No. 09-0387

IN THE SUPREME COURT OF TEXAS

CAROL SEVERANCE

Plaintiff-Appellant

v.

JERRY PATTERSON, Commissioner of the Texas General Land Office,
GREGG ABBOTT, Attorney General for the State of Texas,
KIRK SISTRUNK, District Attorney for the County of Galveston, Texas

Defendants-Appellants

On Rehearing on Certified Questions from the
United States Court of Appeal for the Fifth Circuit

AMICUS BRIEF

of Brooks Porter
in Support of Carol Severance

TED HIRTZ
State Bar No. 09722000
811 Rusk, Suite 721
Houston, Texas 77002
Telephone: 713- 228- 5570
Telefax: 713- 228- 5575
tedhirtz@wt.net

Declaration under Rule 11
of the Rules of Appellate Procedure

(a) I have endeavored to comply with the briefing rules for parties.

(b) I tender this brief in support of Carol Severance in behalf of Brooks Porter, an owner of beachfront property in the Village of Surfside Beach, Texas. Mr. Porter and his fellow Plaintiffs-Appellants in Brannan v. State, No. 10-0142 on the docket of this Court have been adversely affected by the imposition of the "rolling easement."

(c) Mr. Porter and his fellow Plaintiffs-Appellants, whose own case may be affected by this Court's rehearing in this case, have paid and have agreed to pay a reduced fee for the preparation of this brief. No other person has paid or agreed to pay any consideration for the preparation of this brief. No other attorney has taken part in the preparation of this brief.

(d) As set forth in the Certificate of Service at the end of this brief, I have served a copy of this Amicus Brief on Rehearing on the attorney for each of the parties.

_____/s/_____
Ted Hirtz

Table of Contents

Index of Authorities

Cases

Texas Statutes

Texas Natural Resources Code (Vernon)

Miscellaneous

To the Honorable Justices of the Supreme Court of Texas

Clear eyes and honest reflection can discern the hang of the world.

George Santayana

Introduction
and Points to Consider on Rehearing

This Court correctly decided in its opinion of 5 November 2010 that the "rolling easement" developed by State Officials and applied in this case against Carol Severance has no place in the Texas law of real property. Rehearing gives the Court the opportunity to answer critics of its November opinion and to examine two concepts which underlie the "rolling easement," namely:

1. That a vegetation line determines the landward boundary of an established public Common Law easement of recreational use on the Gulf Coast, and
2. That a change in the vegetation line moves the landward boundary of such an easement.

Summary of Argument

A line of vegetation does not establish a public Common Law easement of recreational use on privately owned land on the Gulf Coast of Texas. Lack of vegetation may make the land desirable for beach use, but the absence of vegetation does not establish a public easement. Public use

establishes the Common Law easement. Public use while the easement is being created determines the landward boundary of the easement. A vegetation line or lines may exist while the easement is being established. At some point in time a vegetation line may be a convenient line for reference. But lines of vegetation are transitory. The landward boundary of a public Common Law easement is the landward limit of continuous public use over the period of time during which the easement is being created.

Once the public by its use establishes the easement and its landward boundary, that boundary does not change, except on mutual consent. Changes in surface vegetation have no effect on the location of the boundary of the easement. A current vegetation line is of no probative value in determining the location of the landward boundary of an easement established years before. The landward boundary of the easement is as unchanging as the survey line which forms the landward boundary of the littoral fee estate on which the easement has been established. The stability of the landward boundary of the easement stands in contrast to the seaward boundary of the easement, which changes with the movement of the mean high tide line measured over an 18.6 year full lunar cycle.

Public use may establish new easements with new boundaries landward of the original easement, but the landward boundary of the original easement does not change. We must wean our thinking from the two inaccurate concepts that a vegetation line determines the location of the landward boundary of a public easement and that a change in the vegetation line moves that landward boundary. Ways other than shifting boundaries must be found to provide beaches for Texas.

Public Use Establishes a Common Law Easement and its Boundaries; a Vegetation Line Does Not

The easement in this case is a Common Law easement of public recreational use on privately owned land on Galveston Island. The public collectively, not the State, owns the easement. This easement existed seaward of Carol Severance's property. State Officials tried to "roll" the easement onto her property.

No written grant established the easement. Public use of the kind described in *Seaway Company v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App. - Houston 1964, ref.n.r.e.), established the Common Law easement. The seaward boundary of the easement is the mean high tide line measured over an 18.6 year full lunar cycle. The landward boundary of the Common Law easement is the landward limit of continuous public use during the period of time during which the easement was established. See *Seaway,* 375 S.W.2d 927 et seq. At the time the *Seaway* case was tried, there was a vegetation line which coincided with the line of public use. In the absence of other landmarks, that vegetation line made a convenient reference line, but the existence of vegetation did not establish the easement or its boundary. Public use did that. Consider how Common Law easements are established.

A Common Law easement of prescription is created by open, notorious, continuous, exclusive and adverse public use of land during the period of prescription. *Brooks v. Jones*, 578 S.W.2d 669 (Tex. 1979)

At Common Law the public shows its acceptance of an easement of dedication or implied dedication by public use of the property. *Las Vegas Pecan & Cattle v. Zavala County,* 682 S.W.2d 254, 256-257(Tex. 1984).

A Common Law easement of custom is created by public use. 1 Blackstone Commentaries 75-78 cited in *State ex rel. Thornton v. Hay,* 254 Ore. 584, 595, 462 P.2d 671 (Ore. 1969)

In all these forms of Common Law easements, public use establishes the easement. Public use during the period the public is establishing the easement determines the location of boundaries of the easement.

If one were challenged to prove today that the public had established a Common Law easement of recreational use on a tract of sandy beach, what evidence would he present in court? Would he present evidence of a vegetation line that may have existed when the public established the easement and then rest his case? Certainly not! Would he rely on just proving the location of the current vegetation line? Not if he wanted to win. He would present witnesses who could testify they used the tract or saw others use the tract for beach recreational purposes. He would present witnesses, maps and documents that the public had used the beach up to a certain landward line continuously for the period of time required to prove prescription or public acceptance of an implied dedication. A vegetation line, or more likely multiple vegetation lines, may have existed during that period of time. If they existed, they may have made convenient reference lines. But, the existence or non-existence of a line of vegetation is really irrelevant to his proof. He must prove continuous public use landward to a certain line. That line of public use will be the landward boundary of his easement, not some line of vegetation.

When analyzed, it appears axiomatic that the landward boundary of any Common Law easement of public recreational use on the Texas Coast is the landward limit of continuous public use during the period of time during which the easement was being established. When this fact appears so self-evident, how did the concept that a vegetation line determines the landward boundary become engrained in our legal and our popular thinking?

The answer may be that at the time Texans started thinking about easements, they thought their beaches were stable. The policy statement of the Open Beaches Act, enacted in 1959, now § 61.011 of the Natural Resources Code, states that if the public acquired such a right under the Common Law, the public had a right of use or easement to "the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico."

The first major case after the adoption of the Open Beaches Act was the *Seaway* case. The area in dispute was the "beach." In its jury charge, the trial court defined "the beach" as the "area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." 375 S.W.2d at 927. The court further defined "Line of vegetation" as "the extreme seaward boundary of natural vegetation which spread continuously inland." *loc. cit*. In response to special issues, the jury in *Seaway* found that appellant's predecessors in title had dedicated the beach of the West one-half of Section 12 of the Jones & Hall Grant to public use. The jury also found that the public had exercised peaceable, adverse and continuous use of the beach from 1840 to 1947. The jury found that there had been no landward advance of the mean high tide line since 1840, that there had been no erosion, and that the beach remained in substantially the same geographic position since the Jones & Hall Grant of 1840. *loc. cit*. In his opinion, Chief

Judge Spurgeon Bell cited testimony that the vegetation line on this section of Galveston Island was stable and marked the boundary of the easement. 375 S.W.2d at 931. The easement the *Seaway* jury found existed was a stable, static easement in which public use extended to the then-existing vegetation line.

Within two decades after the *Seaway* case, the concept of beach stability was destroyed. The threat of coastal erosion was recognized. The beach on the Jones and Hall Grant on Galveston Island proved to be unstable. Its vegetation line was subject to enormous changes. Successive lines of vegetation lines bore no relationship to the line of continuous public use the *Seaway* jury found to have existed since 1840. Erosion was so great that there was fear that the "dry beach" of the existing easement would disappear and that the public would have no sandy area for its recreation. To meet this problem, attorneys for the State developed a solution. They seized upon the idea that the existing public easement moved intact inland onto new land as the coastline receded. They needed a landward boundary for their moving easement. The vegetation line moved. It had been used in *Seaway* to mark the landward limit of public use on a stable beach. State Officials seized upon the vegetation line to use as the landward boundary of their migrating easement. They forged a connection that does not exist in fact.

Using the term, "public beach," which they defined in terms of the vegetation line, § 61.013(c) and §61.014, State Officials induced the public to consider all privately owned land seaward of the vegetation line as subject to public rights. To many, the term "public beach" connotes public ownership. Indeed, the rights the State asserted for its "easement" trumped all of an owner's rights of fee title. This concept that the public's rights

always extend to the current vegetation line became part of the concept of the "rolling easement." State Officials sold both concepts to the public and to certain appellate courts. Rolling the "rolling easement" to the current vegetation line satisfied the Open Beaches Policy announced in the Act. The public obtained new sandy areas for beach use. The State did not have to prove the establishment of a new easement and the State did not have to pay for the land for the new beaches. The concept was popular and populist. The only losers were those persons unlucky enough to own beachfront property at the time the "rolling easement" was imposed on them. But they were few, and they were subject to the enforcement powers State Officials could employ under the Open Beaches Act. Few would challenge the State in the appellate courts, and they lost.

Over the years State Officials developed the "rolling easement" into a mighty engine which squeezed out all property rights from the owners of the land on which it was imposed. With amendments to the Open Beaches Act they increased their powers and their legal arguments. They obtained a warning statute that gave them an argument that buyers of beachfront property after 1985 assumed the risk of losing their land to public use. § 61.025. They increased their powers from denying the rebuilding a heavily damaged home to denying all repairs to homes that were structurally sound and then obtaining orders to remove these homes. Declaring court proceedings too slow and too expensive, in 2009 State Officials obtained the power from the Legislature to remove existing homes in an in-house administrative proceeding. § 61.0183 and § 61.0184.

State Officials have obtained statutory presumptions and the power to determine the current location of the vegetation line. § 61.920.

After a storm or a tidal event, State Officials use the new vegetation line on the coast as the landward boundary of their "rolling easement" even though it has no relationship to historic or to present public use. State Officials descend upon the coast to "red tag" houses that have become located seaward of the new vegetation line. They claim that houses are on the "public beach" and are in violation of the Open Beaches Act. After Tropical Storm Frances in 1989 the Land Commissioner listed 107 houses in Galveston and Brazoria Counties that had become located seaward of the new vegetation line as "encroachments." He requested the Attorney General to commence enforcement action to remove them.

The lack of relevance between the line of natural vegetation line after a storm and the boundary of public use became apparent in 2008 on the Bolivar Peninsula after Hurricane Ike. The line of vegetation was hundreds of yards inland. A public highway, Highway 87, separated the landward limit of any possible public use of the beach from the vegetation line. The Commissioner promulgated a rule that the "vegetation line" was 4.5 feet above mean sea level. He later promulgated a new rule and published maps that the "vegetation line" was to be 200 feet inland from mean low tide. See GLO Press Release of 17 August 2009 viewed online 8 October 2009 at http://www.glo.state.tx.us/news/docs/2009-Releases/08-17-09_Beach_Access.pfd; last viewed 28 March 2011 at www.guidrynews.com/story.aspx?id=1000019955. Over the years the State-imposed post-storm vegetation line has promoted arguments whether vegetation such as the salt cedar was "natural," and whether vegetation growing for 40 years behind an elevated bulkhead really counts as vegetation. Other arguments have flared over whether and how far vegetation would regenerate after a particular storm.

The Report of the Riparian Boundary Committee of the Texas Surveyors' Association, cited and quoted in Kenneth Roberts' article in 12 Baylor Law Review 141 at 142 requires any boundary to meet three tests:

Is it practical?

Is it certain?

Is it stable?

The use of a vegetation line as a boundary on the Texas Coast fails all three of these tests.

Some argue that it is necessary to use the vegetation line as the boundary of the easement because the vegetation line is visible. How much use is a visible reference line if it is wrong? The landward limit of public use can be proved by testimony.

Proponents of the "rolling easement" contend that because the beach is dynamic, the law of the beach must be dynamic too. The seaward boundary of the easement, measured by the high tide line, changes; therefore, they claim that the landward boundary must also change. Since the vegetation line changes, it makes a convenient landward-moving boundary for a "rolling easement." The proponents' argument does not withstand analysis.

Although the seaward boundary of the easement changes, the changes are not as drastic and dynamic as some would portray. The location of the mean high tide line is calculated by the average of the mean high tides over an 18.6 year full lunar cycle. Because of averaging the measurements over so long a period of time, the change in the seaward boundary from one year to the next may be very small.

The seaward boundary of an easement and the vegetation line do not move in tandem. The seaward boundary of an easement and the vegetation

line are independent of one another. They move at different rates, at different times, for different distances, and for different reasons.

As demonstrated above, the vegetation line makes a very poor boundary for anything and it is not the landward boundary of a public Common Law easement.

One cannot shift fee estates or easements on fee estates landward. Consider the littoral fee estate to which the public easement is affixed. The seaward boundary of the fee estate is the average of the mean high tide lines. The seaward boundary can move. The landward boundary of the fee is a survey line. That survey line is tied into a system of survey lines and boundaries that stretches to the 49th Parallel at the Canadian border. That survey line does not move. Movement of the seaward boundary of the fee estate has absolutely no effect on the survey line which determines the landward boundary of that fee estate. This same principle governs the seaward and the landward boundaries of public Common Law easements.

Moving boundaries, however gradually or imperceptibly, to compensate for loss to the sea destroys the stability of all titles to real property landward of the moving boundary. Stability and certainty of titles are bedrock principles of our legal system and our economy. A court ought to exercise great care before allowing any undercutting, however small, of these principles. A littoral estate in land cannot shift landward because it faces erosion from the sea. An easement, a mere interest in land affixed to that fee estate, cannot shift landward because it faces erosion. The owner of the fee and the public, the owners of the easement, must accept the reality that both can lose all of their rights on an eroding coastline.

The "rolling easement" moving landward with each change in the vegetation line is a powerful weapon in the hands of State Officials. They

do not want to give it up. It still fulfills the needs for which the State adopted it. The "rolling easement" allows the State to impose this "easement" on land without having to prove up that the public had established an easement on the land. It allows the State to provide land to the public for popular beach recreation without the State's having to pay for that land. The hue and cry generated against the Court's November opinion, the attacks upon the Court itself, the outright misinformation presented in the public press, and the plethora of amicus briefing for rehearing are all measures of the value the State Officials attach to this weapon.

There is no question that this weapon should be taken from their hands. In an earlier *amicus* brief the author compared the concept of the "rolling easement" to a camel. On further reflection he would compare the "rolling easement" to an oppressive fire-breathing dragon. It needs to be killed. Welcome and three cheers for St. George!

In dispatching the dragon a second time, the author asks the Court to do a clean job. Declare that vegetation lines, past, present and future, have no legal effect on the location of the landward boundary of an established public Common Law easement. Under the Common Law, public use established the public easement. Public use determined the location of the landward boundary of that easement. By uncoupling the connection in our legal thinking between a vegetation line and the landward boundary of the easement, the Court can free us to do some clear thinking about the problems of the Texas Coast. Affirm the Common Law. Declare that public use, and not a vegetation line, determines the landward boundary of an established public Common Law easement.

Once Established, the Landward Boundary of a Common Law Easement Does Not Move

The concepts in real property at Common Law are static concepts. They are concepts by which we attempt to impose order on the natural world. Fee estates are static. Survey lines are static.

Easements are a static concept in the law of real property. At Common Law an easement is not even an estate in land. Thompson on Real Property, 1980 ed. § 425. An easement is an interest of a limited use or enjoyment of the land of another. Powell on Real Property, 1994 ed. § 34.02[1]. An easement attaches only to that portion of the fee estate on which it is created. Once the public by its use has determined the landward boundary of its easement, that boundary is the boundary of the easement. That boundary does not change. It certainly does not change just because some vegetation is removed from the surface of the land. The Law of Easements is well established. The location of an established easement can change only with the consent of both the holder of the easement and the owner of the fee estate. See *Sisco v. Hereford*, 694 S.W.2d 3, 7 and 8 (Tex. App. - San Antonio 1984, no pet.)

The Court recognized this principle in its opinion of 5 November 2010 and cited Thompson on Real Property. However, in an attempt to deal with shrinking public easements on an eroding coastline, the Court created an exception to the rule that easements don't move. Still wedded to the concept that the current vegetation line determines the easement's landward boundary, the Court held that sudden, large, avulsive movements of the vegetation line do not move the landward boundary of the easement, but that gradual, small, imperceptible movements do. Critics of the Court's majority

opinion seized upon this distinction. How does one determine whether the movement of the vegetation line is sudden and large or small and gradual? Critics have called the distinction unworkable.

The "rolling easement" is very bad law. It takes from the owner of the land valuable property rights without compensation. The author questions whether it is wise to replace a "rolling easement" with a "nibbling easement" which does the same thing by smaller increments.

The Court is on ground more sound, both legally and logically, if it affirms the Common Law rule and holds that the landward boundary of an established easement does not move at all. Having taken the first step of eliminating the misconception that a vegetation line determines the location of the landward boundary of an established easement, the Court should take the next step. The Court should hold that the landward boundary of an easement established by public use does not move, not even a little bit. The landward boundary does not move when the vegetation line moves. Movement of the seaward boundary has no effect on the landward boundary of the easement.

Other critics of the Court's opinion have wondered why the Court introduced the concept of avulsion to support its answer on the "rolling easement." The concept of avulsion is not necessary to the Court's holding to eliminate the "rolling easement." The Court applied to the landward boundary of the public easement a concept which the Court has not recognized as applying to the seaward boundary. The Court opened itself to the criticism of inconsistency.

The Common Law rule is salutary. Easements and their boundaries do not move, except on mutual consent. This rule applies to all easements throughout Texas. This Court should apply this rule flatly and without

exception to the landward boundaries of public Common Law easements on the Texas Coast. Applying this rule eliminates the need to distinguish between great and small landward movements and it eliminates any need to invoke the doctrine of avulsion.

In analyzing the landward boundary of a public easement, the Court should eliminate vegetation from its legal diet. Vegetation did not establish the landward boundary of a public Common Law easement; public use did. Vegetation, or its removal, does not cause the landward boundary of a Common Law easement to move, because the landward boundary of a Common Law easement does not move at all. In determining the location of the landward boundary of a Common Law easement and in prohibiting the movement of that boundary, the Common Law provides this Court with the correct rules for its decision on these issues.

Conclusion

As a lawyer who has dealt personally and professionally with beach easement problems for more than twenty-five years, the author has certain ideas of how to create new beaches for the public. An appellate brief is not the place to present such ideas, nor has the Fifth Circuit requested such ideas or long-term solutions from this Court. The Fifth Circuit has requested the Court to answer three specific questions concerning the "rolling easement." The author suggests the Court to answer these questions in as straight-forward a manner as possible. He trusts that the Court will maintain its position to eliminate the "rolling easement" from Texas law. In doing so, he requests the Court in any new opinion to address and clarify the law on the two points he has presented in this brief:

1. Public use, not vegetation, establishes a public Common Law easement and its landward boundary.
2. The landward boundary of that easement, once established, does not move because of vegetation; in fact, without mutual consent, it does not move at all.

Further, this *amicus* sayeth not.

Respectfully submitted,

_____/s/_____

Ted Hirtz
State Bar No. 09722000
811 Rusk, Suite 721
Houston, Texas 77002
Telephone: 713- 228- 5570
Telefax: 713- 228- 5575
tedhirtz@wt.net

Certificate of Service

I certify that on __ April 2011 I served the attorney for each party in this case with a copy of this Amicus Brief on Rehearing by depositing it an official repository for the receipt of United States Mail in a wrapper with sufficient postage prepaid, certified mail, return receipt requested, properly addressed to:

J. David Breemer
Pacific Legal Foundation
3900 Lennane Drive, Suite, 200
Sacramento, California 95834

Attorney for Plaintiff-Appellant, Carol Severance

Daniel Lake Geyser
Kenneth Charles Cross
Office of the Attorney General
Natural Resources Division
208 Price Daniel, Sr. Building
P.O. Box 12548
Austin, Texas 78711-2548

Attorneys for Defendants-Appellees,
Jerry Patterson and Greg Abbot

Barry C. Wiley
Attorney-in-Charge
Galveston County Legal Department
4127 Shearn Moody Plaza
123 29th Street
Galveston, Texas 77550

Attorney for Kirk Sistrunk

_____/s/_____
Ted Hirtz