

IN THE SUPERIOR COURT FOR THE STATE OF VERMONT
IN AND FOR THE COUNTY OF WASHINGTON, CIVIL DIVISION

CALVIN BLODGETT,

Plaintiff,

v.

TOWN OF MORETOWN,

Defendant.

Docket No. 669-9-12 Wncv

10:01 a.m.

August 18, 2014

HEARING
BEFORE THE HONORABLE HELEN TOOR
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

FOR THE PLAINTIFF:

Stephen Cusick
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I N D E X

<u>WITNESS (ES)</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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FOR THE PLAINTIFF:

Calvin Blodgett	--	--	4	8
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FOR THE DEFENDANT:

John Hoogenboom	10	16	31	35
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MISCELLANEOUSPAGE

None	--
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EXHIBITSIDEVD

PLAINTIFF'S EXHIBIT 4	Map	--	40
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1 (Proceedings commence at 10:01 a.m.)

2 THE BAILIFF: All rise. Thank you, you may be
3 seated. And the matter before the Court at this time, is
4 docket number 669-9-12 Wncv. Appellant, Calvin Blodgett,
5 represented by Attorney Cusick. Appellee, Town of Moretown,
6 represented by Attorney Gillies. Also, at the Appellee table
7 is John Hoogenboom, vice chair of the Selectboard, and is
8 accompanied by Michelle Beard, also on the Selectboard.

9 THE COURT: Good morning everyone.

10 MR. GILLIES: Good morning.

11 THE COURT: So, we are, as I understand it,
12 continuing the hearing that we started a while ago, because it
13 was not resolved by agreement, is that correct?

14 MR. CUSICK: Correct, Your Honor.

15 MR. GILLIES: That's correct, Your Honor. We -- but,
16 you may remember there was a magical moment where we thought we
17 had a way of settling this. The Selectboard --

18 THE COURT: Uh-huh.

19 MR. GILLIES: -- decided that that -- I'm not sure I
20 should even get into that, but we did decide --

21 THE COURT: It didn't get resolved.

22 MR. GILLIES: -- there was not any middle ground that
23 we could find. We're very close, but not so close we can
24 settle it.

25 THE COURT: Okay. So, I know that we had

1 Mr. Blodgett's testimony, and I don't think it got beyond that.
2 So, we're doing --

3 MR. CUSICK: We were in the middle of Mr. Blodgett's
4 cross-examination by attorney Gillies.

5 THE COURT: Okay. Does that sound right?

6 MR. GILLIES: Yes, but I --

7 THE COURT: Are you ready to present it?

8 MR. GILLIES: -- do not -- I'm -- I have nothing more
9 to cross on that, so.

10 THE COURT: Okay. All right, did you have any other
11 witnesses?

12 MR. CUSICK: Yeah, may I redirect briefly, Your
13 Honor?

14 THE COURT: Yes. Go ahead. So, come on back up
15 here, and we'll swear you in.

16 CALVIN BLODGETT

17 Plaintiff, having been duly sworn, testified as follows:

18 THE WITNESS: I do.

19 THE BAILIFF: You may be seated, sir.

20 MR. CUSICK: May I approach the witness?

21 THE COURT: Go ahead.

22 REDIRECT EXAMINATION

23 BY MR. CUSICK:

24 Q Just so that I can refresh everybody's memory,
25 Mr. Blodgett, can you please identify on this map the Skomitz

1 camp parcel? Is this the parcel right here?

2 A (No audible response)

3 Q Okay. And was there any discussion regarding the
4 Skomitz camp parcel at mediation?

5 A Yes, there was.

6 Q Okay. And can you describe that discussion?

7 A I was --

8 MR. GILLIES: Your Honor, I'm going to object to the
9 admissibility of discussion --

10 THE COURT: Normally that would not --

11 MR. GILLIES: -- of this mediation.

12 THE COURT: -- be admissible.

13 Mr. Cusick, why would it be here?

14 MR. CUSICK: Because in this instance, Your Honor,
15 it's going to the formation of the contract of knowledge of the
16 parties in a formation of contact on the contract. It's been
17 the towns position that there was no discussion of mediation
18 regarding the Skomitz property. We believe that's pretext, and
19 we also know that there actually was discussion.

20 THE COURT: Wait, I'm confused. The mediation that
21 you just did?

22 MR. CUSICK: No, the mediation --

23 THE COURT: Mediation --

24 MR. CUSICK: -- which is the subject of this
25 agreement.

1 THE COURT: Okay. I'm trying to remember what the
2 history is here. Right, so there was -- was it a formal
3 mediation? I can't remember --

4 MR. GILLIES: Yes.

5 MR. CUSICK: Attorney Spink was the mediator down
6 there.

7 THE COURT: Okay. And you're saying that it's a
8 exception to the normal rule again, because what?

9 MR. CUSICK: There's a formation in the contract that
10 says -- so we're -- in order to --

11 THE COURT: That happened in mediation?

12 MR. CUSICK: -- that happened in mediation in order
13 to determine the -- the proper use of the judgments to do that
14 to go beyond the language of the document instead of -- and
15 assess the arguments on this --

16 THE COURT: Right. And this is really an action to
17 enforce the agreement that came out of mediation? Is that --

18 MR. CUSICK: That's correct, Your Honor --

19 THE COURT: -- is that --

20 MR. CUSICK: -- that's what the --

21 THE COURT: -- a fair decision?

22 MR. CUSICK: -- hearing is about. Our motion to
23 enforce (indiscernible).

24 THE COURT: So, Mr. Gillies, it sounds like this
25 would be different than the usual situation.

1 MR. GILLIES: May I add to my objection? Parol
2 evidence.

3 THE COURT: Which I guess would come in if things
4 aren't ambiguous, would it not?

5 MR. GILLIES: I've heard it was ambiguous.

6 THE COURT: I'll allow it. Go ahead, overruled.

7 BY MR. CUSICK:

8 Q Okay. Was there a discussion at the mediation
9 regarding the Skomitz camp parcel?

10 A Yes.

11 Q Okay. Can you --

12 THE COURT: How do you spell that?

13 MR. CUSICK: S-K-O-M-I-T-Z.

14 THE COURT: Thanks.

15 BY MR. CUSICK:

16 Q Can you recount that session, please?

17 A My best recollection is that I was asked about the camp
18 there and I brought it up -- the -- that there's a camp across
19 the brook, and then it was brought up again that, does anybody
20 live at that camp? No, it's a camp. And it sat there, and --
21 but, I own the land all around it. And Mr. John Hoogenboom
22 asked about the camp and mentioned, and Mr. Paul Gillies also
23 asked and the mediator asked.

24 Q Mr. Hoogenboom is -- was representing the Town at
25 mediation?

1 A Representing the Town, right.

2 Q Okay. And have you had the opportunity to refresh your
3 recollection of this mediation -- of the mediation recently?

4 A Yes, I have.

5 Q And how did you do that?

6 A I listened to a tape.

7 Q And who took that tape?

8 A We did.

9 Q And the tape was of what?

10 A Pardon?

11 Q What was the tape of?

12 A Of the mediation.

13 MR. CUSICK: I have no further questions, Your Honor.

14 THE COURT: Mr. Gillies, any questions?

15 MR. GILLIES: Yes, I have, Your Honor.

16 THE COURT: Uh-huh.

17 RECROSS-EXAMINATION

18 BY MR. GILLIES:

19 Q When -- where -- you do agree that the -- in mediation
20 we were separated into two rooms?

21 A We were separated into two rooms, correct. At one
22 point.

23 Q And you taped it in the earlier section, is that what
24 you were saying?

25 A When you, Mr. John Hoogenboom, Mr. Cusick, myself and

1 Nancy and Mr. Spink, was at the table, is when everything was
2 pointed out. And that's when you were writing down the
3 stipulations of what we were going to agree to and not agree
4 to. We did (indiscernible).

5 Q As long as you have opened the door, what was the
6 discussion about the camp?

7 A If what this property was back there, you showed the
8 map, Mr. Spink and somebody showed the map, and asked about the
9 top of that building there. And I said I do not own that
10 building.

11 Q Okay.

12 A That is the Skomitz camp. And somehow, during that
13 same time, the Martin's camp way up above you, which is not on
14 that map, was discussed.

15 Q Okay. Thanks.

16 THE COURT: Anything else?

17 MR. CUSICK: No, Your Honor.

18 THE COURT: Okay. You can step down, thanks.

19 Mr. Cusick, any other witnesses?

20 MR. CUSICK: No, Your Honor.

21 THE COURT: All right. Mr. Gillies?

22 MR. GILLIES: We'll call John Hoogenboom.

23 THE COURT: Mr. Hoogenboom, come on up.

24 JOHN HOOGENBOOM

25 Called as a witness for the Defendant, having been duly sworn,

1 testified as follows:

2 THE WITNESS: Yes, I do.

3 THE BAILIFF: Please be seated.

4 DIRECT EXAMINATION

5 BY MR. GILLIES:

6 Q Tell us your name, sir?

7 A John Hoogenboom.

8 Q Your job, as far as the Town of Moretown goes, I'm
9 sorry?

10 A Vice chair of the Selectboard.

11 Q And you were present at the mediation?

12 A I was.

13 Q And does your recollection agree with Mr. Blodgett's,
14 that the subject of the camp was discussed at the session
15 within the mediation where we were all together?

16 A The camp was discussed.

17 Q And is it your recollection that during the mediation,
18 whether the joint session or separate session or in the signing
19 of the agreement, that there was any promises made by the Town
20 of Moretown to discontinue the road from the Skomitz camp to
21 the area of the new -- the new orientation of the road?

22 A No, what the discussion was, was basically, who had a
23 right-of-way into their camp, and it was discussed that nobody
24 would be cut-off. If in fact we didn't give up that
25 right-of-way, that section of right-of-way, that that would not

1 cut off any landowner from getting to their property.

2 Q And --

3 MR. GILLIES: May I approach?

4 THE COURT: Yes.

5 BY MR. GILLIES:

6 Q This is Exhibit 4 of the Plaintiff's. Could you point
7 out the Skomitz camp?

8 A Right here.

9 Q And could you point out the new route that the parties
10 generally agreed with, would be the alternative?

11 A That would be --

12 Q All right.

13 A We were coming here.

14 THE COURT: I can't actually see that.

15 MR. GILLIES: All right. Let --

16 BY MR. GILLIES:

17 Q Now point to it.

18 A This one right here.

19 THE COURT: The bright yellow?

20 THE WITNESS: Yeah.

21 MR. GILLIES: Yes.

22 BY MR. GILLIES:

23 Q And what is -- was it settled as to what this route
24 would be? Whether it would be a trail or a resulting
25 right-of-way, or retained as a Town trail?

1 A That section would be retained so that this -- they
2 still have a right-of-way to their camp.

3 Q Okay. And the agreement was that -- and what was the
4 agreement relative to the Blodgett improvements and the access
5 to the Moretown mountain road from -- and crossing the brook,
6 what was the agreement there?

7 A Well the agreement here was that we would not basically
8 force him to remove his building, because --

9 THE COURT: Can --

10 THE WITNESS: -- the Town right-of-way is there.

11 THE COURT: -- just identify who you mean by him.

12 THE WITNESS: Mr. Blodgett.

13 BY MR. GILLIES:

14 Q So, it would be fair to say that there would be no
15 crossing of the brook at his place?

16 A Correct.

17 Q And did your understand -- was it your understanding
18 that the stipulation was a final document and that no other
19 decision needed to be made by the Town?

20 A At that point, correct. Yes.

21 Q So, the Town was committed to that. You had -- did you
22 have authority of that meeting to make a commitment to the
23 Town?

24 A Yes, I did.

25 Q Good. And what -- and then was that all that was

1 needed to end the case?

2 A That's correct.

3 Q Was there anything left over? Did Mr. Blodgett have to
4 do anything after the signing of the stipulation?

5 A Yes. He was to work with the landowner that adjoins
6 his property to locate a accessible route that's -- that was
7 basically agreeable to the Selectboard.

8 Q And was the Selectboard prepared to accept anything
9 that he proposed?

10 A We accepted the new route, but we did not accept
11 cutting off the access to the Skomitz property.

12 Q Thank you.

13 THE COURT: Mr. Cusick? Oh actually, can I just ask
14 one clarification?

15 THE WITNESS: Sure.

16 THE COURT: He asked you when -- if the new route was
17 put in, what was going to happen with the old route, and you
18 didn't clarify what the nature of it would be.

19 THE WITNESS: Okay. The --

20 THE COURT: You said -- you know road trail, et
21 cetera.

22 THE WITNESS: Okay. The old -- when you say old
23 route, do you mean the -- the one that the --

24 THE COURT: Well --

25 THE WITNESS: -- survey showed or the one that has

1 been in use?

2 THE COURT: The one we were just looking at on that
3 exhibit. Maybe he could get that back for you. So, the double
4 line or whatever, four lines I think come from here, yeah, that
5 one. What would you describe that as, first of all?

6 THE WITNESS: This?

7 THE COURT: Yeah.

8 THE WITNESS: This is the right-of-way that has been
9 used.

10 THE COURT: Okay.

11 THE WITNESS: Okay. But, that's not where the -- it
12 was shown to be.

13 THE COURT: And what were you -- what was your
14 understanding of what was going to happen with that access, if
15 you --

16 THE WITNESS: The access --

17 THE COURT: -- adopted the new route?

18 THE WITNESS: -- going across the brook and up to the
19 point where Skomitz would have access we would -- we would give
20 up. The only part we needed --

21 THE COURT: The lower part, then?

22 THE WITNESS: -- the only part we needed was so that
23 landowners could get to their homes.

24 THE COURT: Right. But, that line --

25 THE WITNESS: Uh-huh.

1 THE COURT: -- I don't know what to call it. Thank
2 you, Mr. Gillies. What was going to happen with the rest of
3 that? Was it going to be a trail, a road? I -- you didn't
4 answer his question earlier about that, and I'm just --

5 THE WITNESS: Okay.

6 THE COURT: -- trying to clarify.

7 THE WITNESS: We were going to throw up this portion,
8 but still have a portion here, so that --

9 THE COURT: As a road?

10 THE WITNESS: -- they can get to their --

11 THE COURT: As a road?

12 THE WITNESS: -- they can get to their camp.

13 THE COURT: As a road?

14 THE WITNESS: Correct.

15 THE COURT: Okay. That's all I was trying for.

16 Okay. Mr. Cusick?

17 MR. GILLIES: Actually, if I could just clarify that?

18 THE COURT: Yeah, sure.

19 BY MR. GILLIES:

20 Q Was it a road or a trail?

21 A A trail; Town trail.

22 Q Was it -- but, it was a Town trail?

23 A Town trail.

24 Q Good, thank you.

25 THE COURT: And are -- so, are you saying that's what

1 it's been? Town trail?

2 THE WITNESS: That is what has been used as the
3 trail, correct.

4 THE COURT: Okay. Mr. Cusick, go ahead.

5 MR. CUSICK: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. CUSICK:

8 Q Touching on your last comment --

9 A Uh-huh.

10 Q -- are you saying this was currently used as a trail?

11 A Yeah.

12 Q Are you saying that there's a -- that it's used as a
13 trail right here? From the -- from the road across the brook
14 on Mr. Blodgett's --

15 A Correct.

16 Q -- property?

17 A Correct. That is correct, yes.

18 Q Okay. How -- isn't this a rather steep crossing right
19 here?

20 A It is a steep crossing. It hasn't always been, but it
21 is --

22 Q Okay.

23 A -- a steep crossing.

24 Q Okay. But, how do people cross it now, if it's so
25 steep?

1 A Well, they have difficulty, because Mr. Blodgett had
2 put a lot of material up on the bank to make it so steep that
3 it would be difficult to get up.

4 Q Do you have any idea, how many people use that
5 crossing?

6 A As far as I know, in terms of frequent use, it's really
7 one person.

8 Q One person?

9 A Right. Yeah.

10 Q Okay. So --

11 A But, there's still -- the Skomitz do have an access
12 there.

13 Q Okay. Do the Skomitz use that access?

14 A Yes, when they --

15 Q They use this for access --

16 A -- when they get to their camp, yes when they get to
17 the camp.

18 Q -- across the (simultaneous speaking) --

19 THE COURT: Wait, whoa, whoa, whoa, one at a time,
20 please.

21 MR. CUSICK: I'm sorry.

22 THE WITNESS: Yeah. When they go to their camp, yes
23 they would use that.

24 BY MR. CUSICK:

25 Q They would go across the Blodgetts' property, then

1 across the steep place in the brook to get over to their
2 property?

3 A Correct.

4 Q How do you know that?

5 A Because that's the only way you could get there.

6 Q Okay. Have you ever talked to him about that?

7 A No, I did not.

8 Q Okay. So, did you ever verify that they use that?

9 A No, I've not verified it.

10 Q So, if Mr. Blodgett were to testify that they don't use
11 it for that, you really wouldn't have any way to account to
12 that, would you?

13 A Well, let's put it this way, that's the only access.
14 Whether they use it --

15 Q What about down here --

16 A -- frequently or not.

17 Q Excuse me.

18 A Okay.

19 Q What about down here, is there access down here?

20 A No.

21 THE COURT: And what about coming from above?

22 BY MR. CUSICK:

23 Q What about -- this -- as I understand it, this comes in
24 over here, can they come down that way?

25 A Can they come down this way?

1 Q Yes.

2 A Yes.

3 Q Okay. So, there is another access then? This way?

4 A When you said there is another access --

5 Q There is an access, this way -- you're saying this --
6 you were saying this was an access --

7 A Yes, it is.

8 Q -- at the --

9 A Yes.

10 Q -- now you're saying that this is an access, as well,
11 coming from this direction?

12 A Correct.

13 Q Okay. All right. So, you're saying that there -- in
14 your testimony, you testified that there was discussion
15 regarding the Skomitz camp?

16 A Yes.

17 Q Okay. I'm going to have you look at the -- a copy of
18 the manual under the original exhibits.

19 THE COURT: There's our folder.

20 MR. CUSICK: Thank you.

21 COURT: Can I just ask a question while he's looking
22 for that?

23 THE WITNESS: Sure.

24 THE COURT: When you say those are trails --

25 THE WITNESS: Yes.

1 THE COURT: -- what kind of vehicle can go on those
2 trails?

3 THE WITNESS: That one basically -- it's basically
4 four-wheel drive.

5 THE COURT: Four-wheel? And over the brook, as well?

6 THE WITNESS: Correct.

7 THE COURT: Okay.

8 BY MR. CUSICK:

9 Q The Judge just asked you over the brook as well, you
10 could take a four-wheel drive over the brook at that location
11 on the Blodgett --

12 A I'm not sure right now if that can be done, because the
13 banks have been --

14 Q It's pretty steep in there?

15 A -- so steep, right. And my understanding is that the
16 owners have not been able to get across at that point.

17 THE COURT: What owner?

18 MR. CUSICK: You say that --

19 THE COURT: What owner? What owner?

20 THE WITNESS: Both, Martin, Guy Martin, and then the
21 Skomitz.

22 THE COURT: Okay.

23 BY MR. CUSICK:

24 Q Do you recognize this document, Plaintiff's Exhibit 2?

25 A Yes, I do.

1 Q And what is it?

2 A This is the agreement that we reached, during --

3 Q Okay.

4 A -- the mediation.

5 Q And on the last page of it -- and it has your name and
6 your signature?

7 A It does, yeah.

8 Q And that's Calvin, Moretown underneath it?

9 A Yes.

10 Q And you testified to attorney Gillies, that you have
11 the authority to buy the Town in the stock market?

12 A Yes.

13 Q Now, turning -- what was your understanding in looking
14 at the document? I prefer for you to look at the document as
15 we go through this. What was your understanding of the first
16 step that Blodgett had to do regarding this area that's
17 outlined in yellow?

18 A Our understanding was that it would be his, basically
19 his job to determine the best place to cross. And if it meant
20 being on another landowners property, getting permission from
21 the landowner.

22 Q His ultimate proposal ended up being -- going on his
23 property?

24 A Correct.

25 Q Okay. And I believe I heard you testify to your

1 attorney, Gillies, that Mr. Blodgett satisfied that part of the
2 agreement?

3 A He did.

4 Q Okay. And just to -- just to make it official here, if
5 you look at paragraph two of the agreement, states you still
6 look for a route in a course running westerly from the four
7 degree corner of the original survey to meet the Moretown
8 Mountain Road, correct?

9 A Correct.

10 Q And that's what this does?

11 A Correct.

12 Q And that's at Calvin Blodgett's altern (phonetic sic)?

13 A That --

14 Q The proposal?

15 A -- would satisfy that, yes.

16 Q Okay. Now, can we go to the second page of the
17 agreement --

18 A Uh-huh.

19 Q -- and could you just read the first paragraph, please?

20 A F in the --

21 Q Month --

22 A -- matters?

23 Q Months, I believe.

24 A Oh months, months of repose, Calvin Blodgett, can
25 propose a new route as described in paragraph two, above --

1 Q I'm going to stop you -- stop just briefly there.

2 A Okay.

3 Q But, you did do, correct?

4 A Yes.

5 Q Okay. Please keep reading.

6 A Learn whose land would be crossed, and if Mr. Case is
7 involved, obtain his consent to the new location without claim
8 of compensation by the Town of Moretown, the Town shall.

9 Q Okay. So, if he fills his part, then the Town shall do
10 something, and we're going to get to that in --

11 A Correct.

12 Q Correct? Okay. Why don't we go to paragraph five,
13 what the Town shall do then?

14 A Okay. Paragraph five, or -- the last one?

15 Q Paragraph five, yeah, the next -- the subsequent
16 paragraph to paragraph --

17 A Oh, okay. Consent to a dismissal without prejudice of
18 this appeal, as shall Calvin Blodgett after 30 days post-public
19 hearing on the change of location.

20 Q Okay. And so number one, there'd be a dismissal, and
21 number two, you were to select where it was to hold a hearing
22 on this change of location?

23 A Correct.

24 Q Correct. Okay. Then what was to happen next?

25 A Include within that hearing the discontinuance of Town

1 Trail 49 from four degree corner of the original survey
2 southerly of the -- I'm not sure what that says.

3 Q Is that about a turn, perhaps?

4 A Southerly of the turns? Okay.

5 Q Okay. You see that four degree turn down here?

6 A Yeah.

7 Q And can you identify it? Is this is it right here?

8 A That's it right there.

9 Q Okay. And could you show me southerly of the four
10 degree turn?

11 A Southerly would be this way.

12 Q Okay. So, when this document's saying discontinue of
13 Town Trail 49, from the four degree corner of the original
14 survey southerly of the turn. What does that mean to you?

15 A That does say here, but there was no indication that
16 Skomitz would not have the right-of-way.

17 Q Okay. That's -- but, my question is you agree that
18 this document, this mediation agreement, requires at least a
19 hearing on the discontinuance southerly of this four degree
20 turn, correct?

21 A Correct.

22 Q Okay. And did the Town ever try and get a hold of
23 Ms. Skomitz regarding her interest in this?

24 A No, we did not.

25 Q When Ms. Skomitz says -- to your knowledge, ever raise

1 an objection to this discontinuance?

2 A Not to the Town, as far as I know, but perhaps she did
3 speak with our Selectboard clerk, who is now the Town
4 administrator, Cheryl Brown.

5 Q Did the Town ever hold a hearing on the discontinuance
6 of this?

7 A No.

8 Q Doesn't the agreement require the Town to hold a
9 hearing on the discontinuance?

10 A It does, but we did not, because the -- because of the
11 Skomitz property.

12 Q Okay. But, why did it -- this mediation occurred on
13 August 5th, 2013, correct?

14 A Yes.

15 Q Okay. Do you recall meeting with the Selectboard on
16 that same date, later that day?

17 A On which day, I'm sorry?

18 Q August 5th, 2013.

19 A August 5th. Well, to be very honest, I'm not sure.

20 Q I'm going to show you what's marked as Plaintiff's
21 Exhibit 3.

22 A Okay. Yes, we wouldn't have met then; that's the first
23 Monday of August, right. Okay.

24 Q Okay. And -- excuse me.

25 A Sure.

1 Q And if you could read it on the second page there,
2 paragraph, Blodgett appeal?

3 A It says Blodgett mediation regarding appeal of the
4 location of Trail Number 49. John was seconded by Tom to enter
5 into an executive session at 9:31 to discuss the Blodgett
6 mitigation where premature general public knowledge would
7 clearly place the Town in a substantial disadvantage, all were
8 in favor.

9 Q Okay. So, you had the mediation agreement of that --

10 A Yeah.

11 Q -- meeting, right? It's on the same day as the
12 mediation?

13 A Yeah.

14 Q And when you came out of the executive session, did you
15 denounce the agreement, because of the discontinuance provision
16 in it?

17 A No decisions were made, the mediation settlement
18 process will be ongoing for the next four months and the
19 details will remain confidential.

20 Q If the Town objected to the discontinuance provision,
21 why did it not come out on the same day of the mediation or
22 shortly thereafter?

23 A At that point we weren't aware of the location of the
24 Skomitz property.

25 THE COURT: You weren't aware of what?

1 THE WITNESS: The location of the Skomitz property.

2 BY MR. CUSICK:

3 Q Didn't you testify earlier that you actually discussed
4 the Skomitz property during mediation?

5 A We discussed -- we discussed that, it was not -- I
6 don't remember seeing it on the map.

7 Q Thank you.

8 A I know it was mentioned and that they would continue to
9 have access. That was the important part, that they would
10 continue to have access over a Town right-of-way.

11 Q Let me show you Exhibit number 9. I'll ask if you
12 recognize the -- this document?

13 A Yes.

14 Q Okay. If I may, this is the survey, the Townsend
15 survey of the Town Trail 49; is that correct?

16 A That's correct.

17 Q Okay. And this was the basis for -- this was for
18 approving this -- the Town Trail 49 route; is that correct?

19 A That's correct.

20 Q And when did the Selectboard actually move to adopt
21 Town Trail 49?

22 A To adopt?

23 Q To adopt the Townsend -- this Town Trail 49?

24 A You mean the rerouted?

25 Q Right. The Townsend proposal to reroute the

1 property --

2 A Uh-huh.

3 Q Or not -- excuse me, not -- the Townsend proposal --

4 THE COURT: I'm not sure what you mean by the
5 Townsend proposal? So, maybe you can have him clarify?

6 BY MR. CUSICK:

7 Q Okay. What is the Town Trail 49 route based on?

8 A Do you mean what has been used for Town Trail 49? Or
9 the new road?

10 Q Let me -- let me start it. Do you recognize this
11 document?

12 A Yes.

13 Q Okay. Can you describe it for the Court?

14 A This is finding to the fact that this is regarding Town
15 Trail 49, finds it in fact in the collusions of law and
16 decision.

17 Q And that situates -- is the Selectboard saying this is
18 where Town Trail 49 is located, correct?

19 A Yes.

20 Q Okay. And what was that decision based on? Was there
21 a survey that that was based on?

22 A Yes, it was based on the survey that -- from Robert
23 Townsend.

24 Q Is this document that survey? Or a portion of that
25 survey?

1 A It's a portion of it, yes.

2 Q Okay. And does it designate Town Trail 49 according to
3 Robert Townsend?

4 A Yes. Right here.

5 Q Okay. And does it identify the Skomitz camp on there?

6 A Right here.

7 Q And what does it say there?

8 A It says land now, slash, formally of Kathleen Skomitz.

9 Q And when was --

10 THE COURT: Can I just clarify what exhibit that
11 was?

12 MR. CUSICK: This is Exhibit number 9, Your Honor.

13 THE COURT: All right. Thanks.

14 BY MR. CUSICK:

15 Q What -- when did the Selectboard approve Town -- this
16 Town Trail 49, according to Townsend?

17 A That was 23rd of August, 2012.

18 Q Okay. So, on the 20th day of August in 2012, the Town
19 adopted the survey for Town Trail 49 from Robert Townsend,
20 correct?

21 A Correct.

22 Q And on that map, the Skomitz property is indicated,
23 correct?

24 A It is indicated.

25 Q So, at that point in time the Town knew that the

1 Skomitz property was on the subject trail, correct?

2 A Correct. But, the understanding was that we're talking
3 about this piece that we were getting rid of. This piece would
4 still go to her camp.

5 Q But, the mediation agreement doesn't say that. All
6 right? It says south of the four degree point, correct?

7 A It actually does say that.

8 Q Okay. Do you -- at his part of testimony, you were
9 here at the time that Mr. Blodgett testified that that portion
10 of Town Trail 49, that Townsend identified on Blodgett's
11 property, is not used by anyone; you're disputing that today?

12 A I'm sorry, which -- by whom --

13 Q By --

14 A As far as I know, that's not being used now.

15 Q Okay. That's slightly different than your testimony
16 earlier, but it's your testimony now that this is not being
17 used?

18 A I really don't know whether it's being -- I'm not
19 there, so I can't really tell. I know that there has been some
20 discussion about the banks being very steep and very difficult
21 to get up the bank.

22 Q So --

23 A Now whether Mr. Martin has done that or not, I don't
24 know.

25 Q So, you -- can you even dispute Calvin Blodgett when he

1 says that this has not been used for access? Do you have
2 personal knowledge?

3 A I don't have any knowledge if it has been used, or
4 hasn't been used.

5 Q Okay.

6 MR. CUSICK: I have no further questions, Your Honor.

7 THE COURT: Mr. Gillies?

8 MR. GILLIES: Thank you.

9 REDIRECT EXAMINATION

10 BY MR. GILLIES:

11 Q In the -- do you still have the --

12 A Yeah.

13 Q And your understanding in stipulations, were you
14 obliged to discontinue the road from the four percent corner to
15 the south at a hearing? Well, let me ask you it in a different
16 way.

17 A Okay.

18 Q What kind of a hearing is this, that you would be
19 holding, is this a quasi-judicial hearing?

20 A What you're speaking of, what hearing?

21 Q If you will look at page 2, section 6, included within
22 that --

23 A Oh, okay.

24 Q -- hearing, that --

25 A Included within that hearing?

1 Q Would that be a hearing that's called, according to
2 proper notice, the site plan, and the --

3 A Yes.

4 Q -- testimony?

5 A Yes.

6 Q Would you be able to exercise any discretion at that
7 hearing, or would you feel as though the stipulation obliged
8 you to reach a certain, particular outcome?

9 A There would be a discretion.

10 Q And your understanding of the present differences
11 between what Mr. Blodgett wants and what the Town wants, can
12 you describe precisely what our differences are?

13 A The differences right now, is that it's -- Mr. Blodgett
14 would like it discontinued to that four degree point, and we
15 are saying just discontinue across the brook, up to the Skomit
16 camp, so that they still have access to their property.

17 Q And based on, at least, your understanding what the
18 board has thought, why do they care whether that's a Town trail
19 or a private right-of-way, as Mr. Blodgett has said
20 (indiscernible)?

21 A I don't know.

22 THE COURT: I'm sorry, who? Why does --

23 BY MR. GILLIES:

24 Q Why does the Selectboard --

25 A Oh, the Selectboard?

1 Q -- that it remains a Town trail?

2 A Gives a -- I would say it gives us more control.

3 Q And if the Town had discontinued it, and in some future
4 time there was a need to use it for -- to lay it out, what
5 would be the consequences to the Town?

6 A We wouldn't be able to do it.

7 Q And would you be able to lay out a new road there?

8 A Not if we throw it up completely.

9 Q Well, I mean if you discontinued a road, could you then
10 decide later to lay it out again?

11 A I really don't have --

12 Q Okay. Sorry, I --

13 THE COURT: Mr. Gillies may be the only person in
14 Vermont who knows the answer to that.

15 THE WITNESS: Yeah, that's right.

16 MR. GILLIES: I've always wanted to be the witness
17 and the examiner. But, it doesn't work that way.

18 BY MR. GILLIES:

19 Q Why was the Blodgett proposal originally denied?

20 A Why was the proposal originally denied? When you
21 say --

22 Q Well, let me ask it this way. Did the board make a
23 counter proposal to Mr. Blodgett after he originally said that
24 he would build a -- that he would agree to a rerouting of the
25 route?

1 A Yes.

2 Q And what was the reason that the board came back with a
3 different proposal?

4 A The reason was that we had determined that the Skomitz
5 would no longer have access to the property.

6 Q Okay. Was there a bridge involved?

7 A Was there a bridge?

8 MR. CUSICK: Objection, Your Honor. It's quite a
9 leading question.

10 THE COURT: Well, we've all heard about the bridge
11 anyway, so, unless we're talking about a different bridge.

12 MR. GILLIES: Oh --

13 THE COURT: Overruled.

14 MR. GILLIES: -- this is -- all right.

15 THE COURT: If you can -- if you want to rephrase the
16 question?

17 MR. GILLIES: Yes, I'd be happy to.

18 BY MR. GILLIES:

19 Q Did the board intend to have -- what was the board's
20 intention in crossing the brook in the northerly section
21 proposed by Mr. Blodgett?

22 A What was our intention?

23 Q Yes.

24 A That that would be marked as the new right-of-way.

25 Q Look at page 2 of the stipulation, and section 7.

1 A Uh-huh.

2 Q Do you agree that it says the Town of Moretown shall
3 not be required to construct a road or trail over said new
4 location, nor construct a bridge over the brook?

5 A Correct.

6 Q And did the rejection of the original Blodgett proposal
7 have anything to do with that?

8 A No.

9 Q Okay. Thanks.

10 THE COURT: Mr. Cusick, anything else?

11 MR. CUSICK: Just briefly, Your Honor.

12 RECROSS-EXAMINATION

13 BY MR. CUSICK:

14 Q Isn't it correct that if you were to follow Townsend's
15 Town Trail 49 as it is now, that it would require a bridge over
16 Mr. Blodgett's property?

17 A As it's now located, even though it's not the right
18 location, is that what you're asking?

19 Q No. Mr. Townsend's proposal in his survey --

20 A Uh-huh.

21 Q -- crossed the Blodgett property, the one that goes
22 through his house --

23 A Uh-huh.

24 Q -- the one that's indicated on Exhibit number 9, would
25 that require a bridge to cross on his property?

1 A I'm not sure. We never got to that point.

2 Q Okay.

3 A We certainly did not want to be in a position to deny
4 access to his buildings or to have him remove a building --

5 Q How steep are the banks there, at the Blodgett --

6 A I have no idea.

7 Q Okay. You've stated over and over again, that the
8 reason the Selectboard can't support this, is because of the
9 Skomitz property, correct?

10 A Correct.

11 Q Okay. And isn't it true though that Ms. Skomitz, even
12 if the road was continued, would regain access by state
13 statute?

14 A I believe that's true.

15 Q Okay. Well, then what's the deal then? I mean why do
16 you keep objecting to it? Why does the Town -- excuse me --

17 A Well --

18 Q -- keep objecting to it, when -- let me just rephrase
19 the question, I'm sorry. Okay, you said you stated that access
20 to the Skomitz camp is the key factor in your objection --

21 A Correct.

22 Q -- correct? But, if state statute allows access to
23 that camp, why does that objection still hold?

24 A Because as far as I know, state statute also, at this
25 stage, basically would -- he could continue to use, if Skomitz

1 could continue to use the existing right-of-way, as could the
2 Town.

3 Q So, it would be correct to say, it's not just the
4 Skomitz -- it's not primarily the Skomitz' property, it's the
5 Skomitz' use of the property, but the towns use of the
6 property?

7 A It's the Skomitz -- it's the Skomitz use of the
8 property, however we would want to retain that portion, and we
9 thought we were retaining that portion that would go to
10 Skomitz. It would be their access.

11 Q But, that's not --

12 A And that way in the future, there could be no acts by
13 the Blodgetts to block that or deny travel over that portion.

14 Q So, your action is directed individually at Calvin
15 Blodgett?

16 A I guess I don't understand.

17 Q You just stated that the reason that the Town wanted
18 it is so Calvin Blodgett couldn't do any more with it,
19 basically?

20 A Well, all I know is that in the past he has blocked
21 access across that brook by making the banks too steep.

22 Q How many other property owners, other than Calvin
23 Blodgett and Skomitz, about that parcel?

24 A Guy Martin.

25 Q From the four degree turn south, tell me isn't it

1 correct that the only two property owners, for the four degree
2 turn south, are Skomitz's and Blodgett?

3 A That would be correct.

4 MR. CUSICK: I have no further questions, Your Honor.

5 THE COURT: Mr. Gillies?

6 MR. GILLIES: Nothing else.

7 THE COURT: Okay. You can step down sir, thank you.

8 THE WITNESS: Thank you.

9 THE COURT: Any other witnesses?

10 MR. GILLIES: No, Your Honor.

11 THE COURT: How about you?

12 MR. CUSICK: No, Your Honor.

13 THE COURT: Okay. So, can we just have
14 clarification, Mr. Cusick, on -- and actually could you give
15 him back all the exhibits so I can have them in front of me
16 while I'm --

17 MR. CUSICK: Well, Your Honor, I'm still -- with the
18 last hearing I just had the large-sized version of this. I
19 brought back one that's --

20 THE COURT: Let me see it --

21 MR. CUSICK: -- size --

22 THE COURT: -- okay. Let me see what we have in
23 evidence already. If it's -- if that whole folder of orange
24 exhibits. That orange folder of exhibits, I should say.

25 MR. CUSICK: (Indiscernible).

1 THE COURT: Okay. So, I guess I don't have a small
2 version of that.

3 MR. CUSICK: I just brought it today, Your Honor --

4 THE COURT: Okay.

5 MR. CUSICK: -- yes.

6 THE COURT: So, was that previously admitted, I don't
7 recall?

8 MR. CUSICK: Yeah, it was one of the stipulated --

9 THE COURT: What exhibit?

10 MR. CUSICK: Well, actually I haven't --

11 THE COURT: Lori, do you know if that was admitted
12 before? I don't see it.

13 (Court and clerk confer)

14 THE COURT: Oh, okay. It looks like it was.

15 MR. GILLIES: If there's any question maybe --

16 THE COURT: No, I see it. I see Katelyn's
17 handwriting on it actually. But, then the large one, is that
18 something different? Are you --

19 MR. CUSICK: No, that's --

20 THE COURT: -- offering that too?

21 MR. CUSICK: -- this is -- I did offer it last time,
22 Your Honor, but you didn't want to keep it, because it was so
23 large. And you said you referred to an exhibit that would be
24 filed, that wasn't -- but, I have -- I brought the small ones.

25 THE COURT: Okay. Any objection to any of that?

1 MR. GILLIES: No.

2 THE COURT: What's that marked as?

3 MR. CUSICK: Plaintiff's 4.

4 MR. GILLIES: It's the same number.

5 MR. CUSICK: It's the same number as the last one.

6 Same document --

7 THE COURT: Oh, okay.

8 MR. CUSICK: -- it's just a small version.

9 THE COURT: Exhibit 4 will be admitted.

10 (Plaintiff's Exhibit 4 received)

11 THE COURT: And I will let Lori mark that later,
12 because I don't want to look at it right now. So, if I could
13 just understand Mr. Cusick, what it is you're asking the Court
14 to do and exactly what route your client was -- I -- I mean I
15 think I understand that his proposal is the bright yellow be
16 added, and everything below that disappear?

17 MR. CUSICK: That's correct.

18 THE COURT: And what is his position about the access
19 for the Skomitz property?

20 MR. CUSICK: Well, there's two positions that he has
21 it by -- that they -- that Skomitz have by Statute
22 9 VSA 717(c).

23 THE COURT: Which is --

24 MR. CUSICK: That 19 VSA. But, I covered it pretty
25 extensively in my pleadings, Your Honor.

1 THE COURT: Okay. Yeah, I didn't go back and review
2 everything before today --

3 MR. CUSICK: I would like to read it --

4 THE COURT: -- so, I apologize for that.

5 MR. CUSICK: -- to the Court if that'll be helpful.

6 THE COURT: Go ahead.

7 MR. CUSICK: "A person whose sole means of access to
8 parcel of land or portion thereof owned by that
9 person, is by way of a town highway or identified
10 court order that is subsequently discontinued, shall
11 retain the prior right-of-way over the former town
12 highway, or an identified court order for any
13 necessary access to the parcel, the land, or portion
14 thereof, and maintenance of his or her right-of-way."

15 So, it's -- it's our first argument that there's a
16 right-of-way that exists by law. It's our second argument that
17 my client is more than willing to give the Skomitz a private
18 easement as well in case there's nervousness still on the Town
19 or on the client's part. That's just --

20 THE COURT: Is that what the parties were negotiating
21 about since last time? I don't remember.

22 MR. CUSICK: Yes, it was, Your Honor.

23 THE COURT: And was Skomitz involved in that
24 conversation?

25 MR. CUSICK: I believe that attorney Gillies wrote a

1 letter to her, or at least he copied me on a letter that
2 purportedly went to her.

3 THE COURT: Okay. All right, so as I understand it,
4 the agreement required them to have a hearing, which didn't
5 happen. And so --

6 MR. CUSICK: Correct.

7 THE COURT: -- you are asking for that hearing to
8 happen?

9 MR. CUSICK: That's correct.

10 THE COURT: But, do you disagree with the way that it
11 was described, which is anything could happen as a result of
12 that hearing? I mean all the mediation agreement mandates is
13 that a hearing be held, not --

14 MR. CUSICK: I realize that, Your Honor, but it also
15 commits the Town to other processes in the setting up the
16 alternative route and perhaps it would take more clearly and
17 diligently about the expenses and all. But, also we
18 acknowledge that by statute, there needs to be a hearing. We
19 also acknowledge and purport now that as that hearing arrives,
20 we'll make sure that it's conducted in good faith, and it's a
21 public process with all due process concerns addressed to make
22 sure that it's all above board. Frankly, we don't believe
23 that the Town has treated my client above board, up to this
24 point.

25 We'll be vigilant and I can't say that once the Town

1 does this, if we believe the Town acts in bad faith, even
2 though it's discretionary, I don't believe the Town can act in
3 bad faith. And just simply deny this without a real public
4 process.

5 THE COURT: But, so what you're asking the Court to
6 do, is order that that hearing be held --

7 MR. CUSICK: Yes.

8 THE COURT: -- basically? Okay. Mr. Gillies, your
9 position here?

10 MR. GILLIES: We have not been reluctant to hold the
11 hearing, but we were reluctant to hold the hearing until we
12 worked out the details of what we were doing.

13 THE COURT: Uh-huh.

14 MR. GILLIES: What we were laying out, and what we
15 were discontinuing. I have to say that it just occurred to me
16 that the whole exercise is probably mistaken in that, what the
17 board's intention of discontinuing the road from the Town road,
18 the Moretown Mountain Road across lands of Mr. Blodgett in
19 order to prevent somebody from using it, and getting in the way
20 of his septic tank, and --

21 THE COURT: Uh-huh.

22 MR. GILLIES: -- his work, falls a foul of the
23 principal of 717(c), which says that Mrs. Skomitz could still
24 use it as an access to her own property. I mean there's no
25 ability in the part of the Selectboard to discontinue the

1 resulting private right-of-way that comes out of that. But,
2 the Town is trying to act in good faith here, it's -- obviously
3 there's a lot of frisson between the two parties. But, there
4 -- but, to the extent that the Town will hold a hearing on
5 discontinuance, I will assure the Court that it will be done in
6 good faith. It's a little awkward to have a true impartial
7 quasi-judicial hearing after you've filed for something for a
8 couple of years, but I've -- I'm confident that we can do that.

9 THE COURT: I take it you have not heard from
10 Ms. Skomitz?

11 MR. GILLIES: I have not.

12 THE COURT: And do we even know if she's still alive?
13 Does anybody have any idea?

14 MR. GILLIES: I believe she pays her taxes --

15 THE COURT: Okay.

16 MR. GILLIES: -- annually.

17 THE COURT: And she lives out-of-state somewhere, I
18 presume?

19 MR. GILLIES: I believe so. I don't know where she
20 lives.

21 MR. CUSICK: Your Honor, it's my understanding that
22 it makes no difference what Ms. Skomitz says, because the Town
23 is not going to accept the idea of a private roadway between
24 the two parties as a means for --

25 THE COURT: Even if she was happy with it?

1 MR. GILLIES: Well, I don't want to testify, but the
2 Town's interest is not -- as Mr. Hoogenboom has said, his
3 interest is in policing it, not -- they don't really want to
4 have anything to do with it, but they don't want to have it
5 interfered with. But, also as any town would do to discontinue
6 a road that might later be needed to be laid out --

7 THE COURT: But --

8 MR. GILLIES: -- and therefore we purchase that the
9 Town has -- I mean I dare say there would be --

10 THE COURT: Why would they need to lay it out again
11 in the future?

12 MR. GILLIES: If they discontinue --

13 THE COURT: You're much more of an expert on this
14 than I am.

15 MR. GILLIES: -- if they were to have discontinued
16 it, and then instead of, how many people in town? 2,000 people
17 or 10,000 people in town and that whole area needs to be
18 developed and it becomes a town -- it need -- there's a need
19 for a town highway. A town that's laid out and compensate
20 Mr. Blodgett for the new access to the new right-of-way
21 proposal. In which is one of the main features of the old road
22 struggle with many towns is that many towns are loath to give
23 up anything --

24 THE COURT: Uh-huh.

25 MR. GILLIES: -- but, are happy to give -- dispense

1 with any of the maintenance by making it a trail. But, to
2 preserve the option of at later times, reclassifying it, and
3 building it up into a road if the needs of the residence --

4 THE COURT: Is there --

5 MR. GILLIES: -- require it.

6 THE COURT: -- a way to have it be maintained as town
7 something, whatever it would be called, with limited access?

8 MR. GILLIES: Yes.

9 THE COURT: With a gate or something?

10 MR. GILLIES: It -- by ordinance, it -- they can
11 prevent motorized traffic on it. Although that would
12 somewhat --

13 THE COURT: But --

14 MR. GILLIES: -- defeat Mrs. Skomitz' use.

15 THE COURT: -- right, but I mean, can you have
16 something that's --

17 MR. GILLIES: They could have a gate, they could have
18 a locked gate.

19 THE COURT: Just only the property owners would be
20 the only people with access through the gate?

21 MR. GILLIES: A pedestrian could still use it in any
22 case.

23 THE COURT: Is that something that's been --

24 MR. CUSICK: I don't --

25 THE COURT: -- talked about?

1 MR. CUSICK: -- think so, Your Honor. I mean there's
2 already been so many conflict from four-wheelers coming up and
3 down that road and disturbing the --

4 THE COURT: But, I mean if it was gated, then that
5 would stop them --

6 MR. CUSICK: -- (simultaneous speaking) -- the town.
7 I mean, we don't believe that the Town has acted in good faith
8 up to this point.

9 THE COURT: Well, then how are you ever going to be
10 satisfied with anything they do?

11 MR. CUSICK: Well, to give -- to put a road in there,
12 that they would be responsible for maintaining isn't like
13 exactly the -- that's a greater degree of trust that they'd
14 certainly be willing to give up at this point. I don't --

15 THE COURT: But, isn't that already there?

16 MR. CUSICK: Actually, no it's --

17 THE COURT: I mean isn't that the whole point?
18 You're trying --

19 MR. CUSICK: No --

20 THE COURT: -- (simultaneous speaking) --

21 MR. CUSICK: -- there -- it hasn't -- despite
22 Mr. Blodgett's testimony was that that has not been used as a
23 trail. You can see that Mr. Hoogenboom's testimony was --
24 it --

25 THE COURT: And I'll have to go back and review my

1 notes from the other day --

2 MR. CUSICK: Okay, but it's not been used as a trail
3 from my client's perspective. There's not a trail --

4 THE COURT: Then why does he care about getting rid
5 of it, if it's not really being used? What's the big deal?

6 MR. CUSICK: Because, it's going to bring the
7 four-wheelers, and the -- up and down that route, and if the
8 Town will enforce what's happening here.

9 THE COURT: And why --

10 MR. CUSICK: He's --

11 THE COURT: -- why do you think that's going to start
12 happening now, and it hasn't happened before?

13 MR. CUSICK: It is. It has happened on occasion in
14 the past. That's been the problem, that's one -- been one of
15 the underlying disputes behind this whole case.

16 THE COURT: But, wouldn't the gates be the best way
17 to solve that problem?

18 MR. CUSICK: I don't believe so, Your Honor, no.

19 THE COURT: Okay. I mean the problem is, I -- well,
20 it sounds as if Mr. Gillies may actually be saying that, you
21 know, at this point we'll agree to do the hearing. But, if
22 not, I have to decide whether to order that, but I don't think
23 I can do more than order that a hearing be held, even if I
24 agree with you. And having a hearing doesn't mean your client
25 gets what he wants, so I'm trying to find something that might

1 be a middle ground that would satisfy his concerns.

2 MR. CUSICK: I thought we had a good solution, Your
3 Honor. It was heartbreaking to me that the Town didn't see it
4 that way, because it's going to cost a lot more money and a lot
5 more time.

6 THE COURT: Okay. Are you in agreement about having
7 a hearing or --

8 MR. GILLIES: Certainly.

9 THE COURT: Okay. And that's the only relief you're
10 seeking, Mr. Cusick? Is there something that you want to add?

11 MR. CUSICK: Well, Your Honor, there -- it's kinds of
12 an unrelated issue. We have a claim before the Court on the
13 recording of the interrogatories, which my client raises have a
14 detrimental impact on his ability to convey, or to sell his
15 property.

16 THE COURT: We didn't have -- did we have testimony
17 about that?

18 MR. GILLIES: No.

19 MR. CUSICK: Yes.

20 THE COURT: Oh. Were we separating the issues? I
21 don't -- what are you asking me to do about that?

22 MR. CUSICK: They'll -- that was supposed to be a
23 part of this hearing actually. You added it to after I -- you
24 asked what my client was concerned about, that was the issue.

25 THE COURT: I'm sorry, I'm confused. Do we need more

1 evidence? Or are you saying that I had evidence last time,
2 that I'm not remembering?

3 MR. CUSICK: No, you instructed -- I have a motion to
4 reconsider before the Court on that issue. You instructed
5 attorney Gillies to file a response to that within a month.

6 THE COURT: Okay. I apologize. When we do a hearing
7 in two pieces like this, I kind of lose track of --

8 MR. CUSICK: And at the previous hearing I asked --

9 THE COURT: So --

10 MR. CUSICK: -- if you would like to take evidence,
11 foundations and that.

12 THE COURT: Okay. So, you both briefed that issue,
13 is what you're saying? And I just need to go back and make a
14 determination on that, is that what you're saying?

15 MR. CUSICK: I believe we did, Your Honor, yes.

16 THE COURT: Did you respond?

17 MR. GILLIES: I don't remember.

18 THE COURT: Okay. And --

19 MR. GILLIES: But --

20 THE COURT: All right. Let me go back and look.
21 That was part of your notice of appeal?

22 MR. CUSICK: No, Your Honor, it's part of our --

23 THE COURT: Where you've added --

24 MR. CUSICK: -- motion to amend, because the facts of
25 those after are raising notice of appeal.

1 THE COURT: Right. Okay. Let me just go back. And
2 the Court denied the motion to amend, and that's what you're
3 asking me to reconsider?

4 MR. CUSICK: That's correct, Your Honor.

5 THE COURT: Got it. All right. And it looks like
6 motion to amend was filed in March. There was a response.

7 MR. GILLIES: I did respond?

8 THE COURT: Yeah, you did.

9 MR. CUSICK: I thought -- then I filed a motion to
10 reconsider and you instructed attorney Gillies to respond to
11 that, and I haven't seen a response of that --

12 THE COURT: Oh, okay, let's see here.

13 MR. GILLIES: Apparently I failed on that.

14 THE COURT: Apparently what?

15 MR. GILLIES: I failed, Your Honor.

16 THE COURT: Well, now I'm really confused. So,
17 request to reconsideration was filed May 1st.

18 MR. GILLIES: Actually, I'm not sure I have the
19 motion to reconsider. I just went through my pleadings and I
20 didn't see it.

21 THE COURT: But, on the same day, you filed a reply
22 to the response to the motion to enforce.

23 MR. CUSICK: That's the stuff we just
24 (indiscernible).

25 THE COURT: Okay. So, that's separate? All right.

1 MR. GILLIES: I would be happy to supplement within
2 24 hours.

3 THE COURT: Right. I did give you until July 9th,
4 he's correct. Although, perhaps you decided you didn't need to
5 respond. But, you don't remember that?

6 MR. GILLIES: I have a memory of sorts.

7 THE COURT: All right, any objection to his at --
8 tomorrow?

9 MR. CUSICK: No, Your Honor.

10 THE COURT: Okay. And I think we all got a little
11 off track here by splitting this in the middle, so I understand
12 how that could've gotten lost Mr. Gillies to file. Response to
13 motion number 5 by tomorrow.

14 So, Mr. Cusick, is your point that even if they agree
15 to have the hearing, I still need to resolve that issue --

16 MR. CUSICK: Yes, Your Honor.

17 THE COURT: -- is that where you were going? Okay.
18 But, we could resolve one issue today if they're agreeing to go
19 ahead and proceed with that hearing.

20 MR. GILLIES: We are.

21 THE COURT: And your client's on board with that?
22 And you're not speaking out of spool?

23 MR. GILLIES: Yes.

24 THE COURT: Okay. Okay. So, what would happen next
25 on that, just so everybody's clear about how that works?

1 MR. GILLIES: We need to pick a date that gives 30
2 days notice by law, published in the paper, conduct a site
3 visit, hold a hearing, decision written in -- within -- well
4 probably within a week, but we've lost this -- 45 days. And
5 appealed within 30 after that, so it would make sense for the
6 Court to set a status conference if necessary 60 days out.

7 THE COURT: Well, I don't see that the Court would
8 retain jurisdiction.

9 MR. GILLIES: No, maybe not --

10 THE COURT: I mean --

11 MR. GILLIES: -- but --

12 THE COURT: -- that would be a settlement of --

13 MR. GILLIES: Fine.

14 THE COURT: -- one issue. I'll resolve the other
15 issue --

16 MR. GILLIES: Fine.

17 THE COURT: -- and figure out what to do, but that
18 would close this case I think. I mean --

19 MR. CUSICK: I'm not sure, Your Honor.

20 THE COURT: Why wouldn't it?

21 MR. CUSICK: There's --

22 THE COURT: I mean if he didn't -- if they don't
23 agree, all I have to do is issue an order and we're to -- I
24 mean, if I rule in your favor without their consent, it would
25 be a judgment in your favor, the case would be closed. It --

1 assuming I resolve the other issue, whichever way I resolve it.

2 MR. GILLIES: Their appeal of the decision that they
3 found unacceptable would be a new case.

4 THE COURT: That's what I was thinking. I think it
5 is a new appeal. I mean I don't retain jurisdiction to --

6 MR. CUSICK: An appeal on the underlying appeal, in
7 this case? I mean I --

8 THE COURT: No, I'm saying if I -- I mean that the
9 relief that you were seeking, put aside the other issue --

10 MR. CUSICK: Uh-huh.

11 THE COURT: -- the relief you were seeking as we just
12 discussed, was for the Court to order that they go back and
13 have the hearing?

14 MR. CUSICK: That's correct, Your Honor, but if
15 there's a -- if there are things involved in the administration
16 of that hearing that aren't kosher, I think it would be
17 appropriate --

18 THE COURT: I don't agree. That's not how it works.
19 The Courts not just to hold onto a case to babysit everything
20 that happens after the issue of judgment is done. If, you
21 know, if --

22 MR. CUSICK: No, we would have --

23 THE COURT: -- you know, you don't like what
24 happened, then --

25 MR. CUSICK: -- we would have an appeal --

1 THE COURT: -- you would follow the normal process.

2 MR. CUSICK: -- on that decision --

3 THE COURT: Right. I mean, you certainly would have
4 a right to come to court --

5 MR. CUSICK: And we would all -- yes. Okay.

6 THE COURT: I think it's a new case. And you
7 wouldn't get me anyway, because I won't be here. You'll have a
8 new judge regardless, so it's not as if the institutional
9 memory would be significant one way or the other.

10 MR. GILLIES: Would also retain jurisdiction, I
11 suppose.

12 THE COURT: Oh.

13 MR. GILLIES: Sorry.

14 THE COURT: I have plenty to do with my new court, I
15 don't need to take things with me. Okay, so I had one other
16 thought, and I got sidetracked. What I guess I'm trying to put
17 through is, Mr. Cusick, your request if I were to grant your
18 motion to reconsider, was to have a jury trial on those issues,
19 correct?

20 MR. CUSICK: That's correct.

21 THE COURT: Okay. So, we will need to sort out that
22 question, as well. And typically if I were to grant that
23 request and that part of the case proceeded normally, that
24 means no judgment is issued until that's all done, so nothing
25 would happen while all that is pending. I mean, I don't know

1 if you -- you'd probably need discovery, I don't know if that
2 were to proceed. But, a jury trial would be some months down
3 the road, and all of this would be held in advance, until then,
4 unless somebody convinced me that a partial judgment made
5 sense, which I guess you can think about it.

6 MR. CUSICK: Okay, Your Honor.

7 THE COURT: So, at this point, until I grilled on
8 that, unless you folks stipulate to that, I guess nothing
9 should happen. Does that make sense? Do you understand my
10 point?

11 MR. CUSICK: Yes, I understand.

12 THE COURT: Mr. Gillies?

13 MR. GILLIES: I do.

14 THE COURT: Okay. All right. I will go back and
15 review everything, and await your filing tomorrow. Thank you.

16 MR. GILLIES: We'll file. Thank you.

17 MR. CUSICK: Thank you, Your Honor.

18 (Proceedings concluded at 11:04 a.m.)
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CERTIFICATION

I, Cindy Ferguson, a court approved proofreader, do hereby certify that the forgoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST: MELISSA BOYD


CINDY FERGUSON

February 27, 2015