



Defendants filed an answer asserting a prescriptive right to discharge water onto Ms. Rhodes' property based on longstanding use of an original "Orangeburg" brand drain pipe. Defendants also asserted a prescriptive right to maintain the drain pipe. They also claim a riparian right to maintain a flow of water from their property to Ms. Rhodes' property, and a right of necessity to drain water from their property. Defendants admit they hold no deeded easement for the drainage pipe.

Defendants then filed the present Motion for Summary Judgment. They claim that at some point prior to 1979, and perhaps as far back as the 1950s, previous owners of their property installed a drainage system to facilitate the flow of surface water under Route 73. The drainage system worked by gathering water from two drains on Defendants' property and piping the water under the road onto the Rhodes property. The original Orangeburg drainage pipe extended onto the Rhodes property.<sup>1</sup>

Defendants periodically experienced flooding in their basement between 1979 and 2004. In 2004, Defendants engaged in landscaping and certain other repairs, including replacement of pipes on their property, that alleviated the flooding somewhat. In 2006, Defendants replaced the sewer pipes connecting their residence to the town sewer to remedy a sewer failure. As part of this repair, Defendants replaced the aging Orangeburg drainage pipe that ran onto the Rhodes property with a new PVC pipe.

Defendants argue that these facts establish a prescriptive right to use and maintain the discharge pipe on the Rhodes property, and that the replacement of the Orangeburg drainage pipe with the new PVC pipe was consistent with their prescriptive right. They argue that the existence of the drainage system has been open, notorious, and hostile since at least 1979 (and perhaps longer) and that the drainage system has continuously discharged water onto the Rhodes property since that time. They also assert a riparian right to discharge water onto the Rhodes property.

Ms. Rhodes disputes a number of the facts set forth by Defendants. In her response to the Motion, she argues that the PVC pipe is a new point of discharge that exits at a different location than the old Orangeburg pipe, and disputes whether the old Orangeburg pipe ever actually exited onto her property. She also disputes whether the Orangeburg pipe ever actually discharged water onto her property. She points to deposition testimony indicating that Orangeburg pipes were made from compressed paper, were difficult to install properly, and could have split or failed "from day one." Ms. Rhodes also argues that no prescriptive right could have been established because the Orangeburg pipe was not visible and therefore not open and notorious, and also surmises that a previous landowner may have given permission for the pipe to be installed.

Defendants' reply memorandum advances additional deposition testimony suggesting that the drainage system was in fact working at various times. Defendant also argues that, even if a prior landowner granted permission for installation of the original pipe, the permission constitutes an irrevocable license.

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<sup>1</sup> The property is called the "Rhodes property" for ease of reference. Ms. Rhodes apparently purchased the property in 1999.

On a motion for summary judgment, judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). In determining whether any party is entitled to judgment, the Court considers the admissible evidence in the light most favorable to the non-moving party and draws all reasonable doubts and inferences in favor of the non-moving party.

It is apparent that there are genuine issues of material fact in this case that preclude the grant of summary judgment. Defendants assert a prescriptive easement, which is established by showing an adverse use or possession that is open and notorious, hostile, and continuous for fifteen years. *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 155 (1989); 12 V.S.A. § 501. The extent of the prescriptive easement must be determined by the extent of the actual occupation and use enjoyed by the party claiming prescriptive rights. *Id.* at 156.

In this case, there are genuine issues of material fact concerning the location of the original drainage pipe, whether the existence of the drainage pipe was open and notorious, whether permission was granted,<sup>2</sup> and whether (or to what extent) the original drainage pipe worked at all. There is also a question of fact concerning whether the new PVC pipe is physically located within the scope of any established easement and whether its discharge of water is consistent with any prescriptive rights.

With respect to riparian rights, the rule is that the lower landowner must accept the natural flow of surface water upon her land, but “an upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge.” *Powers v. Judd*, 150 Vt. 290, 292 (1988) (quoting *Swanson v. Bishop Farm, Inc.*, 140 Vt. 606, 610 (1982), *overruled on other grounds by Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 619 (1983)).

The parties dispute whether the new PVC pipe discharges water in the same location as the old PVC pipe. The parties also dispute whether the new pipe artificially increases the flow of water onto Ms. Rhodes property, and whether the increased flow has caused injury to the property. See *Powers*, 150 Vt. at 292 (“[I]n cases involving only increased flowage and not a change in the place of discharge, an upper owner may

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<sup>2</sup> The general rule is that a prescriptive easement may not be established if the use of the property was by permission. *Guibord v. Scholtz*, 2006 VT 22, ¶ 5, 179 Vt. 623 (mem.). Defendant argues that, in the context of permission to take water from a spring via an aqueduct, permission constitutes an irrevocable license for the “ordinary life of the aqueduct.” *Guilbault v. Bowley*, 146 Vt. 39, 42 (1985) (quoting *Phillips v. Cutler*, 89 Vt. 233, 235 (1915)). Even assuming that the discharge of surface water through a pipe is equivalent to the taking of water from a spring via an aqueduct, questions of material fact remain regarding (1) the ordinary life of the discharge pipes in this case and (2) whether the installation of the new PVC pipe was consistent with the rule that a licensee “may repair the aqueduct as far as necessary to keep it usable, but not to the extent of renewing it.” *Id.*

increase the flow as long as it causes no injury to the lower property.”). Summary judgment is thus inappropriate. V.R.C.P. 56(c)(3).

**ORDER**

For the foregoing reasons, Defendants’ Motion for Summary Judgment is *denied*.

Dated at Rutland, Vermont this 18<sup>th</sup> day of January, 2008.

*Mary Miles Teachout*

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Hon. Mary Miles Teachout  
Presiding Judge