

VT SUPERIOR COURT  
WASHINGTON UNIT  
STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

2019 AUG 28 P 2:22

CIVIL DIVISION  
Docket No. 607-10-16 Wncv

FIELDS, et al.,  
Plaintiffs  
v.

RUBENSTEIN, et al.,  
Defendants

**DECISION**  
**Cross-Motions for Summary Judgment**

In this case Plaintiffs raise claims based on interference with an easement that historically provided access over land owned by one of the Defendants to a remote "mountain lot" owned by one of the Plaintiffs that is not contiguous to a second frontage lot owned by that Plaintiff. Defendants claim that no Plaintiff has an enforceable interest across Defendant property.

Presently before the court are Defendants' three motions for summary judgment.

The court made a site visit and heard oral argument on May 30, 2019. Plaintiffs are represented by Attorney A. Jay Kenlan. Defendants are represented by Attorney Christopher J. Smart.

The facts about what documents are recorded in the land records are all undisputed although there are disputes as to the legal conclusions to be drawn from those facts. As to events that have occurred on the property, some facts are disputed between the parties to some degree, although most disagreements are about the legal effect of undisputed actions. The state of the facts and the legal issues are addressed for each summary judgment motion as set forth below.

**MPR 1: Defendants' Motion for Summary Judgment: Standing**

In 1965, relatives of one of the individual Plaintiffs were deeded title to a lot with public road frontage ("frontage lot"), a "mountain lot" located on the other side of land held by an intervening owner, and an easement providing access to the mountain lot. Various individuals and entities, all relatives of the Field family, have held title to the frontage lot, the mountain lot, and the access easement since then. In 2005, title to all property interests was conveyed to the Nancy E. Fields Revocable Trust.

The causes of action asserted by Plaintiffs (trespass and nuisance) are all based on claims of interference of property rights held by the owner of the frontage and mountain lots and connecting easement. The owner is the Nancy E. Fields Revocable Trust. Only the Trustee can enforce rights held by the Trust as owner. The Trustee argues that the Trust has given rights to the individual Plaintiffs, and thus they should be plaintiffs as well. While the Trust can give

*permission* to individuals to use its property rights, there is no evidence that the individuals have been granted enforceable property rights. Only the Trustee as owner has a property interest sufficient to raise the causes of action in the complaint, and thus only she may pursue the claims in this case.

The Defendants' Motion for Summary Judgment for lack of "standing" is granted as against Plaintiffs Garson Fields and Nancy Fields as individuals but denied as to the Nancy E. Fields Trust. The Trustee has a sufficient legal interest to enforce the asserted claims. Hereinafter, the sole Plaintiff will be referred to as the "Trust."

### **MPR 2: Defendants' Motion for Summary Judgment: Prescriptive Termination**

The easement was described in the 1965 deed to the Trust's predecessors in title (Garson and Bertha Fields) as follows: "There is hereby conveyed the two-rod right of way along an old road running east and west across the lot which was the subject of said land contract and which right of way is mentioned therein." The land contract is referenced in the prior paragraph as having been recorded at Book 26, Page 1 of the Warren Land records. In that document, recorded in 1961, it is referred to as "a two rod right of way along the old wood road which runs east and across said lot."

It is apparent from these references that there was an "old road" that already existed as of 1961 on the location of the right of way described in this first deed to the Trust's predecessor. Also in 1965, then-owner Fields recorded a survey showing the location of the right of way over the lot between the frontage lot and the mountain lot, although that survey is not referenced in any recorded deed.

The right of way and old road ran across lands now owned by Defendant Five Way Farms, LLC, hereinafter referred to as the "LLC," of which Defendant Kenneth Rubenstein is a member. The LLC owns 4 separate lots, referred to in materials as D1, D2, D3, and D4. The right of way, and the old road, crossed lots D2, D3, and D4. Defendant Kenneth Rubenstein acquired lots D2 and D3 in 1997, and conveyed them to the LLC in 1998. The LLC acquired D4 in 1998 directly from a third party grantor. The parcels acquired by both Rubenstein and the LLC reference a reserved right of way to Fields.

In 1997, the predecessors in title of both the Trust and the LLC had exchanged quitclaim deeds that relocated a short portion of the easement and old road on lots D2 and D3. That relocation is not itself at issue in this case. It simply created a minor adjustment in the route of a small portion of the road.

Beginning in 1998, the LLC relandscaped a portion of its property in the area of a part of the easement road by putting in horse fencing, trees, stonework, and a fire hydrant. It also placed boulders and a fence across a short strip of the old road on the back portion of the frontage lot (then owned by Garson Fields, Jr.) that led to the old easement road on LLC land. The relandscaping work eliminated less than half of the old road but the work also included relocating the eliminated portion by putting in a new road that curved around the relandscaped

area. The new route started from the same starting point as the old one, which was on the back boundary of the Trust frontage lot, and then made a curve to the left around some of the improvements and landscaping and then rejoined the preexisting old road on the easement along its original route such that more than half of the easement road, leading up to the mountain lot, remained intact. The modified road ran from the backline of the Fields frontage lot to the Fields mountain lot. The LLC used this modified road for access to portions of its own land.

A dispute about the effect of these actions and the impact on legal rights—whether Fields and later the Trust continued to hold an easement across LLC land to the mountain lot—has been simmering for the last 20 years, and is the subject of this lawsuit. Plaintiffs filed this suit asserting claims and seeking relief based on interference with easement rights, and Defendants counterclaimed seeking a declaration that Plaintiffs have no legal easement across LLC land.

One of Defendants' legal positions is that when it eliminated that portion of the old road that ran straight uphill from the Fields frontage lot, and replaced that area with lawn, pasture, fencing, stonework, and trees such that the Fields could no longer drive up the road, it began adverse use that ripened into prescriptive ownership of the full fee, and such adverse use lasted more than 15 years before this lawsuit was filed. Defendants seek summary judgment on this basis on its claim that no Plaintiff currently holds a right of way interest across LLC land.

Defendants focus on the physical work that was done to interfere with a portion of the road as it originally existed, but the facts are clear that Defendants did not just eliminate a road; rather, they relocated a portion of it in a different location than it had originally existed. Fields and the those acting on behalf of the Trust have been able to enter the relocated road at the same place they did when it was the old road, travel along the relocated roadway as it arcs around the new development and then—where the relocated segment rejoins the old road—continue on to the mountain lot. Although Defendants did not want them to, there was nothing that physically interfered with the ability to use the relocated road. While boulders and a fence had been placed on the Fields frontage lot, the LLC had no legal right to place objects on Fields land and Fields as owner had the legal authority to remove those and apparently did.

With respect to the legal effect of relocating a right of way, it was the traditional rule in Vermont that consent of both parties was required for a relocation. Prior law in Vermont was that a servient owner could not relocate an easement without an agreement between the owners of the servient and dominant estates. "It is the general rule that a way, once located, cannot be changed thereafter without the mutual consent of the owners of the dominant and servient estates." *Sargent v. Gagne*, 121 Vt. 1, 12 (1958). However, the Restatement Third of Property made a significant change on that point. Since 2000, the Restatement (Third) of Property (Servitudes) has provided in § 4.8 entitled "Location, Relocation, and Dimensions of a Servitude" in subsection (3) that:

Unless expressly denied by the terms of an easement, as defined in §1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a)

significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

The purpose is to allow minimization of “the servitude’s interference with current value and future development of the servient estate. The owner of the servitude is protected by the requirement that the location be reasonably suited for the purpose. The primary application of this rule is to easements.” *Id.*, Comment b. The facts of this case meet all the requirements: the partial relocation of the road enabled LLC to develop and use its own property to greater purpose, while neither the utility of the easement nor the burden on the Trust were increased.

The Vermont Supreme Court, which often follows the Restatement, has had two cases in which it has discussed the new Restatement provision.

In *Sweezy v. Neel*, 2006 VT 38, the servient owner put an addition on to his house and relocated the Defendants’ easement around the addition. The Vermont Supreme Court considered a request to adopt the change to the Restatement and opined that “the potential effects of doing so demand caution before abandoning our established law foreclosing unilateral relocation of established easements” and accordingly declined to remand the case to the trial court for application of the Restatement standard. *Id.* at ¶ 25. *Nonetheless*, the court approved and upheld the “bend” in the easement road around the new construction. Essentially, while the Court declined to remand to direct the trial court to follow the Third Restatement, in fact it allowed the same “bend” around newly constructed improvements that occurred in this case and that is enabled by the new provision in the Third Restatement.<sup>1</sup>

In *Roy v. Woodstock Community Trust, Inc.*, 2013 VT 100A, the Court claims that it had rejected the Third Restatement approach in *Sweezy*, 2013 VT 100A, at ¶ 20. Despite that statement, it adopted the Third Restatement principles for subsurface water easements. While it purported to create a distinction between subsurface and surface easements, and declined to adopt the Third Restatement approach for all purposes, since the issue was only about subsurface water easements, the comments were dictum as related to surface easements.

Neither case includes a holding that amounted to outright rejection of the Third Restatement approach, and both cases indicate that the Vermont Supreme Court has been inching toward the Third Restatement approach. There is also the possibility that depending on facts not sufficiently developed in the record, the conduct of the Trust or its predecessors could be interpreted as acquiescence or consent, even under prior law.

In sum, because of the fact that the LLC’s conduct was not simply a full elimination of the old road, but a relocation of only a portion that still enabled physical use by the Trust of the easement on a partially relocated route, and in view of the flux in the development in the law on

<sup>1</sup> The trial court prohibited the easement owner from using the right of way for future development of the dominant estate. The Court ruled that the trial court should not have ruled on the scope of the easement as to future development of the dominant estate since it was not a controversy before the court at time of trial. Similarly, the scope of use of the easement is not an issue in this case.



relocation of easements, the court cannot conclude that the LLC's conduct amounted to adverse use to the extent that it eliminated any easement interest of the Trust. The Motion for Summary Judgment based on Prescriptive Termination is denied.<sup>2</sup>

**MPR 3: Defendants' Motion for Summary Judgment: Deed Basis**

Defendants claim Plaintiff Trust has no easement because no easement was ever originally created by either grant or reservation in a deed. However, land records show that the easement right has been granted to all holders in Plaintiff Trust's chain of title since 1965 and was excepted from what Defendants acquired in their original acquisitions in 1997 and 1998 and was previously an exception in their chain of title. A survey of it was recorded in 1965. The land contract recorded in the land records in 1961, with Goves as parties, demonstrates that a physical roadway existed on the land as of that time and there is no dispute as to its original location and that it led from the Trust's frontage lot to the mountain lot. The Goves conveyed the intervening land in 1963, reserving and excepting the easement.

There may well be legal bases to support the Trust's current ownership of the easement right. The court is not satisfied that all facts pertinent to possible claims (such as adverse possession with or without color of title, acquiescence, estoppel, marketable record title<sup>3</sup>) have been presented such that the issue may be decided on Defendants' motion for summary judgment. The court cannot conclude that there is no basis for Plaintiff Trust's claim of an easement right to the mountain lot. The Defendants' Motion for Summary Judgment on the basis of deeds is denied. Plaintiff Trust is not foreclosed from the opportunity to prove its claims.

**Order**

Based on the foregoing,

1. Defendants' Motion for Summary Judgment: Standing (MPR #1) is *granted*;
2. Defendants' Motion for Summary Judgment: Prescriptive Termination (MPR #2) is *denied*;
3. Defendants' Motion for Summary Judgment: Deed Basis (MPR #3) is *denied*.

A pretrial status conference will be scheduled to plan for an evidentiary hearing.

Dated at Montpelier, Vermont this 28th day of August 2019.



Mary Miles Teachout  
Superior Judge

<sup>2</sup> This is not a summary judgment ruling in favor of Plaintiff Trust on this issue, but only a denial of summary judgment to Defendants. Plaintiff Trust is still left to its proof on all its claims.

<sup>3</sup> Defendants' counsel is correct that Plaintiffs have not pleaded a claim for an easement by necessity or claimed that the mountain lot is landlocked.