

B. Richard Giordano Living Trust v. Smith, Docket No. 541-11-06 Wmcv (Wesley, J., June 28, 2007)

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**STATE OF VERMONT
WINDHAM COUNTY, SS**

B. RICHARD GIORDANO LIVING TRUST,)	Windham Superior Court
B. RICHARD GIORDANO, TRUSTEE)	
<i>Plaintiff</i>)	Docket No. 541-11-06 Wmcv
v.)	
)	
AL SMITH and PAULA SMITH,)	
<i>Defendants</i>)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW
& ORDER**

The above captioned case was presented to the Court by bench trial held January 11 & 12, and March 9, 2007. Plaintiff was represented by Robert M. Fisher, Esq. and Defendants were represented by John C. Mabie, Esq. Following the close of the evidence, the record remained open until April 2 to allow the parties to submit proposed findings of fact and conclusions of law.

Based on the evidence presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT:

1. Plaintiff is a Connecticut living trust which owns approximately 320 acres of unimproved real property located in Newfane, Vermont, bounded on the north by the Dover

Road. Plaintiff claims an easement from its southern boundary to the Stratton Hill Road across property owned by Defendants.

2. Plaintiff and Cersosimo Lumber Company entered into a "Timber Sale Agreement" by which Plaintiff is contractually bound, and which guarantees Cersosimo the right to enter the property to harvest the timber throughout the period of the agreement, which terminated on April 1, 2007. The timber designated to the agreement is located in a large stand on the southern side of a ridge that centrally divides Plaintiff's property, running from southwest to northeast, between the ridgeline and the southern boundary of the property. The agreement contemplated access over a logging road running from Stratton Hill Road across Defendant's land, which is the subject of this dispute. Shortly after learning of the agreement, Defendants caused the entrance to the logging road to be blocked, precipitating this lawsuit for declaratory relief and damages stemming from claimed interference with Plaintiff's duties pursuant to the agreement with Cersosimo.

3. Defendants are residents of Newfane, Vermont, whose property abuts Plaintiff's, with access by the Stratton Hill Road which bisects the property along a contour above Ada's Brook. The site of the disputed easement is located several hundred yards southwest of Defendants' house, where a well-worn logging road intersects Stratton Hill Road veering westerly through a cut in an old stone wall and past a timber landing, and traversing Defendant's land approximately 200 - 250 yards before reaching Plaintiff's boundary.

4. Plaintiff's and Defendants' titles can be traced back to common grantors, Dwight Bailey and Minnie S. Bailey. Plaintiff's chain of title began by conveyance in 1903 from Bailey to King (recorded at Book 22, Page 125), and Defendant's chain of title began by conveyance

later in 1903 from Bailey to Knapp (recorded at Book 22, Page 162). Plaintiff's title includes an appurtenant easement establishing a right of access from Stratton Hill Road, originally created in the conveyance of Bailey to King. The language creating the easement in the deed to King is as follows: *"...and hereby granting right of way from highway across lands of above D.E. Bailey to lands conveyed in this instrument."* It is undisputed that the highway specified by the deed into King is Stratton Hill Road; only the location of the easement along that road is in dispute.

5. Although the deed by which Plaintiff acquired title does not contain specific reference to the right of way, that easement has never been conveyed out separately from the property down the chain of title between King and Plaintiff. Apart from the slight reference in the King deed, there are no other descriptions providing metes and bounds for the right of way, nor is there any specific reference to its location except that it runs from Stratton Hill Road to the premises then owned by King and now owned by Plaintiff.

6. Defendants' chain of title is even less enlightening regarding the King easement. Neither Defendants' deed, nor those of any of their predecessors in title, make even arguable reference to the King easement. However, Defendants' title originates from lands of Bailey like Plaintiff's, and it is subject to any previously established rights of way. Since the deed to King (22/125) is prior in time to the deed to Knapp (22/162), the conveyance to Knapp and successors became subject to the easement conveyed to King, assuming it is established that the easement lay across the property which was conveyed to Knapp soon after the conveyance to King.

7. The location of the right of way as asserted by Plaintiff is credibly established by its depiction on various maps dating back to 1940, established in connection with periodic logging operations in the vicinity of Stratton Hill Road. These maps show the diagonal (NW-SE) log road

access to Stratton Hill Road from the southerly side of the Plaintiff's lands in the same location as that log road currently exists today.

8. George Weir, consulting forester, was the forester during the 1978 logging of the property now owned by Plaintiff and is the consulting forester for the current logging operation on the property. The disputed log road access over the Defendants' land was, and remains, the access necessary to log the southerly side of Plaintiff's land. It is undisputed that the log road access was used in 1978 to allow Monroe, Plaintiff's predecessor, to log that portion of the property under a contract for sale of the timber to Potvin Lumber Company. Around the same time Weir was consulting for Monroe, the log road was also used by Defendants' predecessor in title, Toussaint, when he was taking logs off what is now the Defendants' property. The logs from both the Monroe and Toussaint logging projects in 1978-1979 were transported off the respective properties to Stratton Hill Road, and then southerly through Marlboro via Adams Brook Road due to the inadequate width of the bridge on the northeasterly end of Stratton Hill Road.

9. According to Weir's credible account, which the Court adopts, he spoke on Monroe's behalf to Toussaint at the time, who confirmed and acknowledged the existence of the right of way now claimed by Plaintiff. While not determinative, this admission is part of a pattern of historic use undertaken consistently with the likely intent of the original grant of the right of way in the King deed.

10. Nevertheless, Defendants dispute any claim of admission or concession, relying on

diaries from Toussaint offered into evidence over Plaintiff's objection.¹ Defendants maintain that the diaries persuasively demonstrate that any use by others of the disputed right of way while Toussaint owned it was by his permission, and that it is doubtful that he would have acknowledged a deeded easement. From its review of the diary entries, the Court is unable to accord any substantive weight to them. While Toussaint recorded mention of conversations with Weir, they all appear to relate to logging contemplated on his own property, not that of Monroe or other predecessors of Plaintiff. The only direct mention of the property now owned by Plaintiff references individuals who came in to take off "tops", presumably for firewood, following the substantial logging operation undertaken by Monroe. This reference is simply too vague to contradict Weir's testimony recalling his own conversation with Toussaint about Monroe's project.

11. The right of way on Defendants' land was likely used in the 1940s when the New England Box company owned and logged the premises now owned by Plaintiff. The timber cruise survey in evidence, prepared prior to the conveyance to New England Box Company, indicates a log access in the same location where the log road access to Plaintiff's property currently exists. Furthermore, George Weir's expert testimony as to the age of the trees on the

¹ The authenticity of the diaries was established by the testimony of Charles Brousseau, husband of Toussaint's step-daughter, who took title from Toussaint before conveying to Albert Smith and Adam Smith, who conveyed to Defendants. In offering the diary excerpts, Defendants rely on V.R.E. 803(16), the exception to the hearsay rule for ancient documents. Although the diaries are credibly authenticated and more than 20 years old, Plaintiff questions whether diary entries have sufficient indicia of reliability to qualify under the ancient documents exception. Yet, Plaintiff acknowledges that the Reporter's Notes to Rule 803(16) reject McCormick's criticism of the exception for general lack of trustworthiness, based on the foreseeable prospect of circumstances that admit of no other probative evidence except ancient texts. The present instance is a good example of the dubious value of diary entries, however ancient. As here, they may simply be too vague and tangential to the precise issue at hand to have much relevance. Nonetheless, the Court concludes that they are admissible under Rule 803(16), while granting them little

southerly side of the ridge running southwest to northeast centrally through Plaintiff's property indicates that the trees were harvested approximately 60 years ago. The logical route for removing logs harvested at that time would have been down logging roads leading to the present staging area and access to Stratton Hill Road, as opposed to the much longer uphill traverse over the top of the ridge and out to the Dover Road.

12. The Court conducted a site visit on the second day of trial. The Court walked the area of the disputed right of way, as well as the location of an alternative route for the easement as suggested by the Defendants. The disputed right of way leading across Defendants' property proceeds for a short distance, going first gently uphill and then becoming flat. It is well- drained, and intersects Stratton Hill Road at an opening between two large maple trees and two ends of a stone wall along the road. The maple trees along that section of Stratton Hill Road are mature and their apparent age and location inside a stone wall of likely even older origin suggest a configuration of road, wall and trees that have stood in the same relative location to one another for more than 100 years.

13. Defendants disagree that the present location of the Stratton Hill Road is where it was located in 1903 when Bailey granted the easement to King. Indeed, their claim that the road once ran much closer to Ada's Brook is the premise on which they most vigorously tie their disclaimer that the way asserted by Plaintiff is the location intended in the grant from Bailey to King. Their logic proceeds as follows: prior to the Flood of 1938, the road was along the brook several contours below its present location; to get from the present intersection of the logging

evidentiary weight as explained above.

road with Stratton Brook Road, to the earlier route taken by the road, would require a steep descent over terrain characterized by ledge; thus, what now appears to be the most convenient means of access to what is now Plaintiff's property would not have been apparent to the original conveyancers; ergo, they must have intended a different right of way. As explained in the following paragraphs, this tautology is woefully unsupported by any evidence.

14. The central premise - that the present location of Stratton Hill Road was established after the Flood of 1938 - fails for lack of proof. Defendants have placed much emphasis on records reflecting alteration and relocation to Stratton Hill Road in 1940, after the devastating flood of 1938 which washed away many portions of the thoroughfare. However, there is no evidence of a prior location of Stratton Hill Road different from where it presently runs near the intersection of the disputed right of way, a course that likely predates the 1938 flood as strongly indicated by the venerable configuration along its line of stone walls and maple trees. The official resolves from the 1940 Newfane records, establishing the layout of the road's reconstruction, do not describe those portions of the roadway that were either discontinued or relocated; rather, the plot plan only lays out the metes and bounds of the new roadway. Indeed, the 1940 Notice of Hearing Relative to the Relocation of Stratton Hill Road indicates that only portions of the road were being discontinued or relocated, while other parts were presumably repaired without substantial alteration of the location or direction of the route. While it is clear from the layout of the new road that the old road had originally continued alongside the south bank of the river beyond the placement of the present day bridge, the Court finds that the location of Stratton Hill Road, where it now intersects the disputed right of way, was not changed as a result of the 1940 reconstruction from the route likely in existence at the time of the Bailey to King conveyance in

1903.

15. The Beers Atlas map in evidence, while not to scale, derives from maps that predate the 1903 conveyance, and it shows the Stratton Hill Road being on the north side of the brook starting from the Zina Bailey (now Borisoff) place, and continuing to the Stratton (now Risley, Tucci and Semmelrock) place, which is located beyond the intersection of the disputed logging road. This location is consistent with the remarkable testimony of Kendall Bailey, whose memory of the 1938 hurricane and flood is still vivid though he was only five years old at the time. He came up from Connecticut with his parents to visit his grandparents shortly after the storm, and he recalls the devastation (including a cast iron stove carried a substantial distance downstream before being tossed out into the crotch of a tree). Zina Bailey - whose residence is noted on the Beers Atlas extract - was his great-grandfather's brother. Kendall Bailey's recollection conforms to the Beers Atlas description of the location of Stratton Road, including his memory that prior to the flood the road once ran on the south side of Ada's Brook until it crossed a bridge directly across from the former Zina Bailey place, then continued up the north side along its present course.

16. In sum, the testimony of Kendall Bailey together with the Beers Atlas excerpts (evidence adduced by Defendants) serve to reconcile any question raised by the 1940 road reconstruction as to relationship between the present location of the Stratton Hill Road and the disputed right of way, as compared with its location in 1903: there has been no change. At least as regards portions of the road most closely related to the present dispute, the evidence supports the conclusion that downhill and downstream from the former Zina Bailey place, the road was relocated from the south side of the brook to the north after the flood, beginning where the

present day bridge was constructed. However, this new segment connected at approximately the old Bailey place with the portion of the road which remained essentially in its historical location, as it ran higher up the bank going uphill and upstream from Baileys along the stone wall through which the disputed logging road was already likely established, based on its description on the 1942 timber cruising map in evidence. The 1940 reconstruction did not alter the location of this segment of the Stratton Hill Road.

17. The Court's site visit also entailed a lengthy walk over lands of Borisoff (known as the Butternut Barn place, and the Zina Bailey place before that), following a course suggested by Defendants as a more plausible location for the easement created by the Bailey-King conveyance. This route begins at a point on Stratton Hill Road approximately 1/3 mile downhill from its intersection with the disputed logging road on Defendant's land. It proceeds across fields bordered by marsh, then up a couple of steep pitches to the height of land between two knobs along the ridge line, and then gradually downhill to the north of the ridge before coming to an opening in a stone wall at the border of Plaintiff's land. This boundary lies between lands of Plaintiff and lands now or formerly of Henry Turner. No part of this alternative route lies over lands owned by Defendant, and its proposed terminus at Plaintiff's boundary is far removed from Stratton Hill Road and even farther from the timber stand on the south side of the ridge covered by the Cersosimo contract. The length of this walk was easily five-fold longer than the distance traversed by the disputed right of way over Defendants' land.

18. Virtually every aspect of the topography involved with Defendants' proposed alternative location of the easement makes it implausible. It is only reasonable to assume that at the time the easement was created, then as now, its principal purpose related to access for

domestic or commercial timber cutting. The lengthy, arduous and circuitous nature of this route, only to arrive finally at a point on the former King boundary on the *north* side of the central ridge, would not have made it a rational subject for negotiation between the original contracting parties. The northerly side of the ridge is much more easily accessible from the Dover Road, and always has been. This has been made evident historically by other timbering operations on the north side, as recounted by Henry Turner (another of Defendants' witnesses). While Turner, whose memories and recall are almost as phenomenal as Kendall Bailey's, remembers uses of Defendants' suggested route for various recreational purposes, he specifically denies that it was used as a logging road. Rather, according to Turner, the most extensive timbering on his property occurred in the late 1970's when Potvin Lumber Company skidded logs downhill to the *north* to Dover Road, and not over the ridge and out to the Stratton Hill Road. In sum, the ridgeline tells the tale. A right of way from the Stratton Hill Road to a point *northerly* of the ridgeline would have made even less sense in 1903 than it does now; it was and is more practical and economical to take timber lying on that side out to the Dover Road; it was and is practically and economically almost impossible to conceive taking timber lying south of the ridgeline on a long northward trek, involving a double-crossing of the ridgeline, before finally reaching Stratton Hill Road at the roadhead postulated by Defendants.

19. Defendants have demonstrated no support for their thesis anywhere in the chains of title involving the lands which would ostensibly be burdened by their proposed alternative right of way. Similarly, none of the evidence of any activities for which that route has been used links it to any purpose or activity associated with Plaintiff's predecessors in title. At the end of the inquiry, the skimpy support for the inferences urged by Defendants is left decisively exposed by

closer examination of one of its initial premises: that a continuation of the disputed right of way down to an earlier location of Stratton Hill Road closer to the brook would have been impracticable. Even assuming such a different location for the road, which the evidence doesn't support, the practicalities involved with managing the topography of such a transit would have been uncomplicated and manageable compared with the double-crossing required by Defendants' alternative route.

20. Based on the evidence discussed above, the Court concludes that the location of the right of way was intended by its creators to be along the course urged by Plaintiff. That route coincides with the way historically used by Plaintiff's predecessors, and is the only reasonable and convenient way for accommodating the pre-eminent purpose of the easement: the removal of timber from the property.

CONCLUSIONS OF LAW

The crux of the dispute is the location of the deeded easement, a determination that the evidence has established as a matter of fact without need to resort to elaborate principles of legal construction. Under these circumstances, as Plaintiff urges, the law gives plain and unmistakable guidance. "Where deeds to lots containing grants of right of way thereto over other lands of Grantor did not locate right of way but simply granted right without limiting or defining it, grantees were entitled to a convenient, reasonable and accessible way, having regard to the interest and convenience of owner of land as well as their own." *Lafleur v. Zelenko*, 101 Vt. 64 (1928). Even had the circumstances been more ambiguous than the evidence has established, Plaintiff would still have been entitled to designate the location as it presently exists based on the overwhelming indicators that it most conveniently suits the purpose contemplated by the

easement, and has been used for those purposes regularly since the creation of the easement. See *Clearwater Realty Co. v. Bouchard*, 146 Vt 359 (1985); *Holden v. Pilini*, 124 Vt 166 (1964) ; *Cassani v. Northfield Savings Bank*, 2005 VT 127.

As to other features of the easement undefined by the language of the grant, Plaintiff is further entitled to the relief it proposes. See *Clearwater Realty Co.* There exists evidence that such right of way should be 50 feet in width to allow for proper drainage. The disputed right of way across Defendants' land is in some sections wider than 50 feet, while at the intersection with Plaintiff's land it is slightly narrower than 50 feet. The historical use of the right of way has accommodated large logging trucks, suggesting a roadway wide enough to handle heavy loads. Consequently, the evidence strongly suggests that the width of the right of way be set at 50 feet. Defendants' quarrel has been the location; they haven't raised any objection, or submitted evidence that puts into question the reasonableness of Plaintiff's request for the declaration of a 50 foot wide right of way unrestricted as to any legal usage associated with ingress and egress from the benefitted property.

ORDER

BASED on the foregoing Findings of Facts and Conclusions of Law, **IT IS HEREBY ORDERED:**

1. Plaintiff's complaint for declaratory and injunctive relief is **GRANTED**, and Defendants' counterclaim for declaratory relief is **DENIED**. Plaintiff is entitled an easement over Defendants' property at the location specified in its complaint, which right of way shall run with the land for the benefit of Plaintiff and its assigns, being 50 feet in width for any lawful purpose associated with ingress and egress from Plaintiff's property to the Stratton Hill Road in

Newfane, Vt.

2. Defendant is **PERMANENTLY ENJOINED** from taking any action to interfere with Plaintiff's use of said right of way. Defendant is further **ENJOINED** to immediately cause the removal of any barriers to Plaintiff's access to said right of way.

3. Within five days of this Order, Plaintiff shall submit a Proposed Judgment setting forth the relief granted herein in a form suitable for recording.

4. Based on the stipulation that further proceedings as to Plaintiff's claim for damages would be deferred pending the determination of the respective claims for declaratory relief, the parties shall within fifteen days represent to the Court an estimate of the time needed to hear additional evidence as to the damages claim, and a brief synopsis identifying further witnesses and their expected testimony.

Dated at Newfane, Vermont this day of June, 2007

John P. Wesley
Presiding Judge