foot wide easement under the highway by user statute and that defendant's actual use did not extend far enough onto plaintiff's property to accommodate the planned construction. Consequently, it granted plaintiff a permanent injunction restraining defendant from using plaintiff's property for the construction project absent taking the needed land by eminent domain.

Defendant argues the trial court erred in concluding that defendant did not have a presumed thirty-three foot easement over plaintiff's land pursuant to the highway-by-user statute, MCL 221.20; 9.20. We agree. As plaintiff concedes, the Supreme Court recently clarified that public highways created pursuant to the highway-by-user statute are presumed to be dedicated four rods (sixty-six feet) wide. *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 657-660; 581 NW2d 670 (1998). The only time the public road is limited in size to actual use is when the property owner presents evidence that the presumption of dedication has been rebutted within the ten-year statutory period. *Id.* at 658-659. The trial court in this case, without the benefit of *Kentwood*, *supra*, based its rulings on the erroneous premise that a public road is always only as wide as its actual use. *Id.* at 659. Although the trial court heard evidence regarding the width of the use, it was not in the context of whether plaintiff rebutted the presumption of dedication. Instead, the trial court considered whether defendant proved that its actual use extended beyond the paved portion of the road and the shoulder. Because the trial court did not recognize that the road is presumed to be dedicated sixty-six feet wide, we reverse its finding that defendant's right-of-way over plaintiff's property extended only as far as its actual use and remand for a new hearing applying *Kentwood*, *supra*. At the new hearing, plaintiff has the burden of proving that the original property owners rebutted the presumption of dedication within the statutory ten-year period. *Id.* at 655, 665-666, n 10.

Defendant next argues the trial court erred in awarding plaintiff attorney fees on the basis of the Uniform Condemnation Procedures Act, MCL 213.66(2); MSA 8.265(16). In light of our disposition of the first issue in this case, we also reverse the trial court's award of attorney fees.

In light of our disposition of the case, we need not address the additional issues raised by defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Helene N. White