See also Determination of Atty Fees 9/2/22

STATE OF VERMONT

SUPERIOR COURT
ADDISON UNIT

CIVIL DIVISION
Docket No. 167-10-17 Ancv

JUNE MONCRIEF and NICHOLAS TONZOLA,
Plaintiffs

v.

GERALYN McBRIDE and DOUGLAS TOLLES,
Defendants

DECISION

This is a dispute between abutting landowners over an area on Defendants' land on which Plaintiffs hold an easement for replacement septic system use. The claims were bifurcated and the court first tried Plaintiff's quiet title claim in 2019 to determine the legal interests in the disputed area, leaving for later resolution various claims for unlawful mischief, nuisance, trespass, and others.

By decisions of February 10, 2020 and May 21, 2020, the court (J. Arms) declared that Plaintiffs have a deeded septic easement in the disputed area. The court issued a preliminary injunction precluding Defendants' use of the area except for walking. The court dismissed Defendants' claims that Plaintiffs had waived their right to the easement as well as Defendants' defenses of trespass and estoppel.

In a summary judgment ruling of September 3, 2020, J. Arms dismissed some claims and denied summary judgment on others. In a ruling of October 29, 2020, she issued an Order clarifying and amending the September 3, 2020 Order.

On October 19, 2020, the undersigned granted the Plaintiffs' request for a pretrial attachment in the amount of $17,726.25.

In a summary judgment ruling of June 2, 2021, the undersigned denied Defendants' motion for summary judgment on their unlawful mischief claim, and granted their motion for summary judgment on Plaintiffs' claim for punitive damages.

The above rulings left for final hearing the claims identified in the "Conclusions of Law" section below.

On December 12, 2021, the undersigned made a site visit to the property in the company of attorneys for both parties.

A final hearing on all remaining issues took place on March 7-11, 2022. It was a hybrid hearing conducted largely in-person but with some remote participation by Webex. Plaintiffs June Moncrief and Nicholas Tonzola were present in person and represented by Attorneys Richard Cassidy and Michael T. Russell. Defendant Douglas Tolles was present in person and both Defendants were represented by Attorney Christopher Roy.

At the close of Plaintiffs' case, Defendants moved for judgment on Plaintiffs' unlawful mischief claim pursuant to V.R.C.P. 52 (c). The court deferred ruling at that time, but denies that motion in the "Conclusions of Law" section below, based wholly on the evidence introduced by Plaintiffs in their direct case. The attorneys submitted post-trial memoranda and responses on all pending claims.

Based on the prior rulings of law and the evidence admitted at the final hearing, the court makes the following overall findings of fact and conclusions of law.

Findings of Fact

The land of both parties was previously part of a hilly dairy farm owned by the Mahans, pertinent parts of which are in the Town of New Haven, Vermont. There is a large barn that is still used for agriculture uphill (north) from the parties' parcels. Both parcels have frontage on Hallock Road, which runs in a north-south direction uphill to the former Mahan farm. Plaintiffs' land is below the barn and Defendants' land is below Plaintiffs' parcel.

In 1998, Plaintiffs Moncrief and Tonzola bought the 2-acre parcel they now own from the Mahans for use as their personal residence. The property included a house built in 1953. Environmental subdivision regulations at the time required that if a homestead exemption was claimed, there needed to be at least a 100 foot buffer between the septic system and the boundary of land available, either in fee or by easement, for additional or replacement septic system use.

Thus, the deed to Plaintiffs included not only the fee for the homestead parcel of 2 acres but also an easement for a replacement septic system in an area that extended beyond the lower boundary line 80 feet south in an open field retained by the Mahans. Unbeknownst to the Plaintiffs, underneath the surface of the land they bought and the easement area was a length of Orangeburg pipe 4 inches in diameter perforated with holes and buried in a bed of drainage stones. It ran 220 feet downhill from the site of Plaintiffs' home, underneath the fields across portions of what is now both the Plaintiffs' and Defendants' parcels. It is unknown how long the Orangeburg pipe had been there, and what its original intended use was.

At the time of purchase Plaintiffs had a new septic system for the residence installed by Thomas Fisher, who was unaware when he installed it that there was an Orangeburg pipe underground in the vicinity. The septic system was installed at a level in the ground several inches above the Orangeburg pipe. The entire system was located within the boundaries of the 2-acre parcel and did not use any of the easement area. It included a lateral leach field trench approximately 20 feet northerly of, and parallel to, the southern boundary line of the Plaintiffs'

2-acre parcel. Thus the septic system was 100 feet away from the southern boundary of the Plaintiffs' easement area.

In 1999, Mr. Tonzola noticed a wet area some distance downhill from his property on the neighboring downgradient land. He was curious about where the water came from, and put red dye down the drain in his house, but no dye appeared at the wet site. He concluded that the wetness was not coming from his house.

Prior to 2003, the Mahans sold a parcel of 30.75 acres of their remaining land, downgradient from and abutting the Plaintiffs land, to the Etkas. This parcel included the area of the Plaintiffs' septic easement, which is located just below and adjacent to the Plaintiffs' parcel. The septic easement area has frontage on Hallock Road 80 feet wide. Its 80 foot width runs back away from the road for 158 feet. The rear boundary extends even further back in the shape of an arc leading up to meet Plaintiffs' boundary line. The Etkas built two houses and a garage on the property in locations not affecting the easement area.

The Plaintiffs had problems of water in their basement, and in 2004, they had the house lifted up to replace failed foundation walls in the basement, and they then installed a curtain drain to divert water away from the house. The ends of the curtain drainpipes direct water downhill toward Defendants' land. Judge Arms found that "Plaintiffs' new curtain drain has not increased the amount of surface and subsurface water that flows across the parties' property, including the easement area. Plaintiffs' curtain drain has refocused the water, but not increased the amount of water." (February 10, 2020 Decision, page 10.) As a result of the additional evidence at the most recent hearing, this court finds that there is no change to the finding except that the curtain drain no longer discharges at the common boundary, but now discharges 17' back from the common boundary, causing the water to disperse more broadly before it reaches the boundary. The evidence does not support a finding that water from the curtain drain presently causes areas of saturation or pooling on Defendants' property.

In 2009, Defendants bought the entire Etka property and have resided in one of the houses since then. The other is a tenant house. Fields are leased to a farmer for hay production. The portion of their land encumbered by the Plaintiffs' easement continued after purchase to be an open, undisturbed field. In the spring following purchase, Mr. Tolles asked Mr. Tonzola about a wet spot on his property in the field south of the easement area. Mr. Tonzola had no explanation for it. At that time, neither party knew anything about the Orangeburg pipe.

In 2014-15, Mr. Tolles cleared the side of Hallock Road along the 80 foot frontage of the easement area by taking out an old farm fence and brush. In 2016, he applied to the Town for a curb cut to put in an access road "for farm purposes only" that would come off Hallock Road and cross the easement area. He later amended the application to remove the limitation for farm use only. He told the Selectboard that he wanted access for parking for tenants in the tenant house. He testified that he also wanted to be able to haul water to the tenant house. The Town granted the permit without limitation for farm purposes. He wanted to add gravel or crushed stone to the access road. A separate permit was needed from the Town for that purpose, and a hearing was scheduled.

2017: Differences develop between the parties

In March of 2017, Mr. Tolles detected a smell at a location in the field north of his driveway and south of the easement area. He notified the State. He believed that it was a smell of sewage and that it came from the Plaintiffs' land. He did not notify Plaintiffs. Environmental Officer Gary Urich of the Agency of Natural Resources came to inspect. Nothing was apparent on the surface of the ground. He did not smell sewage at the site and took no action.

At a public hearing in May, Mr. Tonzola heard for the first time that Mr. Tolles believed sewage from the Moncrief/Tonzola property was entering the Tolles/McBride property. Mr. Tonzola apparently raised the issue of the Plaintiffs' easement. The Town granted the permit for the addition of gravel for construction of an access road on Defendants' land based on Town regulations. Nonetheless, on May 8, 2017, the attorney for the Town sent Mr. Tolles a letter reminding him that his use of the permitted road was subject to the Plaintiffs' easement. "Any town permit issued for lands subject to easement rights is issued subject to that easement." (Exhibit 108). Mr. Tolles testified at trial that as a layperson he did not agree. Subsequent events and Defendants' post-trial memoranda show that Mr. Tolles believed that governmental regulatory permits gave him all the permission he needed to construct a road in the easement area. He declined to recognize that the private easement imposed any limitations on his activities on the land in the easement area.

In May of 2017, Mr. Tolles started construction of an access road across the easement area by filling in the ditch on the side of Hallock Road, scarifying some inches of the soil on the proposed location of the access road within the easement area, and laying down gravel. The access road was roughly 25 feet from, and parallel to, the southern boundary line of Plaintiffs' parcel. It bifurcated the easement area, beginning from Hallock Road and running back across the easement area for the full length of it (approximately 200 feet).

In August of 2017, Mr. Tolles asked Mr. Piper, an excavating contractor, to dig up the swale where Mr. Tolles had detected the smell in March. Mr. Piper discovered the end of the Orangeburg pipe laid in stone. He dug it up, and when he dug into the ground, he smelled a sewage smell. At Mr. Tolles's direction, he excavated the pipe out of the trench lined with stone along the length of the pipe except that he cut the pipe just below the Plaintiffs' boundary line. He removed all of it that crossed the easement area and extended south and downhill into Defendants' land. Defendants did not tell the Plaintiffs about the Orangeburg pipe or their removal of a portion of it from the easement area or the fact that Mr. Piper had cut it near their boundary. Mr. Tolles caused the trench to be filled in with fill dirt or clay, and again spread gravel on the portion of the access road that had been disturbed by the excavation. This raised the height of the roadway to some degree and was likely a cause of at least some of the wetness and periodic ponding that subsequently occurred in the easement area between the boundary with Plaintiffs and the access road.

Mr. Tonzola was concerned about Defendants' activities in the easement area, specifically the road across it, and possible impact on the Plaintiffs' easement rights. In August, Plaintiffs contacted Stephen Revell, a geologist and hydrogeology expert and septic system

designer, to evaluate the potential impact of these activities on Plaintiffs' ability to use the easement. When Mr. Revell visited the site, he saw the excavated pit at the end of the cut-off Orangeburg pipe. He saw no standing water, and smelled no odor. At that time, as a result of Mr. Revell's investigation, Plaintiffs had no reason to suspect that there was anything wrong with the septic system on their own property. Mr. Revell dug some test pits with a hand augur to evaluate the soil profile in the easement area. He planned to return in the fall for further work.

In September of 2017, pursuant to a complaint of Mr. Tolles, Mr. Urich visited the site again. He smelled organic matter, but did not smell sewage and again did not take any action. There was apparently no discharge on the surface of the ground. Mr. Tolles was frustrated with Mr. Urich's response as he believed that sewage from Plaintiffs' land was affecting his property.

Mr. Tolles hired Dr. Miles Waite, a hydrogeologist and expert in groundwater and septic system assessment, who collected a sample from the cut-off end of the Orangeburg pipe in September of 2017. It smelled of septic and had the appearance of septic effluent. He had the sample tested. The Endyne lab results indicated both human waste and groundwater. This was the first indication that some kind of septic effluent likely moved underground through the Orangeburg pipe from Plaintiffs' land to at least the easement area on Defendants' land.

In early October of 2017, Mr. Tolles issued a Notice against Trespass to both the Plaintiffs and to Mr. Revell. This prevented them from investigating the circumstances and conditions in the easement area and at the end of the Orangeburg pipe. It appears to reflect Mr. Tolles's view that his ownership of the land gave him exclusive authority over the area subject to the easement, despite the existence of the legal easement that burdened the property.[1]

At about the same time, the Town Zoning Administrator issued a permit to Mr. Tolles for application of crushed stone on the access road on the easement area based on Town zoning regulations only, without consideration of rights created by the private easement. Also in early October, Plaintiffs filed this suit, complaining of the construction of the road in the easement area and seeking enforcement of their rights based on the easement in their deed. In pleadings and amendments over the next two years, the parties asserted numerous claims against each other.

Late in the fall, a driver drove a truck onto the Defendants' property to pull a trailer full of hay bales off Defendants' land. When the trailer brake froze, the truck and trailer were stuck on the access road. A tractor was needed to pull all the vehicles out.

In November of 2017, a hearing was held before the Development Review Board on the Plaintiffs' appeal of the grant of a permit for crushed stone on the access road. The appeal was denied. The DRB, like the Zoning Administrator, based its decision on Town regulations only, as it determined that it did not have jurisdiction to address the civil dispute related to the validity and scope of the easement. Plaintiffs appealed to the Environmental Division of Superior Court.

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[1] Throughout the case, including at the final hearing, despite the final ruling on the quiet title claim, Mr. Tolles continued to assert that the Plaintiffs' easement was not valid.

2018

In the spring of 2018, Dr. Waite, on behalf of Defendants, set up a meeting with himself, Mr. Tolles, and Elias Erwin, the State of Vermont Regional Engineer who reviews permit applications. Dr. Waite showed Mr. Erwin the Endyne test results. They walked the general area, including the northwest corner of Plaintiffs' land in addition to the easement area. Plaintiffs apparently had no involvement in this meeting or knowledge of it. Dr. Waite was skeptical that the easement area would be suitable for a replacement system. Mr. Erwin expressed interest in the northwest corner of the Plaintiffs' property, as opposed to the easement area, as a replacement site for Plaintiffs' septic system. The court infers that Mr. Tolles was hopeful that the easement area on his property would be determined to be a poor one for a replacement septic system so that he would not be limited by the easement. Mr. Tolles's position throughout this litigation is that the land in the easement area is not suitable for use for a replacement septic system in any event, and therefore the easement is not valid and it is unnecessary for Defendants to limit their activities in the area.

In July of 2018, Dr. Waite dug test pits in the easement area to evaluate suitability for replacement sites for a septic system for the Plaintiffs. He avoided the access road, the site of the Orangeburg pipe, and areas with previously disturbed soil. This evidence shows that Mr. Tolles's activities in the easement area had already limited available eligible sites within the easement area for a replacement system.

Over the summer, heavy farm equipment and trucks and trailers loaded with hay were driven over the access road within the easement area.

A hearing was held in October of 2018 before the Environmental Division on the appeal from the DRB grant of a permit to apply crushed stone for the access road. In a Decision issued in December of 2018, the Environmental Division affirmed the approval of a permit to Defendants to add more than 50 cubic yards of crushed stone to their property for an access road, a portion of which would cross the easement area. The court did not address the issue of the easement area being burdened by Plaintiffs' septic easement. Rather, its decision was based only on the application of legal criteria in Town regulations.

In November of 2018, Mr. Revell, on behalf of Plaintiffs, submitted a written proposal for potential remediation work to plug the open end of the Orangeburg pipe.

2019

In the spring of 2019, the parties agreed to scope the Orangeburg pipe by running a camera up it to investigate its path. On April 30, 2019, two weeks prior to the event, Mr. Tolles dug a hole in the ground with an augur mounted on a tractor just below where the Orangeburg pipe had been cut off near the Plaintiffs' boundary. He discovered what he believed to be effluent. Dr. Waite arrived after the hole had been dug. There is disputed evidence about whether or not Mr. Tolles dug additional holes the next day. He says he did not, but Plaintiffs' photographic evidence shows he did. It is not necessary for the court to determine this issue.

The camera work was done on May 15, 2019 with Dr. Waite present. It was discovered that the Orangeburg pipe went right under the Plaintiffs' leach field. Plaintiffs subsequently did additional investigative work on their own property for which Dr. Waite was also present. He concluded that there was a vertical white pipe near the Plaintiffs' septic tank that served as a conduit for sewage to "get over to the Orangeburg pipe." This suggested the possibility that the Plaintiffs' effluent was not being treated solely by the system within the 2 acres, but that at least some was traveling through the Orangeburg pipe south into at least the easement area.

In July of 2019, Mr. Waite sent an email to Mr. Erwin with a concern of release of effluent from Plaintiffs' property. The email was forwarded to Mr. Urich, the enforcement officer. As a consequence, Mr. Urich conducted a dye test by putting green dye in one of Plaintiffs' toilets. On that day, there was a shovel in the hole below the open end of the Orangeburg pipe at the location of the April 30 augur hole. The parties dispute whether Mr. Tolles had done further digging in the hole. It is unnecessary to determine whether he did or not. The dye surfaced on Defendants' land the next day, indicating that wastewater traveled through the Orangeburg pipe onto the easement area on Defendants' land. The green dye spread through ponding of surface water north of the access road, some of which likely resulted from heavy rains. As a result of the green dye test, it was clear that the Plaintiffs had a system that had "failed" according to terms in the Wastewater Regulations, and that a replacement was needed.

In July of 2019, following the green dye test, the Department of Environmental Conservation issued a Notice of Violation to Plaintiffs indicating that their septic system had failed and needed to be replaced. Plaintiffs hired a contractor to cap their septic tank. Thereafter they minimized use of water in the home and had the tank pumped out on a regular basis and the contents hauled away for 14 months until they had a replacement system in place.

Mr. Tolles mowed the grassy growth in the easement area with his tractor, sometimes when it was muddy. The tractor wheels left ruts in the ground. Rain water ponded in the ruts made by the tractor.

There was an old wooden fence along the boundary line between the Plaintiffs' and Defendants' parcels that had been there for years. The Plaintiffs had hung birdhouses on it. Mr. Tolles determined where he thought the boundary line was between the two parcels based on stringing twine along what he understood to be the description of the property line, and removed 6-10 fenceposts, including 4 birdhouses, on what he believed was "his" side of the boundary. That left one fence post that he believed was on the Plaintiffs' side of the boundary line. He left a knocked-down fence post with a birdhouse on it lying in the field. Plaintiffs believe the fence accurately marked the boundary.

Tension between the parties was high. Plaintiffs observed things like Mr. Tolles's removal of the fence and birdhouses and mowing with a tractor in the easement area, and photographed such actions to document activities in the easement area. Mr. Tolles considered this to be harassing behavior that intruded on his management of his own property. At some point, Mr. Tonzola parked his truck along Hallock Road at the entrance to the accessway to prevent vehicle passage across the easement area. Mr. Tolles called the police who authorized

the truck to be towed away. Mr. Tolles applied chemicals to vegetation in the easement area near the end of the Orangeburg pipe on the grounds that Plaintiffs should have done so pursuant to the Notice of Violation but had not done so. Plaintiffs felt constrained by the Notice against Trespass.

The first trial in the case took place in September of 2019. It addressed the legal issue of quieting title to the septic easement: i.e., whether Plaintiffs held a legal easement interest in the easement area, and the scope of the easement. Defendants argued that "the Court should construe the easement's language narrowly to keep Plaintiffs from constructing a new septic system in the easement because, according to Defendants, the land that constitutes the easement is not suitable for a septic system." *Id.* at 45. It was a final hearing on the quiet title issue, but not a final hearing on the other claims in the case. The parties were free to introduce additional evidence at the final hearing that took place in March of 2022.

In its February 10, 2020 Decision based on evidence presented in September of 2019, the court included a finding that

> Defendants have altered the septic easement by constructing an accessway across it and removing the Orangeburg pipe within the easement's bounds. Through this process Defendants have operated heavy equipment on the accessway, including tractors, wagons, flatbed trucks, tractor trailers, pickup trucks, and tandem trucks. Heavy equipment was operated on the accessway approximately twenty times over the past several years as credibly asserted by Plaintiff Tonzola. Defendant Tolles has continued to engage in activity in the septic easement throughout the litigation. He drives his tractor between the accessway and the parties' property line.

Id. at 14-15. The court also found that:

> Defendant Tolles has 'generally heavily disturbed this septic easement'. . . [and] changes to the native materials beneath the accessway have had a profound effect on permeability (the ability to transmit fluids) of the land within the easement. Substantial evidence exists to support Mr. Revell's conclusion that this is what occurred in this case." *Id.* at 17. . . .The Court finds that Defendants' activities damaged the easement by disrupting and compacting the soil therein threatening its use as a future disposal system. . .

Id. at 18. The additional evidence presented at the court trial in March of 2022 is fully consistent with these findings of fact, and the court so finds.

In the Decision regarding quiet title to the easement, the court concluded that Plaintiffs have title to the septic easement, and defined the scope and permitted uses of the easement, including the right to enter the easement area to determine whether a septic system may be built there, and to construct and repair a system within the easement area. The court also temporarily enjoined Defendants from engaging in any activities within the easement area, with an exception for walking, pending a final order in the case.

Following the Notice of Violation to the Plaintiffs in July of 2019, Mr. Revell designed and submitted a plan for a replacement system in the easement area on behalf of the Plaintiffs. He took into account the effect of the construction of the access road on the ability of the soil to handle a septic system, the soil disturbances related to excavation in the easement, the addition of fill on the access road, the compaction effect of heavy equipment use, and the effect of tractor ruts. These disturbances were significant in that they lowered the permeability of the soil and affected the ability of the area to accept effluent migration. In addition, the gravel on the access road raised its height and caused a damming effect that increased the amount of water north of it. As a result, the portion of the easement area available for a possible replacement system was limited to south of the accessway.

Mr. Revell's design for a replacement system south of the accessway was a mounds system that used variance procedures, but also had an application area in excess of non-variance requirements. An application for a permit was submitted in October of 2019. At the end of October, Dr. Waite sent an email on behalf of Mr. Tolles to Mr. Swift, the State of Vermont Regional Engineer reviewing the application, to provide his professional opinion (Dr. Waite's) that the easement area was a poor place for a septic system. His biggest concern was that effort was directed at a replacement in the easement area when there could be a better place to locate it (the northwest corner of Plaintiffs' parcel).

2020

On May 26, 2020, Mr. Swift, after reviewing Mr. Revell's design for use of the easement area, wrote to Mr. Revell that a replacement system should be designed for the northwest corner of Plaintiffs' property because a system in that location "would entail fewer, or less extreme, variances, compared to the design submitted. Please understand that this determination does not constitute a conclusion on my part, or otherwise establish, in my opinion, that the septic easement area has no potential value as a wastewater disposal site." (Exhibit UU.) Both locations would require variances.

One of the reasons that State Engineer Mr. Swift preferred the northwest corner location for the Plaintiffs' replacement septic system was that it could "avoid coinciding with any areas having significant existing disturbance of the native soils." (Exhibit UU, page 1). All of the significant existing disturbance of the native soils in the easement area were caused by the intentional acts of Mr. Tolles except for the original installation of the Orangeburg pipe.

Mr. Revell designed a second system for the northwest corner location which was approved in a letter from Mr. Swift dated July 10, 2020. Mr. Swift again did not reject the design for the easement area as unusable, but compared the two and found the northwest corner location preferable. The replacement system was constructed in October of 2020 in the northwest corner pursuant to the permit issued. The cost to Plaintiffs was $44,387.

Cause of failure of Plaintiffs' septic system

Plaintiffs claim that Mr. Tolles caused the failure of their septic system by digging holes on April 30-May 1, 2019 and July 30, 2019 in the ground below the end of the Orangeburg pipe.

The claim is that such digging disrupted the underground flow through the Orangeburg pipe, causing effluent to burst up to the surface and causing the septic system to fail.

This is based on the opinion of Mr. Revell, Plaintiffs' expert, that the digging of the augur hole on April 30, 2019 caused the upwelling of grey black water containing organic material, which otherwise would have remained underground and been dispersed and treated in the soil, to come to the surface and flow from the hole. His opinion is that the Orangeburg pipe was functioning underground as a leach field, allowing effluent to migrate into the native soil for treatment along the line of the pipe. Mr. Revell's view is that if the Plaintiffs' system had actually failed, there would have been evidence of failure all along the pipe, whereas the only evidence of surface appearance of effluent occurred on the two dates, April 30 and July 30, at the single site where holes were dug by Mr. Tolles, with a tractor-mounted augur and a shovel marking the spot, thereby causing flow from the Orangeburg pipe to come to the surface.

The evidence shows that for some unknown period prior to August of 2017, which is when the Defendants had the Orangeburg pipe cut off and excavated out of its trench, the pipe had functioned as a supplemental leach field for overflow from the Plaintiffs' septic system. The overflow traveled to the Orangeburg pipe where it went down the Orangeburg pipe and was released out of the perforation holes and treated by absorption into native soils. It is unknown how long this had been taking place underground. There is no evidence that effluent ever surfaced above ground at any point prior to the removal of the Orangeburg pipe, either along the line of the pipe in the easement area or in the Defendants' land to the south unencumbered by the easement. It is possible that some of the effluent that traveled down the Orangeburg pipe while it was functioning as a leach field went beyond the end of the 80' easement area and on to the portion of Defendants' land beyond the easement. Mr. Tolles' detection of a smell in March of 2017 suggests that this might have happened. If it did, it was clearly only an occasional event. When Mr. Urich came to the site, he did not detect such a smell, and there is no other evidence of an odor at that location prior to the excavation of the Orangeburg pipe in August of 2017.

Mr. Revell's opinion that Defendants' actions in digging caused the failure of the system appears to be based on the definition of "failure" of a system of Plaintiffs' type in the State of Vermont Wastewater regulations:

> (32) **Failed System** -- means:
> (A) a wastewater system that is functioning in a manner:
> (i) that allows wastewater *to be exposed to the open air, to pool on the surface of the ground, to discharge directly to surface water*, or to back up into a building or structure, unless in any of these instances the approved design of the system specifically requires the system to function in such a manner; or. . .[inapplicable]
> (B) Notwithstanding the provisions above, a system shall not be a failed system if:
> (i) these effects can be and are remedied solely by a minor repair or minor replacement; or
> (ii) these effects have lasted for only a brief period of time, the cause of the failure has been determined to be an unusual and non-recurring event, and the system has recovered from the state of failure. Systems that have recurring, continuing, or seasonal failures shall be considered to be failed systems.

16-3 Vt. Code R. § 300. (Emphasis added.) Thus, the State did not consider that the system had "failed" until wastewater surfaced and was exposed to the air and pooled on the surface of the ground. This occurred in July of 2019 at the time of the green dye test.

However, all the investigations had revealed that the Plaintiffs' system, as installed by Thomas Fisher, was no longer functioning as designed and intended. The effluent from the Plaintiffs' home had 'jumped the fence' (underground) and was using the Orangeburg pipe as an extended leach field. Thus, although 'failure' per the Wastewater Regulations did not occur until holes were dug that caused effluent to rise to the surface, the system had 'failed' in that it was not functioning properly. This had occurred at some unknown time prior to July of 2019.

In any event, the Plaintiffs' system was discovered not to be working properly, and needed to be fixed or replaced. Whether the problem could have been remedied using the existing system is unknown. There was some evidence that the system as originally installed was insufficient, although the evidence of that was not conclusive. Whether or not the actions of Mr. Tolles in digging holes caused 'failure' within the meaning of regulatory definitions is unclear and unnecessary to decide. As to causation of 'failure' in the functional sense, as opposed to the regulatory meaning, there is no evidence that any action on the part of Defendants caused the Plaintiffs' system to fail to function as it was designed and intended to do. Whether Mr. Tolles dug holes or not, at some point the Plaintiffs were going to have to be responsible for fixing or replacing their septic system. The easement area was or should have been available to Plaintiffs for a replacement system with soils in the same condition as when the easement was granted. The damage to the easement area caused by the activities of the Defendants seriously limited the availability of soils and space in that area for its intended use.

Current situation

The easement area remains in a disturbed state due to the excavation, road construction, compaction from heavy traffic, addition of fill in the trench, gravel on the roadbed of the access road, and rutting from vehicles. In order for it to be used for purposes of a replacement septic system, remediation work would need to be done. Mr. Tolles remains convinced that the easement area is not suitable for a septic system at all, and that he should be free to use the area as if it were unencumbered. He maintains a high degree of anger and resentment toward the Plaintiffs, as well as an unrealistic belief that the existence of the easement should not be an impediment to his own use of the easement area for his own purposes. This is despite the court ruling and despite the fact that Mr. Swift, the Regional Engineer, did not rule out the potential use of the easement area in the future for wastewater disposal, even with disturbed soils.

Plaintiffs have requested damages on their claim of unlawful mischief or, in the alternative, an order that Defendants return the septic easement area to "as good or better condition than it was before." (Plaintiffs' Post-Trial Memorandum, page 33). Due to the lack of trust between the parties and Mr. Tolles's pattern of acting unilaterally as well as his overall opinion about the easement, it does not make sense for Mr. Tolles to be the person responsible for engaging contractors and directing remediation activities.

As to the cost of remediation, there is some evidence that as of September of 2020, the cost of remediation would have been $3,600. (Exhibit 168.) The damage to the easement area by disturbing and compacting the soils (excavation of the trench, addition of fill, creation of the access road with gravel, compaction from heavy traffic) had occurred by the summer of 2017. Adding legal interest to that amount for the two years from 2020 to arrive at a current amount results in a figure of $4,464 ($3,600 x 12% per annum of $432 x 2 = $864 + $3,600 = $4,464). That figure is not likely to accurately reflect current costs due to the passage of time. It is also not clear from the estimate whether that would simply cover undoing the road and smoothing over the surface, or whether it would sufficiently restore the characteristics of the soil to a condition suitable for installation of a septic system. There may be a need for costs for advice from a wastewater expert and septic system designer to advise as to how best to conduct the remediation in order to make the soils as suitable for septic use as they were before the disturbances, to the extent possible. The court does not find that either the $3,600 figure or the higher amount including interest represents a reasonable measure of damages.

Mr. Tonzola testified that the value of the Plaintiffs' property has been diminished by $15,000 by the damage done to the easement area. An owner is entitled to give opinion evidence about property value, and this evidence is unrefuted. This figure does not seem excessive given the extent of the damage done throughout a significant portion of the easement area over a period of time, the clear need for remediation costs to be incurred prior to use of the easement by Plaintiffs or any successor owner, and the fact that the unrepaired state of the easement area affects the fair market value of the Plaintiffs' property. A portion of the Plaintiffs' property interest is unusable for its intended purpose, with an accurate current cost of remediation and outcome uncertain. Defendants offered no contrary evidence of the diminution in value of Plaintiffs' property due to the damage. The court finds that the best evidence of damages is the amount of reduction in value of the fair market value of Plaintiffs' property, or $15,000.

Plaintiffs' replacement septic system, located in the northwest corner of their 2-acre parcel, is in place and apparently functioning properly. Their prior failed system is no longer operational.

The end of the Orangeburg pipe apparently remains in position, protruding south of the common boundary line into the area owned by Defendants. It no longer discharges effluent onto Defendants' land. It serves no function as a replacement septic system. Because its source is on Plaintiffs' property and its presence is not part of a use consistent with the easement, Defendants are entitled to have Plaintiffs remove it.

Plaintiffs' curtain drain remains in place. It discharges surface water to the surface 17' north of the common boundary, from which water disperses and drains downhill. It is possible that some of the water reaches the portion of Defendants' property that is subject to the easement, but Defendants have not proved that the manner in which it reaches that area is in excess of natural drainage or impacts their residual rights in the easement area. Plaintiffs either have or intend to build a water garden at the location of discharge. Defendants claim it is a continuing trespass. The evidence does not support a finding that any water that drains south of the common boundary causes harm to either the easement area or any other lands of Defendants.

Conclusions of Law

Plaintiffs' Claims

Unlawful Mischief (Count II of Second Amended Complaint)

Plaintiffs claim that the Defendants "intentionally damaged the Septic Easement, in violation of Title 13 V.S.A. §3701." Second Amended Complaint. At the close of Plaintiffs' case, Defendants moved for judgment pursuant to V.R.C.P. 52(c) on this claim, and the court deferred ruling.

13 V.S.A. §3701(f) provides: "A person who suffers damages as a result of a violation of this section [unlawful mischief] may recover those damages together with reasonable attorney's fees in a civil action."

"A person is liable for unlawful mischief if he or she: (1) intends to damage property; (2) has no right to do so; (3) has no reasonable ground to believe that he or she has such a right; and (4) does any damage to property." *LeBlanc v. Snelgrove,* 2015 VT 112, ¶58.

Plaintiffs claim that Defendants damaged their septic easement in multiple ways:

- by removing the Orangeburg pipe which was a component of their septic system
- by damaging native soils and impacting soil structure in the easement area
- by digging holes at the end of the Orangeburg pipe to create failure of their system
- by interfering with surface and groundwater migration causing ponding
- by mowing in the easement area with a tractor causing ruts in the ground

With respect to the motion for judgment, the court concludes that Plaintiffs introduced sufficient evidence in their direct case to show that Defendants damaged the septic easement by disturbing the soils as a result of excavation and adding gravel and fill, by causing heavy equipment to drive over the easement area compacting the soil and affecting its permeability for septic disposal purposes, and by digging up the portion of the Orangeburg pipe located within the easement area; that these acts were done intentionally by Defendants (factor 1); that Defendants had no right or reasonable grounds to believe that they could exercise full ownership rights over the easement area in derogation of the legal easement rights of Plaintiffs (factors 2 and 3); and that the easement area was damaged for use by Plaintiffs for its intended purpose as the soils were altered and would need remediation prior to easement use (factor 4). Thus, the court denies the Rule 52 (c) motion and proceeds to analyze the claim based on all the evidence.

The court concludes that the Plaintiffs have proved their claims of unlawful mischief to the Plaintiffs' easement in two respects: (a) digging up the portion of the Orangeburg pipe that crossed the easement area in August of 2017, disposing of the pipe and backfilling the trench with new material, and (b) damaging the soils in the easement area to the extent they require remediation prior to easement use by laying out an access road over the easement area, including scarifying the topsoil and adding gravel and fill, and causing heavy equipment to drive across the easement area repeatedly causing compaction of the soil, affecting its permeability.

The Orangeburg pipe was not designed as part of the septic system installed by Thomas Fisher in 1998. Mr. Fisher did not know it was there (nobody did). He installed a complete system that did not involve the pipe and that was located several inches higher than the pipe within the ground. It was located wholly on the 2-acre parcel owned by the Plaintiffs in fee. The evidence suggests that at some later point after installation, at least some portion of effluent from the Plaintiffs' system made its way to the Orangeburg pipe, at which point the pipe began to function as an extended leach field, allowing effluent to travel down the pipe for subsurface dispersal and treatment in surrounding soils. The fact that this happened did not mean that the Orangeburg pipe was designed as a component of the Plaintiffs' system or knowingly used as part of it. The septic system apparently simply enlarged itself and extended itself across the property boundary into the easement area--and apparently possibly into Defendants' unencumbered land--through the use of the preexisting Orangeburg pipe.

When Mr. Tolles discovered the pipe on the portion of his land unencumbered by the easement in 2017, he certainly had the right to dig it up and dispose of it as far as the boundary of the easement. However, the situation changed when it got to the southern boundary of the easement area. He had discovered a perforated pipe laid in a trench with stone within an area on which the Plaintiffs held an easement for septic purposes. He was on notice that Plaintiffs held a septic easement on that area of his land both by virtue of the original deed and the recent letter he had received from the New Haven Town attorney reminding him of his obligations to honor the easement. He proceeded to dig up the pipe all the way across the 80 foot width of the easement area up to close to the Plaintiffs' boundary line without contacting Plaintiffs, to cut off the pipe, to dispose of the pipe, and to backfill the trench with fill brought in from elsewhere. This was intentional behavior that disturbed and changed the soils in the easement area. It destroyed a component of a system that was functioning as a practical matter, even if the Plaintiffs did not know it and repair or replacement was needed. These actions were undertaken without notice to the Plaintiffs in an area in which they held an easement for septic purposes.

The evidence does not support a finding that this act caused the Plaintiffs' original system to fail, but it was the first of a long series of actions in which Mr. Tolles repeatedly excavated and disturbed and changed the native soils in the easement area, deposited gravel into the soil to build an access road, and compacted the soils by repeatedly running heavy equipment over the easement area. The evidence is very clear that beginning in 2017, Mr. Tolles did not recognize, honor, or respect the Plaintiffs' deeded property rights in the easement area, that he intended acts which damaged those easement rights, and that he caused damage to the easement property sufficiently extensive that in order for it to be used for septic easement purposes, remediation will be necessary.

The Defendants purchased a property in which their neighbors, the Plaintiffs, held a valid legal property interest in a portion of the Defendants' field for purposes of septic system use. Defendants had a legal obligation not to harm the Plaintiffs' ability to use the easement area for the intended purpose. Land set aside for use for a septic easement means use of the native soils to treat and disperse septic effluent. It inherently calls for maintenance of the integrity of the land

and soils for that purpose. Mr. Tolles consistently acted as though he had exclusive authority to develop the land as if the property were not subject to an easement held by Plaintiffs.

Defendants argue that because they did not physically enter the Plaintiffs' land (i.e., cross the common boundary into the area owned by the Plaintiffs in fee), they did not harm Plaintiffs' property interest. However, Mr. Tolles did intend to and did engage in actions which caused harm to the Plaintiffs' property interests in the *easement*. The septic easement is a real legal property interest that consists of the right to use the land and soils for septic system purposes. This is the paramount use, and while the owner of the underlying property has the right to engage in compatible uses, such owner has no legal right to interfere with the availability of the land for use by Plaintiffs pursuant to the easement. "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Restatement (Third) of Property* (Servitudes) § 4.1 (2000)

Specifically, Defendants caused a heavy truck full of water to drive across the easement area in 2016 and become stuck in the soil, thereby affecting the level of compaction and permeability of the soils. He had the Orangeburg pipe excavated out of the trench not just on the portion of his property in which there was no easement, but all across the easement area as well. This disturbed the soils in the easement area. He then caused the soils to be altered by filling in the trench on the easement area with non-native soils. He also changed the character of the soil and its structure by creating an access road by scarifying soil surfaces in the easement area and adding gravel, then adding and spreading fill, and by causing heavy equipment pulling heavy loads to drive across the easement area. The creation of the access road affected surface and groundwater, causing it to back up above the access road, causing or contributing to wet areas that then became rutted as a result of Mr. Tolles driving his tractor in that area.

In short, he intended all of these acts, and all of them resulted in changes to the soil structure and its permeability and compromised the suitability of the area to serve its intended legal purpose of being a location for a replacement septic system.

Defendants argue that they had permits and relied on contractors, but the permits only recognized compliance with governmental regulations, and did not authorize violation of an easement holder's private legal rights in the property. Even at the time of the initial permit, in May of 2017, the attorney for the Town of New Haven noted in a letter to Defendants that "Any town permit issued for lands subject to easement rights is issued subject to that easement." (Exhibit 108). Mr. Tolles was on notice that the permits did not authorize actions that caused damage to easement rights. He had no reasonable ground to believe that he had a right to use the easement area for his own purposes in a manner that compromised its use for septic system purposes. Even he acknowledges that if the land were to be used for a septic system in the future, remediation work would need to be done to prepare it for such a use. This would not have become necessary unless Defendants had damaged the easement area.

Evidence from three of the wastewater professionals demonstrates that the easement area was diminished in available area for use for a septic system because of the soil disturbances

caused by Defendants. Both Dr. Waite and Mr. Revell, in evaluating where possible sites for a replacement system could be, specifically had to rule out areas of disturbed soils, and Mr. Swift, in preferring the northwest corner location, specifically cited the disturbances of soil in the easement area as affecting his preference when choosing between the designs for the two locations. If Plaintiffs' easement rights had been respected, Plaintiffs should have had the full easement area undisturbed and available for replacement septic system use. Although they would have had to deal with the existence of the Orangeburg pipe, they should have had the opportunity to obtain expert advice in minimizing its impact. The easement area is seriously damaged such that it cannot be used for its intended purpose without remediation. As set forth above, the best measure of the value of the damage is the diminution in property value, or $15,000.

Plaintiffs claim damages in the amount of the full cost of installing the replacement system. Plaintiffs are not entitled to such damages because they had a system that needed replacement in any event, without any unlawful mischief. They did not prove that the unlawful mischief caused the system to fail to function properly.

The Plaintiffs also seek attorneys' fees, which are authorized by 13 V.S.A. §3701(f) on a successful unlawful mischief claim. Plaintiffs called Attorney James Dumont as an expert witness on the subject of reasonable attorneys' fees. Defendants' counsel objected on the grounds that there had not been a timely disclosure of the witness pursuant to the pretrial order, as he only learned late the night before that Mr. Dumont would be called. Plaintiffs' counsel appeared to argue that disclosure was not required because attorneys' fees are normally addressed in post-trial proceedings if a claim authorizing attorneys' fees has been successful. The court ruled that it would take the witness's testimony and defer ruling on the objection.

Defendants' counsel raised a valid objection. He had insufficient notice and opportunity to prepare to cross examine a witness presenting new facts on a critical issue. It is also the case that it is customary for attorneys' fees to be addressed after the trial when the outcome of claims is known. Thus, the court will defer decision on the issue of reasonable attorneys' fees for the unlawful mischief claim, allowing both parties opportunity to address the issue in post-trial proceedings. The procedure is set forth in the order at the end of this decision.

Nuisance (Count VII of Second Amended Complaint)

The most recent summary by the Vermont Supreme Court on the law of nuisance is as follows:

> The law of private nuisance springs from the general principle that it is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor." *Myrick*, 2017 VT 4, (quotation omitted). A private nuisance is accordingly defined as a substantial and unreasonable interference with a person's interest in the use and enjoyment of land. *Coty,* 149 Vt. at 457); *accord Post & Beam Equities Grp., LLC v. Sunne Vill. Dev. Prop. Owners Ass'n,* 2015 VT 60, ¶ 24.

Jones v. Hart, 2021 VT 61, ¶ 26.

The Court also recognized that "a sustained and intentional campaign to annoy a neighbor by interfering with the use and enjoyment of the neighbor's property can amount to nuisance." *Id.* at ¶ 29.

In this case, the Plaintiffs' claim is that Defendants violated the 'duty to make use of their property interests so as to occasion no unnecessary damage or annoyance,' and that they did so in a manner that caused substantial and unreasonable damage and interference with the Plaintiffs use and enjoyment of their interest as holders of an easement on Defendants' land and as owners of the neighboring land benefitted by the easement. The principles of a nuisance cause of action are as applicable to dominant and servient owners in the same parcel of land as they are to neighbors, especially where the easement is held by the neighboring landowner for the benefit of that land.

Defendants' actions included all of the intentional acts described above in relation to the unlawful mischief claim. In addition, Plaintiffs have proved that Defendants engaged in a sustained and intentional campaign to make the Plaintiffs' easement unusable for its intended purpose so that Defendants would then be able to use the easement area for their own purposes free from the limitations imposed by the easement. This included making independent contact with regulators through their expert in an apparent attempt to influence the outcome of Plaintiffs' permit application. The evidence is clear that throughout this litigation, Defendants' position has been that the easement area is unsuitable for a septic system, and therefore the easement is "moot" or a nullity and not to be enforced.

In pursuit of this campaign, Defendants pursued permits to construct a road for use by heavy equipment across the easement area while ignoring obligations of the easement, and proceeded with construction of the road and its use by heavy equipment despite a warning from a municipal attorney. Defendants also sought to obstruct, through the issuance of Notices against Trespass, Plaintiffs and their expert Mr. Revell from entering the easement area to investigate the Orangeburg pipe problem, despite the Defendants' deeded right of entry to address septic issues.

In pursuit of their effort to moot the availability of the easement area as a site for a replacement system, Defendants engaged in the following preemptive activity:

- convened a meeting at the property in the spring of 2018 in which Dr. Waite brought Mr. Erwin, an engineer from the State responsible for permitting, to meet with Mr. Tolles and Dr. Waite to review test results and walk the property, thereby encouraging the State to favor the northwest corner of Defendants' property as the preferred location for a replacement site, all without notice to the Plaintiffs
- caused his expert Dr. Waite to send an email in October 2019 to Mr. Swift, the engineer reviewing the first application for a permit for a replacement system, providing his professional opinion that the easement area was a poor place for a replacement system, without notice to Plaintiffs

These are contacts above and beyond the reports with state regulators made by Mr. Tolles in March of 2017, September of 2017, and July of 2019, in which Mr. Tolles was entitled to make complaints based on his belief of effluent discharges. Unlike reports of claimed discharges, the

above contacts were specifically designed to influence the permitting process to nullify the Plaintiffs' opportunity to use the easement area for a replacement septic system. The court is not suggesting that they actually influenced the permitting decision, which the court presumes was made by State regulators on the basis of professional judgment, but rather they show Defendants' intent and ongoing efforts to undermine the possibility that the easement would be usable by Plaintiffs and to pursue Defendants' goal of considering the easement moot.

Evidence of Mr. Tolles's activities in the easement area from 2017 through the trial in March 2022 as well as his trial testimony show that he held and continues to hold an unrealistic and fixed belief that his rights as property owner are superior to any rights held by the Plaintiffs, and that they entitle him to exercise dominant ownership rights in the easement area. Even at the beginning of the trial on March 7, 2022, Mr. Tolles testified that he did not agree that the Plaintiffs had a valid easement, despite the ruling by Judge Arms quieting title to the easement to Plaintiffs. He also testified that 'we are the owners of the land—they are not.'

He was highly emotional about his position. Portions of his testimony were not credible or consistent with the testimony of others, and seemed to be influenced by his passionate anger toward the Plaintiffs and belief that he held superior dominion over the land in the easement area. His actions in removing many of the fenceposts from an old boundary fence based on his unilateral measurements of the line, and his knocking down of Plaintiffs' birdhouses, are minor actions but are reflective of his intent and motivation to assert dominant ownership in the easement area.

While the nuisance cause of action has been proved, there are no compensatory damages that are justified in addition to those already awarded in relation to the unlawful mischief claim. However, Plaintiffs seek a permanent injunction with the same terms that are in the preliminary injunction issued by Judge Arms: enjoining Defendants from all activities within the easement area except for walking across and within the easement.

While Plaintiffs current septic system is now located within their property boundaries, the court cannot conclude that the easement area will be unnecessary in the future. Both regulations and technology change over time, and there is no basis to nullify the legal property rights in the easement Plaintiffs acquired when they purchased their property and continue to hold as a matter of law. The court is unaware of any legal basis for nullification of such rights.

The court concludes that a permanent injunction is justified by the evidence in order to protect Plaintiffs' rights in the easement and preserve it for its intended purpose. It is apparent from the evidence that Mr. Tolles continues to believe that his ownership supersedes any rights of Plaintiffs. The evidence shows that he cannot restrain himself from engaging in various activities within the easement area, and he invokes various justifications for his actions.

Thus, a permanent injunction, in addition to the declaratory judgment quieting title in the easement, shall issue. Defendants shall be precluded from any and all activities in the easement area except for walking across or within it. While preservation of the easement area for a replacement septic system may call for periodic mowing of grass to prevent natural reforestation, Defendants are precluded from doing so. Plaintiffs are authorized to do so in their discretion.

Defendants' Claims

Nuisance (Count VI of Counterclaim)

As stated above, private nuisance is a "substantial and unreasonable" interference with a person's interest in the use and enjoyment of land. *Coty v. Ramsey Associates,* 149 Vt. at 451, 457. Factors to consider include whether an interference is brief or of long duration, whether it is continuous, and whether it involves unsightliness, odors, and offensive practices. *Id.* Intentional motivation can be a highly significant factor. *Id.; Jones v. Hart,* 2021 VT 61, ¶ 29.

Defendants claim nuisance on the basis of (a) discharge of sewage and groundwater on to their land from the Orangeburg pipe, and (b) discharge of surface and groundwater from the curtain drain.

Orangeburg Pipe.

There is no evidence that Defendants intended effluent to flow from their home premises to Defendants' property through the Orangeburg pipe. Both Plaintiffs and Defendants inherited a situation in the easement area, an area in which they both held property interests, that neither knew anything about and that did not affect their respective uses of the easement area for years. The Plaintiffs did not know that their septic system was not functioning properly and had overflowed into the Orangeburg pipe, which they did not even know was there. At no time was there intent on the part of the Plaintiffs to create a nuisance through placement or use of the Orangeburg pipe. Defendants argue that nuisance can occur without intent, and one case acknowledges that without specific intent, changes over time can cause a situation to become a nuisance. *Roy v. Woodstock Community Trust, Inc.,* 2013 VT 100A, ¶ 73.

In analyzing Defendants' nuisance claim with respect to the Orangeburg pipe, there are two distinct periods of time. For the period prior to the discovery of the Orangeburg pipe (August of 2017), the presence of the pipe caused no interference with the Defendants' use and enjoyment of their property. Prior to March of 2017, when Mr. Tolles detected a smell that raised suspicion, there was no visible indication of the pipe or surface effluent at any time, and no evidence of even a smell. The fact that Mr. Tolles's reports of smell were not corroborated by the State inspector who visited the site several times indicates that a smell of effluent was not a constant condition. Mr. Tolles's testimony at trial was often exaggerated and inconsistent, and his testimony about a pattern of smell, unverified by a professional over several visits, is insufficient to show a "substantial and unreasonable interference" with use of the land.

Similarly, there is insufficient evidence to meet the burden of proof that there was any surfacing of effluent prior to the digging up of the Orangeburg pipe in August of 2017. Although there was some testimony from wastewater experts in which they surmised that at times some effluent *might* have surfaced in the Defendants' field, there is no actual evidence of this having occurred sufficient to meet the burden of proof for a claim.

Therefore, with the only reliable evidence for the period prior to August of 2017 being the single occurrence of smell in March of 2017, the evidence is insufficient to prove any nuisance claim based on the Orangeburg pipe prior to August of 2017.

Defendants argue that when the information about the Orangeburg pipe came to light in the fall of 2017, Plaintiffs took no responsibility for the condition. Defendants premise their nuisance claim for this second period on alleged failure to act on the part of the Plaintiffs. However, the evidence shows that at approximately this same time, Plaintiffs hired an expert, Mr. Revell, to investigate circumstances related to the easement area, but were prevented from doing so by Defendants' prompt issuance of a Notice Against Trespass.

Moreover, after Defendants cut the Orangeburg pipe and Plaintiffs knew about the pipe, the evidence of incidents of surface discharge are those that occurred only during investigations of the unknown effect of the Orangeburg pipe. These occurred when Dr. Waite took a sample and when Mr. Urich performed the green dye test. These events occurred at times of testing for investigative purposes and were related to Mr. Tolles's own digging and prodding to explore. There is no credible evidence of occurrences of surface flow of effluent affecting the Defendants' use and enjoyment of their property outside of these investigative events during this period (August of 2017 to July of 2019). Plaintiffs were not ignoring the situation, but were relying on an expert who advised them that there was no evidence that their septic system had failed.

With respect to knowledge of possible underground migration of effluent, it is completely understandable that the Defendants would be offended at the *idea* that effluent might have migrated to their land underground during this period. Moreover, it is possible that there was some underground migration. The court recognizes that the elements of nuisance are met if claimants know that it is reasonably possible, even likely, that underground effluent migration might be occurring on their land, especially unencumbered land. The fact that effluent is or could be traveling to one's land makes it both substantial and unreasonable because of the noxious nature of effluent. However, any effect was slight and based primarily on the possibility that it might be occurring during this two-year period. There is no credible evidence or documentation of incidents during that period, even involving just odors, except as the result of Defendants' own actions in digging in conjunction with investigative purposes. The surface flows that occurred during the investigations were of very short duration and took place at a considerable distance from the parts of the property Defendants used. There is no evidence of harm calling for compensatory damages for interference with use and enjoyment during this investigatory period.

Thus, for this second period (August of 2017 to July of 2019), the actual effect on use and enjoyment was weak, without intent, and it ended promptly once the actual cause was determined. There are no effects calling for compensatory damages. Nonetheless, "[p]articularly in matters involving rights relating to real property, invasion of those rights, when established, require some recognition, even if only by way of nominal damages." *Clark v. Aqua Terra Corp.*, 133 Vt. 54, 58 (1974). Therefore, Defendants are entitled to nominal damages of $100.00.

A portion of the Orangeburg pipe near the cut-off end may remain on the Defendants' property near the common boundary. If so, this is a continuing nuisance, as it remains on Defendants' land after the Plaintiffs have completed the process of dealing with the issue. "One is subject to liability for a nuisance caused by an activity." Restatement (Second) of Torts,

§ 834. An activity is defined, in part, as "those that create physical conditions that are harmful to neighboring land after the activity that created them has ceased—such as structures, excavations, cesspools, piles of refuse, bodies of water, oil and other substances." *Id.* § 834 cmt. b. While Plaintiffs did not place the Orangeburg pipe there, the investigations are all over, and they now know that it originated from their property. If it has not already been removed, Defendants are entitled to an injunction that Plaintiffs not allow any remnants of the Orangeburg pipe to remain south of the common boundary line, and shall cause it and all vestiges of it to be removed no later than September 1, 2022.

Curtain Drain

Defendants claim that discharge of water from the curtain drain causes water to travel to their property, causing saturation of the soils on the easement area portion of their property. In response to this issue having arisen during the lawsuit, Plaintiffs shortened the discharge point from the curtain drain so that it no longer discharges directly on to Defendants' property, but disperses drain water at a spot 17' back from the boundary line. Defendants claim that it still causes saturation. The court does not find that Defendants have proved that Plaintiffs are currently discharging surface water on to Defendants' land in a manner in excess of natural drainage, or that it causes substantial and unreasonable interference with Defendants' use of any portion of their land. Therefore, no injunction shall issue. Based on the location of the discharge point of the drain right on the property line prior to it being changed, recognition of violation is appropriate. Due to the absence of proof of any damage or effect on Defendants' use and enjoyment of their property during that period, the court awards nominal damages of $100.

Trespass (Count II of Counterclaim)

By order of September 3, 2020, Judge Arms granted partial summary judgment on Defendants' claim of trespass based on the location of the curtain drain and discharge of water onto Defendants' land. The question of remedy was left for the continuation of the trial.

Defendants seek injunctive relief. Based on the Plaintiffs' conduct in changing the location of the discharge of the curtain drain so that it is now no longer on the boundary line but 17' further away, and the lack of evidence sufficient to meet the burden of proof that it now causes invasion of surface water onto Defendant's property above and beyond normal drainage patterns on an ongoing basis, the court concludes that the facts do not warrant a form of injunctive relief with prospective effect. Thus, the request for a remedy in the form of an injunction is denied. No compensatory damages are warranted.

Negligence (Count I of Counterclaim)

The injury claimed in support of this claim appears to be the same as those for the nuisance claims described above.

"Common law negligence has four elements: a legal duty owed by defendant to plaintiff, a breach of that duty, actual injury to the plaintiff, and a causal link between the breach and the injury. *Zukatis v. Perry,* 165 Vt. 298, 301, 682 A.2d 964, 966 (1996)." *Demag v. Better Power Equip., Inc.*, 2014 VT 78, ¶ 6.

The existence of a duty under the circumstances of a case is a question of law for the court to decide. *Higgins v. Bailey,* 2021 VT 74, ¶ 9. Certainly owners have a duty not to damage their neighbors' property.

Defendants claim that when Plaintiffs had work done on their foundation in 2004, they knew or should have known that there was an Orangeburg pipe underground that posed an unreasonable risk of interfering with the proper functioning of their leach field and/or that conveyed sewage and contaminated groundwater onto their neighbor's downgradient land.

Defendants also claim that Plaintiffs knew or should have known that collecting surface and groundwater from around the perimeter of their house and concentrating it and diverting the flow to a single point on the boundary with Plaintiffs' land would cause an unreasonable risk of inundating and saturating Defendants' downgradient land.

Analysis of these claims of negligence involves consideration of the appropriate standard of care. "The standard of care, on the other hand, is the conduct a reasonable person would undertake, or refrain from undertaking, if a duty exists. See *Restatement (Second) of Torts* § 283 cmt. a (1965) (distinguishing standard of conduct required to avoid being negligent from question of whether duty exists). Whether a defendant has breached a duty by failing to adhere to the standard of care is generally a factual question." *Id.*

Defendants have not provided a factual basis for determining the standard of care in either situation. Testimony would be needed to determine the standard of care of owners in both situations; installation of a new septic system on the site given its characteristics, and installation of a system for diverting water from collecting around the foundation. Without sufficient evidence to establish a standard of care, the court does not have a basis for ruling as a matter of law that Plaintiffs breached a duty. Therefore, Defendants' claims of negligence are not proved.

Unlawful Mischief (Count III of Counterclaim)

As stated above, the elements of unlawful mischief are as follows: "A person is liable for unlawful mischief if he or she: (1) intends to damage property; (2) has no right to do so; (3) has no reasonable ground to believe that he or she has such a right; and (4) does any damage to property." *LeBlanc v. Snelgrove,* 2015 VT 112, ¶ 58.

Defendants claim unlawful mischief by Plaintiffs in two respects: (a) the design and installation of a foundation drain system that discharged surface and groundwater onto Defendants' land in an area that was already wet and was used by Defendants for access into and out of their fields, and (b) failure to stop effluent from discharging from the Orangeburg pipe once they had received results of the Endyne test in 2017.

Foundation drain system. The evidence does not support a finding of fact that Plaintiffs intended to cause saturation on Defendants' property by the drain system that diverted water away from their foundation, much less that they intended to impact access into and out of the Defendants' fields in that manner. The drain system was established long before the Defendants acquired their property. Moreover, the evidence does not support an inference that Plaintiffs had

the intent claimed by Defendants. While there was some evidence of wetness in the area between the access road as laid out by Defendants and the common boundary line, there was conflicting evidence as to the causation of such wetness. Credible evidence was that the roadbed itself as laid out contributed to wetness by acting as a dam to cause accumulation of water. The necessary elements of intent and damage have not been proved.

Failure to act on 2017 test results. The facts show that by the time the sample collected by Dr. Waite in September of 2017 was tested, the Plaintiffs had already hired Mr. Revell, a geologist and hydrogeology and septic system designer, to evaluate the circumstances in the easement area. Mr. Revell had visited the site at the end of August 2017, which was shortly after the Defendants had the Orangeburg pipe dug up and removed, and had not found cause for concern about the functioning of the Plaintiffs' septic system. Following the September 2017 test results, he and the Plaintiffs were prevented from entering the property by a Notice of Trespass issued against him by the Defendants on October 2, 2017. The Plaintiffs filed this case that same month, at which time the issues between the parties became joined and attorneys were involved in investigation and solutions. Mr. Revell made written proposals for remediation in March of 2018. The parties, through their attorneys, agreed to scope the Orangeburg pipe in the spring of 2019. On these facts, the court cannot find that Plaintiffs caused damage by intending to cause effluent to discharge from the Orangeburg pipe after 2017. It was Mr. Tolles who dug a hole below the open end of the Orangeburg pipe that resulted in discharge of liquid from the pipe. The parties, with their attorneys and experts, were investigating unknown circumstances.

Defendants have not proved the necessary elements of intent and damage on either of the asserted grounds. Plaintiffs are entitled to judgment on the counterclaim for unlawful mischief.

Summary

Based on the foregoing findings of fact and conclusions of law, the final judgment shall include the following components:

1. Declaration quieting title to the septic easement and declaring rights as set forth in paragraphs 3 and 4 of the Opinion and Order of February 10, 2020.
2. Judgment for Plaintiffs in the amount of $15,000 for damages for unlawful mischief.
3. Permanent injunction enjoining Defendants from engaging in any activities in the Plaintiffs' easement area except for walking across and within the easement area.
4. Judgment for Defendants in the amount of $100 for nominal damages on their nuisance claim related to the Orangeburg pipe, and in the amount of $100 for nominal damages on their nuisance claim related to the curtain drain.
5. Judgment for Plaintiffs on Defendants' claims for negligence and unlawful mischief.
6. Denial of remedy of injunctive relief on Defendants' claim of trespass related to water from the curtain drain.
7. Injunction to issue enjoining Plaintiffs from allowing end of Orangeburg pipe to remain after September 1, 2022.

Final judgment shall not issue until resolution of the issue of reasonable attorneys' fees.

Upon the issuance of a final judgment, the attachment in the amount of $17,726.25 issued October 19, 2020 shall be dissolved pursuant to a separate court order.

Order

Plaintiffs are entitled to reasonable attorneys' fees related to their claim of unlawful mischief. Plaintiffs may submit, no later than August 1, 2022, an affidavit and supporting documentation as a supplement to the evidence introduced at the March 2022 court trial. Defendants shall have 14 days thereafter to file any objection and/or request a hearing. Memoranda of law are welcome. Defendants' counsel may, if he wishes, recall Attorney Dumont, at Plaintiffs' expense, for further cross examination.

Electronically signed pursuant to V.R.E.F. 9(d) on July 21, 2022 at 12:42 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge