STATE OF VERMONT
ADDISON COUNTY, SS.

EDWARD SYMULA,	)	
SUSAN SYMULA,	)	
LARRY ROBERTS, and	)	
TONYA ROBERTS	)	
	)	**Addison Superior Court**
v.	)	**Docket No. 62-3-00 Ancr**
	)	
JEAN CHASE,	)	
PATRICIA CHASE, and	)	
DONALD HATCHER	)	

FINDINGS OF FACT and CONCLUSIONS OF LAW

This matter came before the Addison County Superior Court on June 19, 20, and July 2, 2001 for a final hearing on the merits, before the Honorable Mary Miles Teachout, presiding, and the Honorable James D. Lilly and Honorable Wayne J. Heath, Assistant Judges. Plaintiffs were present and represented by Anthony R. Duprey, Esq. Defendants were present and represented by Lisa B. Shelkrot, Esq. and Liam Murphy, Esq.

Findings of Fact

The various claims arise from a controversy over a right of way that serves several lakefront cottages on Lake Champlain. Plaintiffs are owners of two of the lakefront lots. Defendant Jean Chase owns the property burdened by the right of way easement, and she also owns two of the lakefront lots. Defendant Patricia Chase is Jean Chase's daughter and a resident in one of Jean Chase's lakefront lots. Defendant Donald Hatcher is a resident in his father's lakefront lot and a close friend of Patricia Chase.

The lakefront development project was first created in 1926 by Henry Rousseau and is shown on a survey of that year. Rousseau owned a field fronting on Lake Champlain. He created twelve numbered lots along the waterfront. The survey also shows a right of way running behind all twelve lots along the remaining Rousseau land. No width is shown for the right of way, which lies between the back lot lines of all twelve lots and a wire fence on the Rousseau land. This width could be from 10 up to 14 feet according to the visual evidence of the 1926 survey and the testimony of Defendant's expert surveyor, Albert W. Harris.

Over the years, the lots were deeded to various owners, together with a right of way, and cottages were built on some of the lots. An additional east-west right of way was created from a public road across private land to the beginning of the north-south right of way running behind the lakefront lots. The east-west right of way joined the north-south right of way at a small elm tree behind Lot 12, which is the first one from the road. The north-south right of way ended at the southern tip of Lot 1, which was the last one from the road. Three additional lakefront lots were created to the north of the original 12 lots. These were lots 13, 14, and 14A, and were accessed by the east-west right of way and driveways that branched to the north from the small elm tree. Recorded maps of the properties which were referenced in many of the chains of title for the lakefront lots show the east-west portion as 20 feet wide. No maps referred to in any of the deeds for the lakefront lots show a right of way wider than 20 feet on the east-west portion.

Through the 1950's and 1960's, the actual road leading to the summer cottages, at least on the north-south portion, consisted of two tire tracks with grass growing in the middle, and often the grassy middle area was significantly higher than the tire tracks. The road was only wide enough for one car at a time. The east-west portion was somewhat wider.

In 1962, surveyor Lee Lowell surveyed the development and drew a survey plan that was recorded in 1963 that shows the north-south right of way behind the 12 lots as 10 feet wide, and still bounded on the east (field) side by a wire fence. The east-west portion is shown as much wider, but with no footage specified. In 1965 Lee Lowell drew another survey plan that was not recorded. This was a survey of the Rousseau property, which by this time was owned by John Covill, and showed the lakefront lots and rights of way. It showed the north-south right of way as 10 feet wide and bounded by a wire fence, and showed the east-west portion as 20 feet wide. In 1966, Green Mountain Power Corporation used a copy of this Lee Lowell 1965 survey to mark the location of telephone poles, which were very close to the wire fence which was drawn as 10 feet east of the back lot lines of the lakefront lots. In 1967, Lee Lowell prepared a survey that was recorded showing the boundary line between lots 2 and 3. It includes portions of lots 1 and 4 as well, including the right of way behind all those lots. The right of way is depicted as 10 feet wide, with no indications of a wire fence boundary. The location of telephone poles is not shown.

In the fall of 1969, Carl and Helen Gustafson first visited the area when they were considering purchasing Lot 1, the last cottage on the north-south right of way. They took title in January of 1970, and began to stay overnight at their property during the winter of 1970. The north-south portion was too narrow to be plowed, and they hiked to their cottage along the course of the right of way on snowshoes. From the beginning of their ownership, they spent their summers at the lake as well as five or six weekends during the year, including during the winter.

In the summer of 1970, significant changes were made to both portions of the right of way by both John Covill and the Gustafsons. The junction of the east-west and north-south portions of the right of way was changed. In place of a near 90 degree angle left turn after the elm tree, a curved course was created by eliminating the elm tree and cutting the corner in a gradual curve.

John Covill did some grading of the hump in the middle of the road, and the Gustafsons arranged and paid for a significant widening and improvement of the right of way, including the addition of gravel. The traveled portion of the right of way became approximately 15 feet wide. A turn-around was created near the southern end of the right of way, opposite Lot 2. Two culverts and ditches were added to accommodate the water flow off the Covill field toward the lakefront lots. One culvert directed runoff under the right of way into a gully on Lot 9, and a second directed runoff under the right of way onto Lot 1, the Gustafsons' property, at the southern end. The culverts were between 16 and 18 feet long. The Gustafsons paid for the improvements to and widening of the road.

At some point after 1966, the telephone poles that had previously been located on the east side of the right of way very close to the wire fence were moved further to the east to points approximately 20 feet east of the lakeshore owners' back lot lines. From the evidence, the court infers and finds that this occurred prior to the widening work in 1970.

After the road was widened and improved in 1970, the Town of Ferrisburgh assumed responsibility for maintaining it in both summer and winter. The Town plowed it. The snowbanks resulting from the plowing were to the side of the traveled portion. At first, the Town only plowed when the Gustafsons called ahead and said they were coming up for the weekend. After the Gustafsons moved to their property permanently in 1978, the Town plowed it routinely. The Town graded the road every year. The lot owners contributed funds for the cost of materials that were needed, such as gravel. The work itself was done by Town employees with Town equipment.

In May of 1971, the Covills, who owned the property easterly of the lakeshore lots and on which both portions of the right of way was located, executed an untitled document in the presence of two witnesses and a notary public. The instrument was recorded in the land records on June 5, 1971. The complete instrument reads as follows:

> This indenture made this 28th day of May, 1971, between John Covill and Eunice D. Covill of St. Petersburg, County of Pinellas, and State of Florida, of the the first part, and Carl E. Gustafson and Helen Gustafson of Danbury, County of Fairfield and State of Connecticut, of the second part.
>
> Witnesseth, that in consideration of One and more dollars paid to said John Covill and Eunice D. Covill by the party of the second part, the receipt whereof is hereby acknowledged, the said John Covill and Eunice D. Covill, for themselves, their heirs and assigns, covenants and grants with and to the party of the second part, their heirs, and assigns, their agents and servants and the tenants and occupants from time to time of the premises now held by the second party in Ferrisburg and known as a portion of the former Frances Rousseau property, and any other person or persons, for his and their benefit and advantage, at all times freely to pass and repass on foot, or with vehicles, loads, or otherwise, through

and over a certain road or way, presently used by other property owners on Lake Champlain and extending from the Lake Road, so-called, to said Lake Champlain property, of Carl E. Gustafson and Helen Gustafson.

IN WITNESS WHEREOF, we, John Covill and Eunice D. Covill, hereunto set our hands and seals this 28th day of May, 1971.

At the time this instrument was executed, delivered, and recorded, the upgrading and widening work done by the Gustafsons the previous year had been completed.

In November of 1971, Rejean Lafleche purchased the first of two lakefront lots he was to own on Button Bay Lane until he sold his remaining interest in 2000. He, along with all of the other lot owners, used and benefitted from the widening and upgrading work that the Gustafsons had done. The traveled roadbed of the north-south portion of the road was between 16 and 12 feet wide, and was wider at the north end and narrowed as it ran south The road was not wide enough for two cars to comfortably and easily pass, but two cars could pass if they did so carefully. Due to the widening of the road, it became a popular place for people who came to go fishing to park. They generally parked along the east side, and there remained enough room for cars to travel along the road. The Town continued its winter and summer maintenance until the early 1980's, thus keeping the width of the traveled portion at between 16 and 12 feet.

In 1980, Jean and Milo Chase moved to the Covill property which they purchased from the Covills. John Covill was Jean Chase's stepfather. Jean Chase had first become familiar with the property in 1965, when she had visited her mother and stepfather there after their purchase of the property. In 1981 Patricia Chase began living in her parents' house on the double Lot 11/12. She had first become familiar with it in 1965, when the access was a one lane road. She had never spent a winter there until 1981-82.

By 1985, the Town had stopped maintaining the road due to the effect of a Vermont Supreme Court decision in a case involving the Town of Hinesburg. On August 17, 1985, the Gustafsons wrote to the Chases asking to set up a meeting regarding plans for care of the road. Two days earlier, the Symulas had purchased lot 8. At the time of their purchase, the width of the traveled portion of the road was generally 15 feet, and still wider to the north and narrower to the south. Some of the traveled portion may have encroached west over some of the lot lines, but not along the entire length. The roadbed occupied 15 feet to the east of the lot owners' lot lines.

After the Town stopped maintaining the road, various lot owners contributed services and funds toward maintenance, but on a much reduced level. Individuals sporadically plowed or graded with makeshift equipment, or they filled in potholes. Neighbors occasionally collected money to spend on road upkeep. Without the regular maintenance by the Town, vegetation began filling in on the side, with bushes beginning to grow and fill in the shoulder gravel. The traveled portion narrowed a bit, perhaps up to two feet, and the increased vegetation narrowed the sidelines and gave a feeling of additional narrowing. Depending on the specific location along

the road, one car might have to brush by the bushes on the east side or veer over the lot line onto a lawn on the west side when two cars passed each other. In the winter, various owners plowed with their own equipment or hired others to do it. Sometimes the width from snowbank to snowbank was not as wide as when the Town had plowed it, or as wide as it was in the summer. At other times, the snow was pushed back into snowbanks close to the telephone poles.

In 1989, a water line was installed on the east side of the north-south right of way for the benefit of the lot owners. Lines were run to each lot.

In September of 1992, Lee Lowell redrew his 1965 survey on a mylar so that it could be recorded, which had not previously been done. The content of the drawing was not updated to reflect contemporaneous conditions on the ground.

In 1993, Donald Hatcher moved to his father's cottage on Lot 7 as a residence. He had helped his father build the house in 1964 and 1965, and had spent most summers and many weekends at the property since 1970. He had started coming regularly in the winter in 1991. He often plowed the road in the winter.

In 1994, Milo Chase died. Jean Chase became sole owner of the former Covill property as well as owner of Lot 4, which is vacant, and the double Lot 11/12 occupied by her daughter Patricia Chase.

In 1996, the Symulas moved permanently to their property on Lot 8, and began to make improvements. They arranged for their power lines to be buried underground by Green Mountain Power.

In 1997, the Gustafsons ended their occupancy of their property, and on May 22, 1998, the Gustafson property, Lot 1, was sold by Carl Gustafson to the Roberts. Helen Gustafson had died. The deed from Carl Gustafson to the Roberts specifically includes the Gustafsons' interest conveyed to them by the Covills on May 28, 1971. Carl Gustafson is now known as Carla Gustafson.

When the Roberts moved in, the traveled portion of the road near their lot was about 12 feet wide. This was Lot 1, the lot at the end of the road where the road was narrowest. The location of the traveled portion behind their lot had migrated westward onto their lot, burying their corner marker beneath the road, as there are no users beyond Lot 1, and the road turns toward their lot. In1998, Donald Hatcher did some trenching work in Jean Chase's field that affected the runoff through the northern culvert. Larry Roberts asked Jean Chase who did the plowing and maintenance of the road. She told him that everyone was on their own.

In 1999, the culvert in the right of way behind and on the Roberts' lot needed maintenance. It had been replaced once by the Gustafsons several years before. Larry Roberts asked Donald Hatcher about the arrangements for maintenance work on the culvert. Donald

Hatcher, who was good friends with the Chases, told Larry Roberts that Larry Roberts was not to do any maintenance, but that Donald Hatcher would do it. Donald Hatcher did not do any maintenance or repair of the southern culvert.

Relations began to be strained between two groups, consisting of the Chases/Donald Hatcher on the one hand and the Symulas/Roberts on the other. The Chases and Donald Hatcher believed that lot owners were taking liberties with the eastern boundary of the right of way and encroaching on Jean Chase's land. In September or October of 1999, Jean Chase had a fence erected along the eastern edge of the traveled portion of the north-south road starting from double Lot 9/10 at the north end to Lot 2 at the south end. Although it was not within the traveled portion but on the edge of it, there is about 3 feet of soft shoulder, now filled in with vegetation in many places, easterly of where the fence line was located. The Symulas and Roberts were unhappy with the limitations created by this fence, as it restricted the ability to maneuver boats and vehicles along the narrow lane and into the lots. Mr. Symula would like the road to be broad enough to accommodate fire trucks and emergency vehicles. The placement of the fence narrowed the usable roadbed in the winter, as the fence interfered with the ability to plow snow to snowbanks beyond the traveled roadbed.

During the same period, September and October of 1999, the Symulas undertook a major improvement project of constructing a concrete seawall on their waterfront. This required bringing in trucks with equipment, an excavator, and a concrete truck. Patricia Chase told one of the Symulas' contractors that he could not use the road for that purpose, although he did. One of the Symulas' contractors brought forms in a pickup truck by driving along the beach, crossing the Chase double Lot 11/12. When an excavator crossed the Chase beach, driving over the Chase breakwater, Patricia Chase's brother tried to stop it. As a result, the excavator drove out into the water below the low water mark. Patricia Chase claims that the excavator ran over the Chase beachfront at least six times and damaged the breakwater and ruined the water quality and thereby reduced property value. Mr. Symula claims that he knows through study where the low water mark is, and that his excavator only crossed above the low water mark on one occasion. Mr. Symula caused equipment to cross the Chase double Lot 11/12 beachfront on at least two occasions. There are periodic variations in lake depth and water quality and the relative height of different breakwaters for a variety of reasons, and the evidence does not support a finding, by a preponderance of evidence, that there has been a detrimental effect on the Chase property caused by the Symula equipment crossing it.

On one occasion, the fence along the east side of the roadbed was broken, and a wire was sticking out into the road. As Mr. Roberts drove by it with his vehicle, the wire scratched his vehicle. He believes that Donald Hatcher is responsible for placing the wire there, and claims repair costs.

In February of 2000, Mr. Symula plowed the road after a snowstorm. After he was done, Donald Hatcher plowed again, intentionally leaving small mounds of snow in the road behind Mr. Symula's truck, and parking his own truck in the middle of the road deliberately blocking the

north-south right of way. When asked to move it, he made a very rude, aggressive, and hostile remark to Mr. Symula and went into Patricia Chase's house. He only moved it some time later after having been requested to do so by the police. The same month, when he saw Mr. Roberts driving on the road, he revved up the engine of his truck behind Mr. Roberts in an aggressive manner.

On February 14 of 2000, snow that had been plowed by Larry Roberts was found by him moved and piled up in the road in front of Patricia Chase's driveway high enough that it was difficult to drive over the piles without a four wheel drive vehicle. A week later, there were snow speed bumps located in the road in front of the Chase property.

Donald Hatcher believes that the right of way should only be 10 feet wide because that is what his aunt told him it was when he first became familiar with the area in the mid 1960's. In April of 2000 he put stakes, bricks, and rebar in the road at locations signifying the east line of the right of way where he thought it should end. He also parked his vehicles with their noses or tails stuck out into the traveled portion of the right of way to limit its width. In May of 2000 he rolled stumps and logs into the east side of the roadbed to limit its width. In March or April of 2001, Donald Hatcher raked leaves from the side of the road into the road, limiting its width.

At some point, Patricia Chase told Larry Roberts that the land on which the right of way was located was her mother's, and that everybody thought they could do with it what they liked. At the time, Larry Roberts was trying to figure out the rights of lot owners and others regarding the road and right of way.

In June of 2001, surveyor Albert W. Harris did field work along the north-south right of way. He observed ditches along the right of way to the east of the roadbed. The culvert that crosses the right of way opposite the Biache property (Double Lot 9/10) is buried deeply. Its east end is located 16 ½ feet easterly of the Biache lot line. From the end, the land slopes up to the Chase field located above it to the east. Along the north-south right of way, the distance from the lot owners' lot lines on the west side of the right of way to a line within the fenceline Jean Chase has erected along the eastern edge of the traveled portion of the right of way varies from between 14 feet to 9.4 feet. There is no information about the width of the entire traveled portion of the road, including portions that may be located on the lot owners' side of their boundary lines. The traveled portion of the road is generally wider at the north end, and narrower at the south end. Behind Lot 2, it bends slightly east before shifting to the west as it reaches Lot 1. Opposite Lot 2 is a turnaround that permits three point turns into a portion of the Chase field from the north-south right of way.

On June 14, 2001, Larry Roberts spent $310.00 for repair of erosion to the Roberts property from runoff from the Chase field that flowed over the damaged culvert.

Conclusions of Law

Plaintiffs seek a declaration of a 16 foot wide easement by prescription along the north-south portion of the right of way and a 20 foot wide easement along the east-west portion of the right of way. They also seek judgments against Donald Hatcher and Patricia Chase for obstructing use of the right of way and punitive damages. They further seek an injunction against all Defendants from interference with the Plaintiffs' use and maintenance of the right of way as declared by the court, and an order requiring Jean Chase to remove the fence. Larry Roberts seeks damages for repair of his vehicle and erosion repair.

Defendants seek a declaration of a 10 foot wide easement along the north-south portion of the right of way and a 20 foot wide easement along the east-west portion. Jean Chase seeks an order requiring the Symulas to remove power lines buried underneath the Chase property, and judgment for damage to the Chase lakefront property.

Rights of Way

The parties essentially stipulate that the width of the east-west portion of the right of way benefitting the Plaintiffs' lots is 20 feet, based on the specified width included in deeds and surveys in the chains of title to the lots in the Rousseau development. The Court will so order.

It is the north-south portion over which there is a dispute. In the chain of title of each lakefront lot, there is at least one reference to a recorded Lee Lowell survey showing a ten foot right of way. Consequently, as a matter of record title, the Plaintiffs right to a north-south easement by express grant is limited to a right of way ten feet wide. Furthermore, there is no evidence that prior to 1970, the width of usage of the north-south right of way by owners of Lots 1-12 was any greater than ten feet. Prior to 1970, the road itself was a one-lane set of tire tracks wide enough for only one vehicle. The monument marking the eastern edge of the right of way was a wire farm fence that has not survived. There is no evidence that the road was used for vehicles in the winter until the Gustafsons widened it and began to plow it for weekend visits starting in the winter in 1970.

Plaintiffs rely on prescriptive use, or adverse possession, as the basis for their claim that the right of way is wider than 10 feet, and they claim a road width of 16 feet. Defendants argue that the evidence of any use wider than 10 feet does not meet the legal standard necessary for acquiring an interest by prescriptive use.

The requisite elements to establish an easement by prescription are the same as those necessary to establish adverse possession, the distinction being in the interest claimed, with prescription being non-fee interests and adverse possession being an interest in the fee. *Community Feed Store v. Northeastern Culvert Corporation*, 151 Vt. 152, 155-56 (1989). A prescriptive easement is established where there is "adverse use. . .which is open, notorious, hostile and continuous for a period of fifteen years, and acquiescence in the use. . .by the person

against whom the claim is asserted." *Id.*

Plaintiffs Roberts hold a specific interest in the right of way that the Plaintiffs Symula do not hold. It was the conveyance of an easement interest from the Covills, then owners of the former Rousseau property, to the Gustafsons, in which the Covills covenanted and *granted* to the Gustafsons, *their heirs and assigns,* [the right] *freely to pass and repass* . . . through and over *a certain road or way, presently used by other property owners on Lake Champlain and extending from the Lake Road, so-called, to said Lake Champlain property, of Carl E. Gustafson and Helen Gustafson.* The instrument was signed by the grantors and two witnesses and notarized. While the instrument did not specify a width, it defined the extent of the grant as follows: *a certain road or way, presently used by other property owners on Lake Champlain and extending from the Lake Road, so-called, to said Lake Champlain property, of Carl E. Gustafson and Helen Gustafson.*

The Plaintiffs have stipulated that their claim is limited to a claim of adverse possession or a prescriptive easement. "Adverse possession may be asserted either under claim of title (where claimant took possession under a deed which is for some reason defective), or under a claim of right which arises from the open, notorious and hostile possession of the land at issue. Where there is color of title, it is relatively simple to ascertain the extent of the possession claimed, since 'actual and exclusive occupation of any part of the deeded premises carrie[s] with it constructive possession of the whole. . .' [citation omitted]. *Id.* at 156. Here, Plaintiffs Roberts are not claiming under color of title. Rather, the claim of all Plaintiffs is based on open, notorious and hostile use. Nonetheless, the language of this instrument is instructive in that it defines a point in time, May of 1971, when the Gustafsons, and the other lakefront owners as well, were unfurling their flag of use on the Covills' property. If the use in May of 1971 was within the ten foot width referenced in deeds and surveys, there was no adverse use on Covill land. If it was greater than ten feet in width, then it is clear that a use had been established that was open, notorious, and hostile. The instrument from the Covills cannot be construed as permission, as it was an express grant and therefore could not be withdrawn. It does not expressly grant a right to a width greater than ten feet because it specifies no footage.

The facts show that the extent of use in May of 1971 was the same as the extent and use in the summer of 1970, after the widening and improvements, and greater than the extent and use prior to 1970. In 1970, the north-south road had been improved by the Gustafsons so that the traveled portion had a width of 15 feet. The full use of the road also included in its construction a shoulder and ditching on the east side, also used for snowbanks in the winter when the road was plowed, and two culverts. The northern culvert extended to a point 16 ½ feet east of the lot line of double Lot 9/10. East of the end of the culvert was ditching that extended up a slope to the Covill field. The southern culvert was also 16-18 feet long, although it was not centered on the right of way but placed to the west partially on the Gustafson property. All portions of the roadbed, shoulders, culverts, and ditching were located west of the telephone poles, which were placed approximately 20 feet east of the lot owners' property line. Snowbanks produced by plowing ran between the traveled roadbed and the telephone poles.

To summarize, the facts show that as of May of 1971, the area used consisted of a roadbed 15 feet in width with approximately 4 feet of shoulder, culvert use, and ditching and snowbank area necessary for the full use and maintenance of the road for year-round use. In addition, the facts show that the use at that time included the use of a turnaround area opposite Lot 2 that permitted a single vehicle to turn east into a space large enough for a road maintenance vehicle to make a three point turn from the north-south right of way. These uses had been established the previous summer, in 1970.

From the time the Gustafsons began using the 15 foot wide roadbed with its supporting shoulder, culvert, and ditching and snowbank area, all owners of Lots 1-12 also used the same area. This included the predecessors in title of the Symulas to Lot 8, as well as Rejean Lafleche and all other lot owners. The use of the road at this width continued uninterrupted until the Town stopped maintaining the property in the early 1980's. As soon as the Town stopped regular maintenance, vegetation began to grow on the sides. By 1985, the Town had stopped and the owners had begun to contact each other about maintenance. The roadbed was still 15 feet wide though the part to the north was wider and the part to the south narrower, and some of the roadbed encroached on the lot owners' land at points. Over several more years, it narrowed a foot or more in places, to a maximum width of 14 feet from the lot owners' property line. However, the facts support a conclusion that as of the summer of 1985, there was still a 15 foot wide roadbed to the east of the lot owners' boundary.

At that time, which was 15 years from the summer of 1970 when all lot owners started use of the improved and widened road, the area used for shoulder, culvert, and ditching and snowbanks extended to just within the telephone poles, or 19 feet east from the lot owners' property line. The use of the turnaround opposite Lot 2 had been maintained on an uninterrupted basis. When the Symulas purchased their property in August of 1985, their grantors had already had the use and benefit of the improved and widened road for a period of fifteen years, as had the Gustafsons.

The Court concludes that by the summer of 1985, there had been a continuous period of 15 years of open, notorious, hostile and continuous use. When the Symulas acquired their property in August of 1985, they acquired an interest in the right of way, the extent and use of which had been defined by prescriptive use over a period of 15 years. When the Roberts purchased Lot 1, they acquired the Gustafson interest in the right of way, which had also been established by more than 15 years of use. Therefore, all Plaintiffs acquired the right to use and maintain a roadbed no wider than 15 feet from the lot owners' eastern property line, with the related shoulder, culvert, and ditching and snowbank area to extend no more than an additional 4 feet. In addition, the use of the right of way included a turnaround area opposite Lot 2 that permitted a single vehicle to turn east into a space large enough for a road maintenance vehicle to make a three point turn from the north-south right of way.

The Symulas and other lot owners have continued that prescriptive use on an uninterrupted basis, and have not abandoned it. Despite the fact that the roadbed has narrowed

another foot or more since 1985, abandonment had not occurred prior to the expiration of 15 years at the time this lawsuit was commenced in March of 2000, in which the Symulas and Roberts assert a claim to a right of way based on prescriptive use. 12 V.S.A. §501.

The prescriptive easement that the Symulas and Gustafsons (and later their successors in interest the Roberts) and other lot owners acquired also included not only the use of the traveled portion of the road, which was 15 feet wide from the eastern lot line of the lakefront owners' lots, but the authority to enter the servient property, then owned by Chase, within the 19 foot width for the purpose of maintaining the 15 foot roadbed and the related shoulders, culverts, and ditching, and using it for snowbanks related to winter plowing. It also included the use of the turnaround.

The court has not been asked to, and thus does not, make any findings or conclusions regarding whether prescriptive use of the right of way has been established on any lot owner's property, on the west side of the lot owners' back boundary lines.

Interference with Use of Right of Way

Jean Chase has interfered with the use of the Plaintiffs' access to the north-south right of way by erecting a fence within the easement area. Jean Chase was familiar with the property from 1965 and thus was aware of the improvements and widening in 1970 and the status of the road in 1971. The fence she erected was within the 19 foot wide area the Court has determined as the easement area for the 15 foot wide road and the related extended 4 foot width for shoulders, ditches, culverts, and snowbank area. Although the fence was erected within this area, Jean Chase did make an effort to locate the fence on the edge of the traveled area in order to minimize interference with travel. Nonetheless, the fence interfered with the width of the traveled area in the winter, and further inhibits the Plaintiffs' ability to enter the extended area for the purpose of maintaining the roadbed, shoulder, culverts, and ditches as well as deposit plowed snow in snowbanks.

Jean Chase is required to remove the fence, and is enjoined from erecting any fences or other structures within 19 feet to the east of the lot owners' eastern boundary in order to avoid interfering with their right to use and maintain the road. She is further enjoined from interfering with the Plaintiffs' rights in the right of way as declared herein in any manner. She is entitled to use the 4 foot width of apron area east of the roadbed as long as there is no interference with the rights of the easement holders as declared herein. She has the same right to use and maintain the road as the other owners; she has no greater responsibility than each of them has for the maintenance of the road and its culverts and other features related to road use.

Because of the prior lack of clarity of the boundary of the right of way, and her good faith attempt to keep the road open to the full width of the traveled roadbed, only nominal damages in the amount of $100.00 are awarded against Jean Chase on behalf of all Plaintiffs ($25.00 each) for interference with the use of the right of way.

Donald Hatcher engaged in a series of acts designed to inhibit the Symulas and Roberts from ordinary use of their legal right of way interest, including within the 10 foot width. In the winter of 2000 he deliberately put piles of snow behind the Symulas' truck after Mr. Symula had cleared the road of snow, and he deliberately parked his truck in the middle of the road to obstruct the Symulas' and Roberts' ability to use the road for egress until instructed to move his truck by the police. He made a hostile remark to Mr. Symula in connection with this incident, and revved up his truck aggressively to Mr. Roberts upon observing Mr. Roberts on the road in the winter. He engaged in a pattern of placing markers in the traveled portion of the road, including stakes, bricks, rebar, stumps, and the protruding ends of his vehicles, to inhibit the Plaintiffs from using even the traveled portion of the roadbed. He was not an owner of the Chase property underlying or east of the right of way, and there is no evidence that he had any direction or authority from Jean Chase to do this on her behalf. It was essentially gratuitous harassment.

The Court awards the Plaintiffs Symula damages in the amount of $500.00 against Donald Hatcher for trespass against the use of the right of way, and awards the Plaintiffs Roberts damages in the amount of $500.00 against Donald Hatcher for trespass against the use of the right of way. The Plaintiffs are entitled to an injunction against Donald Hatcher enjoining him from interfering with the Plaintiffs' rights in the right of way as declared herein in any manner.

Patricia Chase told the Symulas' contractor he could not use the road, although she engaged in no conduct to prohibit or intimidate him from doing so. She is not an owner of the property her mother owns underlying or east of the right of way, and there is no evidence that she had any direction or authority from her mother to act on her behalf. She had piles of snow and speed bumps in the road in front of her house, obstructing the winter use of the road by the Roberts and Symulas, although the evidence is not clear that she placed them there. She told Larry Roberts that the right of way property was her mother's and that people thought they could do what they liked with it. This was simply an expression of opinion and frustration, but not an attempt to interfere with use. There is not a sufficient basis to award even nominal damages against Patricia Chase for interference with use. There is, however, sufficient evidence based on her consistent position in opposition to the Plaintiffs for an injunction prohibiting her from interfering in any manner with the Plaintiffs' rights in the right of way as declared herein.

Punitive Damages

"Punitive or exemplary damages may upon proper showing be awarded if the act or acts relied upon are more than wrongful or unlawful. It must be shown that there was actual malice. This may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vt. Public Service Corp.*, 137 Vt. 32, 33 (1979), citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921).

With respect to Defendants Jean Chase and Patricia Chase, there is no showing of actual malice, in that their conduct reflects a concern over the scope of the right of way, but not personal

ill will toward the Plaintiffs. With respect to Donald Hatcher, the case is closer. The facts show a pattern of low-level harassment designed to inhibit the Plaintiffs from exercise of full use of the road. Nonetheless the conduct does not rise to the level of actual malice. The conduct does not constitute the type of disregard of rights of others that formed the basis for the punitive damages award upheld in *Crabbe v. Veve Associates*, 150 Vt. 53 (1988). In that case, the Defendants' knowledge of specific legal easements held by the Plaintiffs was undisputed, and Defendants, despite such knowledge, constructed an apartment building over the easement. In this case, there was lack of clarity about the extent and width of the easement interest, and the conduct of Donald Hatcher, while annoying and inhibiting, did not prevent use of the right of way. Therefore, judgment is entered for the Defendants on the claim for punitive damages.

Roberts' Claim for Damage to Truck

The Roberts claim that the action of the Defendants caused their truck to be scratched, requiring repair of the vehicle. The complaint makes no such claim. Even if it were to have arisen by consent during the course of discovery and trial, there is insufficient evidence for the Court to conclude that Plaintiffs Roberts have met their burden to prove by a preponderance of the evidence that the Defendants or any one of them were responsible for placing a wire from the fence erected by Jean Chase so as to cause damage to the Roberts' vehicle. The claim is dismissed.

Roberts' Claim for Erosion Repair

The Roberts claim that the Defendants' failure to repair the culvert resulted in erosion on the Roberts' lot that had to be repaired at a cost of $310.00. The complaint makes no such claim. Defendants' attorney represents that such a claim was not identified in the Plaintiffs' Answers to Interrogatories. Therefore, it is not properly before the court, and any such claim is dismissed.

Symulas' Buried Power Line

Defendant Jean Chase seeks an order requiring the Symulas to remove power lines buried underneath the Chase property. Her claim is that the easement burdening her property for power line purposes is for aerial lines and not underground lines. The Symulas' position is that any such claim should be directed to Green Mountain Power, the holder of the easement, and not to the Symulas.

There is insufficient evidence for the Court to conclude that Jean Chase has met her burden to prove by a preponderance of the evidence that the Symulas have engaged in conduct in violation of a power line easement burdening the Chase property. The easement itself is not in evidence. Jean Chase's testimony alone, in view of her interest in all other issues, is not sufficiently reliable and does not support a finding that the power line easement was not broad enough to include underground lines. Judgment is entered for the Plaintiffs Symula on this claim.

Counterclaim against Symulas for Damage to Chase Lakefront Property

Jean Chase claims that the crossing of her beachfront property on Lot 11/12 resulted in the loss of her breakwater and damage to water quality. She claims a reduction in property value as a consequence. As stated in the findings of fact, Jean Chase has shown that the Symula's contractors crossed the Chase beachfront at least twice. These crossings constituted trespass, and the Court awards Jean Chase nominal damages of $100.00 for the trespass. However, the burden to show damage and causation has not been met. Therefore, the claim for damages is denied. Judgment shall be entered for the Plaintiffs Symula on this counterclaim, except for the trespass.

Order

The Plaintiffs' attorney shall prepare a proposed Order based on the foregoing Findings of Fact and Conclusions of Law. Defendants' attorney shall have five days to object to the form of the proposed Order.

Dated this 31st of August, 2001.

ADDISON SUPERIOR COURT

By: Mary Miles Teachout
Hon. Mary Miles Teachout
Superior Judge, presiding

By: James D. Lilly
Hon. James D. Lilly
Assistant Superior Judge

By: Wayne J. Heath
Hon. Wayne J. Heath
Assistant Superior Judge