

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-150

OCTOBER TERM, 2018

David Palumbo v. Thomas L. Merritt,*	}	APPEALED FROM:
Elizabeth W. Merritt,* Randall B. Haskell,	}	
Rebecca A. Haskell	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 62-2-16 Wrcv

Trial Judge: Robert P. Gerety, Jr.

In the above-entitled cause, the Clerk will enter:

In this dispute over rights of access to real property, defendants appeal the trial court’s decision enjoining them from using a gravel driveway on plaintiff’s land and awarding damages to plaintiff for private nuisance. We affirm the trial court’s determination of the boundaries between the parties and the related injunction but reverse its ruling on the nuisance claim.

Plaintiff David Palumbo and third-party defendants Randall and Rebecca Haskell own neighboring residential properties on Chandler Road in Chester, Vermont. The Palumbo property is to the west and the Haskell property is to the east. By deed, the properties are not contiguous. Defendants Thomas and Elizabeth Merritt own adjoining residential property located to the south of the Palumbo and Haskell properties. The Merritts have a deeded strip of land between the Palumbo and Haskell properties that provides them frontage on and access to Chandler Road. The Merritts have improved and use a gravel driveway that leads from Chandler Road to the interior of their property. The central issue in this appeal is whether the trial court erred in concluding that this driveway is on Palumbo’s property.

In February 2016, Palumbo brought a trespass action against the Merritts seeking an order prohibiting them from using the gravel driveway as well as damages for private nuisance. The Merritts counterclaimed, asserting that they owned the driveway or had the right to use it under a prescriptive easement. In July 2016, the Merritts filed a third-party complaint against the Haskells and sought a declaratory judgment regarding the location of the boundaries between the three properties. The Haskells responded that they had acquired ownership of the corridor of land between their property and Palumbo’s property by adverse possession.

Following a bench trial, the trial court made the following findings of fact. The Merritts’ record fee title includes an access corridor that is approximately twenty feet wide and runs from Chandler Road south to the northern boundary of the Merritt parcel. The corridor is located between the Palumbo eastern property line and the Haskell western property line.

The Merritts constructed the gravel driveway shortly after they purchased their property in November 2002 and before Palumbo purchased his property in April 2005. Before Merritt

constructed the gravel drive, there was a remnant of an old trail in that location; it was not recognizable as a drive or road, and was grown over with trees. The south side of the Merritt property has 332 feet of road frontage along a second public highway, Route 10. There is no existing driveway providing access from the Merritts' home to Route 10. The trial court found no evidence that building an access route to Route 10 would be impractical or unfeasible.

In 2012, Palumbo hired surveyor Ralph Michael to conduct a survey of his property after town officials informed him that he built his garage too close to his property line. The 2012 Michael survey locates the gravel driveway as built and used by the Merritts to the west of the Merritts' deeded access corridor, almost entirely on Palumbo's property until it reaches the northerly boundary of the Merritts' property. Palumbo showed the survey to Thomas Merritt and paid money to help Merritt hire a lawyer to review the survey.

Around this time, the relationship between Palumbo and Merritt began to deteriorate. Merritt began to regularly drive unreasonably fast along the gravel driveway during the day and night. He also placed significant quantities of debris along the gravel driveway. Palumbo asked Merritt to move the debris, and Merritt moved it to an area along Palumbo's southern property line. Merritt placed washing machines, dryers, old cars, tires, lumber, old boats, and campers along the line, creating a significant eyesore for Palumbo. The trial court found that Merritt's motive in placing the items along the property line was to annoy and harass Palumbo.

The trial court found that the 2012 Michael survey accurately depicted the boundaries of Palumbo's property, and that the gravel driveway is located entirely on the Palumbo property as depicted in that survey and not within the twenty-foot Merritt access corridor. It found that Palumbo did not give the Merritts permission to use his property for their driveway.

The court concluded that the Merritts did not have any type of easement to use the driveway. They did not qualify for a prescriptive easement because they had used the driveway for less than fifteen years before Palumbo filed his trespass action. They failed to demonstrate an easement by necessity or by implication, as they had not shown that there was no reasonably practical means of access to their property other than over the gravel driveway. Likewise, no easement by estoppel existed because there was no evidence that the Merritts relied to their detriment on Palumbo's conduct. The court therefore held that Palumbo was entitled to a permanent injunction prohibiting the Merritts from using the gravel driveway for any purpose. The trial court also found that the Merritts' placement of junk along Palumbo's property line constituted a private nuisance and awarded Palumbo \$5000 in damages.

Finally, the court concluded that although the Merritts held record title to a strip of land located between the Palumbo and Haskell property (to the east of the gravel driveway at issue here), the Haskells had acquired title to the entire strip through adverse possession because they had openly and continuously used the land without permission for over fifteen years. The Merritts do not challenge this aspect of the court's decision on appeal.

On appeal, the Merritts argue that the trial court failed to make sufficient findings to support its conclusion that the gravel driveway they built is on Palumbo's land. "[W]hen requested, the court ha[s] a duty to make findings essential to the disposition of the issues properly before the court," which "must indicate to the parties and this Court what was decided and how the decision was reached." Roy v. Mugford, 161 Vt. 501, 507 (1994); see also V.R.C.P. 52(a). In particular, the Merritts argue that the trial court failed to address their claim that the found pin in the ground relied upon by Palumbo's surveyor to establish the northeast corner of the Palumbo lot was not located where it should be pursuant to the deeds and was not in fact a pin; therefore an

ambiguity exists as to the proper location of the northeast corner of the Palumbo property; and accordingly in determining the location on the ground of the easterly border of the Palumbo property, the court should have relied on extrinsic evidence of the intent of the original grantor, Jennie Gomez, when she created the Palumbo lot and established the Merritt corridor. The Merritts argued below that extrinsic evidence shows that Gomez intended the Merritt corridor to be located where the gravel driveway is currently.¹

Although the alleged error is framed as a failure to make required findings, what the Merritts are really challenging is the court's factual conclusion regarding the location of Palumbo's eastern boundary line, which is also the western boundary of the Merritt corridor. See Okemo Mountain, Inc. v. Lysobey, 2005 VT 55, ¶ 8, 178 Vt. 608 (mem.) ("The location of a boundary line is a question of fact, to be determined on the evidence."). The trial court's discussion of this point could have been more detailed, but its findings are sufficiently adequate for us to review its reasoning. It noted that the parties had presented conflicting evidence but found that the boundaries depicted on the 2012 Michael survey were accurate. In so holding, the court implicitly rejected the Merritts' argument that the metal pipe relied upon by Palumbo's surveyor as establishing the northeast corner of the Palumbo property was not, in fact, the pin referenced in Palumbo's deed.

The court's conclusion on this point was amply supported by evidence. The court credited the 2012 Michael survey that had been procured by Palumbo. "Because the discrepancies between the . . . surveys presented a question of fact requiring the court to weigh the credibility of two expert witnesses, our standard of review is to determine whether the court's finding of fact is supported by the record and whether those findings reasonably support its conclusions." MacDonough-Webster Lodge No. 26, Free and Accepted Masons v. Wells, 2003 VT 70, ¶ 22, 175 Vt. 382. "If the record contains any credible evidence that fairly and reasonably supports the findings, the trial court's ruling must stand even though inconsistencies or substantial evidence to the contrary may exist." Lawrence v. Pelletier, 154 Vt. 29, 33 (1990).

The trial court's finding crediting the 2012 Michael survey is supported by the record. In fact, the trial court was not really faced with competing surveys or competing expert testimony as to the location on the ground of the deeded corridor. Palumbo's surveyor Ralph Michael testified extensively about the basis for his survey and the reasons he believed his results were accurate. He based his survey on the Palumbo, Haskell, and Merritt deeds, the monuments he found at the site, and his own measurements.

Michael did testify that the pin he found in the southeast corner of the Palumbo property was four to five feet away from where the corner should have been. However, he testified that the other three pins were in their expected locations, allowing him to calculate where the southeast corner should be. The Merritts' expert, Gary Rapanotti, agreed that finding three out of four pins in their expected locations would reassure him that the pins were those described in the deed.

The map produced by the Merritts' own expert further supported the court's finding. Rapanotti did not conduct a formal survey of any of the properties in question, but he did produce a map based on his review of the existing surveys as well as the deeds, monuments, and his own

¹ Palumbo argues that the Merritts waived this argument by failing to raise it below. We find that they sufficiently preserved it by raising it in the proposed findings and conclusions they submitted after trial. Fucci v. Moseley & Fucci Assocs., Ltd., 170 Vt. 626, 627 n.* (2000) (mem.).

ground measurements. His map, like the 2012 Michael survey, depicted the gravel driveway as being almost entirely located on Palumbo’s property and not within the Merritts’ deeded access corridor. Although Rapanotti testified that there were discrepancies between the Michael survey and an earlier 2002 survey, his map placed the Palumbo-Merritt boundary in roughly the same location as the Michael survey, confirming that the gravel driveway was on the Palumbo parcel. Rapanotti also agreed with Michael that the existing pin in the stone wall to the east of the gravel driveway marked the northeast corner of the Palumbo parcel, as described in the Palumbo deed.

With respect to the character of the pin he relied on, Michael explained that “in the old days,” surveyors would often use pieces of water pipe or similar items to mark corners because they were cheap, even if they were described as pins in written documents. The trial court apparently found these explanations to be credible, and the Merritts point to no other evidence that the monuments identified by Michael were not the original monuments. See Pion v. Bean, 2003 VT 79, ¶ 19, 176 Vt. 1 (holding trial court’s determination that pins found by surveyor, which were later removed by plaintiffs, were original pins described in deed was supported by testimony of landowners regarding locations).

Finally, the Merritts challenge the trial court’s determination that their placement of junk along their boundary line constituted a private nuisance to Palumbo. “In Vermont, a private nuisance is defined as an interference with the use and enjoyment of another’s property that is both unreasonable and substantial.” Myrick v. Peck Elec. Co., 2017 VT 4, ¶ 4, 204 Vt. 128. The trial court found that “the unsightly nature of the discarded items along the boundary not far from his residence” interfered with Palumbo’s use and enjoyment of his property. As we made clear in Myrick, however, “[a]n unattractive sight—without more—is not a substantial interference as a matter of law because the mere appearance of the property of another does not affect a citizen’s ability to use and enjoy his or her neighboring land.” Id. ¶ 5. The reasons for this rule are that emotional distress is not an interference with the use or enjoyment of land, and aesthetic preferences are inherently subjective matters which the courts are ill-suited to judge. Id. ¶¶ 5-7. Accordingly, because the court’s nuisance ruling was based solely on the aesthetic impact of the debris, it must be reversed.²

Affirmed, except that the ruling in favor of plaintiff on his private nuisance claim is reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

² Palumbo argues that the Merritts were illegally operating a salvage yard without the permit required by 24 V.S.A. § 2242. Whether true or not, the Merritts’ alleged violation of the statute is irrelevant to the elements of a nuisance claim. Moreover, Palumbo has not demonstrated that § 2242 permits a private right of action for damages.