STATE OF WISCONSIN CIRCUIT COURT WAUSHARA COUNTY

Bruce Gebhardt a/k/a Robert Bruce Gebhardt,
And Sharon Gebhardt a/k/a Sharon P. Gebhardt,
Michael E. Krause, Richard N. Kutz,
Charles P. Savoie, Richard C. Stellmacher,
Barbara E. Stellmacher, Brian K. Price and
Carol L. Price,

Plaintiffs,

MEMORANDUM DECISION

-vs-

Green Lake County,

03 CV 146

Defendant.

The court is called upon in this case to determine the width of county highway PP in Green Lake County. Both parties agree that the defendant, Green Lake County, has worked this road for a period in excess of 10 years. By virtue of Wis. Stat. sec. 80.01(2), the road is presumed to be a width of four rods. The plaintiff contends that the presumption that the road has a four-rod width has been rebutted and that the plaintiff has established that the road is, in fact, 3 rods wide. The width of the road makes a substantial difference to the parties because the defendant plans to remove numerous old trees from within the four-rod right of way. Plaintiff is adamant about saving the trees. The defendant finds their removal necessary to establishing a safe and efficient traffic

path, consistent with other comparable county roads existing in Green Lake County.

The most recent authority concerning sec. 80.01(2) and rebuttal of the four-rod presumption contained therein is the decision in *Threlfall* v. *Town of Muscoda,* 190 Wis. 2d 121 (Court of Appeals, 1994). In that case, like the present, the municipality had worked the road for many years both before and after the four-rod presumption in sec. 80.01(2) became effective in 1951. *Threlfall* states in very plain language, that the municipality need not work the entire four rod roadway in order to assert the presumption. If the road is worked at any width, the presumption is available. It states:

> The plaintiffs assert that in order for the four-rod presumption to apply, the town must show that it worked the road and the public adversely used it, for the full four-rod width for ten years. Section 80.01(2), Stats., contains no such requirement. Under sec. 80.01(2), upon a town's showing that it maintained an unrecorded highway for ten years, the public's use of the road is presumed adverse and the landowner bears the burden of showing otherwise. *Ruchti v. Monroe,* 83 Wis. 2d 551 (1978). If the landowner does not show the use is permissive, the four-rod presumption arises, whether or not the town worked, or the public adversely used, a four-rod width.

Consistent with this language, plaintiff's evidence that Green Lake County did not work the entire width of the roadway does not rebut the presumption that the road is

four rods in width. Much such evidence was offered, such as the testimony regarding width of culverts, distances between embankments where the roadway cut through a ridge, the existence of aged trees within the four-rod width, and so forth.

In keeping with *Threlfall*, the court finds that the road was used as a public road for at least ten years and that Green Lake County is entitled to assert the presumption that the roadway is four rods wide. The issue at this point then becomes whether the plaintiffs have or have not rebutted the presumption. The court of appeals in *Threlfall* resolved the issue, but not by applying the "If the landowner does not show the use is permissive, the four-rod presumption applies" language quoted above. Instead it declared: "We conclude that the existence of the ancient fences within the four-rod width rebuts the statutory presumption that the road is four rods wide. *Barrows,* 8 Wis. 2d 58 at 63 (1959)."

The reliance on *Barrows* for clarification seems misplaced. In *Barrows*, Kenosha County had undertaken roadwork in 1954. The presumption created in sec. 80.01(2), enacted in 1951, could not confer a presumption based upon 10 year user unless the court made the effect of sec. 80.01(2) retroactive to encompass work done before the

enactment. That court stated: We are satisfied that, if Wood road actually was a highway established by user, as found by the trial court, the above recounted testimony as to the existence for forty-five years of the fence along the west side of the parcel now owned by the Barrows, would be sufficient to rebut the first-stated presumption in sec. 80.01(2), Stats., that the width of such highway was four rods." But the court in *Barrows* then found the road was **not** a road established by user. Instead, the court found the road was a laid road, having been laid out by a missing order. Since the width of road laid out by the missing order could not be determined from the wording (the wording as well as the order were missing), the court then concluded that road was *presumed* to be four rods in width. It then declared that the same fences it had stated to be sufficient to rebut the presumption for a highway established by user was **not** sufficient to rebut the presumption concerning the highway laid out by missing order. This difference may be explained by the fact that prior to 1951, roads established by user were established only to the width used.

The court is bound by the language of *Threfall* whether or not that court should have relied upon the *Barrows* decision. This prior language is reviewed only from the

standpoint of illustrating the conceptual difficulties involved in applying this language to the problem at hand determining just what must be shown by way of ancient fences in order to rebut the presumption that a highway established by user is four rods wide.

Plaintiff's position appears to be that ancient fences trump all other considerations and that if the court is convinced that at some prior time in history fences existed, that the court must then find that the presumption is rebutted. This position seems too extreme to the court, and would lead to an absurd result if given the primacy the plaintiffs urge it be given. Assume the county worked a highway for 10 years, but did not work all of its width. Hills were cut through. Culverts were placed in low spots. Snow was plowed and grass cut. All of this activity marked a use of the roadway less than four rods. None of the work was with the permission of the adjacent landowners. Under the language of *Threfall* cited earlier in this opinion, the presumption is not rebutted because the statute does not require full use of the width of the four-rod width and the use was not permissive. Now assume that instead of the lines formed by the culverts, vegetation, cuts into hills, and so forth, there existed buried remnants of a fence located below ground here and there, but forming a line

showing that at some point in history a fence was located there. Would the existence of the fence then rebut the presumption under the "ancient fences" language of the *Threfall* decision?

The trial court in *Threfall* found that no specific and identifiable boundary could be established, but the court of appeals found that fences existed north and south of the road, that the fences had been there for some time, and that the fences "in the same location now" (page 130) as before. The court of appeals detailed the existence of the location of various segments of the fences, as well as present locations (at time of trial). The court of appeals found the trial court's decision erroneous based upon the evidence produced at trial. It concluded fences were "basically continuous except for a 700-foot gap." A fair reading of this decision shows that the court was concerned with the extent of the fences and with their continued as well as historical existence.

The court in *Barrows* also concerned itself with the nature and extent of the fences as well as with the fact that fences continued to exist until the town undertook the improvements that precipitated the suit. That court also addressed the problem encountered when a segment of a road appears different at some points than at others. Burrow's

fences were approximately one and one-half rods from the section line, implying a three-rod road. The court concluded that since the evidence showed that the road was a four-rod road both north and south of the Burrows property, this evidence was not persuasive. It emphasized that the evidence must be taken as a whole when determining if a statutory presumption should be rebutted.

In applying sec. 80.01(2) and the case law referenced in this decision, the court concludes that the plaintiffs have failed to rebut the statutory presumption that the road is four rods wide. The plaintiff's witnesses testified concerning factors showing the road was a three-rod road. This testimony relied in significant part upon the location of old trees within the four-rod right of way. They argue that these physical limitations show reduced width, thereby negating the presumption. They testify to locating remnants of now buried fences, as well as some still visible. They testified to maintenance practices by the county that, in their view, also negated the presumption. They concede that this evidence related to a section of the road which was 20% or less of the length of the roadway, a point which is argued to be not relevant. The defendant's witnesses contradict most of the maintenance practices, stating that this road was

maintained as any other, mostly for the full four rods, occasionally for a lesser width as needed to avoid obstacles. The failure by Green Lake County to use the full four rods does not by itself rebut the presumption for the reason that sec. 80.01(2) does not require such use to preserve its presumption. The fences are for the most part insubstantial as fences, do not continue to exist, and are not a sufficient factor to overcome the presumption of a four-rod road. The evidence on this point must be construed as a whole when considered for the purposes of deciding if the presumption has been rebutted. The court concludes that the evidence as a whole fails to rebut the statutory presumption and that Green Lake County must be accorded the four-rod roadway based upon 10-year user under sec. 80.01(2).

Plaintiff also asserts a second cause of action, contending that the County's use of its four-rod right of way must be limited to avoid committing waste upon the land in the right of way. They contend that the removal of the trees is unnecessary, would constitute waste, and that they should be awarded an injunction to prevent the removal. Common law waste requires showing of three elements:

1. unreasonable conduct by the owner of a possessory estate,

2. resulting in physical damage to the real estate, and

3. a substantial diminution in the value of the estate in which others have interest.

The court accepts for the purpose of this decision that Green Lake County's right of way is a "possessory estate." However, the court is unable to accept the premise that a county's use of a roadway for roadway purposes is an unreasonable use. Further, sec. 86.03 Stats., provides the county with broad powers concerning plants, trees, and shrubs located in highway rights of way. The plaintiffs concede that they can locate no authority demonstrating that the law of common law waste has been applied against a municipality in such a way as to limit the public authority having control of a highway from removing vegetation from the highway right of way. Neither can the court find such authority. Accordingly, as to this second cause of action, the court finds that plaintiff has failed to assert a claim upon which the relief sought may properly be granted.

Conclusion

The court concludes that:

1. The plaintiffs have failed to rebut the statutory presumption that Green Lake County Highway PP is a road having a width of four rods.

2. The plaintiffs have failed to demonstrate that they are entitled to injunction relief under the common law of waste.

3. The defendant is entitled to a judgment dismissing the plaintiff's complaint.

4. The defendant is the prevailing party under sec. 814.03.

Defendant's counsel may prepare findings and judgment consistent with the court's ruling in this memorandum decision.

Dated this 2nd day of June, 2005.

By the Court:

Lewis Murach, Circuit Judge