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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-286

FEBRUARY TERM, 2007

Marie J. Thompson, Frank Lawrence Thompson, Frank Larry Thompson and Patrick J. Thompson	}	APPEALED FROM:
	}	Washington Superior Court
v.	}	
Katherine Ryan and Pamela Ryan	}	
	}	DOCKET NO. 489-9-03 Wncv
		Trial Judge: Helen M. Toor

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

Plaintiff landowner appeals the superior court's decision granting him limited access to his property by way of a discontinued town highway.[1] We affirm.

Plaintiff owns approximately 180 acres of land in Woodbury and East Calais, Vermont. Principal access to his property is from Route 14 in East Calais. On a few occasions over the years, however, plaintiff accessed his property from Stevens Road in Woodbury to hunt or remove logs. At one time, Stevens Road, a town highway, ran through what is now a one-acre lot abutting plaintiff's land and purchased by defendant Pamela Ryan in 1987. In 1902, the Town of Woodbury discontinued Stevens Road at a point that is now on defendant's property. In 1995 or 1996, defendant placed a horse fence across the discontinued part of Stevens Road. Plaintiff had used the road a total of six or eight times during his 75-year lifetime, and he did not use the road at all between 1986 and 1998. In 1998, defendant agreed to open the fence and allow plaintiff and his nephew to take a skidder through to remove logs on his property.

In 2003, plaintiff filed suit, asking the superior court to recognize his common law right to access his property by way of the discontinued town highway. Defendant counterclaimed, alleging adverse possession. Following a hearing, the superior court determined that plaintiff had a common law right of access to his property through the discontinued highway, but that the right was limited to what was reasonable and convenient, as evidenced by plaintiff's use during his lifetime. The court concluded that, under the circumstances, defendant would be allowed to access his property

[1] The parcels involved in this case are owned by other persons besides plaintiff Frank Thompson and Pamela Ryan, who were the representatives on either side that prosecuted the instant action; however, for the sake of simplicity, we will refer only to those two individuals.

over a sixteen-foot right of way for hunting and log skidding only, with no right of access by automobile. The court also rejected defendant's claims of estoppel, abandonment, and adverse possession, which are not at issue in this appeal. Plaintiff argues on appeal that the court erred by restricting the scope and nature of his common right of access. According to plaintiff, the court should have allowed access by any and all vehicles within the fifty-foot width of the original road. We reject this argument.

The superior court and both parties rely on Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201 (2000), a case that involved a landowner's right over an existing public road to access his landlocked private property. We noted that "when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law." Id. at 207. We further noted, in dicta, that "when a public road is discontinued or abandoned, the abutting landowner retains the private right of access." Id. We cautioned, however, that such a common law right of access entitles the abutting landowner only to " 'reasonable and convenient access,' " id. at 209 (quoting Op. Vt. Att'y Gen., No. 310 (Jan. 12, 1970)), and that the question of "[w]hat constitutes reasonable and convenient access is a question of fact." Id. at 209.

On appeal, plaintiff argues that his common law right of way is unlimited, and that the superior court erred by restricting the scope of his right of access based upon his individual and historic use of the right of way. According to plaintiff, the "reasonable and convenient" analysis concerns only the question of whether a competing public use has so restricted the abutting landowner's right of access as to warrant a remedy, and not the question of whether the scope of the right of access should be limited. In plaintiff's view, because his right of way is not affected by a public use, his right of access is unlimited. Plaintiff further argues that even if the trial court had the discretion to apply a standard of reasonableness in defining the scope of his right of access, the concept of reasonableness depends upon the public's interest in the road, which is nonexistent in this case. Plaintiff contends that the superior court's consideration of his personal use of the right of way, rather than the historic use of the road by the public, was essentially an application of the standards for determining the scope of a prescriptive easement. He asserts that this was error under Rowe v. Lavanway, 2006 VT 47, ¶ 25, 904 A.2d 78 (mem.), where we explained that the scope of a prescriptive easement, in contrast to that of an express easement, necessarily depends on past use by the dominant landowner.

We find these arguments unavailing. As noted, we stated in dicta in Okemo Mountain that an abutting landowner retains a reasonable and convenient private easement over a discontinued highway. But see Luf v. Town of Southbury, 449 A.2d 1001, 1006 (Conn. 1982) (before enactment of a statute giving abutting property owners a right of way over discontinued highways to the nearest accessible highway, the discontinuance of a public highway "extinguished both the public easement of travel and the private easement of access"). Most jurisdictions allowing a private right of way to abutting landowners following the discontinuance of a public highway have conditioned the existence of the right of way on the abutting owner demonstrating, at minimum, a reasonable need for it. See, e.g., Paul v. Wissalohican Camp Co., 148 N.E.2d 248, 250-51 (Ohio Ct. App. 1957) ("[A] private easement in a public highway is already in existence when the highway is vacated, and continues if there is a reasonable need for it"; the abutting owner's easement continues after vacation of the highway if "no other road is reasonably suitable to meet the necessities of such owner");

Taylor v. Cox, 63 S.E.2d 470, 472 (S.C. 1951) (ordinarily, when a public highway is abandoned, abutting landonwers do not retain private easements in the highway absent a showing of necessity).[2]

In this case, the record does not contain detailed evidence concerning the history of the subject properties or the highway in question—other than that it was discontinued in 1902. As far as we can tell, the discontinued public highway was never the principal means of ingress and egress to and from plaintiff's property; in any event, plaintiff made no such showing at trial. To the extent that plaintiff made any showing of a reasonable need for a private easement, it was limited to his need to access the property to hunt and remove logs. This is precisely the "reasonable and convenient" access that the superior court granted to him.

We find no error. This case may not involve a prescriptive easement as in Rowe, but neither does it involve an express easement set forth in a deed. See 2006 VT 47, ¶ 25 (contrasting relevance of historic use as between prescriptive and express easements). Rather than an express right of way, plaintiff retained a reasonable and convenient access to his property via a discontinued highway, the extent of which is a question of fact to be determined upon consideration of the circumstances of the case. Okemo, 171 Vt. at 209; see Small v. Kemp, 727 P.2d 904, 910 (Kan. 1986) ("The right of access of an abutting property owner upon a public street or highway is merely a right to reasonable, but not unlimited, access to and from the abutting property.") The case we relied upon in Okemo for the proposition that an abutting landowner retains a common law right of access from a discontinued highway emphasized that the "correct inquiry" is "whether a greater burden is imposed upon the servient estate." Gillmor v. Wright, 850 P.2d 431, 438 (Utah 1993). Here, the record supports the superior court's conclusion that, under the circumstances of this case, reasonable and convenient access over defendant's land by way of the long-discontinued section of Stevens Road should be limited to plaintiff's access for hunting and logging only, with no automobile access.

Affirmed.

BY THE COURT:

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Denise Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice

[2] Effective July 1, 2006, 19 V.S.A. § 717(c) became law. That subsection provides as follows: "A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way." 2005, No. 178 (Adj. Sess.) § 4. The law does not affect any lawsuit, including the instant one, begun or pending at the time of its passage. Id. § 14.