State of New Hampshire

Supreme Court

Docket No. 2017-0151

Great Island Footpath Association, *et.al*.
v.
Thomas Hoffmeister *et.al*.

and

Dwight Stowell, Jr.
v.
Jeffrey Andrews, *et.al*.

APPELLANTS' REPLY BRIEF

by
Great Island Footpath Association *et.al.* (Plaintiffs)

Great Island Footpath Association, *et.al*.
By their attorneys,
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ARGUMENT

I. The Deeded Easements Are Enforceable

A. Dr. Stowell Failed to Preserve His Claim for Appeal.

Dr. Stowell argues that the trial court's June 29, 2016, order incorrectly granted summary judgment enforcing the plaintiffs' deeded footpath easements. Brief, p. 19-25. Dr. Stowell failed to preserve that claim for appeal.

The trial court's June 29, 2016, order (SJ Order) appended to Dr. Stowell's brief addressed several motions. The "Hoffmeister Parties" filed motions that focused on several specific property owners on Great Island (Ann Montgomery and Laura and David Davenport) and they also filed a motion for partial summary judgment concerning the deeded easements. The Hoffmeister Parties' summary judgment motion filed on January 22, 2016, which Dr. Stowell references in Question 3 of the Questions Presented at page 1 in his Brief, was submitted not by Dr. Stowell but by the Hoffmeister Parties. The preface to that summary judgment motion on which Dr. Stowell relies identifies the Hoffmeister Parties as follows:

> NOW COME the defendants/counter-claim plaintiffs, Thomas Hoffmeister, 1085 North Thomas Hoffmeister, 1085 North Broadway, LLC, and Leslie J. Hoffmeister, Trustee of Great Island Realty Trust (the Hoffmeister Parties"), by and through their attorneys, McLane Middleton, Professional Association, and move for partial summary judgment that the deeded easements to reach the steamboat wharves are now extinguished as a matter of law. In support thereof, the Hoffmeister Parties state as follows:

Appendix to Appellants' Reply Brief, p. 12.

In response to the Hoffmeister Parties' motion, the plaintiffs filed a cross-motion for summary judgment on the same subject, namely, the enforceability of the deeded footpath easements. The plaintiffs' cross-motion sought partial summary judgment not only against the

Hoffmeister Parties but also against Dr. Stowell. The trial court's summary judgment order referenced in and attached to Dr. Stowell's Brief denied the Hoffmeister Parties' summary judgment motion. The trial court granted the plaintiffs' cross-motion for partial summary judgment, ruling that the footpath easements are "granted for transit to locations" and are not for a specific purpose. SJ Order, p. 15. The SJ Order concludes by stating that "the Hoffmeister Parties and Stowell may not bar the Plaintiffs from using the Circle Trail based on Plaintiffs' deeded easement rights." *Id*., at 16.

Dr. Stowell filed no pleading in response to the plaintiffs' motion for partial summary judgment or in support of the Hoffmeister Parties' summary judgment motion. *Blagbrough v. Town of Wilton*, 145 N.H. 118, 121 (2000) ("opposing party must set forth specific facts showing the existence of a genuine issue for trial"). Dr. Stowell did not file any motion for reconsideration of the trial court's order. With the SJ Order in place, the plaintiffs and Dr. Stowell proceeded to trial without having to address the enforceability of the deeded easements.

At trial, the parties did not address the ruling that the "easements .. are granted for transit to locations." and that the "Plaintiffs' easements to use the Circle Trail footpath have not been extinguished" SJ Order, p. 15; Trial Court Order on the Merits, p. 2. "Once a [trial] judge issues a partial summary judgment order removing certain claims from a case, the parties have a right to rely on the ruling by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims." *Blagbrough,* at 125*, citing Leddy v. Standard Drywall, Inc*., 875 F.2d 383, 386 (2d Cir. 1989).

Dr. Stowell cannot argue that this is a matter of plain error since the Hoffmeister Parties and the plaintiffs submitted substantial materials in support of their summary judgment motions.

Hilario v. Reardon, 158 N.H. 56 (2008). The materials submitted by the Hoffmeister Parties and the plaintiffs and referenced in the SJ Order demonstrate that the trial court's order was amply supported.

Having failed to object to plaintiffs' cross-motion for summary judgment or join the Hoffmeister Parties' motion for summary judgment, Dr. Stowell waived his right to appeal the trial court's summary judgment order affirming the plaintiffs' rights to "use of the Circle Trail footpath in Newbury to reach the locations of the former Melrose and Auburn wharves" and that the footpath "easements ... are granted for transit to locations - the steamboat wharves -, rather than for a specific purpose." SJ Order, pp. 15-17; Order on the Merits, p. 2. Supreme Court Rule 16(3)(b) requires that "[a]fter each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue." The issue may have been raised, but it was not raised by Dr. Stowell nor did he make or preserve any objection.

B. The Footpath Easements Provide Access to a Location.

When this action was begun in July 2014, the plaintiffs sought, in addition to other relief, a temporary injunction to require the Hoffmeister Parties to open or remove a barbed-wire topped fence that they had erected around the entire perimeter of their property. In granting the temporary injunction, Judge Smuckler wrote:

> First, the plaintiffs have demonstrated that they are likely to succeed on the merits. The deeded easements at issue provide a right to use the footpaths to reach the steamboat wharfs. Thus, the easements are granted for transit to a location - not for a purpose. The absence of the steamboat wharves in their historic location (or any location) is not dispositive.

Appellants' Appendix, p. 002.

In issuing that order, Judge Smukler cited *Boissy v. Chevion*, 162 N.H. 388 (2011), a case that included similar easement issues. As Dr. Stowell's Brief points out, Judge Smukler authored the trial court order in *Boissy* that was affirmed on appeal. In finding that the easement is "for transit to a location," the trial court was no doubt aided by its familiarity with the *Boissy* case that allowed it to distinguish between an easement for transit to a location versus an easement granted for a particular purpose. The June 2016 summary judgment order issued in favor of the plaintiffs against the Hoffmeister Parties and Dr. Stowell follows the same reasoning as the previous temporary injunction order in this case and, as well, in *Boissy*.

The trial court's summary judgment order is well supported by the affidavits and pleadings and sets forth a lengthy description of the deeds in the chains of title for many of the Island property owners, whether or not they were plaintiffs. SJ Order, p. 9-13. The trial court interpreted the deeds which it found not to be ambiguous and stated as follows:

> None of the easements restrict the lots that may be crossed to the ones immediately between the owner's lot and any wharf or limit the owner to the closest wharf. Nor do the easements state that individuals may only use a footpath if they are also going to be using a steamboat....
>
> The easements, therefore, are granted for transit to locations - the steamboat wharves - rather than for a specific purpose. Although they were destroyed in the 1930s and never rebuilt, the locations of the old steamboat wharves are still known and not in dispute. The Great Island residents can still use the Circle Trail footpath to reach the location of the former wharves ... However, because the easements at issue here are "to reach the steamboat wharves," rather than for the purpose of using steamboats, it is not impossible to use the footpath easements.

SJ Order, pp. 14-15.

The evidence at trial fully supported that summary judgment order. Witnesses recounted how people would go fishing or swimming from the wharves. *See, e.g.*, testimony of Chester, Tr. p. 224, lines 22-25. The island histories also recount use of the wharves. *See, e.g.* Ex 17.

The testimony of the witnesses, whether for the plaintiffs or for Dr. Stowell, confirmed that "everyone" on the Island used the footpaths for access around the island for deliveries of food staples, attend island meetings, recreation, socializing, safety and community business and affairs. *See*, SJ Order, p. 13.

II. The Servient Property Owner May Not Relocate the Easement.

The plaintiffs agree with Dr. Stowell that their deeds do not describe a specific location for their footpath and that they are entitled only to "a reasonably convenient and suitable way." *Barton's Motel v. Saymore Trophy Co.*, 113 N.H. 333 (1975); *Seward v. Loranger*, 130 N.H. 570 (1988). However, the absence in the deeds of a description for a precise location of the easement does not diminish the plaintiffs' rights to maintain the footpath in its established location.

The long-term use of a right of way or easement is evidence of the intended location of the easement, agreed-to by the dominant and servient owners.

> Among the circumstances which could not fail to have great weight in determining what was meant by the doubtful or uncertain terms of a writing would be the acts of the parties indicating that intention, either occurring at the time of the writing, or appearing to be otherwise connective with it.

French v. Hayes, 43 N.H. 30, 32 (1861).

Similarly in *Donaghey v. Croteau*, 119 N.H. 320 (1979), the court found that "the parties' conduct for some fifty years" demonstrated that the "defendants have ... their right of way." *Id.*, at 324. In the present case, the Circle Trail footpath has been used in its present location over Dr. Stowell's property. The Island histories, maps, and witnesses' testimony all demonstrate that the footpath passed between Dr. Stowell's house and the shore of Lake Sunapee, just as it does around most of the Island.

Nowhere in his Brief does Dr. Stowell mention *Sakansky v. Wein*, 86 N.H. 337 (1933), an oft-mentioned case that states that "the respective rights of dominant and servient owners are ... determined by reference to the rule of reason." *Id*., at 339. *Downing House Realty v. Hampe*, 127 N.H. 92 (1985). Not only did *Sakansky* establish that "rule of reason," but it resolved the practical issue between the parties, holding that a servient property owner may not unilaterally relocate an easement for passage. *Id*., at 340. Despite Dr. Stowell's argument that the location of the footpath has changed - citing as examples, the avoidance of a fallen tree and when Dr. Stowell was repairing his stone wall - the location of the Circle Trail has remained in substantially the same location it has been since the island residents began walking the pathway 100 years ago. *See, e.g.*, maps in Appellants' Appendix, pp. 082, 084 and 085. Those temporary detours did not diminish the plaintiffs' rights to use the Circle Trail footpath in the manner and location in which it has been established for one hundred years.

Various witnesses also testified that the detoured pathway proposed by Dr. Stowell is a rugged and difficult pathway.

> Well, there was concern that Dr. Stowell had relocated the circle path around -- far away from the lakefront and away from his cottage. And especially the older generation on the island was concerned because it was a rugged pathway through the woods."

Lois Logan, Transcript Page 44, lines 18-22.

> "I went to the rear of his property once after the path had been in for about a year just to see what it was all about and discovered that if you took that route, I was closer to my property than I was to his and the path was rocky and slippery and everything else and I never took it again. Every time thereafter I went directly in front of Mr. Stowell's cottage."

Thomas Richards, Transcript Page 205, lines 14-19.

> Well, it has been barricaded off and it has been that way for I don't know if it's five, six years perhaps. I may be wrong on that, but Dr. Stowell had provided a path that was way, way up into the center of the island across the center of the island and down. It's a really very disappointing walk.

Chester Andrews, Transcript Page 229, lines 15-19.

> Q. "You certainly view the shoreline route as more convenient of the various possibilities, right?
> A Yes.
> Q And easier for folks who are maybe a little older, maybe not as hardy, right?
> A Yes.

Susan Schultz, Transcript Page 340, lines 9-14.

> Even Dr. Stowell was informed that he detour was not reasonable.

> Well, I was told this past year by a number of people and complaints that it was rough, slippery, too many roots, too many broken trees. So I put the crew out there to clean it up and straighten it out so nobody would be confused when His Honor was coming to visit.

Dwight Stowell, Transcript Page 466, line 23 to Page 467, line 2.

This sampling of testimony illustrates why the rule of reason as well as the outcome in *Sakansky* has remained. The location and use of an easement once established should not be unilaterally relocated or redefined. The trial court erred in ruling that Dr. Stowell may relocate the Circle Trail footpath.

III. The Footpath Easements Are Appurtenant to All Island Properties

The trial court's summary judgment order provides a brief summary of the deeds in the chains of title for the island property owners. SJ Order, p. 10-14. Appellants' Appendix provides a more complete sampling of those deeds, most of which contain repetitive language both granting the right to cross other lots on Great Island but also reserving the rights for others to

cross each of the deeded lots in order to reach the steamboat wharves. Appellants' Appendix, pp. 005-051.

Despite the deeded easements and the long-time use of the Circle Trail pathway by Island residents, Dr. Stowell argues that no prescriptive easement rights can exist because the Circle Trail is "across a non-adjacent property" and is therefore, not "appurtenant to anything." Stowell Brief, p., 14. No cases are cited to support such a proposition and the claim, itself, fails given the existence of cases that have affirmed prescriptive easements to access property which may not be adjacent to that of the dominant easement owner. *See,e.g.*, *Jesurum v. BTSCC Ltd. P'ship*,169 N.H. 469 (2016). In *Burke v. Pierro*, 159 N.H. 504 (2009), the owners of a back lot neither adjacent to or near a beach access claimed a prescriptive easement for access to a beach. But for the fact that a tax sale prevented the establishment of 20 years of continuous use, no dispute existed that such a property owner could have a prescriptive easement to a location that was not adjacent to or abutting one's property.

For the property owners in Sunapee, whose deeds did not reference the footpath, their rights are appurtenant just as are the rights of lot owners in a residential subdivision who utilize private roads in a subdivision for access and egress whether or not their deeds make specific reference to the roads. Lake shore lots with pathways are often "laid out for a summer colony, and a foot-path along a rugged shore might be thought to be of value to each cottager. It might even be considered to be of greater value, from the fact that it could never be intruded upon by vehicular travel." *Douglas v. Belknap Springs Land Co.*, 76 N.H. 254, 258 (1911).

Whether established by deed or by prescription, the plaintiffs' rights to the footpath easements were corroborated by substantial evidence. The trial court found that Dr. Stowell

admitted that "droves of people" were walking on his property. Order, p. 9. From this testimony the court concluded that "this suggests that a large segment of the Great Island population was using Dr. Stowell's property on a regular basis." *Id*. Even Dr. Stowell's claim that he was concerned about liability arose from only one episode in the 1980's when some children apparently entered his boathouse. *Id.*, at 9. Dr. Stowell's claim that his "self-help measures were largely successful" (Stowell Brief, p. 5), is belied by the testimony that no barriers prevented the use of the path until the early 2000's and, even then, people simply stepped over or around them and proceeded along the Circle Trail. Richards's testimony, Tr. 204-205; Ex. 19, p. 491. The court also found the testimony of Dr. Stowell's caretaker who discussed use of the pathway "not ... to be particularly credible." *Id.*, at 10. On the other hand, the plaintiffs' Brief provided a representative and consistent sampling of the witnesses' testimony how the Great Island residents used the Circle Trail footpath for nearly one hundred years. Plaintiffs' Brief, p. 16-21.

Dr. Stowell further argues in support of the trial court's order that those plaintiffs who did not testify failed to sustain their burden of proof. The evidence, however, addressed the easement rights of all property owners on Great Island. Similarly, *Benoit v. Cerasaro*, 169 N.H. 10 (2016) concerned the easement rights of property owners in a subdivision. As the Court noted, "the defendants before us, moved for summary judgment 'on behalf of all' defendants." *Id.*, at 14. The plans of the subdivision in that case created 70 lots and although a number of parties are listed in the pleadings, not all 70 lot owners were parties. Nevertheless, the trial court order, affirmed on appeal, applied to all lot owners in enforcing the covenants applicable to the subdivision.

The exhibits and witnesses' testimony provided consistent evidence that the footpath easement was appurtenant to all properties on Great Island and a right exercised by all property

owners on the Island. The trial court erred in limiting its order to only those plaintiffs who testified.

CONCLUSION

The trial court's order should be reversed.

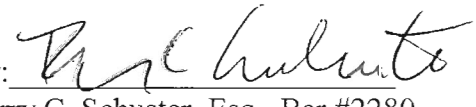
The evidence shows that all property owners on Great Island - not only the individual plaintiffs who testified at trial - and their predecessors-in-title have openly and continuously used the Circle Trail footpath since the early 1900's. That use included both the Newbury and Sunapee portions of Dr. Stowell's property.

Although Dr. Stowell failed to preserve for appeal his claim regarding the deeded easements, the easements have been established and used since they were first deed in the early 1900's. Although the deeds do not define a specific location for the Circle Trail, the usage of the Trail since that time has established a fixed location and scope of use for the Circle Trail.

Dr. Stowell's motivation for desiring to re-locate the footpath is not relevant nor reasonable. The location of the Circle Trail has been long-established and may not be relocated without the consent of the dominant easement owners. The plaintiffs' evidence demonstrates that the alternative is burdensome and neither convenient nor safe.

Respectfully submitted:
Great Island Footpath Association *et.al.*
By their Attorneys:

November 3, 2017

By: 

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CERTIFICATION OF SERVICE

I hereby certify that two (2) copies of this Reply Brief were mailed this 3rd day of November, 2017, to Kathleen Mahan, Esq., and Nicholas O'Donnell, Esq., attorneys for Dwight Stowell, Jr., and further certify that this pleading complies with the requirements of Supreme Court Rule 26(7).

Barry C. Schuster, Esq. #2280

STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

Jeffrey Andrews, David Davenport, Laura Davenport, Donald Fagan, Diane Fagan, Brant Fagan, Jan Fenwick, Edgar Forrest, Janis Forrest, Richard Forrest, Susan Forest, Eleanor Forrest, Patricia Gill, Richard Gill, Abigail Gordon, Lois Logan, Catherine MacLeod Miller, John MacLeod, John MacLeod, Jr., Cindy MacLeod, Wilmar MacLeod, Ann Montgomery, Barry Montgomery, Dean Montgomery, Susan Piotti, Nancy Prewitt, Jerry Prewitt, Ross Roberts, Ross Roberts, Jr., Robert Schmitt, Penny Schmitt, Susan Schultz, James Woods, Ronald Wyman and Diana Wyman
Plaintiffs
v.

Thomas Hoffmeister,
1085 North Broadway, LLC, and
Leslie J. Hoffmeister, Trustee of Great Island Realty Trust
Defendants/Counter-claim Plaintiffs
v.

All the plaintiffs listed above, and Douglas M. Gest and Virginia L. Beggs
Counter-claim Defendants

Docket No. 217-2014-CV-00375

And Consolidated For Purposes of Discovery and Trial With:

Dwight K. Stowell, Jr.
Plaintiff/Counter-claim Defendant
v.

Jeffrey Andrews and
all the plaintiffs listed above, except Douglas M. Gest and Virginia L. Beggs
Defendants/Counter-claim Plaintiffs

Docket No. 220-2014-CV-00053

MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE DEEDED EASEMENTS TO REACH THE STEAMBOAT WHARVES ARE NOW EXTINGUISHED AS A MATTER OF LAW

NOW COME the defendants/counter-claim plaintiffs, Thomas Hoffmeister, 1085 North Broadway, LLC, and Leslie J. Hoffmeister, Trustee of Great Island Realty Trust (the

"Hoffmeister Parties"), by and through their attorneys, McLane Middleton, Professional Association, and move for partial summary judgment that the deeded easements to reach the steamboat wharves are now extinguished as a matter of law. In support thereof, the Hoffmeister Parties state as follows:

1. The thirty-five remaining plaintiffs[1] and have brought claims against the Hoffmeister Parties seeking declaratory judgment and injunctive relief that they have rights to use three footpaths which traverse the Hoffmeister Parties' properties (and elsewhere on Great Island) pursuant to deeded easements.

2. The deeded easements—issued as part of an 1890 subdivision plan creating lots along the Great Island shoreline in the Town of Newbury—were granted for a single, limited purpose, and no other: to reach the steamboat wharves.

3. At the times the deeds were created, steamboat service was the primary method of travel in and around Lake Sunapee.

4. Indisputably, steamboat service to Great Island has ceased, the company which developed and owned the steamboat wharves went out of business by the 1930s, and the steamboat wharves no longer exist and have not existed for decades.

5. Pursuant to *Boissy v. Chevion*, 162 N.H. 388, 393-94 (2011), "an easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended." (citations and quotations omitted).

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[1] The thirty-sixth plaintiff, the so-called Great Island Footpath Association, was dismissed for lack of standing by the Court's Order dated June 29, 2015 (*Smukler*, J.). Two other individuals, Virginia Best and Douglas Gest, are counter-claim defendants. They were original plaintiffs but dropped their claims. They have filed a motion to dismiss the counter-claims against them, which is pending. Two other plaintiffs, Robert and Penny Schmitt, own no property in Newbury and have no deeded easement rights. Their lack of deed rights is the subject of a motion the Hoffmeister Parties filed on November 22, 2015.

6. As discussed in the attached Memorandum of Law, Second Affidavit of Carol Magoon, and Affidavit of Lindsay Holmes, and their accompanying exhibits, because there is no genuine issue of material fact that the steamship service no longer exists, the steamship wharves no longer exist, and the purpose for the easement grant—"to reach the steamboat wharves"—no longer exists, the Hoffmeister Parties request partial summary judgment that the deeded easements to reach the steamship wharves are now extinguished as a matter of law.

WHEREFORE, defendants/counter-claim plaintiffs, Thomas Hoffmeister, 1085 North Broadway, LLC, and Leslie J. Hoffmeister, Trustee of Great Island Realty Trust, pray that this Honorable Court:

A. Enter partial summary judgment on the Plaintiffs' claim for deeded easement rights in favor of the Hoffmeister Parties' and against the Plaintiffs because the deeded easements to reach the steamship wharves are now extinguished as a matter of law;
B. Enter partial summary judgment in favor of the Hoffmeister Parties and against the Plaintiffs' on the Hoffmeister Parties' counter-claim to quiet title because the counterclaim defendants' deeded easements to reach the steamship wharves are now extinguished as a matter of law;
C. Award the Hoffmeister Parties their attorney's fees and costs of this motion; and
D. Award such other relief as is just and proper.

Respectfully submitted,

Thomas E. Hoffmeister
1085 North Broadway, LLC
Leslie J. Hoffmeister, Trustee of Great Island Realty Trust

By their Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: 1/22, 2016

By: Mark C. Rouvalis

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Certificate of Service

I certify that a copy of the foregoing has been delivered, via electronic mail, on this date to Barry C. Schuster, Geoffrey Vitt, and Jennifer B. Hartman, counsel for the Plaintiffs, and Kathleen M. Mahan and Nicholas M. O'Donnell, counsel for Dr. Stowell.

Mark C. Rouvalis

Mark C. Rouvalis