STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: October 3, 2018)

CHARLES E. MARTIN AND NICOLE J. MARTIN	:	
VS.	:	**C.A. No. WC-2016-0027**
GLEN A. WILSON AND VALERIE A. WILSON	:	

DECISION

TAFT-CARTER, J. This matter is before the Court for Decision following a jury waived trial. This case involves a dispute between neighbors over the access and use of an eighteen foot wide Right-of-Way Easement in a Subdivision, known as "North County Estates." The Plaintiffs Charles E. Martin and Nicole J. Martin (collectively the Martins) seek injunctive relief requiring the Defendants Glen A. Wilson and Valerie A. Wilson (collectively the Wilsons) to refrain from obstructing their access to the Right-of-Way Easement and remove a stockade fence placed along the boundary of Lots 3 and 4 and remove the stone wall placed opposite the Martins' current driveway entrance. In their Counterclaim, the Defendants request a declaratory judgment with respect to the rights of the parties to the Right-of-Way Easement, and injunctive relief requiring the Plaintiffs to refrain from encroaching beyond the permitted use of their driveway. The Defendants also seek to quiet title to the property and allege one count of ongoing trespass to land. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

The following facts are adduced from the testimony and exhibits introduced during trial before this Court.

North County Estates is an eight lot subdivision located on Kingstown Road, Route 138, Richmond, Rhode Island. The property originally owned by William and Anna Rzepecki was conveyed to Midwestern Homes, Inc. (Midwestern Homes) on February 13, 1995. (Deed recorded in Book 98 at Page 494; Undisputed Facts 1.)

Each lot in the Subdivision has frontage on Route 138. The lots, however, do not have access to Route 138 because of conditions on the land. As a result, an eighteen-foot Right-of-Way Easement was included on the Plan for North County Estates. (Ex. 63.) The Right-of-Way Easement was placed over a twenty-foot common driveway on Lots 3, 4 and 5. On January 24, 1995, Midwestern Homes conveyed to itself this Easement. The Easement was simultaneously recorded in the Land Evidence Records for the Town of Richmond with a Record Plan for North County Estates (the Plan). (Defs.' Ex. B, Book 100, page 634; Undisputed Facts 3, 5; Slides 118B and 119A of Map 168.) The stated purpose of the Easement was for accessing "adjacent lots (hereafter created) for subsurface disposal systems, drainage for or any similar purpose deemed by the grantor to be necessary and convenient."[1] *Id.* Slide 118B of Map 168—

[1] As a preliminary issue, the Easement conveyed by Midwestern Homes to Midwestern Homes on January 24, 1995 is extinguished under the merger doctrine. It is well-settled in Rhode Island that "'when a single owner is in possession of two contiguous parcels of land, one of which has historically been used for the benefit of the other, and that owner conveys the encumbered parcel, he cannot retain a right to continue the use of the conveyed parcel without a specific reservation.'" *Nunes v. Meadowbrook Dev. Co., Inc.*, 824 A.2d 421, 424 (R.I. 2003) (quoting *Catalano v. Woodward*, 617 A.2d 1363 (R.I. 1992)); *see also Kenyon v. Nichols*, 1 R.I. 411, 413 (1851). Thus, absent a specific reservation, the Easement is held to be extinguished

referenced in the Warranty Deeds—depicts only the eight subdivided lots without reference to the Right-of-Way Easements depicted in Slide 119A of Map 168.

On October 29, 1996, the Wilsons purchased Lot 4 in the North County Estates Subdivision from Midwestern Homes. (Tr. 217-18, Jan. 9 and 10, 2018.) Lot 4 is adjacent to Lot 3. On May 31, 2013, Lot 3 was purchased by the Martins. (Tr. 4.) Lot 3 is situated at the top of a steep hill with the remaining southerly portion of the property is mainly flat. (Tr. 4; 21.). The property consists of heavy woodlands, wetlands, and other obstructions. (Tr. 16; 93.) At the time the Martins purchased Lot 3, the driveway was in the shape of a semicircle with two points of access on the Right-of-Way. (Tr. 26.) The Martins used both points of access to enter and exit their property until the Wilsons erected a stockade fence in 2015. (Tr. 28.)

In addition to the stockade fence running southerly along Lot 4's boundary extending from the border of Lot 7 down to the entrance of the Martins' property, the Wilsons prevented the Martins from accessing portions of the Right-of-Way Easement by erecting a chain link fence; building a partial stone wall directly across from the entrance to the Martins' property; and placing an orange snow fence along the boundary of Lot 4 from the northern end of the entrance to the Martins' property to the southern end of the branch of the "20' Wide Right of Way Easement" that runs across Lot to Lot as shown on Slide 119A. (Undisputed Facts 9.)

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under the merger doctrine. *Nunes*, 824 A.2d at 423 (citing *Kenyon*, 1 R.I. at 413; *Catalano*, 617 A.2d at 1367)).

Midwestern Homes owned the subdivision in its entirety at the time the Easement was created. (Deed, Feb. 13, 1995 - Book 98 at Page 494; Slides 118B and 119A of Map 168.) Midwestern Homes failed to include a specific reservation for this Easement in the Deeds to the Lots making up the subdivision, sufficient to survive the merger doctrine. Each Deed conveying land from Midwestern Homes to a subsequent purchaser was silent as to any reference to a recorded plat card or subdivision map delineating the easement. *Nunes*, 824 A.2d at 424; *Kenyon*, 1 R.I. at 413; *Catalano*, 617 A.2d at 1367. Therefore, the Court finds that any Easement existing prior to the conveyances of each Subdivision Lot to the Wilsons or the Martins was extinguished under the merger doctrine.

Access to the driveway was crucial to the Martins because one of their children is severely disabled, requiring a special school bus to transport him to school. (Tr. 35-36.) The school bus transports their child five days a week, every month of the year except August. (Tr. 31.) Mrs. Martin explained that the school bus would park in the Martins' driveway to pick up the child. (Tr. 35-36.) The bus would then back out onto the common driveway system in a southerly direction, exiting to Route 138 in a forward facing manner. (Tr. 35-36.) After the Wilsons' obstruction of the common driveway system, the school bus had to change the method in which it picked up and dropped off the disabled child. (Tr. 31; 36.) At times, the school bus was required to back down the common driveway, in a backward facing direction, until it reached Route 138 or one of the branches of another easement off of the common driveway, to turn around. (Tr. 32.) Mrs. Martin described her observation of the bus aid, who would direct the driver by standing at the rear of the bus and guide it into a branch of another easement to turn around. (Tr. 96.) She observed the bus attempt this turnaround procedure multiple times. (Tr. 96-97.) On one occasion, Mrs. Martin watched as the bus slid down the easement on ice eventually becoming stuck in a snow bank. *Id.*

Jennifer McHugh, the bus attendant for First Student, also testified at trial. Ms. McHugh testified that she was employed by First Student and was the bus attendant for the Martins' disabled son in 2015 and 2016. (Tr. 147.) She explained that the bus would normally drive to the Martins' driveway entrance using the Right-of-Way Easement. (Tr. 148.) The bus would use the disputed portion of the Right-of-Way Easement in order to turn the bus around once it reached the Martins' driveway in order to safely pick up the Martins' son. (Tr. 148.) The bus would then exit the driveway in a forward facing manner. (Tr. 148.) This pattern was disrupted when the Wilsons began parking their cars in the common driveway at the entrance to the

Martins' driveway. (Tr. 31-32.) The Court finds Mrs. Martin and Ms. McHugh's testimony credible.

Christopher Duhamel, registered civil engineer and land surveyor, also testified at trial.[2] Mr. Duhamel oversaw the engineering and land survey design of the North County Estates Subdivision. (Tr. 103-104.) Mr. Duhamel, as the supervising engineer, was involved in the zoning permitting, planning board permitting, and environmental permitting. (Tr. 104; 107.) Mr. Duhamel testified that he designed the North County Estates Subdivision so that each individual lot making up the Subdivision complied with the zoning requirements of the Town of Richmond, the Planning Board, and the Department of Environmental Management (DEM). *Id*. Mr. Duhamel explained that the existence of freshwater wetlands on the Subdivision required compliance and environmental permitting with DEM to protect these wetlands. (Tr. 104.) In addition to approval of the Plan (Exhibit 63) depicting the proposed Right-of-Way Easement by DEM, Rhode Island Department of Transportation (DOT) approved this Plan depicting the common driveway system Rights-of-Way. (Tr. 108.)

Mr. Duhamel testified that in designing the ingress and egress access points for each lot, private Rights-of-Way were created to avoid impacting the protected wetlands. (Tr. 105.) In designing Lot 3, Mr. Duhamel stated that the ingress and egress options were limited due to the placement of the septic system, wetlands, buffer zones, and the steep grade of land which would result in a larger environmental impact to the property. (Tr. 120.) Mr. Duhamel noted that buffer zones played a "very strong role" in the planning and design of the Subdivision. (Tr.

[2] Mr. Duhamel received a Bachelor of Science degree in Civil Engineering from Merrimack College and a Master's of Science in Civil Engineering from the University of Rhode Island. (Tr. 102.) He has been a professional land surveyor for 26 years and is registered in Rhode Island, Connecticut, and Massachusetts. (Tr. 101.) Mr. Duhamel is also a professional engineer registered in Rhode Island for 31 years, Massachusetts for 30 years, and Connecticut for 33 years. (Tr. 101-102.)

114-115.) Mr. Duhamel explained that the DEM buffer zone is required to preserve the area in its natural state. (Tr. 114.) He also explained that each lot's frontage on Route 138 consists largely of wetlands. (Tr. 103-105.)

Mr. Duhamel explained that the driveway system was labeled "Proposed Right of Way Easement" and implemented a twenty-foot Right-of-Way with an eighteen-foot common driveway contained within it. (Tr. 134; Ex. 63.) As depicted on Map 168, Slide 119A and as the trial evidence demonstrated, the Subdivision contains a shared driveway, proceeding in a northerly direction from Route 138 to Lot 7. This shared driveway is designated and identified as Slide 119A. (Joint Ex. 2.) When asked about Slide 119A's failure to depict driveways, Mr. Duhamel explained that this type of document does not typically show driveways, but that "the overall subdivision was designed to have access that is conducive to the lots." (Tr. 137-138; 143-144.)

Mr. and Mrs. Wilson also testified at trial. Mrs. Wilson believes that they own the area from the Plaintiffs' driveway entrance to the rear of their property abutting Lot 7. (Tr. 160.) The Wilsons used this area to park cars and store a boat and firewood until shortly after the Martins purchased Lot 3 in May 2013. (Tr. 173.) Mrs. Wilson testified that they "maintained" the area for deliveries "so that the trucks could deliver the wood." (Tr. 173.) The Wilsons also engaged a company to remove the existing asphalt on the disputed portion of the common driveway in order to grade the land and pave this area with new asphalt. (Tr. 43-44; 174-175.) Mrs. Wilson testified that none of the prior owners of Lot 3 attempted to access the rear portion of the property. (Tr. 160.) Mrs. Wilson also testified that neither she nor her husband took any action to prevent anyone from traveling on the southerly portion of the common driveway system until

approximately a year and a half after the Martins purchased Lot 3 on May 31, 2013. (Tr. 174-176.)

Mrs. Wilson explained that the chain link fence as well as other obstructions placed at the entrance of the disputed portion of the Easement area were necessary to prevent the school bus from entering the common driveway. (Tr. 169.) This action was taken to prohibit anyone other than themselves from accessing and/or using the area southerly of the entrance to the Martins' property without the Wilsons' permission. (Undisputed Facts 10.) The obstructions prevented the school bus from picking up the Plaintiffs' seriously disabled child at their home. (Tr. 31-32; 169.) Mrs. Wilson explained, however, that the school bus pickup for children riding the bus to school occurred at the bottom of the driveway on Route 138. (Tr. 161.) Mrs. Wilson also complained that the headlights and noise from the school bus were disruptive to her husband's sleep. (Tr. 169; 180-181.)

Mr. Wilson, a former truck driver, testified that from the time he and his wife purchased Lot 4, they maintained the southerly area of the parking lot. (Tr. 204.) Mr. Wilson explained that if he were to drive a truck through the Right-of-Way Easement, he would drive the truck in a backward facing manner up the steep Right-of-Way Easement because it is too dangerous to back down the steep Right-of-Way Easement. (Tr. 203.) Mr. Wilson testified that he was unsure as to how the trucks turned around at the base of the Right-of-Way Easement on Route 138; however, during his ownership of Lot 4, he observed other trucks following this manner of getting up and down the Right-of-Way Easement. (Tr. 203.) Mr. Wilson acknowledged that it would be difficult for a truck to back down the steep Right-of-Way Easement without the proper lighting, such as extra spotlights. (Tr. 207.)

Justin Shay, a distinguished member of the Rhode Island Bar with expertise in the area of commercial and real estate law, testified as an expert witness. (Tr. 213-214.) Attorney Shay testified that the recorded plat map referred to in the Deed did not depict any Rights-of-Way or Easements. (Joint Ex. 1; Tr. 217.) Likewise, the deed to Lot 4 did not reference any easement or common driveway. (Tr. 217-218.) With respect to Lot 3, Attorney Shay testified that the Deed conveying Lot 3 to the prior owners of this Lot did not recite or reference any Rights-of-Way or Easements until the property was sold to the Lewandoskis on June 2, 2008. (Tr. 218-220; 222.) This Warranty Deed contained a handwritten note referencing a Right-of-Way and Easement recorded in Book 100 at Page 624. (Tr. 220.) Attorney Shay testified that this Easement created a Right-of-Way allowing access from adjacent lots not yet created, for subsurface disposal systems, drainage or any other similar purpose deemed by the grantor to be necessary and convenient. (Tr. 221.)

Attorney Shay explained that in order to convey an easement on a parcel of land, there must be a dominant tenement and servient tenement. (Tr. 223.) Attorney Shay concluded that upon conveying the easement from Midwestern Homes to Midwestern Homes, the grant of an Easement on the Subdivision became a nullity under the Doctrine of Merger. (Tr. 223.) Attorney Shay testified that due to the extinguishment of the Easement by merger, neither Midwestern Homes nor any subsequent owner of a North County Estates Subdivision Lot possessed rights to the Easement. (Tr. 224.)

In lieu of closing arguments, the parties were directed to submit post-trial memoranda to this Court. The Plaintiffs filed their post-trial memorandum on January 26, 2018, and the Defendants filed their memorandum on January 28, 2018. The parties summarized the testimony heard at trial in support of their request for relief. A Decision is herein rendered on the

Plaintiffs' request for injunctive relief with respect to the encumbrances obstructing their access to the Right-of-Way Easement as well as the Defendants' request for declaratory judgment, injunctive relief, quiet title, and ongoing trespass to land.

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). Therefore, in a non-jury trial, "[t]he trial justice sits as a trier of fact as well as of law." *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). Consequently, "[s]he weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." *Id.* The trial justice need not engage in extensive analysis and discussion. *Wilby v. Savoie*, 86 A.3d 362, 372 (R.I. 2014). Strict compliance with the requirements of Rule 52 is not required if a full understanding of the issues may be reached without the aid of separate findings. *Eagle Elec. Co, Inc. v. Raymond Constr. Co., Inc.*, 420 A.2d 60, 64 (R.I. 1980). Even brief findings and conclusions are sufficient as long as they address and resolve pertinent, controlling factual and legal issues. *Broadley v. State*, 939 A.2d 1016, 1021 (R.I. 2008). A trial justice's findings of fact will not be disturbed "'unless such findings are clearly erroneous or unless the trial justice misconceived or overlooked material evidence or unless the decision fails to do substantial justice between the parties.'" *Opella v. Opella*, 896 A.2d 714, 718 (R.I. 2006) (*quoting Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I. 2003)).

III

Analysis

A

Parol Evidence Rule[3]

As a threshold issue, the Defendants argue that the testimony of Christopher Duhamel and Plaintiffs' Exhibits 49, 62 and 63—depicting Deeds from Midwestern Homes to the Defendants and the Deed into Plaintiffs' predecessor in title—should be excluded under the Parol Evidence Rule because such documents are complete on their face and without ambiguity. The Defendants conclude that the meaning of these documents "should be determined without reference to extrinsic facts or aids." (Defs.' Post-Trial Mem. 8.) The Defendants assert that any attempt to vary the terms of these Exhibits by reference to the Plan recorded as Slide 119A is impermissible under the Parol Evidence Rule.

"The parol-evidence rule provides that 'parol or extrinsic evidence is not admissible to vary, alter or contradict a written agreement.'" *Filippi v. Filippi*, 818 A.2d 608 (R.I. 2003) (*quoting Paolella v. Radiologic Leasing Assocs.*, 769 A.2d 596, 599 (R.I. 2001). Rather,

> "a complete written agreement merges and integrates all the pertinent negotiations made prior to or at the time of execution of the contract . . . . A document is integrated when the parties adopt the writing as 'a final and complete expression of the agreement.' Once integrated, other expressions, oral or written, that occurred prior to or concurrent with the integrated agreement are not viable terms of the agreement." *Id.* at 619 (*quoting Fram Corp. v. Davis*, 121 R.I. 583, 587, 401 A.2d 1269, 1272 (1979)).

[3] The Defendants presented Justin Shay, Esquire as an expert witness. While the Court recognizes Attorney Shay as a highly skilled and capable attorney, the Court has not relied on his opinion as his opinion concerns the application of law to the facts. ("Testimony in the form of an opinion otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). R.I. R. Evid. 704.

However, parol evidence or extrinsic evidence may be admitted if "the evidence is offered to show fraud, mistake, or a condition precedent to the existence of the contract." *Lisi v. Marra*, 424 A.2d 1052, 1055 (R.I. 1981); *Supreme Woodworking Co. v. Zuckerberg*, 82 R.I. 247, 252, 107 A.2d 287, 290 (1954). Additionally, "[p]arol evidence may also be admitted to supplement an agreement that is incomplete or ambiguous on its face." *Id.*

Here, the Court recognizes the well-settled principle "that a warranty deed, once accepted, becomes the final statement of the agreement between the parties and nullifies all provisions of the purchase-and-sale agreement." *Deschane v. Greene*, 495 A.2d 227 (R.I. 1985) As such, the Warranty Deed referencing only Slide 118, depicting only the eight subdivided lots without reference to the Right-of-Way Easements, became the final statement of the agreement between the buyer and seller. *Id.* However, it is unclear and ambiguous as to whether Midwestern Homes intended to convey the easements and Rights-of-Way—depicted in Slide 119A and contemporaneously recorded with the Land Evidence Records with the Town of Richmond—with the Warranty Deed at the time of severance. *Lisi*, 424 A.2d at 1055; *Supreme Woodworking Co.*, 82 R.I. at 252, 107 A.2d at 290. Mr. Duhamel's testimony and Exhibits 49, 62 and 63 will aid the Court in reviewing the evidence presented at trial in this action. *See Supreme Woodworking*, 82 R.I. at 247, 107 A.2d at 287. Therefore, the Court will rely on the testimony of Mr. Duhamel and Plaintiffs' Exhibits 49, 62 and 63 in its review of the evidence on the record.

B

Injunctive Relief

The Martins request the Court grant them injunctive relief requiring the Wilsons to remove the chain fence across the southerly entrance of the Right-of-Way; to remove the stone

wall opposite the Martins' driveway; to remove the stockade fence in its entirety and restore the areas where posts once stood; to permanently refrain from erecting or placing any obstructions anywhere within the Easement or along its frontage with the Martins' property; and to permanently refrain from hindering, obstructing or impeding the Martins' efforts to create additional entrances from their property onto the Easement.

To succeed on a claim for a permanent injunction, a party

> "must establish first that there is a likelihood of success on the merits of the underlying complaint; second, that irreparable harm will result if injunctive relief is not granted; third, that the balance of the equities in the public interest is served by injunctive relief; and, fourth, that the status quo between the parties will most likely be maintained by the injunctive relief sought . . . ." *King v. Grand Chapter of R.I. Order of E. Star*, 919 A.2d 991, 1000 (R.I. 2007); *Iggy's Doughboys Inc. v. Giroux*, 729 A.2d 701 (R.I. 1999); *see also Giacomini v. Bevilacqua*, 118 R.I. 63, 65, 372 A.2d 66, 67 (1977); *Paolissi v. Fleming*, 602 A.2d 551, 551 (R.I. 1992) (mem.).

In addition, "[w]hen a preliminary injunction is mandatory in nature in—that it commands action from a party rather than preventing action—a stricter rule applies and such injunctions should be issued only upon a showing of 'very clear' right and 'great urgency.'" *King*, 919 A.2d at 995; *see also Giacomini*, 118 R.I. at 65, 372 A.2d at 67.

In determining whether a permanent injunction is appropriate, a party seeking injunctive relief "'must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" *Nat'l Lumber & Bldg. Materials Co. v. Langevin*, 798 A.2d 429, 434 (R.I. 2002) (*quoting Fund for Cmty. Progress v. United Way of Se. New England*, 695 A.2d 517 (R.I. 1997)); *see also Nye v. Brousseau*, 992 A.2d 1002 (R.I. 2010). The Court noted in *Nye* that "'injuries that are prospective only and might never occur cannot form the basis of

a permanent injunction."' *Id.* (*quoting R.I. Turnpike & Bridge Auth. v. Cohen*, 433 A.2d 179, 182 (R.I. 1981)).

1

Permanent Injunction: Success on the Merits

"A party seeking an injunction must also demonstrate likely success on the merits and show that the public-interest equities weigh in favor of the injunction." *Nat'l Lumber & Bldg. Materials Co.*, 798 A.2d at 434; *see King*, 919 A.2d at 995; *Iggy's Doughboys*, 729 A.2d at 705. For the Plaintiffs to succeed in satisfying its burden of proving success on the merits, it must establish that the Plaintiffs had a rightful interest in the disputed common driveway system. *Id.* at 705. The Plaintiffs present two theories of recovery. They allege that an Easement exists over the entire length of the driveway system beginning at Route 138 and proceeding to Lot 7, either by incipient dedication or by an implied easement. The Plaintiffs point to Slide 119A recorded in the Land Evidence Records for the Town of Richmond as evidence of Midwestern's intent for the Right-of-Way Easement to extend back towards the southerly portion of the Subdivision as depicted on this Slide. The Plaintiffs argue that the disputed Easement was apparent, continuous, and necessary for the reasonable enjoyment of the land at the time of severance and that the disputed driveway system was plainly visible and so obviously permanent in nature at the time of severance. The Plaintiffs also assert that the presence of wetlands on each Lot at the time the severance was made significantly limited construction of alternative means of accessing each Lot other than the Right-of-Way Easement at issue utilized during construction.

Alternatively, the Defendants argue that in creating the North County Estates Subdivision, Midwestern Homes intended to convey only those interests in land—depicted in

Slide 118B—because only Slide 118B was referenced in the Warranty Deeds. The Defendants assert that an Easement exists from Route 138 up to where the Plaintiffs' driveway begins, but extends no further. The Defendants contend that the Google Earth aerial photographs, the ISDS plan, and the wetlands map fail to show existing easements or Rights-of-Way or that the Easements or Rights-of-Way were used by the owner during the unity or at the time of severance. The Defendants further allege that the Easement or Right-of-Way is not reasonably necessary for the use and enjoyment of Lot 3 because prior owners of Lot 3 never attempted to travel on, access, or use the disputed property area. They also argue that the only way the Plaintiffs could rightfully use the access is by prescription[4] or permission; [5] however, no such evidence was presented at trial. Therefore, they contend the area in dispute lies south of Lot 3's driveway as depicted on Defendants' Exhibit A and runs along the boundary line of Lots 3 and 4 continuing up until Lot 7.

i

Incipient Dedication

"A valid dedication requires: '(1) a manifest intent by the landowner to dedicate the land in question, called an incipient dedication or offer to dedicate; and (2) an acceptance by the

[4] "It is well established that '[a] claimant of an easement by prescription 'must show actual, open, notorious, hostile, and continuous use under a claim of right for at least ten years.'" *Gianfranceso v. A.R. Bilodeau, Inc.,* 112 A.3d 703, 710 (R.I. 2015). (*quoting Butterfly Realty v. James Romanella & Sons, Inc.*, 93 A.3d 1022, 1030 (R.I. 2014)). Moreover, "[a] plaintiff claiming an easement is held to a higher standard of proof than a plaintiff in an ordinary civil case." *Butterfly Realty*, 93 A.3d at 1030 (citing *Pelletier v. Laureanno,* 46 A.3d 28, 35 (R.I. 2012)). He or she bears the heavy burden of proving "each element by a preponderance of clear and convincing evidence." *Carpenter v. Hanslin,* 900 A.2d 1136, 1146 (R.I. 2006); *see also Hilley v. Lawrence*, 972 A.2d 643, 652 (R.I. 2009) (each element for a prescriptive easement must be proven by "clear and satisfactory evidence"). The Plaintiffs are unable to prove that they obtained the Easement at issue by prescription for the mere fact that they have not owned or resided on Lot 3 for more than ten years. Of significant importance is the fact that the Plaintiffs do not claim to have obtained the Easement at issue by prescription.

[5] It is undisputed that the Wilsons did not give permission to the Martins to travel over the disputed Right-of-Way Easement.

public either by public use or by official action to accept the same on behalf of the municipality.'" *Ucci v. Town of Coventry*, 186 A.3d 1068, 1091 (R.I. 2018) (*quoting Kilmartin v. Barbuto*, 158 A.3d 735, 747 (R.I. 2017)); *see also Newport Realty, Inc. v. Lynch*, 878 A.2d 1021 (R.I. 2005) ("[E]ven though an owner makes an incipient dedication by recording a plat with streets and roads and then sells lots with reference to the plat, the dedication must be completed by one of two ways: the municipality must formally accept the offer; or it is accomplished by public user[]"). More importantly,

> "[i]n order for this general rule to apply . . . the land must be clearly marked as a road or a street on the subdivision map. If the land is not so marked, an individual must demonstrate that the land was dedicated by its owner as a street or a road and that the public has accepted the dedication." *Donnelly v. Cowsill*, 716 A.2d 742 (R.I. 1998).

"When a property owner subdivides land and 'sells lots with reference to a plat, he [or she] grants easements to the purchasers in the roadways shown on the plat, with or without later dedication of the roadways to the public.'" *Newport Realty*, 878 A.2d at 1032 (*quoting Kotuby v. Robbins*, 721 A.2d 881, 884 (R.I. 1998)). Disputes surrounding easements on roads depicted as public plats "should rise or fall by reference to the plat on which the disputed parcel is depicted." *Newport Realty*, 878 A.2d at 1042; *Bitting v. Gray*, 897 A.2d 25 (R.I. 2006).

The undisputed trial evidence indicates that two plans were recorded simultaneously with the recorded Deed. The Plan entitled "Record Plans for North County Estates" referenced in the Warranty Deed contains no roadway system. (Map 168, Slide 118B.) The Easement Plan, on the other hand, depicts a common driveway system recorded on the same day. (Slide 119A.) While the later conveyance with respect to Lot 3 lists the Easement in Book 100, Page 634, absent a specific reservation in the Easement document, this document does not have any legal binding effect due to the extinguishment of the Easement under the Merger Doctrine. '"When a

single owner is in possession of two contiguous parcels of land, one of which has historically been used for the benefit of the other, and that owner conveys the encumbered parcel, he cannot retain a right to continue the use of the conveyed parcel without a specific reservation."' *Nunes v. Meadowbrook Dev. Co., Inc.*, 824 A.2d 421 (R.I. 2003) (quoting *Catalano v. Woodward*, 617 A.2d 1363 (R.I. 1992)); *see also Kenyon v. Nichols*, 1 R.I. 411, 413 (1851).

Moreover, in viewing Map 168, Slide 118B, the landowner failed to clearly mark the border separating each Lot as a street or road. *Donnelly*, 716 A.2d at 748 (explaining that the land must be clearly marked as a road or a street on the subdivision map for incipient dedication to apply) (Map 168, Slide 118B). The Plan depicted on Slide 118B clearly delineates a "Right of Way . . . Easement" and not that of a street or road, thereby precluding any argument that incipient dedication applies.

Evidenced by the driveway system being labeled as a "Right of Way . . . Easement" instead of as a roadway, it is clear that the intent of the landowner was to create a Right-of-Way Easement and not that of a street or a road. In addition, the case law makes clear that for an incipient dedication of this driveway system to apply, Slide 119A would have had to be included in the Warranty Deed. *Newport Realty*, 878 A.2d at 1042; *Bitting*, 897 A.2d at 25). Here, there was no reference to Slide 119A in the Deed recorded on January 24, 1995. (Undisputed Facts 3, 5; Slides 118B and 119A of Map 168.) Thus, the failure to include Slide 119A in the Deed is fatal to the existence of the Easement. Accordingly, the Court does not find that the Easement exists over the entire length of the driveway system beginning at Route 138 and proceeding to Lot 7 by incipient dedication.

ii

Implied Easement

The Rhode Island Supreme Court has held that in order to determine if an easement is implied by grant, the claimant must show by clear and convincing evidence that the claimed easement was (1) apparent, (2) continuous, and (3) reasonably necessary for the enjoyment of the claimant's parcel prior to severance. *Wellington Condo. Ass'n v. Wellington Cove Condo. Ass'n,* 68 A.3d 594, 603 (R.I. 2013); *see also Wiesel v. Smira*, 49 R.I. 246, 142 A. 148, 150 (1928). Moreover, our Supreme Court has held that there must be unity of ownership prior to the time of severance for an implied easement to be found. *Bovi v. Murray*, 601 A.2d 960 (R.I. 1992). An easement is "apparent" if "its existence is indicated by signs which might be seen or known on a careful inspection by a person ordinarily conversant with the subject." *Wiesel*, 49 R.I. 246, 142 A. at 151. A continuous easement is found where the easement had been regularly used. *Id.* at 149 (noting that the use of the pipes was held to be continuous because they had been in use regularly for fifteen years before the suit).

At the time the Right-of-Way Easement was constructed, Midwestern Homes owned the Subdivision in its entirety. (Defs.' Ex. B; Deed recorded in Book 98 at Page 494; Undisputed Facts 1.) Mr. Duhamel, a highly credible witness, testified that he was the supervising engineer of the design of the North County Estates Subdivision. He designed the ingress and egress access points for each Lot. (Tr. 104-105; 107.) Mr. Duhamel explained that the Right-of-Way Easement utilized by the parties was constructed prior to the severance of the Subdivision. (Tr. 126-127.) In fact, according to Mr. Duhamel's testimony, construction and development of the Subdivision could not have occurred without the Right-of-Way driveway system in place

allowing access to each Subdivision Lot. (Tr. 126-127.) The Court finds Mr. Duhamel's testimony highly credible and most insightful.

'"An implied easement is predicated upon the theory that when a person conveys property, he or she includes or intends to include in the conveyance whatever is necessary for the use and the enjoyment of the land retained."' *Hilley*, 972 A.2d at 650 (*quoting Bovi*, 601 A.2d at 962). The test for necessity is '"whether the easement is reasonably necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made."' *Id.* at 653 (*quoting Vaillancourt v. Motta*, 986 A.2d 985, 987-88 (R.I. 2009). The scope of an implied easement is controlled by the apparent intent of the landowner who effected a severance of the dominant and servient estates. *Hilley*, 972 A.2d at 643. Because an implied easement contains no express language, external evidence of intent may be considered. *Id.* The analysis is fact intensive. Therefore, "[t]he proper inquiry for the existence of an easement by implication . . . focuses on the facts and circumstances at the time of severance." *Vaillancourt*, 986 A.2d at 988.

The Plaintiffs presented credible evidence through Mr. Duhamel that at the time of the severance, Midwestern Homes intended to convey an Easement over the disputed driveway system evidenced by the general topography and condition of the Subdivision affecting access to Route 138 for all seven Lots. Thus, an Easement was required. *Caluori v. Dexter Credit Union*, 79 A.3d 823, 830-31 (R.I. 2013); *Hilley*, 972 A.2d at 650; *Bovi*, 601 A.2d at 962. Christopher Duhamel credibly testified that the common driveway system was located in the "most optimum area" so the Lots would have access to adjacent Lots. Mr. Duhamel provided testimony that the driveway system was installed and utilized to provide ingress and egress access to Route 138 so as not to disrupt the protected wetlands and protected buffer zones. (Tr. 114.)

In addition, the Court finds the recorded plat Map 168, Slides 118B and 119A ascertain Midwestern Homes' intent upon divesting of the eight Lots making up the Subdivision. *Kotuby,* 721 A.2d at 884; *see also Vallone v. City of Cranston, Dep't of Pub. Works,* 97 R.I. 248, 254, 197 A.2d 310, 314 (1964). In relying on the Plan (Exhibit 63) depicting the proposed Right-of-Way Easement, DEM approved and issued a Certificate of Conformance giving further support to Plaintiffs' argument that the Right-of-Way Easement was intended to remain with the land. (Tr. at 108-109; 125.) In conjunction, Rhode Island DOT approved this Plan depicting the common driveway system Rights-of-Way. (Tr. 108.)

These items demonstrate that the clear intent of Midwestern Homes, at the time of severance of the Subdivision, was to create an easement accessible by the owners of Lots 3 and 4. (Tr. 114.) *Vaillancourt,* 986 A.2d at 988 (easements by implication focus on the facts and circumstances at the time of severance). Mr. Duhamel's informative testimony as to the protected wetlands and buffer zones located within the Subdivision provided guidance in making the determination that the intent of Midwestern Homes was not for the Court to create or impose additional ingress and egress Rights-of-Way extending from Route 138 to the Plaintiffs' property. (Tr. 103-105; 120.) 25 Am. Jur. 2d § 64; *Vaillancourt,* 986 A.2d at 988 (the existence of an implied easement is controlled by the apparent intent of the landowner at the time of severance). Therefore, the intent of Midwestern Homes upon the divesting of each Subdivision Lot was to confer upon those purchasers of each Lot the benefit of an Easement as depicted on Map 168, Slide 119A. Thus, the Plaintiffs have satisfied the burden of proving likely success on the merits, and the Court will move to the second prong of the analysis. *King*, 919 A.2d at 995; *Iggy's Doughboys,* 729 A.2d at 705; *Nat'l Lumber & Bldg. Materials,* 798 A.2d at 434.

2

Permanent Injunction: Irreparable Injury

"A plaintiff may prove irreparable harm or the inadequacy of a legal remedy in several ways. One of the most common illustrations is that of a continuing trespass interfering with an interest in property." ***R.I. Turnpike & Bridge Auth.,*** 433 A.2d at 182; *see also* ***Newport Yacht Club, Inc. v. Deomatares,*** 93 R.I. 60, 64, 171 A.2d 78, 80 (1961). "Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction." *Id.* at 182 (citing ***Ashland Oil, Inc. v. F.T.C.,*** 409 F. Supp. 297, 309 (D.D.C.1976), *aff'd,* 548 F.2d 977 (D.C. Cir. 1977)). In addition, "[i]nadequacy of the legal remedy may also be shown when a party is entitled to damages but the court is not capable of measuring those damages." *Id.* at 182.

Here, in placing encumbrances over the disputed Easement area, the Defendants prevented the Plaintiffs from using or accessing this portion of the Right-of-Way Easement. (Undisputed Facts 9.) According to the credible testimony of Mrs. Martin and Mrs. McHugh, these encumbrances placed on the Easement area prevented the special school bus used to transport the Martins' disabled son to and from school from safely doing so. (Tr. 31; 35-36.) Mrs. McHugh testified that after picking up the Martins' son, the school bus would normally use the disputed easement area to back out from the Martins' driveway and exit the Lot in a forward facing manner. (Tr. 148.) However, after the Wilsons began parking their cars in the Easement area at the entrance of the Martins' driveway, the school bus was unable to turn around. The school bus was required to back down the Right-of-Way driveway in a backward facing direction, until it reached Route 138 or one of the branches of another Easement off of the common driveway, to turn around. (Tr. 31-32.) As supported by the credible testimony of Mr.

Wilson, requiring the school bus to back down the Right-of-Way driveway in this manner is dangerous due to the steep grade of land. (Tr. 203.) The Court is not convinced that the recommendation that the school bus enter the Subdivision in a backward facing manner from Route 138, driving in a backward facing manner until it reached Lot 3, is a safer option. (Tr. 203.)

The facts in the instant action are similar to those in *Boorom v. Rau*, 640 A.2d 963 (R.I. 1994), where the Rhode Island Supreme Court found that a stockade fence erected by the owners of a servient estate unlawfully obstructed a sixteen-foot wide right-of-way shared by the owners of the dominant estate. *Id.* at 965. The right-of-way abutting the southern border of the plaintiffs' land and running parallel to it through the property owned by the defendants blocked plaintiffs' access to this easement. *Id.* The Court specifically contrasted the nature of the obstruction in *Boorom* with the obstruction in *Chenevert v. Larame*, 42 R.I. 426, 108 A. 589 (1920). In *Chenevert*, the Court found that the erection of a gate at the entrance of defendant's property where a right-of-way met his land did not constitute an unreasonable obstruction to the lawful use of the easement because of the general characteristics of the gate. *Id.* at 591. In so ruling, the Court noted that the gate "was of light construction, not locked, but hooked or bolted, in such a way that a child of tender years could open it . . . ." *Id; see Raposa v. Guay*, 84 R.I. 436, 444, 125 A.2d 113, 117 (1956) ("A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass[]").

Considering the general topography of Lot 3 situated on the top of a steep hill, the heavy woodlands, wetlands and other natural obstructions on the Lot, preventing the Martins from enjoying use of and access to the portion of the disputed Easement area has caused irreparable

injury or harm to their interests in the land. (Tr. 4; 16; 21; 93.) *R.I. Turnpike & Bridge Auth.*, 433 A.2d at 182; *see also Newport Yacht Club, Inc.*, 93 R.I. at 64, 171 A.2d at 80; *Santilli v. Morelli*, 102 R.I. 333, 230 A.2d 860, 861 (1967) ("the fact that such owner has suffered little or no damage because of the offending structure [installed on his or her land], or that it was erected in good faith, or that the cost of its removal would be greatly disproportionate to the benefit accruing to the plaintiff from its removal, is not a bar to the granting of coercive relief"). In placing these encumbrances over the Right-of-Way Easement area, the Defendants also prevented the Martins from utilizing an interest in the Right-of-Way Easement for the benefit of their disabled son to get to and from school. *Id*. Therefore, the Court finds that the Plaintiffs have proven that the encumbrances placed on the Right-of-Way Easement caused the Martins to suffer a presently 'threatened' or 'imminent' irreparable injury interfering with their interest in the Right-of-Way Easement.

3

Permanent Injunction: The Equities

"When real property is involved, '[i]t is a bedrock principle of our property jurisprudence that land is not fungible; and, accordingly, equitable remedies are normally used when it comes to injuries and intrusions to it.'" *Paolino v. Ferreira*, 153 A.3d 505, 515 (R.I. 2017) (*quoting Rose Nulman Park Found. Ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 29 (R.I. 2014)). However, "this general rule is not absolute and . . . in exceptional cases, a court may, in its discretion, decline to follow it where the injunctive relief would operate oppressively and inequitably." *Id.* at 515. "[W]e have also held that courts may withhold injunctive relief after balancing the equities or, put another way, considering the relative hardships to the parties." *Id.* (citing *Rose Nulman*, 93 A.3d at 30). Although a trial justice may balance the equities, he or she

"is not required to balance the equities before granting injunctive relief . . . [as] '[t]he doctrine of balancing the equities is applied in cases when the enforcement of a restriction will disproportionately harm the defendant with little benefit to the plaintiff.'" *Id.* (*quoting Cullen v. Tarini*, 15 A.3d 968, 982 (R.I. 2011)).

Mr. and Mrs. Martin credibly testified that they used their semicircle driveway with two points of access to enter and exit their property until the fence was erected in 2015. (Tr. 28.) In addition, Mrs. Martin testified that when the Right-of-Way Easement was blocked by the Wilsons' fence or parked vehicles, the school bus transporting the Martins' disabled son was prevented from safely entering and exiting the Subdivision. (Tr. 35-36.) This required the bus aid to direct the driver by standing at the rear of the bus, guiding it into a branch of another easement to turn around. (Tr. 96.) Mrs. Martin testified that she observed the bus attempt this turnaround procedure multiple times and that on one occasion, she observed the bus slide down the easement on ice, eventually becoming stuck in a snow bank. (Tr. 96-97.) On the other hand, Mrs. Wilson complained that the headlights and noise from the school bus were disruptive to her husband's sleep. (Tr. 169; 180-181.) In addition, Mrs. Wilson complained that Mrs. Martin tore up a garden that she planted. (Tr. 164-165.) However, Mrs. Wilson acknowledged that a portion of this garden was located on the Martins' property while another area was within the disputed Easement. (Tr. 185.)

In balancing the equities, the Court finds that no hardship would be placed on the Defendants in this action. With respect to the equitable remedies utilized with injuries and intrusions to land, permanent injunctive relief is appropriate where a continuing trespass is occurring. *Paolino*, 153 A.3d at 505; *Rose Nulman*, 93 A.3d at 29; *R.I. Turnpike & Bridge Auth.*, 433 A.2d at 182.

After considering the credible trial testimony and evidence, the Court concludes that the Martins will succeed on the merits of their claim. *Griffin v. Zapata,* 570 A.2d 659, 661-62 (R.I. 1990) (stating that the equitable remedy of specific performance is appropriate where adequate compensation cannot be achieved through money damages, as for example, where land is involved); *Rose Nulman*, 93 A.3d at 29 (noting the bedrock principle of property jurisprudence that land is not fungible and that equitable remedies are normally used when it comes to injuries and intrusions to it).

C

Defendants' Counterclaims

1

Quiet Title

i

Adverse Possession[6]

The Defendants claim that they own by adverse possession the area south of the Plaintiffs' driveway. Mrs. Wilson testified that she and her husband maintained the property from Route 138 to the Martins' driveway entrance. The Defendants argue that even if a Right-of-Way Easement existed over the disputed driveway system depicted in Slide 119A, such

[6] The Defendants argue that the only way the Plaintiffs could rightfully use the disputed common driveway area is by prescription or by permission. The Defendants maintain that permission was never given to the Martins. Alternatively, the Defendants argue that in order for Plaintiffs to sustain a claim for easement by prescription, they must prove the elements of adverse possession. *Reitsma v. Pascoag Reservoir & Dam, LLC*, 774 A.2d 826 (R.I. 2001) ("We have long recognized that 'one who claims an easement by prescription has the burden of establishing actual, open, notorious, hostile and continuous use under a claim of right for ten years as required by § 34–7–1[]'") (*quoting Palisades Sales Corp. v. Walsh*, 459 A.2d 933, 936 (R.I. 1983)); *see also Burke-Tarr Co. v. Ferland Corp*., 724 A.2d 1014, 1020 (R.I 1999). For the reasons stated herein and because Plaintiffs have not made a claim for adverse possession, this Court need not address whether Plaintiffs have adversely possessed the disputed portion of the common driveway.

Easement was acquired by adverse possession. Mrs. Wilson testified at trial that they continuously and exclusively held the disputed shared driveway for over sixteen years. Alternatively, the Plaintiffs argue that the Defendants failed to present evidence showing that they exercised complete dominion over the entire disputed Easement area for ten consecutive years. The Plaintiffs conclude that the Wilsons' failure to occupy the disputed Easement area is fatal to their adverse possession claim.

An easement may be extinguished by adverse possession. *Spangler v. Schaus,* 106 R.I. 795, 264 A.2d 161 (1970). However, in order to obtain property by adverse possession, the Plaintiffs must prove that the disputed driveway system was held in "actual, open, notorious, hostile, continuous, and exclusive use of property under a claim of right for at least a period of ten years." *DiPippo v. Sperling,* 63 A.3d 503 (R.I. 2013). "[I]n order to succeed under such a theory, the use of the easement by the party claiming adverse possession must show that he exercised complete dominion over the property." *Thomas v. Ross,* 477 A.2d 950 (R.I. 1984). "Essentially, the test is whether the use to which the land has been put is similar to that which would ordinarily be made of like land by the owners thereof." *Russo v. Stearns Farms Realty, Inc.,* 117 R.I. 387, 367 A.2d 714 (1977). "The burden of proof 'falls to the claimant to establish adversity and remains with the claimant to establish each element of adversity by strict proof.'" *Thomas,* 477 A.2d at 953 (*quoting Altieri v. Dolan,* 423 A.2d 482 (R.I. 1980)). "Evidence of adverse possession must be proved by strict proof, that is, proof by clear and convincing evidence of each of the elements of adverse possession." *Anthony v. Searle,* 681 A.2d 892 (R.I. 1996). According to G.L. 1956 § 34-7-1,

> "Where any person or persons, or others from whom he, she, or they derive their title, either by themselves, tenants or lessees, shall have been for the space of ten (10) years in the uninterrupted, quiet, peaceful and actual seisin and possession of any lands,

> tenements or hereditaments for and during that time, claiming the same as his, her or their proper, sole and rightful estate in fee simple . . . ." *Id.*

The Wilsons' adverse possession claim fails because there is no credible evidence on this record to establish the required statutory period of ten years. *DiPippo*, 63 A.3d at 508 (noting that a claimant must have "actual, open, notorious, hostile, continuous and exclusive use of property under a claim of right for at least a period of ten years"); *Thomas*, 477 A.2d at 953 ("The burden of proof 'falls to the claimant to establish adversity and remains with the claimant to establish each element of adversity by strict proof[]'"); *Anthony*, 681 A.2d at 897. The Defendants failed to produce, by clear and convincing evidence, that they maintained exclusive and continuous control over the disputed driveway system for the ten-year statutory period. *Russo*, 117 R.I. at 392, 367 A.2d at 717 ("Essentially, the test is whether the use to which the land has been put is similar to that which would ordinarily be made of like land by the owners thereof."); *see also DiPippo*, 63 A.3d at 508.

Mrs. Wilson testified that she took no action in preventing anyone from traveling over the common driveway system until approximately a year and a half after the Martins moved into Lot 3. (Tr. 174-176.) Mrs. Wilson stated that it was not until the Martins purchased Lot 3 in 2015 that the Wilsons erected a chain link fence and subsequently installed a wooden fence on the boundary line of Lot 3 and Lot 4—depicted in Slide 118B— in order to prevent the Martins, or anyone else, from entering the property. (Tr. at 175.) *DiPippo*, 63 A.3d at 508 (noting ten-year statutory period for adverse possession claims); *Gammons v. Caswell*, 447 A.2d 361, 366 (R.I. 1982).

With respect to whether a claimant exercised dominion over the land sought to be adversely possessed, the Rhode Island Supreme Court observed in *Sherman v. Goloskie*, 95 R.I. 457, 463-64, 188 A.2d 79, 82 (1963):

> "According to his testimony, from 1941 to 1959 he continuously engaged in acts of dominion over the land. These acts included his use of the land for hunting, fishing, and wood cutting and taking berries and fruits. He also rented campsites on the land and collected rent from the tenants thereof. He further testified that over the years in the summer and fall he had patrolled the land as often as four times a week and that during those years he had kept the land posted. Although the posting signs were frequently destroyed, he testified that he replaced them at frequent intervals, that he frequently ordered trespassers to leave the land, and that on occasions he had sought the assistance of state conservation officers to prevent trespassers from hunting and fishing on the land. It is clear from the record that his testimony in these respects was corroborated in considerable detail by a number of witnesses, among whom were those people who had rented campsites on the land and had obtained his permission to hunt and fish thereon."

("The possession and concomitant exercise of dominion must also have a continuity that is sufficient to acquaint an owner of the land claimed that the claim of title contrary to his own is being asserted by the claimant[]"); *Id.* at 465, 188 A.2d at 83; *Gammons*, 447 A.2d at 368 (in order to find that the property was not used exclusively, there would have to be evidence indicating that the defendants or others had made improvements to the land or, at the very least, had used the land in a more significant fashion than merely walking across it); *see also* 7 Powell *The Law of Real Property* § 1018 at 740 (1981) ("[c]ultivating land, planting trees, and making other improvements in such a manner as is usual for comparable land have been successfully relied on as proof of the required possession"). Both Mr. and Mrs. Wilson testified that until shortly after the Martins purchased Lot 3 in May 2013, they maintained the disputed Easement area by parking cars and storing wood and a small boat on the Easement area. (Tr. 173; 204.) *Thomas*, 477 A.2d at 953 (". . . merely obstructing access to an easement does not

constitute adverse possession of that easement[]"). Notably, no evidence was presented showing that any improvements were made to the disputed Easement area during the time within which the Wilsons claim to have adversely possessed the portion of land other than Mr. Wilson's testimony that he mowed the lawn. (Tr. 204.)

As interested parties to this litigation, the testimony of Mr. and Mrs. Wilson regarding their adverse possession claim has little weight. There is no evidence, by testimony or documentation, that allows this Court to conclude that the claim has validation. The Court concludes that Mr. and Mrs. Wilson were annoyed that the Martins were utilizing the Easement. In addition, the activities amount to obstruction of the area, not adverse possession. *DiPippo*, 63 A.3d at 508; *Thomas*, 477 A.2d at 950*; Russo*, 117 R.I. at 890, 367 A.2d at 716; *Anthony*, 681 A.2d at 892.

In *Pelletier*, 46 A.3d at 34, the Rhode Island Supreme Court affirmed the trial justices' determination of the plaintiff's trial testimony not to be credible because such testimony was "self-serving" and "biased." The Court noted that while "'a witness's uncontroverted, positive testimony ordinarily is conclusive upon the trier of fact,"' the trial justice may nevertheless "'refuse to accept the uncontroverted testimony of proffered witnesses under certain circumstances."' *Id.* at 39 (citing *Paradis v. Heritage Loan and Investment Co.*, 701 A.2d 812, 813 (R.I. 1997) (mem.)). "[F]or example, positive uncontroverted testimony may be rejected if it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances, tend to contradict it." *Id.* (citing *Laganiere v. Bonte Spinning Co.*, 103 R.I. 191, 194, 236 A.2d 256, 258 (1967). "Such testimony may also be disregarded if it lacks credence or is unworthy of belief . . . especially if the testimony is that of a party to the litigation or of an interested witness." *Id.* at 194, A.2d at 258. "Rejection on credibility grounds may not, however,

be arbitrary or capricious, nor may it . . . 'be left to the whim of a trier of fact[.]'" *Id*. at 195, A.2d at 258 (*quoting Michaud v. Michaud*, 98 R.I. 95, 99, 200 A.2d 6, 8 (1964))*; see also Gammons*, 447 A.2d at 366 (noting that "the findings of fact of a trial justice sitting without a jury will be given great weight and will not be disturbed on appeal unless it can be shown that such findings are clearly wrong or the trial justice misconceived or overlooked material evidence. This policy has specifically been applied to cases involving claims of title through adverse possession[]"); *Star Dinette & Appliance Co. v. Savran*, 104 R.I. 665, 248 A.2d 69 (1968) (*quoting Krall v. M. A. Gammino Constr. Co.*, 97 R.I. 495, 497, 199 A.2d 122, 123 (1964) (noting that the findings of a '"trial justice on credibility is conclusive and will not be disturbed by this court unless he has misconceived or overlooked important evidence or if there is a clear indication in the transcript that he was mistaken in his judgment of the witnesses[]"'). The Court finds the testimony of the Wilsons to be self-serving as party defendants and as interested witnesses.

Here, the Court finds that the Wilsons failed to establish by clear and convincing evidence that they exercised continuous, exclusive dominion over the disputed driveway system for the statutory period of ten years sufficient to place the true owner on notice of their intent to adversely possess the disputed driveway system. *Anthony*, 681 A.2d at 897; *Butterfly Realty v. James Romanella & Sons, Inc.*, 45 A.3d 584, 589 (R.I. 2012); *Locke v. O'Brien*, 610 A.2d 552 (R.I. 1992); *Spangler*, 106 R.I. at 804, 264 A.2d at 166 (noting that "[s]tronger evidence is required to establish the adverse possession of a cotenant than the adverse possession of a stranger"). Therefore, the Wilsons did not adversely possess the disputed Easement area.

ii

Abandonment

The Defendants allege that in abandoning the development of Lot 7 into a Lot with a house, the necessity to extend the Right-of-Way common driveway through the disputed common driveway was abandoned by Midwestern Homes. The Defendants also allege that at the time they purchased Lot 4, they believed that they possessed exclusive use of the disputed property area. The Plaintiffs argue that the Defendants failed to present evidence showing that the prior owners of Lot 3 acted voluntarily and equivocally in abandoning the disputed Easement area.

"In law, to establish abandonment, proof of two factors is required; one, intent to abandon and two, some overt act, or failure to act, which would lead one to believe that the owner neither claims nor retains any interest in the subject matter of the abandonment." *Washington Arcade Assocs. v. Zoning Bd. of Review of Town of N. Providence*, 528 A.2d 736 (R.I. 1987); *(*citing *Richards v. Zoning Bd. of Review of City of Providence,* 100 R.I. 212, 218, 213 A.2d 814, 817 (1965); *see also* 1 Anderson, *American Law of Zoning* § 6.65 at 634 (3d ed. 1986). "Nonuse in and of itself is insufficient." *Washington Arcade Assocs.*, 528 A.2d at 738.

The Plaintiffs presented credible evidence showing their use of—and intention to continue use of—the disputed driveway system. *Id.* (noting the intent to abandon one's property is crucial for a claimant to succeed on a claim for abandonment). The Plaintiffs also presented evidence of their disabled child's need for a special school bus to transport their child to school. (Tr. 31; 35-36.) The evidence showed that the school bus regularly used the parcel of land in dispute in order to safely enter and exit the subdivision. (Tr. 35-36.) This use continued until the Wilsons installed a fence over the disputed driveway system in 2015, preventing the Martins or their guests from further accessing this area. (Tr. 31; 36.) The Court finds that had the Wilsons

not physically prevented the Martins from using the disputed driveway system beginning in 2015, the Martins would have continued to use this parcel of land. *Washington Arcade Assocs.*, 528 A.2d at 738; *Richards*, 100 R.I. at 218, 213 A.2d at 817 (noting the intent to abandon property is crucial to succeeding on a claim for abandonment). The Defendants failed to present evidence showing that the Martins—or any prior owner of Lot 3—intended to abandon the disputed area, nor did they present evidence of some overt act or failure to act on behalf of the Martins—or any prior owner of Lot 3—in abandoning the disputed driveway system. *Id; see also Richards*, 100 R.I. at 218, 213 A.2d at 817. Therefore, the Court does not find that the Martins, or any prior owner of Lot 3, abandoned the southerly Right-of-Way common driveway past the portion of the disputed driveway system. Accordingly, the Defendants did not meet the burden in establishing abandonment.

2

Declaratory Judgment, Trespass, and Equitable Relief

The Defendants also allege counterclaims for declaratory judgment, trespass, and equitable relief. The Court's finding herein of an implied easement renders moot the Defendants' claims for such relief. *Hamilton v. Ballard*, 161 A.3d 470 (R.I. 2017). In *Hamilton*, the Court noted the well-settled principal that '"a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant[s] of a continuing stake in the controversy."' *Id* (*quoting Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1079 (R.I. 2013)); *see also Grady v. Narragansett Elec. Co.*, 962 A.2d 34, 42 n.4 (R.I. 2009) (referencing "[the Court's] usual policy of not opining with respect to issues about which we need not opine"); *Campbell v. Tiverton Zoning Board*, 15 A.3d 1015, 1022 (R.I. 2011). Here, no justiciable controversy exists as to the Defendants' counterclaims for declaratory

judgment, trespass, and equitable relief because of the Court's finding of an implied easement rendering these issues moot.

IV

Conclusion

For the above stated reasons, the Plaintiffs' requested injunctive relief shall be granted allowing the Plaintiffs access to the disputed driveway system; prohibiting the Defendants from obstructing the Plaintiffs' access to this Right-of-Way Easement; and permanently refrain from hindering, obstructing, or impeding the Martins' efforts to create additional entrances from their property onto the Easement. The Defendants' Counterclaims against Plaintiffs for declaratory judgment and injunctive relief are dismissed and denied. In addition, the Defendants' claim seeking to quiet title to the property and trespass to land are denied and dismissed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Charles E. Martin and Nicole J. Martin v. Glen A. Wilson and Valerie A. Wilson
CASE NO:	WC-2016-0027
COURT:	Washington Superior Court
DATE DECISION FILED:	October 3, 2018
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Plaintiff:	Kelly M. Fracassa, Esq.
For Defendant:	Charles F. Reilly, Esq.