Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-035

JUNE TERM, 2005

McLean Enterprises Corporation	}	APPEALED FROM:
	}	
v.	}	Windsor Superior Court
	}	
John P. Mills, Estate of Roger L. Mills and Claire A. Aloan	}	DOCKET NO. 346-7-03 WrCr

Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Defendants John P. Mills, Estate of Roger L. Mills, and Claire A. Aloan, appeal from the trial court=s order granting summary judgment to plaintiff McLean Enterprises Corporation in this dispute over the location of a right-of-way. Defendants argue that the trial court erred because: (1) material facts are in dispute; (2) the undisputed facts do not establish that plaintiff was entitled to judgment as a matter of law; and (3) the court incorporated a survey depicting the right-of-way that had not been submitted with any previous filings. We affirm.

Plaintiff and defendants own adjoining parcels of real property. Plaintiff has a right-of-way over defendants= property, described in a 1922 deed (Athe Una Gay deed@) as follows:

> Commencing on the northerly margin of the highway or Main Street leading from Cavendish Village to Proctorsville and at the southeast corner of the homestead premises of Harry C. and Lena H. Ripley and formerly owned by Bacon & Spofford. Thence running in a northeasterly direction as the same now is used to the brow of the hill or flat. Thence easterly across said flat till it intersects with my private road running through my homestead premises northerly. Thence the use of my said road northerly to land of the said Frank H. Wheeler. The said Frank H. Wheeler to keep the same in repair or passable condition until I myself shall want to use the same after which we will share and share alike in the same.

The parties disputed the location of the right-of-way, and in July 2003, plaintiff filed a complaint for declaratory relief. Plaintiff asked the court to declare that the right-of-way was that depicted on a 1987 survey that had been prepared at the behest of its predecessor-in-interest. Plaintiff also asked the court to enjoin defendant John P. Mills from interfering with its use of the right-of-way. Defendants disagreed with plaintiff=s route, but they did not set forth an alternative route in their answer.[1]

In July 2004, plaintiff moved for summary judgment. Plaintiff explained that the parties agreed on the starting point of the right-of-way where it left Route 131, and they agreed on its path for approximately 150 feet from that point. From that point onward, the parties disagreed over the route. Plaintiff asserted that the evidence in favor of its position was overwhelming and undisputed, and defendants had offered no evidence in support of their position other than the existence of a possible alternative route, part of which had been constructed more than forty years after the right-of-way was conveyed. Plaintiff also explained that a survey, which had been prepared for defendant John Mills (Athe Gulli survey@), supported its position regarding the location of the right-of-way, as did a deed from Mills to his son. In support of its motion, plaintiff attached a 1987 survey conducted by Ralph Michael, an affidavit from Michael, the Gulli survey, Mills= hand-drawn depiction of where he believed the right-of-way to be, and other supporting materials.

In their response to plaintiff=s motion, defendants admitted that the 1987 survey showed a traveled road, and that the 1990 Gulli survey also showed a roadway on the land. Defendant maintained, however, that neither of these admissions were

inconsistent with their claim that the right-of-way created by the 1922 deed (as opposed to the road shown on the surveys) was at an entirely different location. Defendants asserted that the court would need to make factual findings as to where Athe brow of the hill or flat@ was located, the location of the Aprivate road,@ and the meaning of the terms Anortherly@ and Aeasterly@ in the 1922 deed. In support of their position, defendants attached an affidavit from defendant John Mills, who stated that he disputed several paragraphs in plaintiff=s statement of undisputed material facts.[2] Mills averred that the path of the right-of-way that he was claiming Aturned east at the brow of the hill, not halfway up the hill,@ and he asserted that he had spent much more time at the Cavendish property than five days.

In July 2004, the trial court granted plaintiff=s request for summary judgment. As a preliminary matter, the court denied defendants= request to exclude the affidavit of plaintiff=s expert, surveyor Ralph Michael. Defendants argued that Michael=s affidavit should be excluded because the 1922 deed had been drafted by laypersons and an expert opinion was neither necessary nor helpful. They also asserted that Michael=s opinion was based in part on inadmissible hearsay. The court rejected both arguments. It found that, given Michael=s experience as a surveyor, his inspection of the property, and his discussions with a former resident of the area (Ralph Morrison), his opinions might help the court to understand the evidence even if the deed had been drafted by a layperson. Additionally, the court found that it appeared that statements that Ralph Morrison had made to Michael were admissible under an exception to the general hearsay rules because Morrison was unavailable and his statements arguably concerned boundaries of land. The court therefore denied defendants= motion to exclude Michael=s testimony, and it considered his opinion in addressing plaintiff=s motion for summary judgment.

Turning to the merits, the court found that the undisputed facts established that plaintiff was entitled to summary judgment, and it held that the course of the right-of-way was that depicted on the 1987 Michael survey. The court explained that the survey had been conducted at the behest of plaintiff=s predecessor-in-interest, the Merrill Wheeler estate, fourteen years before plaintiff purchased the property. In conducting the survey, Michael had researched the location of the right-of-way. He looked at the description of the right-of-way set forth in the 1922 deed, as well as the chain-of-title for both plaintiff=s and defendants= property; he also visited the property to observe physical evidence of existing roadways and the site=s topography. During his site visit in 1987 and again in May 2004, Michael found physical evidence of a clearly discernable, passable old roadway that began on Route 131 and traveled northeasterly over defendants= property to its northerly boundary, where it adjoined plaintiff=s property. The path of the roadway was sufficiently clear to allow Michael to plot its center line. In Michael=s opinion, the roadway that he physically observed was consistent with the description set forth in the 1922 deed. In his opinion, all reference points in the deed were readily identifiable and consistent with the route taken by the roadway that he identified.

At the time of his survey in 1987, Michael discussed the location of the right-of-way with Ralph Morrison, a nephew of Merrill Wheeler and an agent of the Merrill Wheeler Estate. Morrison regularly used the roadway across defendants= land to access his home, which was located on the lands of the Merrill Wheeler Estate. According to Michael, Morrison=s opinion about the location of the right-of-way was consistent with the position now set forth by plaintiff. Based on his investigation, Michael determined the location of the right-of-way and included it on his survey map. The course, as determined by Michael, proceeded from Route 131 to the brow of the hill where the terrain was relatively flat, and from there it turned eastward. It then intersected with another old roadway, identified by Michael as Una Gay=s Aprivate road,@ and it then ran in a northeasterly direction to plaintiff=s property.

During a more recent site visit, Michael compared the description of the right-of-way set forth in the 1922 deed to the route alleged by defendants. In his opinion, the course alleged by defendants was inconsistent with the deed description. According to the deed, the right-of-way traveled northerly from its starting point to the Abrow of the hill or flat,@ at which point it turned to the east. According to Michael, the path alleged by defendants turned to the east halfway up the hill, at a point where the grade of the road was approximately 12%. The court noted that defendant John Mills asserted that the path of the right-of-way that he was claiming turned east at the brow of the hill, and not halfway up the hill. The court found that the parties had different opinions concerning the location of the referenced Abrow of the hill.@

The court explained that defendant John Mills first visited the property burdened by the right-of-way in 1956. Between 1956 and 2001, he spent approximately five days per year visiting his father in Cavendish. He spent much more than five days per year at the property but much of that time was when his father was not there. Since 2001, John Mills had been a summer resident of Cavendish. Mills never discussed the location of the easement with his father, who purchased the property in 1956. Mills was unaware that the right-of-way was a deeded right-of-way prior to 2000. From 1956 until plaintiff=s complaint was filed, Mills observed people occasionally traveling the right-of-way as alleged by plaintiff. During that time, he never observed

people traveling the course of the right-of-way as alleged by defendants. The course alleged by Mills turns to the right after the first hundred feet. The right hand turn was constructed in the 1960s.

In 1990, Nicholas Gulli prepared a survey of the property at Mills= request, which was recorded in the town land records. The survey depicted plaintiff=s right-of-way as a roadway. The route shown on Gulli=s survey is similar, although not identical, to one shown on the Michael survey.[3] Gulli=s survey did not show a roadway or right-of-way that followed the route suggested by defendants. Mills then subdivided the land over which the deeded right-of-way traveled into four parcels. In July 2000, he conveyed one of the subdivided lots, Lot 1 as depicted on the Gulli survey, to his son Roger Mills. The deed description of Lot 1 described a possible right-of-way that might traverse Lot 1 and provide access to plaintiff=s property. The deed states: AThis conveyance is subject to the rights of others, if any, to traverse said parcel along the private road way which leads from Route 131 to lands now or formerly of the Merrill Wheeler Estate.@ There is no easement or right-of-way in the chain-of-title that this description could refer to other than plaintiff=s right-of-way. Based on the Gulli survey, if the right-of-way were to follow the path alleged by defendants, it would begin on Lot 2 and then traverse Lot 4, without entering Lot 1.

Based on these facts, the court found that plaintiff was entitled to judgment as a matter of law. The court explained that a description in the deed would control the location of a right-of-way if the original deed provided sufficient detail. If a deed did not locate the right-of-way, the parties could fix the location by agreement and use. In this case, the court found that plaintiff had submitted substantial evidence to support its claim that there was an established roadway in the location shown on the 1987 Michael survey, and this established roadway was consistent with the description of the right-of-way in the 1922 deed. The court found that, most significantly, Michael, a licensed surveyor, had identified this route as the location of the right-of-way in 1987, long before any dispute arose. Michael found that this route was Aclearly discernable as an old roadway,@ and that it was consistent with the original deed. All of the reference points in the deed description were readily identifiable and consistent with the route taken by the roadway. The roadway was in regular use at that time by Ralph Morrison, and Morrison=s opinion about the location of the right-of-way was consistent with the route that he used. Moreover, over the years, defendant John Mills had observed people occasionally traveling on the roadway that plaintiff now claimed as the deeded right-of-way. The court concluded that this evidence clearly set forth a prima facie case that the right-of way was located on the route shown in the Michael survey.

The court explained that defendants had not presented any evidence to show that the Michael survey was wrong, nor had they presented any evidence to show that their proposed route was correct. It concluded that the facts disputed by defendants were immaterial. The court explained that it was undisputed that plaintiff=s proposed route had been used as a roadway for many years. There was no evidence that defendants= proposed route was consistent with the deed, or that it had ever been used as a roadway. The court noted that defendants had suggested that it must determine the right-of-way from the language of the deed, after viewing the property. The court explained that, given the vague description of the middle portion of the right-of-way, the use of the roadway over the years was highly significant. It concluded that where plaintiff presented evidence that its proposed route was used over a lengthy period of time, and defendants failed to present any countervailing evidence, there was no factual issue left to be tried, and plaintiff was entitled to summary judgment. Plaintiff prepared a proposed final judgment order, to which defendant objected. Defendant asserted that the order was accompanied by, and made reference to, a survey that had been prepared after the court=s summary judgment decision. Plaintiff responded that the new survey expressly stated that it depicted the same right-of-way as the 1987 survey. The court issued its final judgment order, incorporating the survey, and defendants appealed.

Defendants argue that summary judgment was inappropriate because disputes of material fact existed, and the undisputed evidence did not establish that plaintiff was entitled to judgment as a matter of law. Defendants note that the parties disagreed whether the roadway went northerly or Agenerally northwesterly,@ and they disagreed about the location of the Abrow of the hill@ referenced in the deed. According to defendants, through their pleadings and their motion to exclude the testimony of plaintiff=s expert, they disputed the location of the right-of-way as depicted on the Michael survey because it was inconsistent with the deed and only the trial court could resolve what the parties to the 1922 deed intended. They maintain that it was not incumbent upon them, in responding to the motion for summary judgment, to show that their proposed location was the correct one. Defendants also assert that, by refusing to conduct a site visit, the trial court denied them the opportunity to submit the most persuasive evidence that they had.

On review, we apply the same standard as the trial court: summary judgment is appropriate when the record clearly indicates there is no genuine issue of material fact and that any moving party is entitled to judgment as a matter of law. In

determining whether a genuine issue of material fact exists, we regard as true all allegations of the nonmoving party supported by admissible evidence, and we give the nonmoving party the benefit of all reasonable doubts and inferences. Lane v. Town of Grafton, 166 Vt. 148, 150 (1997); see also V.R.C.P. 56(c). When a motion for summary judgment is properly supported, an adverse party may not rest upon the mere allegations or denials of its pleadings; its response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. V.R.C.P. 56(e).

In this case, defendants filed an inadequate response to plaintiff=s motion for summary judgment. Plaintiff presented evidence establishing that a roadway existed that was consistent with the terms of the 1922 deed. It provided additional evidence, detailed above, to support their position that this was the proper location of the right-of-way. In response, defendants disputed two facts of the hundreds identified by plaintiff, and failed to otherwise respond to plaintiff=s motion. Under V.R.C.P. 56(c)(2), all of plaintiff=s proposed undisputed findings are deemed admitted, and the undisputed facts demonstrate that plaintiff is entitled to judgment as a matter of law. See Leonard, 119 Vt. at 90, 98-99 (recognizing that where right-of-way is undefined in deed, its route can be located by use). We reject defendants= assertion, unsupported by any legal authority, that the trial court was obligated to conduct a site visit before rendering its decision. Defendants failed to properly respond to plaintiff=s motion for summary judgment, and the evidence proffered by plaintiff supports the trial court=s conclusion that plaintiff was entitled to judgment as a matter of law.

Finally, we reject defendants= assertion that the court erred by incorporating a new survey into the final order. Defendants assert that they have no way of knowing if the new survey shows the road in the same location as the 1987 survey. The certified survey attached to the trial court=s final judgment order indicates that it depicts the same right-of-way as shown on the 1987 survey. Defendants= claim of error is without merit.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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[1] The record indicates that plaintiff attached an exhibit to its complaint depicting the respective right-of-ways claimed by the parties. Defendants denied that this exhibit reflected their position as to the location of the right-of-way. Defendant John Mills apparently hand-drew his proposed path during the course of discovery.

[2] The disputed paragraphs provided: AThe path alleged by Defendants turns to the east halfway up the hill, at a point where the grade of the road is approximately 12%. Defendant Mills first visited the property burdened by the Right-of-Way in 1956. From 1956 until 2001, Defendant Mills spent approximately 5 days a year in Cavendish. Since 2001, Defendant Mills has been a summer resident of Cavendish.@

[3] The court noted that neither party claimed that the deeded right-of-way followed the exact path depicted on the Gulli survey.