
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

TOWN OF ESSEX

and

JAMES Z. MORGAN, Jr., as Superintendent
of Highways of the Town of Essex,
Plaintiffs,

-Against-

LEWIS FAMILY FARM, INC.,
Defendant.

INDEX # 000047-07

R.J.I.# 15-1-07-0014

Date Purchased:

FEE WAIVED

January 17, 2007

Trial Date: Oct. 16, 2007

Assigned Judge:

Hon. Mark I. Powers, J.S.C.

MEMORANDUM OF LAW

Dated: October 26, 2007

Office and Post Office Address:

Darrell W. Harp

Attorney for Plaintiffs

12 Rolling Brook Drive

Clifton Park, New York 12065

(518) 371-4836

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PARTIES

Plaintiff, Town of Essex (hereinafter called "Town") is a municipal corporation located in the County of Essex, State of New York.

Plaintiff, James. Z. Morgan, Jr., is the Town Highway Superintendent of the Town of Essex.

Defendant, Lewis Family Farm, Inc., is a corporation within the State of New York and owns property in the Town of Essex, County of Essex, and State of New York.

ISSUES PRESENTED

1. Are the drainage ditches along Cross Road part of the public highway facility?
2. Does the drainage ditch along the south side of Cross Road have rocks therein that came from the Farm Road?
3. Do Plaintiffs have the right to have these rocks removed?
4. Is the drainage culvert under Cross Road a part of the public highway facility?
5. Is the drainage culvert outlet on the south side of Cross Road blocked/
6. With the present location of the Farm Road on the south side of Cross Road, is the culvert under Cross Road prevented from being serviced if the culvert freezes?
7. Is the drainage area from the outlet of the culvert a part of the public highway facility?
8. Is the drainage area from the culvert under Cross Road lying south of Cross Road blocked by the Farm Road?

9. With the present location and height of the Farm Roads on the south and north sides of Cross Road, is snow removal or snow storage interfered with in any respect?

With the materials presented hereinafter and all testimony and papers submitted in the action, all nine(9) questions should be answered in the affirmative.

STATEMENT OF FACTS

Cross Road in the Town of Essex, Essex County, State of New York is a Public Highway that is 1.46 Miles in length and runs generally east and west.¹ However, the area in question of this action is only approximately 400 feet in length at points where Cross Road is at a low level of the road. In the Annual Highway Certifications that are made by the Town Highway Superintendent the road is certified as a public highway that is 20 feet wide with five(5) feet of shoulders on either side.²

In the area in question, Defendant constructed Farm Roads upon, near and/or along Cross Road that: (a) encroached upon the drainage ditches by having stones therein; (b) blocked the drainage culvert at the outlet on the south side of Cross Road; (c) blocked the drainage area where water had flowed for many years through the field until it reached the Webb Royce Swamp by building the Farm Roads across the drainage area; and (d) presently and potentially in the future interferes with Cross Road's snow storage and

¹ See, James Z. Morgan, Jr. E.B.T. Deposition Exhibits Nos. 9 and 10.

² See, James Z. Morgan, Jr. E.B.T. testimony and Deposition Exhibits Nos. 9 and 10.

snow removal.

The drainage ditches along Cross Road were constructed by the Town and have been in place for many years, far in excess of ten.³ The drainage ditches are part of the Town Highway System. The drainage ditches were constructed and are maintained by the Town to a width of three(3) feet and a depth of two(2).⁴

The drainage culvert, that has been in place for many years, far in excess of ten, passes under Cross Road in the area in question.⁵ This drainage culvert and its drainage area is a part of the public highway system of the Town.⁶ The culvert at its outlet on the south side is not visible and is blocked.⁷ For many years, far in excess of ten, drainage has flowed from the outlet of the drainage culvert onto the adjacent property of Defendant until the drainage reached the Webb Royce Swamp.⁸ In heavy storm situations when the drainage ditches, drainage culvert, and/or drainage area are blocked water will pool along and on Cross Road thereby creating dangerous conditions for the travelers using Cross

³ See James Z. Morgan, Jr. E.B.T. testimony at page 25, lines 21 -25 and page 26 lines 1 - 10 and page 54, lines 16 - 25 and page 55, lines 1 - 10.

⁴ See James Z. Morgan, Jr. E.B.T. testimony page 26.

⁵ Testimony of Ronald E. Jackson at the Trial.

⁶ See, Highway Law, 2, subd. 4.

⁷ See James Z. Morgan, Jr. E.B.T. testimony at page 41, lines 12 - 25 and page 42, lines 1 - 3 and testimony of all three of Plaintiff's witnesses at the Trial.

⁸ Testimony of Ronald E. Jackson at the Trial.

Road and may cause the roadway to fail.⁹ The drainage ditches, drainage culvert and/or drainage area and the flow therefrom and there over must be kept opened at all times. During 2006 Defendant blocked the drainage ditches, drainage culvert and/or drainage area with the construction of the Farm Roads.

During year 2006 Defendant built elevated Farm Roads, in part within the highway right of way use area and partly immediately adjacent to the Cross Road right of way use area. Since the Farm Roads lie on both sides of Cross Road and as a result, Cross Road now lies in a depressed area between the Farm Roads. Farm Road is elevated from Cross Road for approximately 400 feet. The toe of the slopes of Cross Road along is approximately 10 to 12 feet from the furthest outside edge of the shoulders of Cross Road. Plaintiffs

During winter conditions for many years, far in excess of ten, the snow removal operations of the Town Highway Department have cast snow up to 40 feet from the centerline of Cross Road onto the highway right of way and onto adjacent lands of Defendant. Thus, the width of the highway use right of way use area is up to 80 feet relative to Plaintiffs' snow removal and snow storage operations. In the winter months the availability of this 80 foot width area is absolutely necessary for proper maintenance of Cross Road, particular with respect to the snow removal and snow storage operations.

⁹ Testimony of Chad Cooke, P.E., at Trial and testimony of Defendant's witness, Todd Deyo, at the April 4, 2007 Hearing. Deyo actually acknowledged that Cross Road would "fail" in a heavy rainfall because of the blocked drainage that resulted from the construction of the Farm Roads, at page 79, lines 17 - 25 and page 80, lines 2 - 19.

The area adjacent to Cross Road is used for storage of the plowed snow. Storage of the plowed snow is necessary so that the snow does not drift back onto Cross Road after it has been removed therefrom. Drifting snow may also cause icing conditions on Cross Road. Drifting snow will cause dangerous conditions for travelers using Cross Road.

At least one resident of the Town is elderly and may require emergency services at any time that would reach her via Cross Road. With respect to other residents along the shore road, it will take longer for emergency vehicles to reach them if Cross Road could not be used.¹⁰ Thus, Cross Road must be kept opened at all time for such emergency services. The first EMS responders are located at Whallonsburg¹¹ and it would take eight(8) to ten minutes longer to reach the elderly resident if she needed assistance. The fire equipment which are also located at Whallonsburg would have the same difficulty.

By letter dated December 8, 2006, that was served by certified mail return receipt, Defendant was placed on Notice that construction of the Farm Roads that blocked the drainage ditches, drainage culvert and/or drainage area violated §319 of the Highway Law and that Defendant must remove such highway obstructions. By the same Notice, Defendant was informed that the Farm Roads built within the highway use area violated §319 of the Highway Law and that the Farm Roads interfered with snow removal and snow storage and that it must remove such highway obstructions. Defendant and/or its

¹⁰ Testimony of Ronald E. Jackson at Trial.

¹¹ Testimony of Ronald E. Jackson at Trial.

representative received the Notice on or about December 11, 2006. Defendant did not comply with the Notice.

On or about January 17, 2007 Plaintiffs commenced the subject action. In the action Plaintiffs sought:

- A. A Preliminary Injunction against Defendant's obstructions on Cross Road and its facilities. This request was denied by the Court at an April 4, 2007 Hearing.
- B. Plaintiffs sought Declaratory Relief, pursuant to CPLR §3001, for a Declaratory Judgment that Defendant lacks any right to built Farm Roads within the highway right of way use area and/or immediately adjacent to Cross Road in a way that it interferes with the proper use, maintenance and/or repair of the public highway. Such interferences included blocking of the drainage ditches, drainage culvert, and drainage area and having Farm Roads that where higher than Cross Road that interfered with snow removal and snow storage.
- C. Plaintiffs also sought a Permanent Injunction against Defendant's maintaining such facilities or undertaking such activities in the future.

A trial on the action was held on October 16, 2007. At the Trial, Plaintiffs offered witness testimony of Chad Cooke, P.E., Ronald E. Jackson, Eugene Benway, and the E.B.T. of James Z. Morgan, Jr. At both the April 4, 2007 Hearing and the October 16, 2007 Trial, Defendant even failed to offer any testimony or documents that would prove any ownership in Cross Road or its adjacent areas. At the Trial, Defendant's witness,

Barbara Lewis, submitted two photographs of Cross Road along areas that were beyond the area in question. Further, her measurements of Cross Road and the Farm Roads demonstrated that the Farm Roads encroached at least six(6) feet onto the Cross Road highway slopes and its drainage ditches.

POINT 1

BY LAW PLAINTIFFS HAVE THE RIGHT TO HAVE THE HIGHWAY DRAINAGE FACILITIES RESTORED TO THE CONDITIONS AS THEY EXISTED PRIOR TO THE CONSTRUCTION OF THE FARM ROADS BY DEFENDANT.

Highway Law, §2, subd, 4 defines a highway facility as:

4. A highway within the meaning of this chapter shall be deemed to include necessary sluices, drains, ditches, waterways, embankments, retaining walls and culverts having a width of opening of twenty feet or less except as provided in section two hundred and thirty, and also the approaches of any bridge or culvert beginning at the back of the abutments. The pavement over any such bridge or culvert may also be included as a part of the highway provided such pavement is separated from such structure by an earth fill.

With respect to drainage ditches and waterways, Highway Law, §319, is very precise and clear, an adjacent property owner **may not place earth, stone or other material in any ditch or waterway of a public highway.**¹² Cross Road is a Public

¹²**§ 319. Obstructions and their removal.**

1. Obstructions, within the meaning of this section, shall include trees which have been cut or have fallen either on adjacent lands or within the bounds of the highway, in such a manner as to interfere with public travel therein; limbs of trees which have fallen within the highway, or branches of trees overhanging the highways so as to interfere with public travel therein; lumber, wood or logs piled within the bounds of the public highway; machines, vehicles and implements abandoned or habitually placed within the bounds of

Highway that is 1.46 miles in length with a traveled portion of 20 feet wide and five(5) feet of shoulders on each side.¹³ Highway Superintendent, James Z. Morgan, Jr. testified that he had been the Town Highway Superintendent since 1991.¹⁴ He also testified that the Highway Department had constructed the drainage ditches along both the north and south sides of Cross Road.¹⁵ Thus, in this action, the Plaintiffs have clearly established that prior to the construction of the Farm Roads there were drainage ditches along both the north and south sides of Cross Road and that they were necessary to carry drainage water from the highway.¹⁶ Highway Superintendent, James Z. Morgan, Jr. testified that these excavated drainage ditches were two(2) feet deep and three(3) feet across.¹⁷ After construction of the Farm Roads, Plaintiffs established at the trial that the drainage ditch on the south side no longer existed for approximately 30 feet on either side of the

the highway; fences, buildings or other structures erected within the bounds of the highway; **earth, stone or other material placed in any ditch or waterway** along the highway; telegraph, telephone, trolley and other poles, and the wires connected therewith, erected within the bounds of the highway in such a manner as to interfere with the use of the highway for public travel. (Emphasis added).

¹³ See, 2006 and 1994 Annual Highway Reports to the New York State Department of Transportation by the Town.

¹⁴ See, E.B.T. testimony of James Z. Morgan, Jr., at page 4, line 18.

¹⁵ See, E.B.T. testimony of James Z. Morgan, Jr, at page 25, lines 21 - 25 and page 26, lines 1 - 3.

¹⁶ Eugene Benway at the Trial testified that he cleaned these drainage each year through year 2006.

¹⁷ See, E.B.T. testimony of James Z. Morgan, Jr., at page 26, lines 5 - 17.

drainage culvert and the area was filled in with stones from the Farm Road.¹⁸ The blockage of the drainage ditch along the south side of Cross Road endangers the integrity of Cross Road.¹⁹ Defendants own witness, Todd Deyo, also so testified at the April 4, 2007 Hearing.²⁰ He actually acknowledged that Cross Road would “fail” in a heavy rainfall because of the blocked drainage that resulted from the construction of Cross Road.²¹

Both Highway Superintendent, James Z. Morgan, Jr. and Highway employee, Eugene Benway testified that this drainage ditch was three (3) feet wide prior to construction of the Farm Road. Eugene Benway also testified that the slope of the Farm Road on the south side of Cross Road actually not only covered the drainage ditch, it encroached approximately one(1) foot up the slope of Cross Road.²² By law, the drainage ditch along the south side of Cross Road was and is clearly part of the highway facility.²³ Thus, there is no question but that Plaintiffs have the right to have the drainage ditch along the south side of Cross open to the conditions that existed prior to the

¹⁸ Eugene Benway so testified at the Trial.

¹⁹ Chad Cooke, P.E. so testified at the Trial.

²⁰ See, transcript of the April 4, 2007 Hearing at page 79, lines 17 - 25 and page 80, lines 2 - 19.

²¹ See, transcript of the April 4, 2007 Hearing at page 80, line 15.

²² Eugene Benway so testified at the Trial.

²³ See, Highway Law, §2, subd. 4.

construction of the Farm Roads.²⁴

The drainage culvert under Cross Road not only carried water from the drainage ditches along Cross Road, it also carried surface water flowing from the north side of Cross Road to the south side. The water course flowed through a swale until it reached the Webb Royce Swamp.²⁵ At the Trial, this fact was testified to by Town Supervisor, Ronald E. Jackson. With more than ten(10) years of use of the swale for water flowing from the outlet of the culvert under Cross Road, Plaintiffs had at least a prescriptive right to have the drainage and the drainage area from the culvert not blocked.²⁶ The old case of *Driggs v. Phillips*, 103 NY 77 (1886) involved the removal of obstructions on a user public highway when the obstructions had been in existence for many years. The Court of Appeals found:

The issue was not between individuals, nor in relation to private property. It concerned the public and their rights in the highway. The defendants, at the time in question, were town officers, engaged in the performance of official duty, and if the acts complained of were performed upon premises which at any time, no matter how long before, had been set apart as a highway, and by dedication had become such, the plaintiff could not recover, although he had occupied a particular portion of it from time to time, or even for a

²⁴ Eugene Benway testified that he last cleaned the drainage ditch along the south side of Cross Road in year 2006.

²⁵ Ronald E. Jackson testified that he observed and knew of this fact for many years.

²⁶ See, *Village of Schoharie v. Coons*, 34 AD2d 701, at 701-702 (3rd Dept.1970), *affd.* 28 NY2d 568 (1971)

continuous period of time extending to twenty years.²⁷

Ronald E. Jackson testified that Defendant filled in a large portion of the swale.

Ronald E. Jackson testified that, thereafter until construction of the Farm Roads, the water from the outlet of the culvert flowed over the adjacent land and down into Webb Royce Swamp. Thus, the flow from the outlet of the culvert onto and drainage through the drainage area was not totally blocked until the construction of the Farm Roads. Plaintiffs actually have the right to require that the swale be restored to the conditions that existed prior to Defendant filling in the swale. However, in this action Plaintiffs only desire that conditions be corrected in the 400 foot area in question to conditions as they existed prior to construction of the Farm Roads.

At the Trial, Eugene Benway testified that when a drainage culvert becomes frozen, he has to use a "steam jenny" to thaw out the frozen culvert. The steam jenny has piping in ten foot sections that are inserted into the drainage culvert with hot water being ejected therefrom. Eugene Benway testified that because the outlet of the drainage culvert was covered over and the Farm Road was immediately next to the culvert outlet there would be no way that the steam jenny could be used. Thus, the drainage culvert, even if it was opened, could not be properly maintained as a result of the Farm Roads.

Defendant apparently acquired the property with the drainage culvert opened and obvious to view. Thus, in addition to the fact that the swale provided natural drainage

²⁷ *Id* at 82.

which Defendant had no right to disturb, Plaintiffs have clearly established all of the elements of an easement by prescription for the drainage area across this property.²⁸

Further, this drainage area was and still is a part of the Public Highway.²⁹

Therefore, there is no question but that Plaintiffs have the right to have the drainage area from the culvert open to the conditions that existed prior to the construction of the Farm Roads.

Even if the statutory law in New York State was not so clear relative to the rights of Plaintiffs to have conditions restored to what they were prior to construction of the Farm Roads, the common law and case law supports the same result relative to blockage of surface water drainage and the rights to use drainage areas. Review of case law finds that even though a lower property owner may ordinarily prevent the running off of surface water, in the event these waters should be carried off by a outlet (such as a culvert or stream) the lower owner may not dam the channel or direct the water back to an upland owner's injury; the upland owner possesses a riparian right in the water course to have the water pass through and from his lands without hindrance notwithstanding that damage caused by the surface water is otherwise not actionable. (See, *Buffalo Sewer Authority v.*

²⁸ *Id.* at 701- 702.

²⁹ See, *Dutcher v. Town of Shandaken*, 23 AD3d 781 (3rd Dept. 2005). That case involve a similar situation to the present action. A blocked drainage culvert and blocked drainage area and the Appellate Court found that: "As the culvert under Fox Hollow Road and drainage area are necessary to preserve the public's right of passage, they constitute a portion of the public highway and may be maintained by the Town (*see Thompson v. Orange & Rockland Elec. Co.*, *supra* at 369, 173 N.E. 224)." *Dutcher* at page 782.

Cheektowaga, 20 NY2d 47 (1967). An upland owner whose property naturally drains into a lower tract need not ordinarily arrest the natural flow of rainwater or melted snow or deflect it from the lower tract. (*Kazansky v. Bergman*, 17 Misc 2d 1015 (1959). An upland owner is entitled to reasonable artificial drainage which does not increase the flow of surface water upon the lower land owner. An adjoining upland owner will not be enjoined from maintaining a culvert which passes water through it and does not increase the upland flowage onto the adjoining lower land. (*Nolan v. Carr*, 19 Misc 2d 167 (1959). Thus, even if Plaintiffs did not have the drainage rights they now possess in the drainage culvert and drainage area for Cross Road, they still would have the rights to prevent blockage and Defendant would have no claim for damages resulting from the flow of surface water.

POINT 2

PLAINTIFFS HAVE THE RIGHT TO HAVE THE FARM ROADS REMOVED WHERE THEY MAY INTERFERE WITH NORMAL SNOW PLOWING OPERATIONS THAT WERE PREVIOUSLY USED BY PLAINTIFFS.

Cross Road is a public highway by use under Highway Law, §189. There has be at least ten years of public use and public maintenance of Cross Road.³⁰ The Court in *Nikiel*

³⁰ See E.B.T. testimony of James Z. Morgan, Jr., who has been the Town Highway Superintendent for 16 years [see E.B.T. transcript, page, line 8], at page 9, line 25 and page 10, lines 1 - 2 , the 1980 United States Geological Survey Map entitled "Willsboro New York - Vermont.", and the 1994 Annual Highway Report to the New York State Department of Transportation by the Town

v. *City of Buffalo* discusses the extent of a user highway with a finding that:

While the width and extent of a highway established by prescription or use are generally measured by the actual use for road purposes, the easement is not necessarily limited to the beaten path or traveled tract. It carries with it the usual width of the highway in the locality or **such width as is reasonably necessary for the safety and convenience of the traveling public and for ordinary repairs and improvements.** A highway established by user **includes the traveled tract and whatever land is necessarily used or is incidental thereto for highway purposes.** (Emphasis added). (*Nikiel v. City of Buffalo*, 7 Misc. 2d 667, 670 (1957)).

The Court in *Gray v. Town of Oppenheim* restates the law that drainage ditches and the disposition of plowed snow are part of a highway maintenance functions and the highway right of way must have areas for such purposes. (See, *Gray v. Town of Oppenheim*, 289 A.D.2d 743, 745 (3rd Dept. 2001)). In this action, the Plaintiffs have clearly established that the constructed Farm Roads under certain winter conditions will interfere with the normal snow removal activities and efforts by the Town Highway Department.³¹

The Plaintiffs have established that in the past, the Town Highway Department has cast snow for up to forty feet out from the centerline of Cross Road. Defendant clearly placed the Farm Roads within such snow removal and snow storage area. Further, the Farm Roads are up to six(6) feet higher than Cross Road. The testimony of Highway

³¹ James Z. Morgan, Jr. at page 20, lines 3 - 7, testified at the E.B.T. that: "There is - - it's too - - it's [Farm Roads] higher than the Cross Road for one thing. And - - and if we get a lot of snow there, I can't push it over top of that to get - - it's just going to build up of snow and I'm not going to be able to move it [snow]."

Department employee, Eugene Benway, establishes that last winter, a winter that was not very severe and the first winter with the Farm Roads in place, the plow that he was operating actually hit into the stones of the Farm Roads with his normal plowing operations. Eugene Benway also testified that the Highway Department would not be able with the equipment the Department normally uses, to cast the snow up and over the Farm Roads in severe snow conditions.

The Plaintiffs' Expert Witness, Chad Cooke, P.E., established that the snow storage and removal areas of the Cross Roads along the area in question was greatly reduced and could cause problems with even a snow storm as little as four(4) inches in and near the drainage culvert on the south side of Cross Road. In addition, the Farm Roads at higher elevations than Cross Road prevent effective snow removal. When the wind conditions are from the north or south it can be expected that snow will drift from the Farm Roads onto Cross Road.³²

The Town has the duty of keeping its highways open and unobstructed at all times. (See, *McLane v. State*, 53 NYS2d 194 (1945). Thus, Plaintiffs cannot not wait until a disaster occurs before the unsafe conditions created by Defendant are corrected. If Plaintiffs can anticipate a dangerous condition, Plaintiffs must comply with their duty and Plaintiffs have the right to have this Court declare that the adverse conditions created by Defendant must be corrected. Therefore, Plaintiffs have the right to have the Farm Roads

³² See, testimony of Ronald E. Jackson, Chad Cooke, P.E., and Eugene Benway at the Trial.

lower so that they do not interfere with normal snow removal operations that are employed under severe conditions.

POINT 3

THE LAW DOES NOT AUTHORIZE "EXCUSE" WHEN AN ADJACENT LANDOWNER INTERFERES WITH THE PUBLIC RIGHTS IN THE HIGHWAY USE AREA.

The requirement of Highway Law, §319, to remove stones and structures that are placed within the highway right of way use area is **absolute**. No cases can be found that authorizes a defendant to maintain obstruction similar to those found in this action in violation of the rights of the public to have their highways free of such obstructions. The old cases actually refer to activities like those of Defendant as "public nuisances." Whatever excuse or purpose that Defendant may claim as a reason for the construction of the Farm Roads in the fashion or manner it did is irrelevant. The fact that the drainage ditches may somewhat work is irrelevant.³³ The residents of the Town have the right to be protected from the actions of Defendant which could endanger them under certain conditions. The fact that such conditions have not arisen since the construction of the Farm Roads is irrelevant. Plaintiffs have the right and duty to assure that public roads are maintained as they were prior to the construction of the Farm Roads. Further, it was acknowledged by Defendant's witness at the April 4, 2007 Hearing that as the result of

³³ The Defendant's witness at the April 4, 2007 Hearing acknowledged that after construction of the Farm Roads and in a heavy rainstorm Cross Road would fail because the water had no outlet. (See, transcript, p. 80, lines 11 - 16).

the construction of the Farm Roads the drainage ditches, culvert, and drainage area would cause Cross Road to "fail" under certain conditions. Plaintiffs have the statutory right to have the drainage ditches restored to a condition that existed prior to construction of the Farm Roads. The items must be removed and such must be accomplished expeditiously since the winter season is rapidly approaching. Further, Plaintiffs have clearly demonstrated that the raised Farm Roads will interfere with normal snow removal and snow storage operations under severe conditions.

CONCLUSION.

Therefore, with respect to the area in question, the Farm Roads created the potentially dangerous conditions by clearly altering the drainage and potentially altering the way snow has been removed and stored for many years. Plaintiffs has done nothing that would acerbate the conditions since the construction of the Farm Roads. In this Action, Plaintiffs only had to demonstrate to the Court that Defendant placed items in the highway right of way use area and, pursuant to CPLR §3001, the Court should determine that pursuant to Highway Law, §319 Plaintiffs have the right to have such items and obstructions removed. Further, the Court should permanently enjoin Defendant from constructing and/or maintaining such obstructions. Thus, based on this Memorandum of

Law, the evidence and testimony submitted in this Action, and all papers filed in connection with this Action, Plaintiffs should be granted the relief requested

Respectfully submitted,

/s/ DARRELL W. HARP

DARRELL W. HARP

Attorney for Plaintiffs

12 Rolling Brook Drive

Clifton Park, New York 12065

Tel: (518) 371-4836