Bren v. Eardensohn, No. 320-5-05 Wncv (Teachout, J., Jan. 22, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

ROBERTA S. BREN,	)	
Plaintiff,	)	**Washington Superior Court**
	)	**Docket No. 320-5-05 Wncv**
v.	)	
	)	
VICTORIA GADD EARDENSOHN	)	
and PAUL EARDENSOHN, et al.	)	
Defendants.	)	

DECISION

Declaratory Judgment on Location and Width of Town Highway 55
Cross-Motions for Summary Judgment

In an earlier summary judgment Decision filed April 11, 2006, the court (Judge Toor presiding) concluded that Town Highway 55 is a public road. The court ruled that the undisputed facts were not sufficient to show a statutory dedication to public use, 19 V.S.A. §§ 708–717, but overwhelmingly showed a common law implied dedication. This decision arises from the second round of summary judgment motions addressing the location and width of Town Highway 55.[1]

Defendants Eardensohn and the Town of Warren argue that the location of the centerline of the traveled part of the road as it currently appears on the ground determines both location and width of the easement. Plaintiff Bren argues principally that the survey reflecting how the road was originally laid out controls both location and width of the easement. For the following reasons, the court concludes that the original survey determines both location and width. Therefore, Plaintiff's motion for summary judgment is granted, and Defendants' is denied.

There is no genuine dispute that Town Highway 55 was originally laid out in a 1963 survey by John Roth in the course of a subdivision by L. Damon Gadd. Gadd retained

[1] There is some dispute about whether the defendants other than the Eardensohns and the Town of Warren must be served with copies of the parties' summary judgment filings. All of the other defendants appear to have been served with the summons and complaint, which requested declaratory relief on ownership and location of the road. Not one has filed an answer or otherwise made an appearance in this case; consequently, they are in default. Pleadings and other papers need not "be made on parties in default for failure to appear." V.R.C.P. 5(a).

ownership of the fee to the land to be used for the road, which the Eardensohns now own. The Roth survey reflects the location and width of the road as coextensive with the land retained by Gadd for that purpose. More detailed facts are available in the April 11, 2006 decision. There is no dispute that the traveled part of the road has migrated slightly over the years but remains completely within the easement boundaries laid out in the Roth survey. No evidence suggests that any of the Town's road-related work has ever encroached on Bren's abutting property.

Defendants' argument that Town Highway 55 extends 1½ rods to either side of the centerline of the traveled part of the road in its current, migrated location reflects confusion over the distinction between the common law of implied dedication and the case law interpreting 19 V.S.A. § 32, which establishes the "assumed" width of highways when the actual width cannot otherwise be ascertained. To understand the distinction, and how the law of implied dedication and § 32 apply in this case, it is helpful to examine how the legislature's amendment in 1985 to the precursor of § 32 changed its interpretation in the case law.

In 1957, the legislature originally enacted 19 V.S.A. § 36. Section 36 was an "evidentiary method of proving the boundaries of a public highway otherwise incapable of ascertainment from public records." *Town of Dorset v. Fausett*, 133 Vt. 476, 479 (1975). If the boundaries could not be ascertained, the statute created the "presumption that an existing highway was originally laid out as a three-rod road and that the center line of the traveled portion as it now exists is the center line of the highway as originally laid out." *Id*. In *Fausett*, the Supreme Court concluded that the presumption was rebuttable by a showing of "evidence of movement." *Id*. at 480. If the party opposing the presumption could show that the centerline of travel in fact had moved from its original location, then the presumption would disappear, and the court would have to find the location based on all the evidence.

In 1985, the legislature amended 19 V.S.A. § 36 and recodified it at 19 V.S.A. § 32. Section 32 now reads:

> A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.

19 V.S.A. § 32.

In *Town of Ludlow v. Watson*, 153 Vt. 437 (1990), the Vermont Supreme Court determined that *Fausett*'s pre-amendment interpretation of § 36 conflicts with the amended language now appearing at 19 V.S.A. § 32. "[T]he new version of the statute recognizes the inevitable fact that the precise location of roadways shifts over time. Thus, the presumption of a three-rod road applies whether or not the traveled way has changed over time." *Watson*, 153 Vt. at 441. Under the amended statute, evidence of movement no longer defeats the presumption. The presumption now functions to shift the burden of proving the true boundaries onto the party claiming that they differ from the statutorily presumed boundaries. *Watson*, 153 Vt. at 442. Consistent with both the plain pre-amendment and amended statutory language, nothing in either *Fausett* or *Watson* suggests that any sort of presumption arises at all except where the highway

boundaries cannot otherwise be determined. If the highway boundaries can be determined otherwise, 19 V.S.A. § 32 simply does not apply.

The Court addressed more complicated facts in the recent *Town of South Hero v. Wood*, 2006 VT 28. In *Wood*, the Town had been maintaining a shoreline road for a long time. Over the years, as the shore eroded, the road migrated inland over the property of the abutting landowners. In 2000, the Town notified the abutting landowners that a project related to the road would encroach even further onto their property. At that point, the landowners objected to any further encroachment, and the Town filed a declaratory judgment action as to the location and boundaries of the road. The trial court found that the landowners' "long acquiescence" to the Town's maintenance of the continually migrating road showed an implied dedication of the landowners' property to the public use of their property for a highway in its continually migrating location up to the time of the 2000 dispute. Because the boundaries could not otherwise be determined, the court applied 19 V.S.A. § 32 to fix the boundaries of the easement at 1½ rods from the centerline of the traveled part of the road as it appeared on the ground in 2000 when the period of implied dedication ended. See *Wood*, 2006 VT 28, ¶¶ 2–7. The Vermont Supreme Court affirmed, rejecting both the landowners' and the Town's arguments on appeal.

The landowners argued on appeal that they adequately rebutted the presumed width of the easement under 19 V.S.A. § 32 by showing that they did not intend to dedicate their property to a public use beyond the traveled portion of the road. That is, they did not intend the easement to extend further onto their property than the traveled part of the road did. The court rejected this argument on the facts and the law. As for the law, the Court ruled that "because the dedication was based in part on the public's long use of the land as a road, the scope of the dedication necessarily included the public's interest in the right-of-way, in addition to the portion actually traveled." *Wood*, 2006 VT 28, ¶ 16.

The Town argued that the trial court erred in fixing the road at its location at the time when the period of implied dedication ended. Rather, the Town argued that "it is entitled to a three-rod right-of-way centered at the centerline of the existing traveled way—*wherever it may be*—because 19 V.S.A. § 32 applies 'whether or not the traveled way has changed over time.'" *Wood*, 2006 VT 28, ¶ 17 (emphasis added). The Supreme Court squarely rejected this argument because it would create a perpetual "rolling easement" by operation of 19 V.S.A. § 32. As the Supreme Court ruled, the easement arises by operation of the implied dedication, not 19 V.S.A. § 32. *Wood*, 2006 VT 28, ¶ 18.

Thus, while § 32 will fix the easement's width at 1½ rods from the centerline of the traveled part of the road, absent proof of different boundaries, when the dedication is complete, only a subsequent dedication will move those boundaries again; they become fixed at the time of the implied dedication. Notwithstanding § 32, a migrating centerline without a new dedication does not alter the scope of the established easement. The implied dedication issue (method of creation) and the § 32 width issue (location of road boundaries) are separate issues; § 32 cannot be turned into a device that automatically moves an easement. *Wood* does not change the interpretation of § 32 evident in *Watson*.

The Town and the Eardensohns now make two arguments in support of their claim that the easement for Town Highway 55 extends 1½ rods to either side of the existing centerline of the traveled portion of the road. In their June 30, 2006 filing, Defendants plainly claim that the originally laid out boundaries of the easement appearing in the Roth survey are "irrelevant" because under 19 V.S.A. § 32 the boundaries must be determined exclusively in relation to the existing centerline of the travel part of the road. That is, Defendants claim entitlement to the same sort of "rolling easement" rejected in *Wood*. The court rejects this argument for the same reasons it was rejected in *Wood*. In this case, it is particularly clear that the boundaries can be determined, and thus § 32 does not apply at all.

In their October 6, 2006 filing, Defendants argue that because the centerline of the traveled part of the road shifted in the mid-1990's without Bren's objection, Bren necessarily has acquiesced to a change to the boundaries of the easement, extending 1½ rods to either side of the migrating centerline, amounting to an implied dedication.[2] The rejected "rolling easement" theory is again at work as Defendants in this argument continue to attempt to use 19 V.S.A. § 32 to create an easement rather than to supply a presumed width.

The court concluded in the earlier summary judgment decision that Town Highway 55 is a public highway by implied dedication and acceptance. Because the parties had not raised the issues, however, the court did not identify the timing of that dedication or otherwise fix location and width. The undisputed evidence in this case uniformly supports one implied dedication, in the location in which the road was originally laid out, which appears on the Roth survey, and which is coextensive with the land retained by L. Damon Gadd to be used for that purpose. In the April 11, 2006 decision, the court noted that TH 55 was included in the Town's 1968 certificate of highway mileage, and the Town has exclusively maintained it and included it on town highway maps without objections since the early 1970's.

Defendants have come forward with no evidence suggesting that the easement moved to a different location by rededication other than the allegation that Bren has "long acquiesced" to the migrated centerline of the traveled portion of the road. However, while the centerline of the traveled portion of the road has migrated, it has done so exclusively within the original surveyed boundaries of the easement, and no evidence shows a new dedication altering the original boundaries. Defendants essentially argue that the migration of a centerline proves acquiescence to changed easement boundaries, by operation of 19 V.S.A. § 32. This is the "rolling easement" theory, which the court again rejects. In this case, unlike those cited above, the original boundaries are ascertainable; § 32 does not apply at all, and, in any event, will not be permitted to operate so as to create a new easement.

Aside from the rolling easement theory, Defendants argue that the Roth survey should not control the location and width of the road for two reasons: "First it would render superfluous the statutory method for establishing a public road by survey by elevating a private survey to the status of a statutorily sanctioned survey. Second, it would deny the public's right of involvement in the process." Defendants' Response at 5 (filed Oct. 6, 2006). The Roth survey reflects the location and width of the road, but it did not "establish" the road as public. Regardless of the

[2] The June 30, 2006 filing was submitted on behalf of the Eardensohns and the Town of Warren; the October 6, 2006 filing was submitted on behalf of the Eardensohns without the Town's participation.

Roth survey, the road was established as public by implied dedication and acceptance, which is a legally valid and long-accepted alternative to the statutory process. The Town, not Plaintiff Bren, has had statutory discretion all along to formally survey Town Highway 55 "to verify the location and width of the existing right-of-way, easement, or fee title and to determine the extent of the interest of the public in the title." 19 V.S.A. § 33(b). For whatever reason, it has not chosen to do so. If it had, it would not have been entitled to limit the survey to the centerline of the existing traveled way and a presumed width of 1½ rods to either side of the centerline unless a survey based on "all available evidence" failed to reveal the "location or limits, or both, of the right-of-way, easement or fee title" to the road. 19 V.S.A. § 33(b), (c).

With regard to involvement of the public, the abutting landowners and the Town were named as parties in this case and served. They have had the same notice and opportunity to participate as is provided in 19 V.S.A. § 33(b) when a town undertakes a survey of a road. The Town itself has participated in the suit. Defendants have not suggested that any necessary parties are absent. As a result, the "public" has not missed the opportunity to be involved in the determination of these issues.

The court concludes that the location and width of the easement for Town Highway 55 exist as they appear on the Roth survey.

ORDER

For the foregoing reasons,

1. Defendants Eardensohn and the Town's summary judgment motion is *denied*;
2. Plaintiff Bren's summary judgment motion is *granted*; and
3. Attorney Kolitch shall submit a proposed judgment order, and Defendants shall have five days to file objections to its terms.

Dated at Montpelier, Vermont this 22nd day of January 2007.

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Mary Miles Teachout
Superior Court Judge