VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 140-8-19 Lecv

Willey et al vs. Hammond

FINDINGS, CONCLUSIONS, AND JUDGMENT

This case is a property dispute concerning boundaries, walking paths, locations of rights of way, and the use that develops over time between adjoining, but largely forested, properties. This matter came before the court for a bench trial on August 18th and 19th, 2022. Based on the testimony and evidence presented by the parties, the Court makes the following findings.

Findings

General Layout and Overall Use of the Properties

The two properties in question are located in the neighborhood known as Cady Falls and are part of a subdivision that was developed in the early 1970s. The entire subdivision is located to the north of Lake Lamoille, south of Vermont Route 15, west of the Village of Morrisville and east of Cady Falls Road. The Lamoille Valley Rail Trail runs along the backside of Defendant's parcel and to the south and west of the area where the disputed right-of-way lies. While both properties have residential houses and out-buildings as well as defined lawns around the curtilage of each, the majority of the area in dispute is forested and largely undeveloped. Although as with much of Vermont, there are indications that prior use has occurred, and the forestation is neither old, nor particularly dense.

Plaintiffs' property fronts onto a graveled town road known as Pinewood Estate Road, also known as Town Highway 93. This road branches off from Needles Eye Road, which itself branches from Route 15. Pinewood Estates Road forms a quadratic loop. Plaintiffs' property fronts on the outside of bottom left corner of this loop. Defendant's property sits behind Plaintiff's lot. Looking at the original subdivision plans as submitted by Plaintiff, this loop road was intended to be the inner loop to a larger loop road. Defendant's property would have had frontage on this outer loop. As the

subdivision progressed, Pinewood Road developed approximately to plans and became town highway 93. The outer loop was never built.

Defendant's property sits entirely behind Plaintiffs' lot. It does not have frontage on Pinewood Road. Defendant's predecessor in title, her late-husband, Wayne Hammond, purchased the lot in the 1970s and built a house there in the late 70s–early 80s.[1] Defendant has lived on the property since 1986. Defendant's lot is accessed by a hard-packed dirt driveway with some gravel. The driveway begins at the southeast corner of the Pinewood Road loop, and follows, initially, the course of the outer loop right of way, but it veers north onto Plaintiff's property after approximately 200 feet. The driveway then runs across Plaintiffs' property for approximately 300 feet until it returns to the area set aside for the outer loop before skirting the back corner of Plaintiff's property and terminating in the middle of Defendant's lot. The driveway is 20 feet in width throughout its course.

Looking at Plaintiffs' Exhibit 15, which the Court finds to accurately portray both the location of the driveway and the property boundaries as described in the parties' deeds, the variation in the driveway appears to be a shortening of the driveway length achieved by cutting-off of the corner of Plaintiffs' lot and running the driveway in a relatively straight line from Pinewood Road to the mouth of Defendant's yard. Defendant testified credibly that this driveway was established prior to her occupancy of the property, and that its layout and location has not altered in the 38 years that she has resided at the property and that she has used it for her ingress and egress and for others to access the property that entire time with some seasonal interruptions.

Plaintiff Jocelyn Willey purchased her property on Pinewood Road in 1998 with her former husband. Upon their separation, Ms. Willey's prior spouse quitclaimed his interest to Ms. Willey. Ms. Willey quitclaimed the property to herself and her current spouse and co-plaintiff, Arnold Willey in 2001. Beginning in 1998, Ms. Willey resided at the property.

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[1] Upon Mr. Hammond's passing, Defendant Penny Hammond became the sole owner of the property through a probate decree. Since the commencement of this litigation, Ms. Hammond has executed an enhanced life estate deed (known commonly as "Lady Bird deeds") to her daughter, Mariah Taylor. While Ms. Taylor was not added as a party, she attended the trial and testified as a witness and is, by extension, aware of this litigation and nature of Plaintiffs' claims. The Vermont Rules of Civil Procedure allow an action to be continued by or against the original party even when there is a transfer of interest. V.R.C.P. 25(a). Rule 25 does not strictly apply in this case because Ms. Hammond retains much of the elements of ownership and control under the Lady Bird deed, including the right to mortgage, sell, subdivide, and use the property as she sees fit. Ms. Taylor's interest is a future and contingent. Nevertheless, the decision rendered by this Court is applicable to both Ms. Hammond as a party and Ms. Taylor as a future, contingent owner taking from Ms. Hammond. *Lakeview Farm, Inc. v. Enman*, 166 Vt. 158, 162 (1997).

For all relevant periods of time—from 1986 to present for Defendant and from 1998 to present for Plaintiffs—the parties have used their properties for residential purposes and both parties have considered them to be their primary residences. The disputes in this case have developed around these edges of this mutual occupancy, and may be summarized and categorized as follows:

1) Defendant's use of the driveway and maintenance of the driveway across Plaintiff's property;

2) Defendant parking on Plaintiff's property where Defendant's driveway is impassable;

3) Defendant's use of a foot path on Plaintiff's property near a spring; and

4) Defendant's maintenance and mowing of a portion of Plaintiff's property.

Defendant's Driveway

As described above, the location and layout of the driveway goes across a portion of Plaintiffs' land. In their complaint, Plaintiffs sought to require the re-location of this driveway to the south and west where on Exhibit 15 it is indicated that the developers originally intended any right-of-way to properties on Defendant's side of the subdivision would be located. The evidence shows that this objection was relatively recent and arose in combination with Plaintiffs' other issues in 2017.

At the end of trial, Plaintiffs withdrew their objection to the driveway and agreed that it could continue in its present location. This withdrawal is consistent with the evidence. The driveway has been in its current spot since at least 1986 and likely as early as the 1970s. Both Plaintiffs' and Defendants' lands come from a common joint owner who subdivided and created the current lot configuration. The driveway is well-established, visible, and is unmistakably a driveway. There is no evidence that Plaintiffs or their predecessors in title has ever conditioned or limited Defendant's use of the driveway prior to the present dispute. The driveway in its present location has been the only established entrance and exit to Defendant's property during this entire time. The only other option that Defendants would have would be to create a second, parallel driveway along the route shown in Exhibit 15 as the common right-of-way area. Currently, this route is forested, ungraded, and impassible.

Plaintiffs, in their concession, also do not object to Defendant or her successor in title performing maintenance and improvements to the driveway or parking along various points when there are seasonal issues with the driveway.

Defendant's Parking

Defendant's driveway follows the terrain of the area that has several small, but significant, changes in grade and passes over an area where seasonal drainage can impact the road. Due to the condition of the road, lack of maintenance, and the mud that builds up in the wet area, there are times of year from March to June, where a normal front-wheel drive car or truck cannot traverse the entire driveway without the risk of becoming stuck. During such times, Defendant testified that she has developed a practice of parking at various points on the driveway and walking to her house. The credible testimony indicated that Defendant has parked as high up on the driveway as the point where it splits off from Pinewood Road, but she and her guests have also parked at a point before the muddy section of the driveway, near the concrete spring cover. This spot, which is on Plaintiffs' property, has developed into a clearing big enough to where two to three cars can park. The evidence indicates that this clearing was done to reach the spring box located on Plaintiffs' property as it allows cars to exit the driveway right up to the springbox. Defendant and Ms. Taylor credibly testified that they only park in this spot at certain times of year when the driveway becomes impassible. Defendant testified that she had been doing this type of seasonal parking on and off since the 1980s.

At the end of the evidence, Plaintiffs indicated that they were most concerned with the expansion of this area and with Defendant's use of the path from the parking area to the spring.

The footpath to the Spring

One the most notable features in the early subdivision maps is a large circle drawn overtop Plaintiffs' and Defendant's boundaries demarcating the shield for a spring box located on Plaintiffs' property at the center of the circle. Whatever initial plans the developers may have had for this spring, it has been capped and does not presently serve either Plaintiffs' or Defendant's properties. There is a well-established foot path leading from Defendant's property, past the spring, which connects to the parking area described above. Defendant stated that she had begun to use this path as a shortcut from the seasonal parking area to her house. Much like the driveway that provided a more direct and shorter route to Defendant's property, the spring path cuts across Plaintiff's land and provides Defendant a more direct route and shorter route to walk from where Defendant and her guests have been parking in the spring to the house.

Unlike the parking area, Defendant's testimony here was that she used to walk down the driveway but has been taking the shortcut because she has been on oxygen for the past few years.

Defendant did not make a conscious choice to use or not use the spring path because she understood it to be a part of her property. She has never maintained the path and has simply used it on occasion, much in the same way one might walk across their own yard.

Defendant did note that there is a right to access the spring in her chain of title, but as Plaintiff's expert credibly noted, this right is associated with the spring and any use or maintenance of lines from the spring to Defendant's house. The language of the deed does not suggest or create an easement for travel or access across Plaintiffs' property.

Plaintiff's Back Corner and Defendant's Mowing

The final area of dispute between the parties concerns a small, triangular parcel at the corner of Plaintiffs' property located at the western-most end of the Plaintiffs' lot. This parcel, bounded to the west by Defendant's driveway and the north by Defendant's yard has been slowly mowed over the years by Defendant. There were no structures, plantings, or other evidence of use on this portion of the property. It is simply mowed and maintained like the surrounding yard as part of Defendant's yard. This portion of the yard as credibly noted by Plaintiffs' expert witness is actually part of Plaintiffs' property, and the mowing and use of this property constitutes an encroachment onto the property. Defendant credibly testified that neither she nor her late husband had ever mowed or maintained any portion of this property with the intent to encroach. Instead, Defendant indicated that they had just mowed to a point where the yard seemed to end without an intent to occupy or claim the land.

Legal Conclusions

The first issue of this litigation concerns the location of the boundaries between the two properties. To this issue, Plaintiffs offered the expert testimony of Aaron Fuller, a licensed Vermont Surveyor, that Plaintiffs had retained to review the deeds, prior survey maps, subdivision permits, and other information concerning the mutual boundaries. From this testimony Mr. Fuller identified a survey map that he had created that summarized his work and represented what he testified are the accurate boundaries between the two properties as laid out in the relevant and supporting deeds and documentary evidence and as his field work at the site found. Mr. Fuller's testimony and survey map were the only pieces of evidence offered as to the issue of what the various deeds and prior surveys, boundaries are between the two properties. As the Court, noted in the last section, it finds this survey map to be a credible and accurate representation of the common boundaries, and it accepts the survey as a true and accurate representation of the boundaries. This is a finding of fact, which is supported by

consistent and undisputed evidence. *Pion v. Bean*, 2003 VT 79, ¶ 15 ("The court's determination of a boundary line is a question of fact to be determined on the evidence.").

Defendant's evidence did not dispute the formal boundaries of the property, instead, Defendant's evidence and testimony went toward the actual practice and experience she and her witnesses have had at the property, which was, as the finding indicate, often in derogation to the formal boundaries.

To that end, the Defendant has established that her driveway across Plaintiff's property has been in the same location for over 40 years. The use of this driveway has been open and continuous for that entire time. There is no evidence that the driveway was ever in a different location, even if the original subdivision plans envisioned its location in another spot. There is also no evidence that this driveway was limited or conditioned on a grant of permission or license that would prevent a finding that the use has also been notorious and hostile. *Wells v. Rouleau*, 2008 VT 57, ¶ 8 (mem.) ("The general rule is that open and notorious use will be presumed to be adverse and under claim of right, unless there is found an exception which rebuts that presumption, such as evidence of permission of the owner of the land to use the right-of-way.") (quoting *Buttolph v. Erikkson*, 160 Vt. 618, 618 (1993) (mem.)). Similarly, the limited seasonal difficulties that Defendant has encountered that have interrupted her use of the driveway during mud season are not sufficient to create a legal issue as to whether Defendant and predecessor's actions have created a year-round prescriptive right to use this driveway. As the Court in *Wells* instructs, such a limitation or expansion would be irrelevant as it does not alter the burden on the servient estate. *Wells*, 2008 VT 57, at ¶ 20.

Based on these findings, the Court concludes that Defendant and her predecessor in title have gained a prescriptive right to use this driveway easement as it currently exists. The scope of this easement is a general-use driveway, which includes the right to use the easement for ingress and egress purposes, to run utilities and services, and to park along the course of such an easement, among other uses. The width of the easement is 20-feet to be measured from the central point of the travelled portion of the driveway. It also includes the right for Defendant and her successors in title to repair and maintain this driveway. *Walker v. Pierce*, 38 Vt. 94, 98 (1865) (duty to maintain an easement lies with the grantee).

This conclusion is largely uncontested by Plaintiffs, who at the end of the trial conceded that the driveway could remain in its current location and that Defendant was free to maintain it. Nevertheless, the Court is obligated to further conclude that the evidence supports this consent and that

the location, scope of use, and width and length of the easement are consistent with the evidence. *Dennis v. French*, 135 Vt. 77, 78–79 (1977) (noting the need for findings to support the conclusions regarding the established burden of a prescriptive easement on a servient estate). The Court concludes that Defendant has met her burden on these points, and that the driveway as described above has been established to the satisfaction of the elements necessary to establish a prescriptive easement.

The next issue is Defendant's use of the clearing adjacent to the driveway for seasonal parking. The evidence for this use, like the driveway, has a long history. Unlike the driveway, Defendant only presented evidence and only seeks a right to use the parking area on a seasonal basis. There was credible evidence that the clearing was originally intended to access the now-capped spring, and this evidence creates a potential point of conflict that if the area was turned into a year-round parking area that such use could interfere with access to the spring. Nevertheless, Defendant credibly stated that the only reason she or any guest would park in this spot was if the driveway had become impassible as it was inconvenient to anyone living at Defendant's house. Based on this evidence, the Court concludes the right to use this parking area is necessarily limited to seasonal emergency situations and any right to park has only been established to exist when the driveway cannot be safely traversed. See *Dennis*, 135 Vt. at 79–80 ("It is clearly the law in this jurisdiction that the owner of an easement cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon."). In this respect, the driveway parking is the contrapositive of the driveway. While Defendant has established a long history of using the driveway punctuated by short periods of partial, seasonal non-use, the parking area is largely not used by Defendant, except for short, limited periods when the season makes the road impassible. Based on this, the Court concludes that Defendant has established only this limited right to use the parking area between March and June when the driveway becomes impassible or threatens to become impassible due to mud and drainage issues.

The next to last issue is Defendant's use of the footpath between the parking area and the house. To begin with, the evidence shows that this path is on Plaintiffs' property. The evidence also shows that Defendant does not have a deeded right to use this path to access the parking area or driveway. The spring right in Defendant's chain of title is limited to accessing the spring for either running lines or maintaining them. In that respect, Defendant and her family's use of the path is adverse. Unlike the driveway or parking area, Defendant's evidence in support of this adverse claim does not rise to level of establishing an adverse possession. The evidence is that the use has not been continuous for 15 years as Defendant admitted that she, at times followed the driveway to access her house and did not always follow the spring path. It is also not open in that the path itself is not well-

established or worn down but runs through a lightly forested area. It also does not appear to be notorious as Defendant stated that she used it because she always thought it was her property and did not intend to create a new path through Plaintiffs' lands.

Taken in whole, the Court finds that the evidence of the path use does not meet the legal standard for adverse possession, and the Court shall enter judgment in favor of Plaintiffs on the right to use the spring path to travel from Defendant's property to their parking area.

Finally, there is the issue of the land at the edge of Defendant's property that she has mowed or had mowed. This land, as established by the Fuller survey map is on Plaintiffs' property. Defendant admitted that she did not intend to occupy or take Plaintiffs' land but had simply mowed to the tree line each year. The Vermont Supreme Court has ruled that mowing a disputed parcel of land, even with the intent to adversely possess the land is not sufficient to establish a claim of such. *First Congregational Church of Enosburg v. Manley*, 2008 VT 9, ¶¶ 15–17 (citing to cases from multiple jurisdictions). The holding of the Court in *Manley* is that the act of mowing alone is simply too ambiguous. It is sometimes performed out of habit or tradition. It is sometimes done as a courtesy to a neighbor. It may simply be that the mowing occurs in an area where neither party maintains sharp boundaries and the guidelines are landmarks that do not correspond to ownership. The present case fits within this tradition. Defendant testified that the intent was not to possess but to simply follow the curves of the open space. Based on this evidence Defendant cannot as a matter of law establish a right to this property, and the Court concludes that no adverse possession has occurred as a matter of fact and law.

Conclusion

Based on the foregoing, the Court grants judgment to the Plaintiffs for the following claims:

1) The Fuller Survey illustrates the legal boundaries of the two properties and properly represents them as laid out in the parties' respective deeds.
2) Plaintiffs are entitled to judgment on their claims of trespass regarding the use of the spring path by Defendant and her family and guests and the mowing of the area at the western end of their property and that no adverse possession has been established to alter Plaintiffs' ownership of either area.
3) Defendant and her successors in interest are ordered to cease all travel across, mowing of, or any other activity in these areas.

Defendant is awarded judgment for the following claims:

4) Defendant has established a prescriptive easement for the existing driveway as identified in the Fuller survey with a width of 20 feet for the general use of access to Defendant's property, including ingress, egress, parking, and utilities.
5) Defendant has the right to maintain and repair their driveway in its current location.
6) Defendant is further granted a limited, prescriptive right to park in the clearing adjacent to the driveway near the springhead where Defendant and her guests have traditionally parked during mud season, as identified on the Fuller survey as the driveway encroachment. This use may occur only in limited seasons when the driveway becomes impassible or presents a risk for a car to be stuck due to water flow and snow melt associated with mud season.

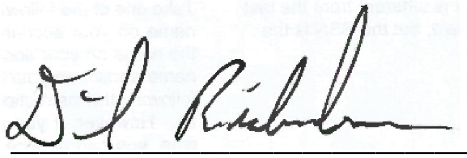
Neither party presented evidence or claims of monetary damages, and none are awarded.

Counsel and parties are directed to prepare the deeds, boundary agreements, or proposed court orders that they believe are appropriate and necessary to effectuate the determinations contained in this Order.

Each side to bear their own costs and attorney's fees.

Dated at Hyde Park, this 13th Day of December 2022.

Electronically signed on 12/14/2022 10:48 AM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge