

SUPREME COURT OF NOVA SCOTIA

Citation: Rafuse v. Swinimer, 2009 NSSC 179

Date: 20090610

Docket: Bwt. 284811

Registry: Bridgewater

Between:

Lena Rafuse, Glen Rafuse and Wendell Rafuse

Plaintiffs

v.

Craig Donald Swinimer and Shelly Lynn Rafuse

Defendants

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: May 12, 13, 14, 2009, in Bridgewater, Nova Scotia

Written Decision: June 10, 2009

Counsel: Michael K. Power, Q.C., for the plaintiffs
G.F. Philip Romney, for the defendants

By the Court:

[1] The plaintiffs, Lena Rafuse, Glen Rafuse and Wendell Rafuse own a dwelling and lot at 29 John's Road, Gold River, Lunenburg County, Nova Scotia. The John's Road property was devised under the will of Lewis Rafuse, the husband of Lena Rafuse and the father of Glen and Wendell Rafuse, to Lena Rafuse for her life and upon her death the property was to pass to Glen and Wendell Rafuse. The property consists of one quarter of an acre of land with a right-of-way from highway #3 over the defendants' property to the Rafuse residence. The right-of-way is described as follows in the deed:

...provided always that the said grantee, his heirs and assigns shall have, when necessary, the use of the said Swinemar Road at all times.

[2] The right-of-way is locally known as Swinemar's Road. The right-of-way and the property now owned by the plaintiffs was conveyed by Harry Swinemar and his wife to Lewis Rafuse by deed dated June 9, 1941.

[3] The defendants, Craig Donald Swinemar and Shelly Lynn Rafuse, own the property over which the right-of-way passes. It is the interpretation of the mode of usage on the Swinemar Road right-of-way which is the main issue between the parties. The plaintiffs maintain that the granted use of Swinemar Road permits them to access their lot over the defendants' property by foot or with motor vehicles. The defendants have admitted the plaintiffs have a pedestrian right-of-way over their lands but take the position that the plaintiffs may not cross with vehicles.

[4] Swinemar Road, so called, runs from highway #3, through the defendants' lands, up to and past the plaintiffs' dwelling. The location of Swinemar Road is shown on a plan prepared by Kevin Fogarty, dated August 5, 2008 and filed as Exhibit #4.

[5] The plaintiffs maintain the right-of-way permits vehicular traffic and that members of the Rafuse family have used vehicles on this road since the late 1970's. The plaintiffs also complain that the defendants blocked their access over Swinemar Road and, claim damages on that account, as well as for the alleged destruction of bushes and shrubs in the plaintiffs' garden. The plaintiffs claim that

the defendants' actions have caused a loss of their enjoyment of their property for which they claim damages.

Issues

[6] The issues are as follows:

- a) What is the mode of usage of the granted use of Swinemar Road? Is it limited to pedestrian traffic only?
- b) Did the defendants block the plaintiffs' right-of-way and, if so, are the plaintiffs entitled to damages and in what amount?
- c) Did the defendants destroy bushes and shrubs in the plaintiffs' garden and, if so, are the plaintiffs entitled to damages and in what amount?
- d) Did the defendants cause loss of the plaintiffs' enjoyment of their property and, if so, are the plaintiffs entitled to damages and in what amount?

[7] There were two subsidiary issues which were settled prior to trial. The first was whether the defendants could relocate the Swinemar Road right-of-way without the consent of the plaintiffs. The defendants have acknowledged that the law in Nova Scotia is clear that they do not have the right to relocate the Swinemar Road right-of-way without the plaintiffs' consent.

[8] The second issue was a possessory claim by the plaintiffs to a portion of the defendants' lands. The disputed area was used by the Rafuse family for years as a flower garden. Prior to trial the defendants admitted this claim. As a result, it is not necessary that I deal with either of these issues.

Issue #1 - What is the mode of usage of the granted use of Swinemar Road? Is it limited to pedestrian traffic only?

[9] The defendants say that when the deed to Lewis Rafuse was executed, it was the intention of the parties that the Swinemar Road would be a pedestrian right-of-way and that it was not intended to be for vehicular traffic.

[10] The defendants submit that the conveyance to Lewis Rafuse is silent as to the mode of usage, and since neither Lewis nor Lena Rafuse owned a motor vehicle or held a driver's licence at the time of the granting of the right-of-way, the mode of usage would not logically have included access by motor vehicle, especially given that there was alternate access to the property by way of John's Road. The defendants maintain that the plaintiffs' right-of-way to their property is through John's Road, and that John's Road was in existence at the time of the right-of-way reservation of Swinemar Road.

[11] The plaintiffs maintain that the Swinemar Road right-of-way is for both pedestrian and motor vehicle access. They led evidence to suggest that since the late 1970's the road has been used for vehicular traffic by members of the Rafuse family. The plaintiffs seek a declaration that they are entitled to a right-of-way for all purposes, including vehicular traffic.

Plaintiffs' Evidence:

Lena Faye Clare Rafuse

[12] Lena Rafuse was born June 3, 1919 and presently lives in Gold River, at 29 John's Road. She was married in 1937 to Lewis Sinclair Rafuse who died August 23, 1997. She moved to John's Road before Mr. Rafuse went overseas in 1940, living in a small house owned by her father adjacent to and north of 29 John's Road. They moved into their present residence at John's Road around 1949 and raised nine children. She testified that her husband received a deed to the property from Harry Swinemar and his wife in 1941. She also referred to her late husband's will which conveyed a life interest to her and the remainder to her sons upon her death.

[13] The will of Lewis Rafuse was dated July 18, 1996 and contained the following devise:

4. I give my home and real property at Gold River in the County of Lunenburg, Province of Nova Scotia to my wife, LENA RAFUSE for her use during her lifetime and then upon her death to my sons, GLEN RAFUSE and WENDELL RAFUSE for their own use absolutely.

[14] Ms. Rafuse recalled a reference to the Swinemar Road contained in the deed from Harry Swinemar to her husband. She described the right-of-way as starting at highway #3 and moving westerly past the Harry Swinemar house up to the Rafuse residence at 29 John's Road. She recalled her husband using this right-of-way and testified that it is the only road he used when he was alive. The right-of-way, as described by Ms. Rafuse, is shown in Exhibit #4.

[15] Ms. Rafuse recalled her husband having a boat on the shore east of the #3 highway and, on occasion, taking his boat from the shore up the Swinemar Road to their residence. Her children used the road to go to school and they had a mailbox at the end of the road.

[16] Most of the early use of the Swinemar Road described by Ms. Rafuse concerned pedestrian traffic. This use would make sense because from reviewing the Fogarty plan the most direct route to highway #3 would be over the Swinemar Road. This would be a more direct route for members of the family to access highway #3 to pick up their mail, go to school and other activities. Her husband never had a licence from the time that Mr. Rafuse purchased the property until his death on August 23, 1997.

[17] Ms. Rafuse recalled her husband using a horse and wagon on the property. She testified that when he returned from overseas in around 1946 he used the road more than before. The family walked the road, used a wheelbarrel on and, on one occasion, when they were building their home, a truck may have come up the Swinemar Road to deliver lumber.

[18] Ms. Rafuse never asked permission from Harry Swinemar to use the Road "cause that was our road to use". She obtained her licence around 1980. She recalls driving on the Swinemar Road and going down from her house to highway #3 and said she often drove on weekends or to take her boys to hockey. She would use John's Road as access to her property on occasion but at other times she used the Swinemar Road.

[19] Although Ms. Rafuse had obtained a licence, she said she did not drive much. Her boys drove bikes on the Swinemar Road and when they got older they would sometimes drive motor vehicles on it.

[20] According to Ms. Rafuse, no one ever blocked the right-of-way until Craig Swinimer bought the property. She said he blocked the road and she received a lawyer's letter suggesting that she not use the Swinemar Road. Ms. Rafuse identified various pictures entered in evidence. Some depicted large stones blocking the road and, in one, a van was seen on the purported right-of-way. She said there was a utility trailer parked at one time in the right-of-way where the rocks were. There were "private property" and "no trespassing" signs erected.

[21] On cross-examination Ms. Rafuse confirmed that she was the daughter of John Zwicker and that John's Road was named after him. John's Road starts at the #3 highway and goes back half a mile. She testified that four families presently use John's Road, including her access to her property, and that they cost-share the snow plowing and maintenance.

[22] When asked if she recalled the first time she used the Swinemar Road, Ms. Rafuse's answer was "when I needed to go I went", or words to like effect. She said she used Swinemar Road once or twice a month. She testified her purpose in bringing this matter to court was to obtain the deeded right-of-way for her sons. She agreed that the roadway is grass and, when asked if she knew the width, she said that it was wide enough if anyone wanted to go up or down. She said it was wide enough for vehicles to travel in April 2007. She testified that the vehicles used on the property between the mid 1980's and 2000 were mostly owned by her two sons.

Earl H. Zwicker

[23] Earl Zwicker is eighty-seven years of age, retired and living in Gold River, Lunenburg County, Nova Scotia. He is Lena Rafuse's brother. Mr. Zwicker lived in Gold River from 1921- 1940 then built a house in Gold River and lived until approximately 1947. From 1947 to the early 1970's he lived away but continued to visit his father until he passed away in 1965, and then continued to visit his mother until she passed away in the early 1970's.

[24] Mr. Zwicker said he always heard Lewis Rafuse had a right-of-way through the Swinemar's property. He recalled Mr. Rafuse using the right-of-way. He testified that Mr. Rafuse cut poles for wooden hoops to be put on apple barrels, and he recalls him using the road to transport these hoops. On occasion he saw Mr. Rafuse using a team of oxen on Swinemar Road.

[25] Contrary to the evidence of Ms. Rafuse, Mr. Zwicker testified that during the above period and his return visits, he never saw her use the Swinemar Road. Likewise, he testified that he did not see her sons, Wendell or Glen Rafuse, drive motor vehicles on Swinemar Road.

Gary Andrew Zwicker

[26] Gary Zwicker is the brother of Lena Rafuse and was born in Gold River in 1937. He was familiar with the Harry Swinemar property and also with Swinemar Road which he described as running from highway #3 westerly, about a mile to the back baseline. He recalled driving an old car on this road with Harry Swinemar's son when he was young.

[27] Mr. Zwicker also remembered a person from the valley using the Swinemar Road to access a back property to the west of the CNR right-of-way. He recalled Ms. Rafuse using the road and remembered her sons using motorcycles from highway #3 to the Rafuse property over Swinemar Road. He recalled Lena Rafuse driving from her property to highway #3. He also recalled that Ms. Rafuse's daughters had boyfriends who used Swinemar Road. He was not aware of any interference with any of these individuals' use of the road.

[28] Mr. Zwicker said he went to Halifax to work around 1953. He joined the Navy in 1954 and served until 1964. After 1964 he lived in Halifax/Chester. He confirmed that his observations of Lena Rafuse driving, and the use of the road by others, was on weekends when he would visit from Halifax.

[29] On cross-examination Mr. Zwicker said he never personally used Swinemar's Road. When asked to put a time frame on his observations of Lena Rafuse driving on Swinemar Road, he said it would be after Lewis died but he could not put a date on it. He did testify that, in total, he saw her on the road four or five times in a five year period. He could not recall the last time he saw her on the road.

[30] When further questioned as to his observations, Mr. Zwicker said he observed Glen Rafuse driving on the road six or seven years ago.

Gregory William Hiltz

[31] Mr. Hiltz was born November 16, 1946 and lives in Gold River. He is not related to the plaintiffs. He moved to Gold River around 1951 residing with his mother in the family home until he was twenty-five. He was familiar with Swinemar Road. He said he saw Bobby Rafuse, Lena Rafuse's son, use the right-of-way on one occasion, when Mr. Zwicker thought Bobby Rafuse was living with his parents. He confirmed that the only person he observed using Swinemar Road was Bobby Rafuse, other than members of Harry Swinemar's family. While living in Gold River he saw Bobby Rafuse using the right-of-way approximately twice but could not give a time frame.

[32] Mr. Hiltz testified for the past eight or nine years he can see Swinemar Road from his present home. During that period he only saw Lena's Rafuse's sons use Swinemar Road twice.

Wendell David Rafuse

[33] The plaintiff, Wendell Rafuse is the son of Lena Rafuse. He was born May 15, 1963. He presently resides at Martin's Point. He lived at John's Road until 1982. His earliest recollection of the use of Swinemar Road was when he was thirteen. He described a day when he was going fishing with his father and recalled his mother and his brother Bobby coming down the road and going for a drive. His brother was driving a blue Chrysler.

[34] Mr. Rafuse confirmed that as a child he used Swinemar Road to go to school, pick up the mail and to ride his bicycle on. He described his father bringing a twelve foot rowboat up the road on a homemade wagon similar to a boat trailer, although it was pushed manually. He recalls himself and his brother Glen helping their father push it up the driveway. He testified that whenever the boat needed to come up from the shore they used the road. Sometimes it was every year, other times it was every second year. He remembered his brother Bobby using the road, saying he "saw him a few times". He said the road surface was basically in good shape and it was mowed. He said he and his brother Glen kept bushes back and mowed the road from their house down to the Swinemar property. He indicated that Swinemar Road from the Swinimer residence to highway #3 was gravel, although the portion from the Swinimer residence, back westerly, to the Rafuse property was mowed grass.

[35] Mr. Rafuse testified his mother used the road after she received her licence. When asked how often she used the road he said “whenever she wanted to”. He said she used Swinemar Road to take him to hockey, although on cross-examination he became somewhat confused with regard to whether his mother drove him to hockey. On cross-examination he agreed that his mother did not have a licence until after he had stopped playing hockey. Therefore, it is doubtful that Ms. Rafuse would have been using Swinemar Road to drive him to hockey as he testified.

[36] Mr. Rafuse referred to Cecil Swinemar, who was known locally as Sid Swinemar. Sid Swinemar was Harry Swinemar’s son, and has been referred to in evidence as an owner of the property, presumably after Harry Swinemar’s death. He testified the road was never blocked by Cecil Swinemar but was blocked shortly after Craig Swinimer bought it.

[37] Mr. Rafuse identified various photos, including one showing a utility trailer blocking the Swinemar Road. He testified that he used the Swinemar Road after he got his licence and used a motorbike on it when he was fourteen years old. He picked up mail at highway #3 using the Swinemar Road. He used the motorbike to pick up the mail a couple of times a week. At sixteen he received his licence and drove a Dodge Dart. He said he used Swinemar Road “whenever I wanted to”.

[38] On cross-examination Mr. Rafuse indicated he received his motor vehicle licence in 1979 - 1980. The first time he saw a vehicle used on Swinemar Road was by his brother, Bobby Rafuse, a couple of times in 1976.

[39] Mr. Rafuse said he moved to Martin’s Point in 1982. His mother got her licence in 1980. After 1982 he visited the Johns’s Road property once or twice a week and sometimes accessed the property by John’s Road and sometimes by Swinemar Road. He said his family used whatever road they wished and he was never stopped on the Swinemar Road until Craig Swinemar bought the property.

[40] Mr. Rafuse could not recollect how frequently he used the road.

Glen Rafuse

[41] The plaintiff, Glen Rafuse, is forty-eight years old. He is the son of Lena Rafuse and the brother of Wendell Rafuse. He resided at 29 John’s Road from

1961 until 1980. He testified that he and his family used Swinemar Road. He confirmed that his father used Swinemar Road to haul his boat from the shore. He remembered using a motorbike on Swinemar Road in 1969 when he was around eight or nine years old. He claimed that he used Swinemar Road with his motorbike almost every day. He used Swinemar Road to walk to school. He said he used his own motor vehicles on Swinemar Road and stated, "I'm sure I used it every day". He testified his brother, Wendell Rafuse, used it, as well as other members of his family, including his sister's boyfriends when they came to visit. He confirmed that his mother used her car on the road, as well as his brother Bobby.

[42] Mr. Rafuse moved back to John's Road in 1999 and remained until 2008. He said that from 1980 until 1999 he went back to John's Road two or three times a week. He never asked permission to use Swinemar road, but did indicate that back then "you did not have to as everyone used the roads".

[43] Mr. Rafuse testified that when he was nine the Swinemar Road was grassy in places and was maintained by his family. The maintenance work on Swinemar Road included mowing and cutting brush. He testified if there were ruts, the Rafuse family fixed it with a wheelbarrel of dirt. He confirmed that they did not use the road when it was wet because it would tear it up.

[44] On cross-examination Mr. Rafuse testified that the last time he drove on the property was after Cecil Swinemar died, except for one occasion when he recalled driving over the property of Craig Swinemar in July of 2007, late at night.

[45] Mr. Rafuse testified that he purchased his first motor vehicle in 1977 or 1978 and moved to Chester Basin. He indicated that he came home to the John's Road residence on occasion. He said he used John's Road when he came from Chester Basin to visit but would go out Swinemar Road when he left.

Mark Whynot

[46] Mr. Whynot is a professional engineer operating under the name Geomap Surveying and Engineering Inc. He prepared a plan of survey of the Rafuse property, including the disputed possessory claim. The plan is filed as Exhibit Book 1, Tab 3 and is dated February 6, 2008. Mr. Whynot had a crew do the field

work on the property and testified that the crew measured the Swinemar Road to be between eight and eleven feet wide as it passed by the Rafuse property.

[47] Mr. Whynot testified on cross-examination that he was never on the property himself. He did not know the width of the right-of-way as it moves from the southeast corner of the Rafuse property eastward towards the defendants' lands as his crew did no calculations for that portion of Swinemar Road. The only measurements that were taken were of the Swinemar Road as it passed adjacent to and along the southern boundary of the Rafuse property.

Kevin Fogarty

[48] Mr. Fogarty is a Nova Scotia land surveyor and carries on business as Fogarty Surveys Inc. He has been surveying since 1980. On February 27, 2007 the defendant, Craig Swinimer, asked him for a survey of his property from highway #3 to the CNR right-of-way. He did a site visit with Mr. Swinimer on March 2, 2007 and spoke with Glen Rafuse on the same day.

[49] When Mr. Fogarty attended the property, he described locating traces of an old road or pathway known as Swinemar Road. It was his opinion that both Glen Rafuse and Craig Swinimer recognized the general location of the old road or pathway. A portion of the Swinemar Road was graveled, from the defendants' property known as Civic #6112 easterly to highway #3. The portion of the Swinemar Road westerly from the defendants' property towards the Rafuse dwelling was scaled to be between five and a half feet and a maximum width of eight feet.

[50] Mr. Fogarty testified that the right-of-way widened along the Rafuse lands to ten or eleven feet which appears to be consistent with Mr. Whynot's testimony. He indicated that there was not a lot of regular traffic east of the Rafuse lot as it proceeded to the Craig Swinimer dwelling. He testified Swinemar Road was not in any apparent regular use. There was no worn surface but rather a grassy type of surface west of the Craig Swinimer dwelling.

[51] Mr. Fogarty described the surface of the road in the area of the Rafuse property as being a treed and bushed area. As Swinemar Road moved east from the Rafuse property, it was bush or unimproved field. There was no lawn. He said that the Swinemar Road generally followed the lot boundary as it passed the

Rafuse dwelling. He talked in general about the Swinemar Road and said there was no regular usage and it did not appear to be maintained as there was no worn area. He said it could almost be called abandoned, but in hindsight he thought abandonment might be a bit strong language.

[52] In cross-examination Mr. Fogarty confirmed that the width of the Swinemar Road to the east of the Rafuse property was five and a half feet at its narrowest, and would go up to eight feet as it moved easterly. He also testified that the right-of-way within the defendants' property boundaries east from the Rafuse property to the Craig Swinemar dwelling was narrow. When asked whether this area of Swinemar Road was wide enough for a motor vehicle to travel, Mr. Fogarty was of the opinion that this portion of the road was not wide enough to allow for travel by vehicle.

Defendants' Case:

Neva Wentzell

[53] Ms. Wentzell was born October 24, 1924 and presently lives in Oakland, Lunenburg County, Nova Scotia. Her parents were Harry and Jean Swinemar who previously owned the defendants' property. As a child from 1924 until approximately 1945 she lived with her parents in the present defendants' residence. When she was twenty-one she moved to Mahone Bay, but often visited the family home until it was sold to Craig Swinimer.

[54] Mr. Wentzell said she visited the property every couple of weeks. She was not aware of any right-of-way. She did not know how Lewis or Lena Rafuse accessed their property. On her visits, she never saw anyone access the property over the Swinemar Road. She did not think that anyone had access to the property and she never saw Lewis Rafuse or any member of his family crossing the property with oxen or cattle.

[55] On cross-examination Ms. Wentzell testified she was not aware of the Swinemar Road. She did say that if Lewis Rafuse did use the property, it would be open for them to use because "my father was a good natured man".

[56] Cecil Swinemar was Ms. Wentzell's brother and a previous owner of the property now owned by Craig Swinimer. She testified that he sometimes complained about the Rafuse family leaving ruts on his land from using a motor vehicle on Swinemar Road.

Wilfred Wentzell

[57] Wilfred Wentzell was born April 16, 1947. He is a retired machinist, having formerly worked at HMCS Halifax. Neva Wentzell is his mother. He is the grandson of Harry Swinemar and said he was familiar with the defendants' property. As a child he spent nights there and he has been visiting the property twice a week or more all his life.

[58] Mr. Wentzell described the driveway around the defendants' property as a gravel driveway. Off this driveway there was a path that went to the back woodland past the Rafuse property the so called Swinemar Road. He said the path had been there since he was a kid. He described it as a footpath that was wide enough to walk up and down. He described it as a grassy field with a path through it. When asked who used it, he said his Uncle Cecil Swinemar used it but no one else did. He said since his uncle passed away he had observed Glen Rafuse using it quite a bit in late 2006 and January 2007. He described being at the property quite a bit during that time and said these were the times he would see Glen Rafuse. Mr. Wentzell said he did not observe Mr. Rafuse using the property prior to that time but, prior to Cecil Swinemar's death, his uncle was upset because of ruts on his property. Mr. Wentzell testified that every time he went to visit his uncle, he complained that Glen Rafuse was using the road. He testified "it's not a road, it's a path". He testified he never saw Lena Rafuse, Wendell Rafuse or Bobby Rafuse drive a vehicle on Swinemar Road. Glen Rafuse was the only member of the Rafuse family whom he observed using the road and this was during the period November - December 2006 and January 2007.

[59] Mr. Wentzell testified the path was three or four feet wide. It was a walking path. He testified the path was still there. When asked on cross-examination why it was called Swinemar Road, he said he had no idea because it was a path on the grass. He agreed on cross-examination that his uncle, Cecil Swinemar, complained of Glen Rafuse using the road with his motor vehicle. He was not aware that Lewis Rafuse had a boat on the shore. His earliest recollection of Glen Rafuse using the road was after Cecil Swinemar's death.

Craig Swinimer

[60] The defendant, Mr. Swinemar was born September 13, 1961. He presently lives at 42 Erbin Road, Gold River, which is west of the Swinemar and Rafuse property on the westerly side of the CNR right-of-way. Mr. Swinemar identified his property as depicted on the Fogarty plan and he acknowledged there was a right-of-way through the property, but said it was a right-of-way “when necessary”. He testified that the Rafuse family had a right-of-way over John’s Road so, therefore, he did not think it necessary that they pass over his property.

Fred C. Swinemar

[61] Mr. Swinemar was born January 31, 1938 and lived in Gold River all his life. He is the father of the defendant, Craig Swinimer. He was familiar with the Harry Swinemar property, having lived on an adjoining property west of the CNR right-of-way, which is the property in which Craig Swinimer now resides. Mr. Swinemar lived there from 1938 until 1968. After 1968 he bought a property half a kilometer away. He was familiar with the Swinemar Road which he described as a hauling road from the shore back about a mile.

[62] Mr. Swinimer recalled the Swinemars using the Swinemar Road, but said that until 1968 he never observed them or anyone else using a motor vehicle on the road. While not clarified in questioning, it is apparent that Mr. Swinemar would be referring to the portion of Swinemar Road west of the defendants property. All of the witnesses have agreed that there is a well used gravel road from highway #3 to the defendants’ property, but the evidence as to use appears to differ as the property moves westerly from the graveled portion around the defendants’ dwelling to the Rafuse lands. He never saw Lena Rafuse drive and, in fact, was surprised she had a licence. He knew her all his life and could see the Rafuse residence and the Swinemar Road from his house. He testified he did not see anyone use the road other than the Swinemars.

[63] He said it was only a hauling road. He had observed animals pulling carts and, in particular, he used the road himself with a team for hauling wood from the back of the property for the Swinemars. He also indicated that he has walked on the road.

Discussion

[64] The plaintiffs maintain that the preponderance of evidence indicates that a road for vehicles and pedestrians has been in existence since the deed from Harry and Jean Swinemar to Lewis Rafuse, and that the attempt by the defendants to restrict the granted right-of-way to a foot path over Swinemar Road is not consistent with the intentions of Harry and Jean Swinemar when they granted the use of Swinemar's Road, nor is it consistent with the plaintiffs' evidence of its use of the right-of-way.

[65] In *Anger and Honsberger Law of Real Property*, 2d edn, vol. 2, 1985, the authors discuss a right-of-way created by express grant as here:

1804.3 Right of Way Created by Express Grant

The nature and extent of a right of way created by an express grant depends upon the proper construction of the language of the instrument creating it. The court primarily will look at the words of the grant. However, parol evidence is admissible to show the situation at the time of the grant and of the parties and the surrounding circumstances in order to show the nature and extent of the intended user. Surrounding circumstances that are particularly material are the description and nature of the land or buildings of the dominant tenement and the nature of the *locus in quo* of the servient tenement over which the right of way is granted as it existed at the date of the grant.

[66] In *Knock v. Fouillard*, 2007, NSCA 27, Justice Fichaud addressed the issue of interpreting rights-of-way in deeds at pgs. 15 and 16 of the decision:

59 A right-of-way's purpose is not the same as its mode of usage. The purpose relates to the intended activity on the dominant tenement - eg. to harvest seaweed. The mode relates to how the passage is accomplished over the servient tenement - for instance pedestrian or vehicular. *Gale on Easements*, para 9-02, 9-05 to 9-13, 9-15 to 9-26. The 1993 deed says that the right-of-way is "for all purposes" but is silent on mode of usage. So the deed is unclear whether the right-of-way includes travel by motor vehicle.

60 Absent a direction from the words in the deed, the court may draw assistance to resolve ambiguity from the surrounding circumstances at the time of the deed's execution. *Anger and Honsberger*, para 17; 20.30(a) summarizes the approach to determine the extent of a right-of-way by express grant:

... The nature and extent of a right-of-way created by an express grant depends on the proper construction of the language of the instrument creating it. The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect of the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee.

See also: *Laurie v. Winch*, [1953] 1 S.C.R. 49, at p. 56; *Gale on Easements*, para 1-123, 9-15.

[67] The right-of-way contained in the deed from Harry and Jean Swinemar to Lewis Rafuse stated as follows:

Provided always that the said grantee, his heirs and assigns shall have, when necessary, the use of the said Swinemar Road at all times.

[68] The reservation of the right-of-way is silent as to the mode of usage, that is, as to how passage is accomplished over the servient tenement. Is it to be by pedestrian traffic only or may it be by motor vehicle?

[69] The right-of-way refers to “the use of the Swinemar Road”, connoting that the road was in existence at the time of the grant.

[70] There was some suggestion that the words “when necessary” had some limiting effect on the use of the Swinemar Road. I take the words “when necessary” used in describing the use of the Swinemar Road to mean nothing more than Lewis Rafuse could use the Swinemar Road when required.

[71] I am satisfied that at the time the use of the Swinemar Road was granted to Lewis Rafuse the intent of the parties was for a right-of-way by foot, with no consideration of motor vehicle use.

[72] Ms. Rafuse testified that her husband did not have a licence from the time they built their house on 29 John's Road until he passed away in 1997. She did not obtain her licence until approximately 1980. During that period neither of them owned a car.

[73] Ms. Rafuse described her husband and her children using the roadway on foot. Her husband, she said, hauled a boat from the shore east of highway #3 up over the Swinemar Road to his residence. There was a mailbox at the end of the road.

[74] The plaintiffs' evidence of using a motor vehicle over Swinemar Road begins with reference to Bobby Rafuse using his car on that right-of-way in 1976 on one occasion. Wendell recalls at age thirteen going out fishing with his father and seeing his brother, Bobby Rafuse, driving down the road in a blue Chrysler. Bobby Rafuse passed away in 1976.

[75] After this limited use, the next use appears to be that of Wendell and Glen Rafuse. Wendell Rafuse testified that he received his licence at sixteen and drove a Dodge Dart. He said he used the Swinemar Road "whenever I wanted to". He moved to Martin's Point in 1982. After that he visited the property at John's Road once or twice a year, sometimes accessing it by John's Road and at other times by the Swinemar Road. He was unclear as to the frequency with which he used the road during that period. Glen Rafuse also testified as to his use of the road.

[76] According to Lena Rafuse she drove on the Swinemar Road after obtaining her licence in the 1980's, for about ten years.

[77] The plaintiffs have provided evidence of their use of the Swinemar Road from approximately 1976 to 2007. The evidence of usage by motor vehicle is not supported by other witnesses called by the plaintiffs, nor is it consistent with the evidence given by witnesses called for the defendants. For example, Earl H. Zwicker, the brother of Lena Rafuse, testified that he never saw her nor any of her sons use the Swinemar Road with vehicles. Her brother, Gary Andrew Zwicker, testified that he saw Ms. Rafuse use the Swinemar Road four or five times in a five year period. He observed Glen Rafuse driving on the road six or seven years before trial.

[78] If the road was used by motor vehicle with the frequency described by the Rafuse family, observers such as Earl Zwicker, would have undoubtedly seen them use the road. Even Gary Zwicker, who did see Ms. Rafuse use the road, only saw her four or five times in a five year period. That is, she would have used Swinemar Road, on average, once a year.

[79] Gregory William Hiltz who is no relation to the plaintiffs, lived near the Rafuse property until six or seven years before trial. The only member of the Rafuse family he ever saw using a car on Swinemar Road was Bobby Rafuse on two occasions. As Bobby Rafuse passed away around 1976, these two occasions would have been prior to that time. Other than Bobby Rafuse, he saw Cecil Swinemar use the road, but Cecil Swinemar was the deeded property owner. Mr. Hiltz stated that from his present residence he can clearly see the Swinemar Road. For the past eight or nine years he said he has not seen any motor vehicles use the road. Mr. Hiltz is not a party. He was called by the plaintiffs and has lived in the area since 1951. His evidence is inconsistent with that given by the Rafuse family.

[80] Neva Wentzell was born in 1924 and is the daughter of Harry and Jean Swinemar. She testified that she never saw the road being used by motor vehicles, but did admit that Cecil Swinemar had sometimes complained about Glen Rafuse causing ruts on his property. The issue of the complaints by Cecil Swinemar to Neva Wentzell and others has been proffered by the plaintiffs to suggest that this is proof that there was a right-of-way for motor vehicles, that it had been used by the Rafuse family and that Mr. Swinemar could do nothing to stop their use. With respect, it may have been that Cecil Swinemar recognized that the Swinemar Road was a pedestrian road only and was upset that members of the Rafuse family were using motor vehicles on this otherwise pedestrian path.

[81] Wilfred Wentzell, the son of Neva Wentzell, testified that Swinemar Road was not a road at all, but a path. He testified he never saw any of the plaintiffs using the Swinemar Road, other than Glen Rafuse during November and December 2006 and January 2007. He also confirmed that Cecil Swinemar had complained, on occasion, about Glen Rafuse using the road and causing ruts.

[82] Wilfred Wentzell's testimony was consistent with the testimony of Kevin Fogarty, the surveyor, whose view was that the portion of the Swinemar Road between the Craig Swinimer property and the Rafuse property was not wide enough for motor vehicle traffic.

[83] Fred Swinemar, the father of the defendant, Craig Swinimer, described the Swinemar Road as a hauling road. He testified that he had not seen anyone drive on it and that he was surprised to learn that Lena Rafuse had her licence as he had not seen her drive a motor vehicle at any time.

[84] The evidence of the surveyor, Kevin Fogarty, is consistent with the defendants' position that the right-of-way has been used for pedestrian travel only. It is also inconsistent with the evidence given by members of the Rafuse family. Mr. Fogarty testified that there was not a lot of traffic east of the Rafuse lot as it proceeded to the defendants' dwelling. He testified that it was not in any apparent regular use and there was no worn surface but rather a grassy surface. He testified it did not appear to be maintained and said it could almost be called abandoned. This evidence is inconsistent with the Rafuse claim that the property was regularly used for motor vehicle traffic. Glen and Wendell Rafuse suggest that the property was regularly used by motor vehicles, but again, this would be inconsistent with what Mr. Fogarty found on the ground.

[85] Mr. Fogarty testified that the width of Swinemar Road as it moved west from the Craig Swinimer property to the Rafuse property measured from five and a half feet, at its narrowest, up to eight feet. The narrowness of the property, from five and a half feet to eight feet, would be inconsistent with vehicular traffic which the Rafuse family testified would regularly pass over the Swinemar Road.

[86] On cross-examination Mr. Fogarty was asked whether the area which ran west of the defendant, Craig Swinimer's, house towards the Rafuse lands was wide enough for a motor vehicle to travel. His opinion was that it was not a width that would allow for travel by vehicle. Again, this testimony is at odds with that given by the Rafuse family and, in particular, inconsistent with their assertion of the regular use the Swinemar Road for vehicular traffic.

Conclusion

[87] I am satisfied on all the evidence before me that the intention of the granting of the use of Swinemar Road, by Harry Swinemar to Lewis Rafuse, was for pedestrian use only. Further, I am not satisfied that this original intended use has changed since then.

[88] The plaintiffs' testimony is, at best, evidence of sporadic use by motor vehicles on the Swinemar Road. Their testimony is not supported by the evidence of the majority of the other witnesses. It is inconsistent with the evidence of the surveyor, Mr. Fogarty. The use is inconsistent with the width of the right-of-way as described by Mr. Fogarty and it is inconsistent with what Mr. Fogarty found on the ground. There were no ruts or other evidence of regular vehicular traffic found by Mr. Fogarty.

[89] The surveyor called by the plaintiffs, Mark Whynot, did not offer any evidence on this issue, as his main concern would have been the survey of the Rafuse property at 29 John's Road.

[90] If the road had been used as frequently as the plaintiffs suggest, then there would have been evidence of such user and the road would not have been described by Mr. Fogarty as almost abandoned.

[91] The plaintiffs' claim for a declaration that the plaintiffs, their heirs, executors, administrators, successors and assigns are entitled to a right-of-way for all purposes is dismissed. I do confirm that there is in existence the right to use Swinemar's Road for pedestrian traffic, said right being vested in the plaintiffs.

Issue #2

Did the defendants block the plaintiffs' right-of-way and if so are the plaintiffs entitled to damages and in what amount?

[92] Ms. Rafuse testified that the defendant, Craig Swinimer, blocked Swinemar Road. She identified pictures entered into evidence and testified that he blocked the road with stones, vehicles and a utility trailer. "No trespassing" and "private property" signs were erected.

[93] Ms. Rafuse was served with a protection of property notice dated July 24, 2007. The notice is contained in Exhibit Book #1, Tab 12 and is directed to Glen, Lena and Wendell Rafuse and purports to prohibit them from entering the property of the defendants. The effect of the prohibition is to deny the plaintiffs the use of the Swinemar Road. The notice states:

TAKE NOTICE that from the date of this notice forward, you are hereby prohibited from entering the following premises:

6112 No. 3 Highway, Gold River, Lunenburg
County, Nova Scotia.

[94] After the plaintiffs were served with the notice, they did not use the Swinemar Road, except for Glen Rafuse, who acknowledged driving up the Swinemar Road in July 2007.

[95] The defendant, Mr. Swinimer, asked Kevin Fogarty to survey his lands in September 2007 so he would know his boundaries. One of the reasons he had a survey completed was that Glen Rafuse started to mow to the east of his boundary line and south of the Rafuse lot in the Spring of 2007. Mr. Swinimer went over his boundaries once the survey was completed and placed steel girders along the boundary line between the Rafuse property and his property as Mr. Rafuse would not stop mowing his property. He placed these in July/August of 2007. The beams were eight inch I-beams, eight inches off the ground. He testified that when they were placed on the ground they were not continuous and there were breaks between them, possibly two, three or four feet. He said this stopped Mr. Rafuse from mowing the property.

[96] Around September 2007 Mr. Swinimer removed the I-beams and replaced them with a yellow fence. He acknowledged on cross-examination that there was a right-of-way through the property but said it was a right-of-way when necessary. He testified that since the Rafuses have a right-of-way over John's Road he did not think it necessary that they pass over his property.

[97] Mr. Swinimer admitted that he blocked the right-of-way but said the rocks and other obstructions were used to stop cars, not pedestrians. He acknowledged that he had a *Protection of Property Act* notice served on the plaintiffs, and acknowledged that at the time he issued these notices, that the Rafuses had the use of Swinemar Road. When asked why he would do this, he testified that he was instructed to do so by the RCMP.

[98] He agreed on cross-examination that he blocked the road to force the Rafuses to accept a new road that he had constructed which accessed their property from highway #3 up the Erbin Road. He intended to have the Rafuse family

release their interest in the Swinemar Road in return for the use of the right-of-way over this new road.

[99] Damages may be awarded for interference with a right-of-way: see, for instance, *King v. Brookins* (1980), 40 N.S.R. (2d) 278, 1980 CarswellNS 270 (S.C.A.D.), where the court awarded nominal damages (due to “unsatisfactory and sketchy” evidence on damages) due to an encroachment of the appellant’s lawn over the part of the respondents’ right-of-way.

[100] The service of the notice on the plaintiffs, the blocking of the right-of-way, the placing of the steel beams and the erection of the small fence, were all meant to prevent the plaintiffs using the Swinemar Road, which they were entitled to do by deed. Mr. Swinemar acknowledged as much in his testimony. I am satisfied that the blockage of the right-of-way was designed to force the plaintiffs into accepting an alternate right-of-way into their property. I agree with the submission by the plaintiffs that this was a planned and deliberate interference with their known right-of-way over Swinemar Road. These actions by Mr. Swinimer were callous and inflamed the situation. He upset Ms. Rafuse, a senior citizen who is alone on the property much of the day. The effect of his actions was that the Rafuse family were prevented from using the Swinemar Road, a road over which they had a deeded right-of-way. This prohibition lasted for about two years. I can come to no other conclusion than that the defendant willfully interfered with the Rafuses’ right to use the Swinemar Road. Conduct of this type by a property owner should be discouraged.

[101] Because of this interference with the Rafuse family’s right to use the Swinemar Road, I award general damages to the plaintiffs in the amount of \$2,200.00. I am satisfied that the defendant, Mr. Swinimer, did everything he could to discourage the use of Swinemar Road, by the plaintiffs, and did so in an attempt to force them into accepting an alternate right-of-way so that he could prevent their further use of Swinemar Road. He had served on them a blanket prohibition from entering his lands which had the effect of preventing their lawful right to use Swinemar Road when he was admittedly aware of their deeded access. I have considered that during the time of the blockage and the prohibition from entering his lands, the plaintiffs were not prevented from accessing their property. The Rafuses were able to use the John’s Road access which they had been using for several years.

Issue #3

Did the defendants destroy bushes and shrubs in the plaintiffs's garden and, if so, are the plaintiffs entitled to damages and in what amount?

[102] Lena Rafuse identified a garden area depicted in photos entered into evidence and shown in yellow on the Geomap plan at Exhibit Book 1, Tab 3. She testified that the defendant used an excavator to dig up several of her bushes and shrubs. All of these bushes and shrubs were in the disputed area where there was a possessory claim by the Rafuse family. Ms. Rafuse called the police, and Mr. Swinimer stopped his excavation in that area of the garden. Ms. Rafuse testified that her garden looked like a disaster area.

[103] The plaintiffs provided no estimates for her loss. She testified that she left to her lawyer to quantify the damages. Mr. Swinimer, shortly after the survey was completed by Mr. Fogarty, began clearing his lands with the stated intention of setting up a grazing area for horses. One of the areas he excavated in was the garden area which was the disputed possessory claim which was admitted by the defendants prior to trial. Mr. Swinimer testified that at the time he did the excavation he was not aware that it was a garden area, because of the time of year. In other words, the bushes and shrubs in the garden had not blossomed. I do not accept this evidence of the defendant. The evidence entered by the plaintiffs by way of pictures and oral evidence, all lead me to the conclusion that it would be evident to the defendant that he was digging in a garden. It appears once he was told by Mr. Fogarty that this garden area was within the bounds of his lands, he took the opportunity to begin clearing the garden area. I am satisfied it was another act by the defendant to force the plaintiffs to accept an alternate right-of-way.

[104] The absence of clear evidence as to the precise quantum of damages suffered is not an automatic bar to recovery. In *G. (B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, 2007 CarswellNS 552, the Court of Appeal said, at para. 172:

The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply

do its best on the evidence available: S.M. Waddams, *The Law of Damages*, 2nd ed. looseleaf (Toronto: Canada Law Book Ltd., 1991) at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[105] I am satisfied that a loss has been suffered. As the plaintiffs have not provided evidence of damage, I will set a nominal amount. I award damages against the defendants in the amount of \$500.00.

Did the defendants cause loss of the plaintiffs enjoyment of their property and, if so, are the plaintiffs entitled to damages and in what amount?

[106] Ms. Rafuse described Mr. Swinemar placing steel beams along the right-of-way to her house and garden. The beams were placed on July 24, 2007 and were not removed until September 2007. Mr. Swinemar did not tell her that he was placing the beams and, in her view, he waited until she was alone to do so. Once he removed the beams, he replaced them with a small fence.

[107] Ms. Rafuse described the passage of trucks and heavy equipment at all hours of the day over the newly constructed road that had been built by Mr. Swinimer. She described him building the road next to her property and that his trucks go up and down the road. She introduced a photo in evidence which shows a large dump truck, float and excavator moving past her property. She testified that the trucks go so close to her house that she can almost touch them. Ms. Rafuse testified as a result she could not get a good nights sleep and it affected her appetite. No medical evidence was provided by Ms. Rafuse as to her symptoms.

[108] Craig Swinimer acknowledged the vehicle traffic through the newly constructed road. The new road, he said, provides access to his residential property where he also operates his construction business. He constructed the road so that it could carry heavy equipment. He acknowledged that he uses it daily for ingress and egress by his company vehicles. He said that the trucks leave at 7:00 - 8:00 in the morning and come back at supper time or a bit later. He also admitted that personal cars and friends' vehicles would use the road to access his property. When asked whether this use of the road causes disruption he testified that there would be no dust with the type of Class A gravel placed on the road. He acknowledged, however, there would be noise when the heavy machinery passed in the morning and evening.

[109] There was no evidence, other than that of Ms. Rafuse, that there was noise and dust. I accept the evidence of Mr. Swinimer that there would be no dust with Class A gravel. Mr. Swinimer did acknowledge that there would be noise associated with the vehicle traffic. Other than for the testimony of Ms. Rafuse, there was no evidence of any further effect of the use of the right-of-way by Mr. Swinimer.

[110] There is authority for the proposition that damages may be awarded for loss of enjoyment of one's property on the basis of nuisance: see, for instance, *Cattell v. Great Plains Leaseholds Ltd.*, 2008 SKCA 71, 2008 CarswellSask 356 (Sask. C.A.), at paras. 31-33. Cromwell J.A. (as he then was) described nuisance as follows in *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2007 NSCA 92, 2007 CarswellNS 379, at paras. 127-128:

... nuisance is concerned with unreasonable interference with the enjoyment of land resulting from another's conduct elsewhere. The interference with the plaintiff's enjoyment of land must be indirect rather than direct.... As the editor of *Street on Torts* put it in a passage cited with approval in *Royal Anne Hotel Co. v. Ashcroft (Village)*, [1979] 2 W.W.R. 462 (B.C. C.A.), a person commits private nuisance when he or she "... is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land": Margaret Brazier, *Street on Torts*, 8th ed. (London, Edinburgh: Butterworths, 1988) at 314-315 [emphasis by Cromwell J.A.]....

... there is virtually no doubt that nuisance is concerned with indirect, not direct, interference with the plaintiff's enjoyment of his or her land in the sense that the interference must originate elsewhere than on the affected land itself....

[111] The property over which the right-of-way runs is owned by Mr. Swinimer. It is used to access his residential premises. The right-of-way was in existence since the conveyance from Harry Swinimar to Lena Rafuse's husband, Lewis Rafuse. Mr. Fogarty testified that the bed of this new road is no closer to the Rafuse property than was the bed of the Swinimar Road. The situation for Ms. Rafuse is not unlike that of many property owners in Nova Scotia that have a right-of-way running adjacent to their lands. I am not satisfied on the evidence that the plaintiffs have met their burden to establish an entitlement to damage for loss of enjoyment of use. The main use of the property appears to be in the morning and evening and

would not seem to be an unreasonable use. The defendants' vehicles leave early in the morning and return later in the evening.

[112] Not only are there are many properties that have private rights-of-way running close to the property boundary lines, but there are many properties in Nova Scotia that are built very close to highways where this type traffic is experienced at all hours of the day and night. I am not satisfied that the plaintiffs have met their burden and I, therefore, dismiss the plaintiffs' claim under this heading.

Costs

[113] The parties have enjoyed mixed success. Given the mixed success of the parties, I would not be inclined to award costs to either party, however, I will make no final determination until I have further submissions from the parties. If the parties are unable to agree on costs, I direct written submissions be provided within ten days of the date of this decision.

Pickup, J.