

**STATE OF VERMONT
WASHINGTON COUNTY**

**JULES CHATOT, JR. and
KATHLEEN CHATOT,**
Plaintiffs,

v.

**RONALD D. FORANT, SR. and,
CARMEL ALLAIRE,**
Defendants.

v.

**ANDREW S. LEINOFF and
GWYNETH A. JONES**

**Washington Superior Court
Docket No. 147-3-04 Wncv**

**FILED
2007 SEP 26 A 9:50
SUPERIOR COURT
WASHINGTON COUNTY**

DECISION ON THE MERITS ON REMAND: WIDTH OF EASEMENT

In the Findings and Conclusions filed February 19, 2002 in Docket No. 47-1-00 Wncv, this court found that Ronald D. Forant, Sr. and Carmel Allaire established a prescriptive easement from the end of West Shore Road across property owned by Jules Chatot, Jr. and Kate Chatot to the Forant/Allaire property formerly known as the "Roy lot."¹ That decision was appealed and affirmed by the Vermont Supreme Court on December 19, 2002.

At issue in this subsequent case is the width of the easement. A Partial Final Judgment was filed August 15, 2006 and appealed. On May 5, 2007, the Vermont Supreme Court reversed and remanded for a determination of width of the easement based on historical use and determination of "a safe width that [is] most consistent with the easement's historic use and scope." At a status conference held on May 7, 2007, the parties stipulated to deferral of the second part of the case, involving Defendants Andrew S. Leinoff and Gwentyth A. Jones, until completion of this portion of the case.

An evidentiary hearing was held on August 3, 2007. Plaintiffs are represented by Attorney Kimberly B. Cheney. Defendants Forant and Allaire are represented by Attorney Edward M. Kenney. Based on the evidence, the court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

All of the Findings of Fact of Judge Cheever filed February 19, 2002 in Docket No. 47-1-00 Wncv are hereby incorporated. In addition, based on the evidence

¹ The centerline of this easement was surveyed in May of 2002 by Mark V. Ward (Exhibit 2 in this case).

introduced at the hearing on August 3, 2007, the court makes the following factual findings.

In 1945 and for a considerable period of time thereafter, the road that was located on the ground and used during the prescriptive period (1940's to 2002) consisted of a one-lane rough narrow backwoods road. In 1945 and the early 50's, it was only passable when the ground was dry, and there was no ditching. Brush grew up on both sides, and in some places it was so narrow that a single vehicle passing over it was scratched on both sides by brush.

In the 1950's, when it was used for logging, vehicles that passed over it included cars, pickup trucks, a farm tractor, and logging trucks for pulp logs. Although there were a few places north of the "cut" (a narrow area with boulders on both sides) where one vehicle was able to pull to the side to let another pass, it continued to be a single lane road. The width of the widest vehicle that used the road was 8 ½ feet. Contemporary log trucks are 8 ½ feet wide and need a total width of 10 ½ feet to maneuver. Log trucks were narrower in the 1950s. There was a gate at the north end, on the property boundary line, for the purpose of keeping cattle on the Roy lot, and the gate was 14 feet wide. However, testimony that the traveled portion of the road was 14 feet wide is not credible. The overwhelming body of credible testimony is that the traveled portion was only wide enough for a single vehicle, except for a few pullover spots, and that the maximum width of the traveled portion was 9–10 feet wide.

The road was not created by building up with fill, so there was no shoulder support along the sides of the road. There was no ditching along either side of the road. The pitch of the land slopes from northeast toward the southwest. Water drained either down the road itself, creating ruts, or to the southwest.

These physical characteristics remained unchanged throughout the 60's, 70's, and until 1988. Throughout this period, there was no gravel on the road, and it was not widened or ditched. It had two dirt tracks for wheels, with grass in the middle and on the sides. A two-wheeled vehicle could occasionally be used to pass over the road, but sometimes it was not passable without 4-wheel drive.

In 1988–89, Berton Frye, an excavator, upgraded the road surface, which had many deep ruts and washouts. With his bulldozer, which was 10 ½ feet wide, he excavated to below grade level and resurfaced the road, putting on a layer of crushed rock 6–8" deep. In the "cut" area, this had the effect of making the traveled way even narrower than it had been when the road level was higher. He also added some ditching on either side to facilitate water run-off. Since his work, water has flowed off both sides of the road, with the result that further maintenance due to washouts has not been necessary. This work did not widen the traveled portion of the road, but only added ditching on either side of the traveled portion. Based on the credible evidence, the court finds that two feet on either side of the traveled way encompasses the area that has been used for ditching during the prescriptive period.

Berton Frye's large dump truck, used to haul material to surface the road in 1989, was larger than vehicles such as ambulances or fire trucks that might need to use the road for safety purposes, and it had no difficulty passing the road safely. The evidence shows that a wide variety of vehicles, including two-wheel drive passenger cars, can safely use the road for one way travel. There are places north of the cut where one vehicle can pull over to permit passage of an approaching vehicle coming the other way. With large vehicles such as logging trucks and dump trucks, which use the road only on occasion over a period of many years, safety precautions include having a person check that the road is clear before the vehicle uses it.

There was no change to road-width up through 2005. The road remained a one-lane road with the improvements done by Berton Frye. In 2005, the narrowest point of gravel width was 8.2 feet, and the widest was 9.7 feet. The court finds that the historical use of the road during the prescriptive period was for a single lane road with a traveled portion no greater than 9–10 feet, with a two-foot wide ditch area on either side and no area of shoulder support, for a total width of easement no greater than 14 feet.

Conclusions of Law

The prescriptive easement was established for “personal residential, farming and lumber uses.” Decision, *Forant v. Chatot*, No. 47-1-00 Wncv (Cheever, J., Feb. 19, 2002), at 18. In determining the width of historical use of the prescriptive easement, the court should include any area used for shoulders, ditches, and lateral support of the roadway. The court has done so. The width of the easement based on historical use is thus 14 feet.

The Court instructed the trial court to consider, on remand, “a safe width that [is] most consistent with the easement’s historic use and scope,” and what width “will safely accommodate traffic passage with the least impact on the servient estate consistent with the easement’s historical scope,” rather than what width represents contemporary “state-of-the-art” traffic safety standards.

The facts show that the use of the easement was always as a single lane road. Farming and lumber uses of the road were sporadic and occasional during the prescriptive period. Personal residential use took place on a limited basis as set forth in Judge Cheever’s Findings of Fact of February 19, 2002. The scope of the historical uses limits the permissible burden of future uses. See *Dennis v. French*, 135 Vt. 77, 80 (1977); Restatement (Third) of Property: Servitudes § 4.8 cmt. e, illustration 3; Restatement (First) of Property § 479 cmt. c.

Thus, need for use by emergency vehicles is likely to be infrequent. Use of the road by lumber trucks and tractors occurs only on occasion every several years, and safety concerns can be accommodated as they have in the past: by having a person check that the road is clear before the vehicle attempts complete passage. Use of the road by emergency vehicles such as fire trucks and ambulances as part of the “personal

residential use” can be accommodated in the same manner, as would have been the case in the past.

Enlarging the width to maximize safety concerns would significantly impact the servient estate. If the width were enlarged from 14 feet to 20 feet for safety purposes, the easement would occupy a land area 43% larger than if it remained at a width of 14 feet, and this would occur along the full length of the easement on the Chatot property, which appears to be approximately 1,200 feet long. This would be a significant increase in the burden on the servient estate, with negligible effect on safety based on the scope of historical use and the ability to accommodate for safety by having a person check that the road is clear prior to use.

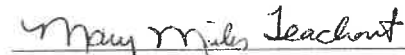
The court concludes that the facts do not warrant a modification to enlarge the width of the easement to permit safe use of the easement for its historical uses. The prescriptive easement is 14 feet wide.

Order

For the foregoing reasons,

1. The decision set forth above shall constitute the judgment of the court on this issue at such time as final judgment is entered in the case, and
2. A status conference will be held to address remaining issues in the case.

Dated at Montpelier, Vermont this 26th day of September 2007.



Mary Miles Teachout
Superior Court Judge