

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' BRIEF

by

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

Rule 7 Appeal of Final Decision of the Merrimack County Superior Court

Great Island Footpath Association, *et.al.*

By their attorneys,

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QUESTIONS PRESENTED
by Appellants on Appeal

1. Where the trial court found that “for about a century” all of the island residents have used a deeded pedestrian pathway easement around an island, did the court err in ruling that the owner of the servient property had the unilateral right to relocate the easement absent any consent from the dominant easement owners?

Motion for Reconsideration

2. Did the trial court err when it ruled that the rights to the easement were limited only to those plaintiffs who testified at trial where the trial court found that “for about a century” all of the island residents along with their guests and invitees, have used the pedestrian pathway easement around the island?

Motion for Reconsideration

3. Does the evidence support the trial court’s finding that the rights to use the pedestrian easement around the island are limited only to those plaintiffs who testified at trial where the evidence showed that all island residents, along with their guests and invitees, have used the pedestrian pathway easement?

Motion for Reconsideration

4. Did the trial court err in ruling that the rights to use a pedestrian easement that has been used for almost 100 years by the property owners on an island are personal and not appurtenant easement rights to each of the properties owned on the island?

Motion for Reconsideration

5. Does the evidence support the trial court’s ruling that the rights to use a pedestrian easement that has been used for almost 100 years by the property owners on an island are personal and not appurtenant easement rights to each of the properties owned on the island?

Motion for Reconsideration

STATEMENT OF THE CASE

Beginning in the late 1890's, Great Island in Lake Sunapee was developed with a number of seasonal residences. The original deeds both conveyed and reserved the right to use footpaths around the Island and through long-term use, the pathways were established on the Island. In 2013, Thomas Hoffmeister, an island property owner, blocked the Circle Trail, a perimeter trail around the entire Island and which crosses through his property. The plaintiffs¹ brought suit to enforce the easement rights in the pathway. Dwight Stowell, Jr., also tried to block the Circle Trail where it crosses through his property and, thus, the plaintiffs also sought to enforce their easement rights in the Circle Trail through his property.

The easement cases against Hoffmeister and Stowell were consolidated. The case against Hoffmeister has been settled. A consolidated defamation case brought by Dr. Stowell against another Island property owner, Jeffrey Andrews, was also settled. The only remaining matter concerns the plaintiffs' rights to use the Circle Trail where it crosses the Stowell property. This appeal arises from the trial court's Order concerning the rights of Island property owners in the Circle Trail across the Stowell property.

¹ The original plaintiffs included the Great Island Footpath Association, an unincorporated association of Great Island residents, as well as 35 individuals associated with Great Island. The Association, two deceased plaintiffs, another having sold his property and other non-property owning spouses were dismissed as plaintiffs. The 14 remaining plaintiffs are all title-holding property owners on Great Island.

STATEMENT OF THE FACTS

In the late 1890's, Norman L. Brockway, F.J. Browning and David Jennison acquired all of the land located in the Town of Newbury on Great Island in Lake Sunapee. Referring to a plan dated 1890 prepared by Browning (Exhibit 18, pgs. 457 - 458), they sold lots along the Island's lake frontage. (*See*, Deeds, Exs. 1 - 16).² All of their deeds for the property in Newbury described the lots sold and contain language, similar in all of the deeds, "conveying the right to cross by foot path all of the lots north or south of this lot to reach the steamboat wharves" and "reserving to ourselves our heirs and assigns the right to cross said lot ... by foot path to reach the steamboat wharves." *See, e.g.*, Ex. 1, p. 10; Ex. 2, p. 38; Ex. 4., p. 86. Some deeds provided "the right of a foot path across any of the lots numbered on the before mentioned "plan" to reach the wharf or wharves that may be established on the shore of said Island ... and subject to a reservation ... of a similar right to a footpath thru or over the within named lot" Ex. 10, p. 210. The foot path referred to in all of those deeds became known as the "Circle Trail" or the "Red O Trail." Ex. 18, pgs. 460, 462 - 463, 466-467; Ex. 19, p. 481 - 488. Transcript, p. 291, 332.³ As described by the witnesses and the histories of the Island prepared by its residents, the Circle Trail has been used continuously since deeds were first granted in the late 1890's. Ex. 17; Tr. 14-17, 224, 226. For most of its course on the Island, the Circle Trail runs between the shore of the lake and the Island

² References to admitted exhibits are abbreviated as "Ex." with the appropriate page number assigned to that page of the exhibit. All pages in the Appendix are numbered sequentially, Rule 17(2), but in order to maintain consistency with the references to exhibits in the transcript, references to exhibits in the Brief will use the exhibit and page number used at trial and in the transcript.

³ References to testimony in the transcript is abbreviated as "Tr." with the appropriate page number and lines of testimony.

residences as it passes around the entire perimeter of the Island. Ex. 8, p. 166; 18, p. 460. The Circle Trail, established by deed for the Newbury or southerly portion of the Island, did not stop at the town boundary line but continued through the Sunapee properties following the shoreline and returning back around the Island to the Newbury properties. *Id.* The only access to the Circle Trail and other island trails is from the various properties on the Island. No roads exist on the Island. The Circle Trail and other trails on the Island are the only routes for Island residents to gain land access around the Island and are considered “sidewalks for the Island.” Tr. 251, lines 13-15; Ex. 19, p. 481-488.

For over a century, the Island residents used the entire Circle Trail around the Island without incident until 2013 when Island property owner Thomas Hoffmeister blocked the Circle Trail by installing a large fence. The trial court granted plaintiffs’ request for a temporary injunction requiring that the fence be opened and permitting the plaintiffs to use the Trail. Court Order, Appendix, p. 1. That matter with Thomas Hoffmeister has been settled.

However, a dispute also arose with Dwight Stowell whose property is primarily in Newbury but a small northerly corner is located in the Town of Sunapee. Ex. 18, p. 459. Beginning in 1997, Dr. Stowell started to place debris and small piles of sticks or brush to mark his boundary and, he now claims, to block the use of the Circle Trail. Tr. p. 44-45. Plaintiffs’ witnesses testified that by stepping over the sticks and brush, they and their guests continued to walk on the Circle Trail between his house and the lake. Tr. 204-205; Ex. 19, p. 491. In 2008, Dr. Stowell even called the police and complained about the “droves of people” walking on the Circle Trail. Order, p. 9. Tr. 474, lines 9-15. More recently, Dr. Stowell tried to block the path by installing a higher and longer fence along his boundary. Ex. 19, p. 495. He has also attempted to

divert people from walking the Circle Trail by clearing a path up through the woods along the perimeter of his property on which he placed signs identifying it as the “Stowell perimeter trail.” That perimeter trail is “rocky and slippery,” winds uphill into the woods toward the center of the Island and is almost three times as long as the Circle Trail route through his property. Tr. p. 205, lines 14-19; Ex. 18, p. 459. The plaintiffs brought suit to prevent interference with their long-established use of the Circle Trail footpath through Dr. Stowell’s property.

SUMMARY OF THE ARGUMENT

The servient estate owner may not unilaterally relocate an easement. The plaintiffs, as easement owners, did not consent to any relocation of the historic footpath. Additionally, the proposed location for a relocated footpath lessens the utility of the easement and substantially increases the burdens on the dominant easement owners.

The easement rights of the property owners in the Town of Newbury to use the footpath on Dr. Stowell's property in the Town of Newbury are appurtenant to their deeded rights.

The easement rights of the property owners in the Town of Newbury to use the footpaths on Dr. Stowell's property in the Town of Sunapee are appurtenant prescriptive easement rights to their property.

The easement rights of the property owners in the Town of Sunapee to use the footpath on Dr. Stowell's property both in the Town of Newbury and the Town of Sunapee are appurtenant prescriptive easement rights to their property.

All of the Island residents, whether or not they testified at trial, have deeded or prescriptive rights to use the Circle Trail and other pedestrian pathways around the Island and those appurtenant easement rights are not limited only to those plaintiffs who testified at trial.

ARGUMENT

Standard Of Review

“The interpretation of a deeded right of way is ultimately a question of law for this court to decide by determining the intention of the parties at the time of the deed in light of surrounding circumstances ... If the terms of the deed are clear and unambiguous, those terms control how we construe the parties’ intent.” *Gill v. Gerrato*, 154 N.H. 36, 39 (N.H. 2006) [internal quotations and citations omitted]; *See also, Motion Motors v. Berwick*, 150 N.H. 771, 775 (2004).

“Whether a use of property is adverse is an issue of fact. We will reverse the trial court's findings and rulings only if they are unsupported by the evidence or are erroneous as a matter of law.” *Bonardi v. Kazmirchuk*, 146 N.H. 640, 643 (2001), *citing Town of Warren v. Shortt*, 139 N.H. 240, 242 (1994). “Questions of law are reviewed *de novo*. Findings of fact, however, are overturned only if unsupported by the evidence. *Crown Paper Co. v. City of Berlin*, 142 N.H. 563, 566 (1997) [internal citations omitted]; *DirectTV, Inc. v. Town of New Hampton*, No. 2016-0151, 2017 Lexis 80, at *7 (N.H. may 26, 2017).

I. An Easement May Only Be Relocated by the Agreement of the Parties

The trial court’s Order provides that Dr. Stowell may relocate the footpath easement “to the back of his property.” p.16. The result of that ruling is that, instead of passing directly through his property along the lake shore, (Ex. 18. P. 460, 467) the relocated pathway would wind uphill to the center of the island, proceed around the perimeter of his property, and then back down to rejoin the lake shore Circle Trail. Ex. 18. P. 459. The relocated path is nearly triple the distance of the existing Circle Trail path. The trial court’s Order would apply both to those property owners

with deeded easement rights as well as to those who have established prescriptive easement rights.

The court's stated basis for its ruling was "Dr. Stowell's testimony that he was concerned about children diving off or going through his boathouse, and walking directly in front of his property...." *Id.* The court also stated, incorrectly, that the "footpaths have changed location over time." p. 15. The only evidence about children near the boathouse came from Dr. Stowell's caretaker, Keith Philip, whose testimony the court found "not ... particularly credible," (Order, p. 6). Mr. Philip admitted that the claim about children arose only from a single event in the 1980's. Tr. 509, lines 16-25. As for the location of the footpath on Dr. Stowell's property, the testimony and evidence show that the path's location has not changed. The footpath known as the Circle Trail was established in its current location in the early 1900's, and Dr. Stowell, as the servient property owner, may not unilaterally relocate the easement, and the court's ruling was erroneous.

A. An Easement Owner May Use the Easement in its Established Location.

The longstanding rule in New Hampshire is that "owners of servient estate may not 'compel the [owner of the dominant estate] to detour over other land of theirs.'" *Duxbury-Fox v. Shakhnovich*, 159 N.H. 275, 282 (2009), citing *Sakansky v. Wein*, 86 N.H. 337, 340 (1933).

Sakansky made clear that,

The use which the [dominant property owner] may make of the way is limited by the bounds of reason, but within those bounds it has the unlimited right to travel over the land set apart for a way. It has no right to insist upon the use of any other land of the [servient property owner] for a way, regardless of how necessary such other land may be to it, and regardless of how little damage or inconvenience such use of the [servient property owner's] land might occasion to them. No more may the [servient property owner] compel the [dominant property owner] to detour over other land of theirs.

Sakansky, 159 N.H. at 340. The Court restated this admonition in *Duxbury-Fox* by citing

Sakansky. See also, *Dumont v. Town of Wolfeboro*, 137 N.H. 1, 7 (1993) (servient estate owners had no privilege to deflect the dominant tenant's course from the location of the deeded way).

Other states have taken the same position. *Davis v. Bruk*, 411 A.2d 660, 664-665 (Me. 1980) (unilateral relocation of easement by servient owner denied citing, among other cases, *Sakansky v. Wein*). *Edgell v. Divver*, 402 A.2d 395, 398 (Del.Ch. 1979). (“A way once located cannot be changed by either party without the consent of the other. When the right of way has once been exercised in a fixed and definite course, with full acquiescence and consent of both parties, it cannot be changed at the pleasure of either of them.”)

In the present case, the trial court failed to follow this long-standing rule. Whether or not Dr. Stowell provides another pathway, the plaintiffs’ rights to use the Circle Trail footpath in the location established by one hundred years’ use may not be unilaterally relocated by Dr. Stowell nor by the trial court.

B. The Location of the Circle Trail over Dr. Stowell’s Property Was Established and Has Remained Unchanged.

The Circle Trail footpath runs around the perimeter of Great Island. Ex. 18, at pages 460, 462 and 467. On Dr. Stowell’s property, which is identified as “15” on the sketch at page 460, the well-trod footpath runs along the shoreline, passes behind his boathouse and proceeds northerly along the shoreline between his house and the Lake. Some of the deeds specifically refer to the pathway “along said shore.” Ex. 8, p. 166. All of the witnesses described the Circle Trail as having always existed at this location.

Chester Andrews testified that he first went to Great Island in 1935 with his grandmother, who was a first generation Island resident. Tr. p. 224, lines 22-25. He grew up going to the Island

and his children have grown up going to the Island. As a child, he, and then his own children, walked and played on the Circle Trail and used it to access the wharves for fishing and swimming. Mr. Andrews's son, Jeffrey, confirmed his father's testimony, adding his own recollections of using the Circle Trail. They, along with all of the other plaintiffs who testified, described the Circle Trail over Dr. Stowell's property as passing between Dr. Stowell's house and the lake shore, as shown on Ex. 18, p. 460. *See*, Chester Andrews's testimony at Tr. p. 226, lines 23-25; Tr. pgs. 227-231; Jeffrey Andrews's testimony at Tr. 238-241; Charles Aiken's testimony at Tr. pgs. 264-265; 278-279.

A representative sampling of other witnesses' testimony also confirms that the location of the Circle Trail has not changed, especially on Dr. Stowell's property:

Lois Logan testified:

Q Okay. And when you were a child in the '50s and afterwards, did you use that circle trail as shown around the perimeter even going through the Stowell property?

A Yes, That's correct.

Q What did you observe about other people on the island using the circle trail?

A Everybody used it....

Tr. p. 17, lines 2-8.

Ronald Wyman described the historic location of the Circle Trail between Dr. Stowell's house and the lake:

Q In the year 2000, for instance, was it three to five feet like the rest of -- much of the path?

A Some of it was and I think it was typical of the other paths on the island.

Q And directly in front of his house, how wide?

A Directly in front of his house it may have been probably two and a half to three feet wide.

Tr. p. 92, lines 3-10.

Thomas Richards testified that he always walked on the Circle Trail where it passed between the lake and in front of Dr. Stowell's house. Tr. p. 204-206.

On the basis of the testimony of these and other witnesses, the trial court found "that for about a century the Great Island residents had used the Circle Trail or - close to the present location of the Circle trail - without incident." (Order p. 3). However, the trial court then referred to a hand-drawn sketch (Exh. 18, p. 461) made by Elizabeth Davis, a former resident on the Island as its basis for finding that "the footpaths have changed location over time" (Order p. 15) and that "the location of the footpaths was not necessarily fixed," Order p. 4. That statement by the court is unsupported by the evidence because that sketch by Mrs. Davis does not refer to or show the Circle Trail. Rather, the legend at the top of the sketch indicates that it shows "Old Trails - per Elizabeth Davis: built in the early 1900's - Destroyed in '38 hurricane." Ex. 18, p. 461.

Susan Schultz, whose family are long-time owners on the Island and who has been coming to Great Island for sixty years, explained that it was her mother who drew the sketch referred to by the court. Tr. p. 331-333. Ms. Schultz also testified that she helped her mother draw the sketch at page 462 which does show the Circle Trail, and which is also known as the "Red O Trail." Tr. p. 291, 332. Mrs. Davis also drew the sketch at page 463 which shows the Circle Trail as of 1967. Tr. 333. A comparison of those sketches from 1967 with a GPS map (p. 467) of the Circle Trail prepared in 2015 by Island resident Edgar Forrest shows that the Circle Trail has not changed over the last nearly 50 years, Tr. 353, 357. The sketches, maps and testimony further confirm that the Circle Trail has always passed between the Stowell house and the lake. *See, e.g.* Tr. 204-206. *Donaghey v. Croteau*, 119 N.H. 320, 324 (1979) (continued use of right-of-way across lot is evidence of the intended location of the way, *citing French v. Hayes*, 43 N.H. 30 (1861)).

The only times that the Circle Trail path detoured were temporary diversions such as when a tree had fallen and blocked it (Andrews testimony, Tr. p. 247), when Dr. Stowell placed brush on the trail which the plaintiffs then simply walked around (Richards testimony, Tr. p. 205) and when Dr. Stowell did construction on a stone wall (Wyman testimony Tr. p. 83). *Flanagan v. Prudhomme*, 138 N.H. 561, 573 (1994) (“When a deeded right of way is obstructed or impaired by the conduct of the owner of the servient estate, the owner of the dominant estate may deviate from the deeded right of way in order to preserve the right granted.”); *Haley v. Colcord*, 59 N.H. 7, 9 (1879) (easement owner could deviate from right of way to avoid obstruction “because such deviation, like an abatement of the nuisance, was a remedy of necessity.”) After each such instance, the Island residents resumed use of the historic, established and well-worn Circle Trail path and at no time did the plaintiffs ever acquiesce to a relocation of the easement nor did they abandon it. *Duxbury-Fox*, 159 at 282.

The Circle Trail did undergo one relocation, at the Sunapee end of the Island, when Robert Schmitt built his home, but even that was an agreed-upon change. As Mr. Schmitt testified, he discussed relocating the trail when he planned to build his house on an empty lot.

Q Did you have any discussions with anyone about moving the path?

A Yeah. Actually Nancy Roberts was sort of the -- seemed to be sort of the manager of the path. And when she saw the house going up, we talked about what we could do about the path and that was her suggestion was just to move it about probably 20 feet from our house, just have a gradual incline and then go behind the house.

Tr. p. 115, lines 16-20.

On cross-examination, Mr. Schmitt explained again that he discussed moving the path to a location directly behind his house with Nancy Roberts who he understood to be the “manager of the path....” Tr. p. 128, line 21. He testified that “she was the one that suggested it where to start,

where to go up and how to go behind the house.” Tr. p. 129, lines 1-3. Mrs. Roberts, a long-standing resident of the Island, provided the agreement for the dominant easement owners. Based on those conversations, the trail was relocated directly behind the Schmitt house so that the detour was minor, created no additional burden and maintained easy access to the connecting points on the Circle Trail.

The easement for the Circle Trail around Great Island was created and defined over one hundred years ago and has been consistently used as the only land route around the Island. Dr. Stowell’s deed, like all of the other deeds for property in Newbury contains the grant of a right to use the footpath and the restriction reserving the footpaths for use by others. Long-term use has defined both the location and the scope of the easement use. *Donaghey*, 119 N.H. at 324. The location of the Circle Trail has always run north-south along the lake shore of Dr. Stowell’s property, passing between his house and the lake. The finding by the trial court that the location of the Circle Trail has changed is unsupported by the evidence.

C. The Plaintiffs have Reasonably Used the Footpath Easement.

Since having been established in the early 1900's, the footpath has provided pedestrian access for the Island residents, their families and guests. They have used the footpaths for exercise (Tr. 18), socializing (Tr. p. 48, lines 16-25), access for attending Island meetings (Tr. p. 546, lines 6-8), communicating about Island issues (gathering signatures for petitions to get electricity on the Island, (Tr. p. 25, lines 3 - 8), playing (Tr. p. 237-239), and aiding neighbors (Tr. p. 545, lines 16-24). No testimony exists that describes any misuse or unreasonable behavior on the Circle Trail or other paths, and especially on Dr. Stowell’s property.

The trial court, however, made reference to an event concerning children on Dr. Stowell’s

property. Mr. Keith Philips, a caretaker for Dr. Stowell, described an incident shortly after he began working in 1987 for Dr. Stowell. He saw two young boys and a girl, about 10 or 11 years old in Dr. Stowell's boathouse. He explained,

And, of course, when they say [*sic*] me -- I started yelling at them and they started crying and it was -- you know, I -- they were afraid, I had my dog with me, which wouldn't hurt any kids. But, I think they were very fearful at that time. I told them I was going to tell their parents they were in big trouble and I let them go on their way. I was sure I wouldn't see them again.

Tr. p. 509, lines 16-25.

That episode in the late 1980's was the only time children were seen in or near Dr. Stowell's boathouse. The trial court cited that event as its basis for permitting the relocation of the Circle Trail. Relying on a single, nearly 30-year-old event as justification to relocate the Circle Trail is unreasonable and unsupportable by the other evidence.

D. The Facts Demonstrate That the Restatement Third of Property Is Not Applicable.

Dr. Stowell has argued that the Restatement Third of Property provides a basis for relocating the trail. Even if that were the law in New Hampshire, the relocated trail does not satisfy the conditions in the Restatement. The proposed relocation lessens the utility of the trail by forcing pedestrians to take a much longer, circuitous route around the perimeter of Dr. Stowell's property. For any pedestrians on the trail, and especially for the many older Island residents, the additional length and changing terrain increases the burden of use. As Thomas Richards testified, "the path was rocky and slippery and everything else and I never took it again." Tr. p. 205, lines 17-18. *See, e.g., MacMeekin v. Low Income Housing Inst., Inc.*, 45 P.3d 570 (Wash. Ct. App. 2002) (in declining to adopt Restatement (Third), servient owner may not relocate easement; straight driveway may not be replaced by a zig-zag driveway.)

The trial court erred in permitting Dr. Stowell to unilaterally relocate the footpath. The trial court's ruling is, as well, unsupported by any evidence. The proposed relocated pathway significantly increases the burdens on the dominant easement owners and lessens the utility of the easement.

II. All Island Property Owners Have Deeded or Prescriptive Rights to Use the Circle Trail and Other Pathways Around the Island.

The trial court correctly ruled that the Newbury plaintiffs have deeded rights to utilize the Circle Trail, Ridge Trail and Midway footpath in Newbury. Order, p. 16. However, the court erred in apparently limiting those rights only to the plaintiffs or to those plaintiffs who testified at trial where the undisputed evidence demonstrated that *all* property owners, whether in Sunapee or Newbury, have established easement rights to use the trails.

A. The Newbury Property Owners Have Deeded Rights to Use the Circle Trail Through Dwight Stowell's Newbury Property.

The court correctly found that the plaintiffs who own property in Newbury have a deeded right to utilize the Circle Trail and Midway Trails in Newbury. The court's finding is supported by its recitation of the evidence in pages 3 through 9 of the Order.

Exhibits 1 through 16 contain the title histories and deeds for the plaintiffs' properties. All of the deeds for the landowners whose properties are located in the Town of Newbury contain language both granting a right to use the "foot path" and reserving the right to cross all of the lots by the "foot path." For instance, the deed for lot 42 owned by plaintiff Ronald Wyman states:

also conveying the right to cross the other lots by foot path to reach the steamboat wharves, reserving to ourselves our heirs and assigns the right to cross said lot 42 to reach the steamboat wharves.

Ex. 1, p. 010.

The deed for plaintiff Lois Logan for Lots 19 and 20 states:

also conveying the right to cross all the lots in this range by footpath to reach the steamboat wharves, and reserving the right to cross the lot by footpath to reach the steamboat wharves.

Ex. 9, p. 172.

Likewise, the deed for Dwight Stowell contains both a grant and reservation of the right to use the footpaths by making reference to prior deeds: “Together with such right of way as was conveyed by deeds” and “conveyed subject to such right of way as was reserved in the deeds aforesaid.” Ex. 14, p. 271. Those “aforesaid” deeds all refer to the original deeds for the lots and state:

also conveying to his heirs and assigns the right to cross all of the lots in this range by foot path to reach the steamboat wharves, also reserving to ourselves, our heirs and assigns the right to cross the lots by foot path to reach the steamboat wharves.

Ex. 14, p. 286. The deeds in the chains of title for all of the Newbury property owners contain the same or nearly similar language. Even though steamboat travel on Lake Sunapee discontinued in the late 1930's, the easements granted and reserved access to a location - the steamboat wharves - a location that continued to be frequented by many Island residents. Ex. 17, p. 406-407, 414; Tr. 22, line 7 to 23, line 3; Tr. 228.; *Boissy v. Chevion*, 162 N.H. 388 (2011) (reference to an “ice pond was a description of the location of the right-of-way and was not a statement regarding the easement’s purpose.”).

The use of those pathways over the last hundred years confirms both the scope of the grants and reservations of the rights-of-way and location for those easements. The summaries of the chains of title for each of the plaintiffs and selected deed pages from plaintiffs’ Exhibits 1 through 16 are included in Plaintiffs’ Appendix.

B. The Prescriptive Rights to Use the Footpaths on the Sunapee Portion of Dr. Stowell's Property are Appurtenant to all Great Island Properties.

“To establish a prescriptive easement, the plaintiff must prove by a balance of probabilities twenty years’ adverse, continuous, uninterrupted use of the land claimed in such a manner as to give notice to the record owner that an adverse claim was being made to it.” *Jesurum v. BTSCC Ltd. P’ship*, 169 N.H. 469, 476 (N.H. 2016) (internal quotations and citations omitted). When the deeds granting the rights to pass on the footpaths were conveyed for the Newbury properties, the Island property owners established pathways. See, Island histories, Pl. Ex. 17; Tr. pp. 11 - 13. The pathway around the Island became known as the Circle Trail which, as the plaintiffs’ witnesses testified, has remained in its current location for almost 100 years. Thus, the trial court found,

From the documents the Plaintiffs produced, including the histories of Lake Sunapee, the Court finds that for about a century the Great island residents had used the Circle Trail or - close to the present location of the Circle trail - without incident. The Circle Trail provides a path around the perimeter of Great Island, while the Ridge Trail crosses the middle of the island from north to south and the Midway Trail bisects the island from east to west.

Order, p. 3.

This finding by the trial court makes no distinction between Newbury and Sunapee property owners. The unanimous testimony by the plaintiffs’ witnesses, and even that by Dr. Stowell (“droves of people” coming through his property. Tr. p. 474, lines 9-15), confirm that the Circle Trail on Dr. Stowell’s property in both Sunapee and Newbury was used by all people on the Island. This theme, that all people on Great Island - whether from the Newbury or Sunapee side - used the Circle Trail through Dr. Stowell’s Newbury and Sunapee property, was echoed in all testimony.

Lois Logan who has been going to Great Island since 1947 testified that she continuously walked the circle path or the perimeter path around the island. Usually it was “the first thing she did when she arrived at the Island.” Tr. p. 7, lines 18-23. She further testified that no one made any distinction between the footpath in Sunapee or Newbury or whether the users of the footpath lived on the Newbury or Sunapee side of the Island.

Q This map with the various names on it has a line -- bag [*sic*] and a line which I'll represent -- say represents the line between Sunapee and Newbury. Was there -- did you ever note any distinction between people who were at the Sunapee end of the lake versus the Newbury end of the lake who used the paths?

A No, none.

Q Everybody just did?

A Everybody did.

Tr. p. 17, lines 14-21.

Q Now your deed refers to paths. And it does not distinguish between Newbury and Sunapee, but it says in the range. There will be testimony later that the Sunapee deeds don't have any reference to paths. Whether or not that's true, can you describe what paths there were on the Sunapee end of the lake?

A Well, it was a footpath near the lakefront just like the footpath around the whole rest of the island. There was really no distinction.

Q It just continued around?

A Yes.

Tr. p. 30, lines 15-25.

Q With regard to other people on the island, whether in Sunapee or Newbury, what were your observations and experience with them using the footpaths? ...

A Okay. My experience with people using the footpath?

Q Yes, please.

A Okay. Children on the island were constantly using the footpath; children, teenagers, and their parents, as well; and oftentimes adults, I think, would choose to walk the path maybe at 4, 4:30, at a time when it was convenient for other islanders to invite them to their porches for a beer or a drink or whatever, to socialize, essentially. So I think that was the traditional mode....

Tr. p. 48, lines 3 - 22.

Ronald Wyman, whose property is located in Newbury but is directly on the Town line, has been a property owner on Great Island since 1971. He testified as follows:

Q Would you ever consider stopping anybody on the path and preventing them from going?

A No.

Q And what's the reason, why do you take that position?

A It is -- before we bought the property on the island, the only way we would get to it was by the circle path. And it was just a path that had been there for 100 years. It was the historic path. And it was open to island residents to get from one cottage to another.

Tr. p. 76, lines 6-14.

Q Did you ever notice any distinction by either Sunapee people or Newbury people in who used the path and who didn't use the path?

A No, I did not.

Q Did everybody on the island use it, I'll say equally?

A Yes, they did.

Q Okay. There was never any discussion about one group keeping the other group out or any distinction?

A. There was not, no.

Tr. p. 92, line 18 to p. 93, line 1.

On cross-examination, Mr. Wyman stated:

Q You certainly never communicated to Dr. Stowell before this case started that you thought you had a prescriptive easement over his property?

A No.

Q And you never communicated to Dr. Stowell before this case started that you were in the process of acquiring a prescriptive easement over his property?

A No.

Q You think the rights you have entitle you to a path in a specific location on the ground?

A I believe the rights that I have are to walk the historic path that's always been there.

Q So you think your rights are in a particular place in the ground and you can walk there if you want?

A A defined spot in the ground, yes.

Tr. P. 102, line 23 to p. 103, line

The testimony by other witnesses, including Dr. Stowell, all corroborated these statements that the Circle Trail was used entirely around the Island and by all people on the Island. A selection of that testimony follows:

- Newbury property owner Janet Fenwick who grew up going to the Island stated:

Q What was lake life like on the island when you were a child?

A Oh, well, we had wonderful times roaming the island. And as kids, the circle trail was just like sidewalks in the city. I mean, they were used all the time by everyone and there was never any concept when we roamed through the middle of the island and went to Indian Rock and played that it wasn't fine to do that.

Tr. p. 144.

- Sunapee property owner Anthony Carter:

Q Do the Cushmans, Trotskys, Levans, and Blocks [Sunapee property owners] all use the trails as you do?

A Yes.

Q Do all the islanders use the circle trail in Sunapee just as you do?

A Yes.

Tr. p. 198, line 25 to p. 199, line 5.

- Former Newbury property owner Thomas Richards:

Q So you had some familiarity with legal rights?

A Legal rights and prescriptive rights, yes. I had dealt with those issues a number of times over the years and as I explained to the group, that to my knowledge, we all had legally deeded rights to pass and repass over the path. I know I did under my agreement. I don't believe I was aware at the time that Jim Dombrowski had apparently removed that provision from the deeds that he gave out after he subdivided what is now the Carter property into one, two, three, four, yeah, four different lots and he built on the first one, what's now the Levan property. I was unaware of that particular omission or deletion, whatever you call it. But as far as I knew, everybody else, according to them, had that specific deeded right. And in addition, I said even if you didn't have such a right, the fact that we have used that path, everyone on the island has had access to it over 100 years, that there is a right by way of prescriptive easement, which is, I think, the term I used to pass and repass. And that Mr. Stowell could not block that path or prevent people from using it absent some kind of a court ruling.

Q And this was an explanation you provided to those in attendance at least at that meeting on August of 2000?

A Yes. And I think I repeated it at several other meetings and what I encourage people to do is just continue as I was doing to use the path and to go in front of his cottage. Because if you didn't eventually you would lose the right.

Q And as of 2000, were you able to go in front of his cottage?

A Yes.

Tr. p. 210, line 12 to p. 211, line 15.

• Jeffrey Andrews who grew up going with his family to the Island testified:

Q Okay. With regard to the circle path throughout the island was there ever any distinction between Sunapee and Newbury as to the path?

A No.

Q Did the Newbury people walk on the Sunapee path with equal expectation or equal occasion, I'll say?

A Yes, they did.

Q And the Sunapee people, did you see them on the Newbury trail?

A Yes.

Tr. p. 243, lines 2 - 11.

• Former Sunapee property owner Charles Aiken:

Q Sure. Ms. Hartman asked you a question about whether you thought you could have prevented other residents from coming onto your property. Do you remember that question?

A Yes.

Q And your answer was that you didn't think that you had the right to do that, right?

A No.

Q And is that because you actually gave some thought to the question and concluded the answer was that you couldn't?

A It never occurred to us.

Q Fair enough. So you never gave any thought one way or the other --

A No.

Q -- to the idea of excluding other people?

A That's correct. We walked it like a public pathway and they walked on our land on the public path and we'd walk on theirs, so you know --

Tr. 278, lines 8 to 24.

Q Did you ever walk the circle path in front of Dr. Spillane, which is now Dr. Stowell's house?

A Yes.

Q Did you ever ask Dr. Spillane if you could walk by his house?

A No.

Q When you walked the path did you ever distinguish between the little triangular piece that's shown on that map there that's in Sunapee for Dr. Stowell's house versus the Newbury portion of his house?

A No.

Tr. 280, line 21 - p. 281, line 6.

... the path followed between a big boulder that sits in front of Dr. Spillane's or the Stowell property and the front porch and wandered down towards their dock. And continued on towards the boat house. And when it got passed the boat house, you had a slight rise and it went up a slight hill

Tr. 281, lines 17 - 22.

... We never really learned where everybody's boundaries were. I mean, it was the island. You just traveled from one spot to the next. I mean, we knew that our property -- when I got older, I knew our property was in the town of Sunapee. But and the rest of the property was in Newbury. We didn't differentiate any different as far as the trail goes going around, who lived where. We were all island people.

Tr. 284, lines 1-8.

- Newbury property owner Brant Fagan also grew up going to Great Island describes the footpath beginning at transcript page 419, at line 12 and continuing to page 420, line 9.
- Dwight Stowell testified how he and his brother walked the paths at transcript page 485, at lines 9 through 16.

This uncontradicted testimony demonstrates that all of the Island property owners, not only those plaintiffs who testified at trial, used the Circle Trail on all of Dr. Stowell's property in a manner to show to Dr. Stowell and his predecessors-in-title that their "right was being exercised, not in reliance upon the owner's toleration or permission, but without regard to the owner's consent." *Jesurum*, 169 N.H. at 477. Further, when Dr. Stowell claims that the use of the Circle Trail was permissive, he "conflates friendly or 'neighborly' relations with permissiveness. The neighborly interactions ... do not negate the fact ... for the property rights of the defendants or their predecessors." *Id.* at 478. Given that the Circle Trail was established some 80 years prior to his acquiring his property, the prescriptive easement rights and the intent and scope deeded easements had all been well established. *Id.* at 479.

C. The Deeded and Prescriptive Easement Rights Are Appurtenant to All Great Island Properties and Are Not Limited Only to the Plaintiffs Who Testified at Trial.

The trial court ruled that “[t]hose plaintiffs who testified at trial” have prescriptive rights to utilize the footpaths located in the Sunapee portion of Dr. Stowell’s property. Order, p. 16. However, by limiting its ruling to the “plaintiffs who testified at trial,” the court erred where the undisputed evidence demonstrated that *all* property owners, whether in Sunapee or Newbury, had established easement rights to use the trails on Dr. Stowell’s property in Sunapee. The court’s Order, the evidence and witnesses’ testimonies show that all property owners used the Circle Trail and other pathways on the Island.

The initial complaint against Thomas Hoffmeister (which was settled and is not now at issue) included 36 plaintiffs who subsequently became counter-claim plaintiffs against Dr. Stowell. Pre-trial orders reduced that number to 14 plaintiffs by removing non-title-owner spouses, others deceased, and those who had sold their property. At trial, plaintiffs called 12 witnesses, 9 of whom are plaintiffs. However, Dr. Stowell’s trial memorandum dismissively states that a “majority of Plaintiffs did not even bother to show up at trial” and argues that they “should be dismissed.” Stowell Trial Memorandum, p. 16. That statement is factually incorrect and legally erroneous.

“[N]o statute or rule of court in this State, nor legal precedent here or elsewhere, and none has been called to our attention, which requires a party in a civil case represented by counsel to be present in person at the trial if not subpoenaed to appear.” *Carveth v. Latham*, 110 N.H. 232, 233 (N.H. 1970). The testimony of plaintiffs’ witnesses was more than sufficient to demonstrate that since the early 1900’s all property owners - whether in Newbury or Sunapee -

along with their families and guests, have used the footpaths and have deeded or prescriptive rights to use the Circle Trail through Dr. Stowell's property. To the extent that the trial court ruled otherwise is in error.

The evidence is uncontradicted that all of the Island property owners, their families and guests, used all of the footpaths. The trial court's Order includes findings of fact that are supported by the uncontroverted evidence and testimony:

"Many plaintiffs have testified that they walked on the Stowell property" Order, p. 4.

Lois Logan who "began coming to Great Island in 1947 ... testified that everyone used the footpaths to see neighbors or just exercise" Order, p.4.

A Realtor told Dr. Anthony Carter "not to be surprised to see neighbors walking around." Order, p. 6

Dr. Carter has used the Circle Trail 10-15 times per summer since 1992 and there "was a tradition that islanders could use the trail. He is not a plaintiff in this case." Order, p. 7.

"Dr. Stowell admitted telling police officers that 'droves of people' were walking on his property. This suggests a large segment of the Great Island population was using Dr. Stowell's property on a regular basis." Order, p. 9.

"The evidence produced at trial indicates Plaintiffs openly used the footpaths without regard for the property rights of those who owned the land upon which the footpaths crossed." Order, p. 13.

The witnesses at trial provided an unchallenged basis for these findings by the trial court.

Nancy Roberts Schultz, whose family is one of the longest-term families on Great Island, has been going to Great Island since 1956 as an infant. She helped prepare the map at Ex. 18, p. 462 (Tr. 332, lines 15-18) and she testified:

Q When you were young and in that group of kids, do you recall ever distinguishing between the path on the Sunapee side of the island from the path on the Newbury side of the island?

A No, not at all. In fact, I might have seen the map before, but I remember really

realizing for the first time when you showed me some documents before my deposition that in fact we were in two different counties....

Tr. p. 329, lines 10-17.

Edgar Forrest, who began going to Great Island when he was 12 years old in 1963, testified that his “experience is that the paths have always been there [in Sunapee] and in my recollection and I started on the island -- when we started on the island in 1963, those paths were used by all island residents.” Tr. 348, 15-23.

Q And for the people in the town of Sunapee, ... did those people use the footpaths?

A They did.

Q And did they use the footpaths in the town of Newbury?

A Yes, they did.

Q Did anyone make any distinction?

A There was never any distinction made.

Tr. p. 348, line 24 to p. 349, line 7.

Despite its own findings and consistent testimony about the use of the footpaths, the trial court stated that “there was some testimony at trial that ‘everyone’ used the footpaths,” but that “these vague statements failed to specify when, for how long, or what portions of the footpaths were used by ‘everyone.’” Order, p. 15. The witnesses’ testimony was not “vague” but, like the use of the trails described in the Island histories (Ex. 17), consistently describe the footpath use over the years. Tr. 210-211. The Island histories, Ex. 17, corroborate that the footpath use described by the witnesses during their own lifetimes was but a continuation of the use that originated with their predecessors-in-title beginning from the time of the initial construction of houses on the Island. Ex. 17, p. 322, 366, 380, 404, 431, 447, 487, 488. *Alukonis v. Kashulines*, 96 N.H. 107 (1950) (tacking prior owner’s period of use permitted); *Seward v. Loranger*, 130 N.H. 570 (1988) (tacking of successive possessions). This evidence was not “vague” but

specifically described generations of use of the footpaths. *See, e.g.* Ex. 17, Ex.18, p. 487 - 488; Tr. p. 32, lines 1-17; 34, lines 10-18.

The testimony, Island histories, photographs and maps show the Circle Trail where it crosses Dr. Stowell's property and demonstrate that it has been used by "everyone" for nearly a century in its current location.

D. The Easements are Appurtenant to the Property of the Owners.

The deeds for the footpath easements expressly describe the rights as appurtenant to the property conveyed. *See, e.g.*, Ex. 5, p. 92; Ex. 6, p. 118. However, with regard to the rights of the property owners on the Sunapee end of the Island whose deeds do not contain the original deeded easements as well as all of the property owners' rights to cross Dr. Stowell's property in Sunapee, the trial court appears to apply a distinction. The court's Order states that "[t]he Plaintiffs who testified at trial have prescriptive rights to use the footpaths ... and Robert Schmitt also has a prescriptive right..." Order, p. 16. The Order also appears to adopt Dr. Stowell's argument that the "prescriptive rights are personal." Order, p. 14. If the trial court's Order implies that the prescriptive easement rights are "in gross," it is in error. Additionally, the evidence demonstrates that, whether the easements to use the footpaths rests on the basis of the deeds or prescriptive use, the rights of all property owners to cross Dr. Stowell's property in Sunapee and Newbury are established and appurtenant to their property.

With regard to the deeded easements, the deeds, going back over a century to the initial deeds that granted the easements to use the footpaths, all included the following language:

... also conveying the right to cross the other lots by foot path to reach the steamboat wharves, reserving to ourselves our heirs and assigns the right to cross said lot ... to reach the steamboat wharves.

To Have And to Hold the above granted and bargained premises, with all of the privileges and appurtenances thereunto belonging, to the said [grantee], her heirs and assigns, to them and their own proper use, benefit and behoof forever.

Pl. Ex. 1, p. 010.

Other deeds include language that the lot conveyed is,

subject to all rights of others, if any, to cross said land by foot, following existing footpaths, if any, to reach existing docks and is conveyed with the appurtenant right to cross other lots on Great Island by foot to reach such docks, by those footpaths presently in existence.

P. Ex. 5, p. 92.

This language is repeated in the same or similar form in all of the Great Island deeds, including that of Dr. Stowell's predecessors-in-title. See, Pl. Ex. 14, p. 286.

Unlike the language in *Tanguay v. Biathrow*, 156 N.H. 313 (2007), which reserved an easement to the named grantor, the language in the deeds for the footpaths on Great Island granted "appurtenant rights" "forever" and for their "heirs and assigns." The presumption that "appurtenant easements are generally favored over easements in gross" amply applies here given the expansive language in the deeds. *Tanguay*, 156 N.H. at 315. "[T]he general rule of construction favors appurtenant easements over easements in gross, and an easement is never presumed to be in gross or a mere personal right when it can be fairly construed to be appurtenant to some other estate." *Burcky v. Knowles*, 120 N.H. 244, 248 (1980) (internal citations omitted).

The appurtenant rights are the same for the use of the footpath across the portion of Dr. Stowell's property in Sunapee by all Island property owners. Access to the footpaths exists only from the properties of the Island's property owners. No public access exists to the foot paths. Since the initial grants to use the footpaths, all Island property owners have walked around the

entire perimeter of the Island, in the same manner and scope as permitted by their deeds for the Newbury properties. Mr. Wyman, whose property is on the Town line, stated that when people walked the Circle Trail, they walked through his property, crossed the Town line and proceeded into the Sunapee properties of his neighbors. Tr. p. 92, line 18 to p. 93, line 1. They continued around the Island, crossing Dr. Stowell's Sunapee property and southerly onto and through his Newbury property. *Id.* As he and the other witnesses testified, there was no distinction between using the footpaths across the Newbury properties or the Sunapee properties. *Id.*

The use of the Circle Trail footpath around the entire Island by all of the property owners since the early 1900's may have arisen initially from the grants in the original deeds for the properties in Newbury but the footpath usage by all Island property owners established the same scope of easement for a prescriptive easement over Newbury property by the Sunapee property owners and also by all property owners over the properties in Sunapee.

Just as the footpath easements over and across the Newbury property are appurtenant rights to the deeds for the Newbury properties, so too are the prescriptive rights to use the footpaths across the Sunapee properties appurtenant rights to all of the properties on the Island. The use of the footpath easements by all property owners on the Island has existed since the early 1900's, a use exercised by and reserved to all Island properties, whose owners have all used the paths for generations. This evidence demonstrates the general rule of construction, namely, that appurtenant easements are favored over easements in gross. *Burcky*, 120 N.H. at 248. In this case, the easements - the right to walk the footpaths - are appurtenant to "some other estate," namely the properties of all of the Island property owners.

CONCLUSION

For over a century, Great Island residents, their families and guests, have walked the Circle Trail. They used the Circle Trail as it was granted in the deeds to reach the steamboat wharves. Since the Trail provided the sole means of land access from cottage to cottage, over the years the residents also used the Circle Trail not only to reach the steamboat wharves for swimming, fishing and socializing but as access to each others' properties, for meetings and conferring about Island business, safety and keeping a helpful watch on neighbors' properties, access to pick up food and supplies, for recreation, and socializing.

This plaintiffs' rights to the plenary pedestrian use of the footpaths arise both from the defined and explicit grants in the deeds for the easements and from the long-term use of the footpaths. The evidence demonstrates that all Island property owners have both deeded and prescriptive rights to use the footpaths. Generations of Island residents have continuously walked the Circle Trail as a matter of right. Both the scope and location of the footpath easement are established and may not be changed by the servient owner.

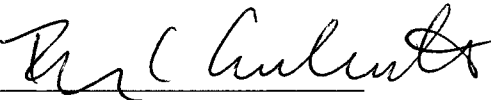
The Order of the trial court permitting the relocation of the pathway on Dr. Stowell's property is erroneous. The trial court's ruling limiting the use of the footpath only to those plaintiffs who testified at trial is not supported by the evidence. Those rulings should be reversed.

REQUEST FOR ORAL ARGUMENT

The plaintiffs, Great Island Footpath Association *et.al.*, request that Barry C. Schuster, Esq., be allowed to present their oral argument before the Court. I further certify, pursuant to Rule 16(3)(i), that the appealed decision is in writing and is appended to the brief.

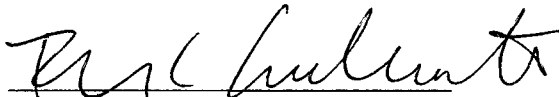
Respectfully submitted:
Great Island Footpath Association *et.al.*
By their Attorneys:

August 18, 2017

By: 
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CERTIFICATION OF SERVICE

I hereby certify that two (2) copies of this Brief were mailed this 18th day of August to Kathleen Mahan, Esq., and Nicholas O'Donnell, Esq., attorneys for Dwight Stowell, Jr.


Barry C. Schuster, Esq. #2280

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Great Island Footpath Association, *et al.*

v.

Thomas Hoffmeister, *et al.*

No. 217-2014-CV-375

This case involves claims by the Plaintiffs that they have deeded and/or prescriptive rights to traverse certain footpaths on Great Island, which lies partially in Newbury, New Hampshire and partially in Sunapee, New Hampshire. The Defendant, Dr. Dwight Stowell, disputes those rights. For the reasons stated in this Order, the Court finds the following:

(1) Those plaintiffs who own property in the Newbury portion of Great Island have a deeded right to utilize the Circle, Ridge, and Midway trails in Newbury to access the areas where steamboat wharfs were once located.

(2) Those plaintiffs who testified at trial— Lois Logan, Ronald Wyman, Robert Schmitt, Jan Fenwick, Jeffrey Andrews, Edgar Forrest, John MacLeod, and Brant Fagan— have established a prescriptive right to use the footpaths located in the Sunapee portion of Dr. Stowell's property. Robert Schmitt has also established a prescriptive right to use the footpaths located in the Newbury portion of Dr. Stowell's property. Dr. Stowell has not established that he successfully blocked the footpaths and so ended their prescriptive easements.

(3) The changes Dr. Stowell made in order to relocate the Circle Trail from the front

of his property to the back do not affect the use of the easement, which is for access around the island, not for aesthetic purposes, and serves a significant purpose in protecting Dr. Stowell from the risk of liability from children using his boathouse as a diving platform.

I

This action began when the Plaintiffs, various residents and direct or beneficial owners of real property on Lake Sunapee's Great Island, brought suit against Thomas Hoffmeister and other related entities ("the Hoffmeister Parties"), also direct or beneficial owners of real property on the island, alleging that they interfered with the Plaintiffs' deeded or common law rights to maintain and traverse three footpaths on the island. Dr. Stowell, another Great Island property owner, then brought a defamation action against Plaintiff Jeffrey Andrews. Jeffrey Andrews counterclaimed, seeking to prevent Dr. Stowell from blocking the footpaths that cross the Stowell property. Following the consolidation of the two actions, the Plaintiffs amended their complaint to assert their rights to use the footpaths that cross Dr. Stowell's property.

There have been various pretrial orders in this case dismissing a number of the Plaintiffs. Additionally, in its summary judgment Order dated June 29, 2016, the Court held that the remaining Newbury Plaintiffs have deeded rights to use the portion of the Circle Trail footpath located in Newbury to reach the locations of the former Melrose and Auburn steamboat wharves. This determination necessarily includes the right to also use the Midway and Ridge trails in Newbury because they also facilitate travel to the place that the wharves used to be located. Thus, those individuals who do not have such deeded rights only have rights to use the footpaths if such rights exist through prescriptive easements.

Shortly before trial, the parties settled the claims against the Hoffmeister Parties. Dr. Stowell's defamation claim against Jeffrey Andrews was also settled. As a result, the remaining claims before the Court are solely in regards to the prescriptive easement rights of the parties on Dr. Stowell's property. The Court held a bench trial on these issues on October 11-13 and 17-19, 2016, including a view of Great Island on October 6, 2016.

II

The Court finds the following facts based on the evidence produced at trial. In the 1890s, Norman Brockway, David Jennison, Louisa Jennison, Frank Browning, and Fannie Browning owned the portion of Great Island located in Newbury. They sold the lots that had frontage on the water. The deeds for those properties described the lots sold and contained similar language conveying the right to cross lots "by footpath" in order "to reach the steamboat wharves." At some point, the Sunapee lots came into the possession of Thomas Dombrowski. When he subdivided and sold lots to others in Sunapee, the "right to cross" language was not included in the deeds. Thus, any rights the Sunapee lot owners have to cross and use the footpaths at issue must be prescriptive.

From the documents the Plaintiffs produced, including the histories of Lake Sunapee, the Court finds that for about a century the Great Island residents had used the Circle Trail or – close to the present location of the Circle trail- without incident. The Circle Trail provides a path around the perimeter of Great Island, while the Ridge Trail crosses the middle of the island from north to south and the Midway Trail bisects the island from east to west.

Shortly after purchasing his property in the 1980s, Dr. Stowell attempted to prevent people from walking the Circle Trail on his property. There was a great deal of

dispute about how effective his efforts were, but the Court finds that they were not effective. Many plaintiffs have testified that they walked on the Stowell property; and by 2008, when Dr. Stowell unsuccessfully tried to have one of his neighbors, Ann Montgomery, arrested for trespassing, he told the police that “droves of people” were walking on his property.

Lois Logan testified at trial. She began coming to Great Island in 1947. She and her sister Jan Fenwick are members of the Davis family, which has lived on Great Island for many years. Her deed, introduced as Exhibit 9, includes a deeded right to use the footpaths to reach the steamboat wharfs. She testified that when she was a child, she walked continuously on the Circle Trail and the other footpaths. She testified that the first thing she and other children usually did when they arrived at Great Island for the summer was to clear the footpaths to remove debris that had fallen onto them over the winter. As children, they used the footpaths as a way to see playmates. During her time on Great Island, she testified that everyone used the footpaths to see neighbors or just exercise.

Logan testified credibly that when she was a child, the footpaths bore the names they use now: Circle, Ridge, and Midway. She testified about a 1967 hand drawn map, which is part of Exhibit 18 at page 461. It shows several footpaths, but it also contains language called “Old Trails- per Elizabeth Davis; built in early 1900s-Destroyed in ‘38 Hurricane.” Elizabeth Davis is a relative of Logan, and had knowledge of how the footpaths were used prior to 1967. The evidence is important not only because it shows use of the footpaths by those who believed they had the right to use them, but because it establishes the fact that the location of the footpaths was not necessarily fixed.

Logan, who has known Dr. Stowell since they were children, believes he put up a

fence on his property to block travel in the past eight to ten years. Prior to that time, Dr. Stowell placed brush and logs in the way of the footpath. Logan thinks that she has both a deeded right and a prescriptive right to access all of the properties. She admitted that the footpaths on the Stowell property have not always been in the same place.

Ronald Wyman also testified. He has been a resident of Great Island since 1971. He has deeded rights to cross the properties. Since at least 1971, there has been a pathway on his property. He never considered stopping anyone from using the footpath because he understood the only way they could access property was via the footpath. He recalls that in 1996, there was a discussion with Dr. Stowell about rerouting the footpath. Dr. Stowell's employee claimed they were working on the retaining wall and were simply rerouting it while the work was done. He did not believe the rerouting was permanent.

After the rerouting, Wyman continued to walk on Dr. Stowell's property even though Dr. Stowell began to put barriers in the footpath. Like others, he testified that a person could step over them. The last time he walked directly on the retaining wall portion of the footpath was seven or eight years ago as he has tended to walk slightly inland in more recent years. However, Wyman has made it a point to walk the Circle Trail every year to maintain his right of way.

There was much testimony about Exhibit 20, the meeting minutes of the Sunapee Island Association, which address Dr. Stowell's attempt to block the footpath, and the belief of Great Island residents that they have the right to use it. The minutes describe a group of people frustrated with the position taken by Dr. Stowell, unwilling to sue a neighbor, but nonetheless determined to exercise their rights to use the path. The minutes state that use of the Stowell property footpaths was "a matter of individual choice." (Pl.'s

Ex. 20 at 545.) The minutes also contain numerous references to the historical right to use the footpaths.

Robert Schmitt purchased his property on Great Island in 1981 and has used the Circle Trail every year for recreation since that time. His property is in Sunapee and was subdivided from Dombrowski, and does not have a deeded right to access the steamboat wharves. Critically, Schmitt relocated the Circle Trail to the back of his house shortly after purchasing his property, but received no objections from the Great Island residents when he did so. Even though he is an owner of property on the Sunapee side of the island, and has no deeded rights to use the Circle Trail, it was not until sometime in the early 2000s that he learned he did not have such deeded rights; nonetheless he continues to use the Circle Trail. He testified that he has never used the Midway Trail and has only used the Ridge Trail once or twice.

Jan Fenwick is the sister of Lois Logan and essentially corroborated her sister's testimony. Like her sister, she has been coming to the island almost every summer since the 1940s. She credibly described the Circle Trail as like a "sidewalk in a city" with respect to Great Island residents. She has been using the footpaths since she was a child. She testified that she walked on the footpaths as recently as this summer. She also testified about the minutes of the Sunapee Island Association, which discussed hiring a lawyer to challenge Dr. Stowell in 2003 and 2004.

Dr. Anthony Carter is a radiologist from Cheshire, Connecticut. He has owned property on the Sunapee portion of Great Island since 1992. When he purchased the property, he was told about the footpaths by a realtor, who told him not to be surprised to see neighbors walking around. He understands his deed does not include the right to walk

about, but he has used the Circle Trail a number of times every summer since he has lived on the property. He believes that he, his guests, and his family use the Circle Trail approximately ten to 15 times in the summer. His daughter has used the trail to sell blueberries. He testified about the August 4, 2001 Sunapee Island Association meeting during which there was discussion that there was a tradition that islanders could use the trail. He is not a plaintiff in this case.

Thomas Richards is an attorney who purchased property on Great Island in 1982 and owned it until 2012. He apparently was very active in Great Island affairs, was involved in the Sunapee Island Association, and created an association for a common septic system called S.E.P.T.I.C. He testified that he would walk the Great Island footpaths every year until he sold the property. When Dr. Stowell put brush down, he would walk over the brush.

Chester Andrews currently lives in Connecticut. He first came to the island in 1935. Although he no longer personally owns property on Great Island, he continues to visit. As a child, he walked all over Great Island on all the footpaths. He referred to Dr. Stowell's property as the "Splaine" property, as it was apparently owned by a Dr. Splaine when he was a boy. He testified that he walked on the Circle Trail on Labor Day weekend in 2016 and that in the past when there was a barrier on the footpath, he "broke the barrier down."

Charles Aiken spent summers on Great Island from 1949 through 1979. His great-grandfather was Jon Breen, who purchased property on the island in 1979. He testified that when he was a child, the footpaths were used by individuals who believed they had the right to use them. The Circle Trail was never blocked, and he used to pass in front of the Stowell property.

Jeffrey Andrews is Chester Andrews's son and he confirmed his testimony. He also corroborated testimony that the footpaths on Dr. Stowell's property were never completely blocked, and he would step over small obstructions or walk around them. Jeffrey Andrews is 63 years old and has been going to Great Island his whole life. He used the Circle Trail often as a child and continued to use it as an adult. However, he has not walked on the Circle Trail in front of Dr. Stowell's property for about five or six years, once Dr. Stowell put up a larger barrier than the brush and logs that were first put on the footpath.

John MacLeod is a resident of Ohio. He owns property that contains a deeded right to use the footpaths. He has been going to Great Island in the summers since shortly after he was born and has used the footpaths on a regular basis. Since he got married in 1983, he has primarily been going to the island every other year and would go to his wife's family's home the other years. He identified Plaintiff's Exhibit 18, which is a very old map of the footpaths. He believes that in addition to his deeded right, he has a prescriptive right to walk on the footpaths. If there were obstructions on a footpath near Dr. Stowell's house, he would push them aside. He testified that the Circle Trail "more or less," depending on trees or other brush, usually follows the shoreline. Like other plaintiffs, he views the footpaths as sidewalks.

Susan Schultz testified to the same effect. Her cottage is on the southern end of Great Island. She was born in 1956 and has gone to Great Island since she was a child. She walked all over the island as a child and never asked for permission. In her view the paths "were like sidewalks." She uses all the paths currently. She identified Exhibit 18 pages 457, 461, 462, and 463, which are maps of Great Island. In particular, she testified that she assisted in the creation of the map on page 462, which includes descriptions of the

footpaths on Great Island. She did agree that the Ridge Trail was modified in 1967.

Edgar (Gary) Forrest corroborated the testimony of the other residents who testified. He also referred to Exhibit 18 and identified the footpaths. He testified that when Hoffmeister blocked the footpath on his land, he used barbed wire to do so. His parents bought property on Great Island in 1962 when he was 12 years old. He testified that he has spent every summer, except one, since then on the island.

Brant Fagan provided corroborating testimony and referred to the footpaths as the “sidewalks” of the islands. His family purchased property on Great Island in 1979 when he was 12 years old and he has been coming to the island ever since then.

Dr. Stowell testified as a defense witness. He began traveling to Great Island as a young child in the 1940s because his uncle owned property there. He eventually purchased property of his own in 1982. Dr. Stowell’s property is located on the west side of Great Island, primarily in Newbury and with a small portion in Sunapee. Dr. Stowell testified that from the time he purchased his property, he was concerned about liability issues. In particular, he testified that he was concerned that children might get hurt going through his boathouse and/or diving off his boathouse and into the lake. He claims to have consulted with an attorney in the early 1980s, who advised him to block the property, post “no trespassing” signs, hire security, and arrest people who walked on his land.

In 2008, he called the police and tried to have one of his neighbors, Ann Montgomery, arrested for trespassing. The prosecution went nowhere, but the police report was marked for identification and Dr. Stowell admitted telling the police officers that “droves of people” were walking on his property. This suggests a large segment of the Great Island population was using Dr. Stowell’s property on a regular basis.

All of the parties are closely intertwined socially. Dr. Stowell stayed at the Fenwick cottage in the 1960s even though he is now being sued by Jan Fenwick, who probably stayed there with him. He claims that in addition to the Schmitt relocation of the Circle Trail, the Andrews redirected the path on their lot. He claims that there is no specific Circle Trail, which the Court does not credit, and that it has been moved over time, which the Court does credit.

Dr. Stowell learned that the Sunapee Island Association was considering legal action against him in 2003. He claims to never have had any understanding of any obligation to allow people to use the footpaths to reach the steamboat wharfs because the steamboat wharfs are no longer on Great Island. While Dr. Stowell admitted he walked on the footpaths when he was a young boy, he never felt he had a right to use them, but felt he was being allowed to do so.

Keith Philip also testified. Philip met Dr. Stowell in 1983 and was hired by him to do construction work and to act as an “enforcer.” If he saw people on Dr. Stowell’s property, he would warn them to get off. He testified that he lived on Great Island from 1983 through November of 1987, and that the frequency of walkers on the footpaths “dried up” during that time. He moved off the island in 1987, but went back there frequently to try to keep children away from the boathouse and to keep people from walking on the Stowell property. In the last 15 years, he admitted that once or twice a week he saw people walking on the property. The Court does not find his testimony to be particularly credible.

Lindsay Holmes also testified. She is a property owner to the south of Dr. Stowell’s property and lives with Attorney McHugh, who represents Dr. Stowell. She claims to have spent her childhood on Great Island and that the Ridge Trail and Midway Trail had

become overgrown and dangerous and rarely used.

Thomas Hoffmeister also owns property on Great Island. His decision to place a barbed wire fence across his property was likely the impetus for this litigation. Hoffmeister acquired his first lot in 1992 and acquired adjacent property by purchasing a lot from Attorney Thomas Richards 2010. He claims to never have walked the Circle Trail, but walked part of a footpath to go to a septic tank meeting. He claims that in 1993 he saw a sign which said “nature trail” and was confused by whether that referred to the Ridge Trail. His unfamiliarity with the footpaths on the island is difficult to credit given the fact that he purchased property from his immediate neighbor, Attorney Richards, an attorney who was heavily involved with the island associations and the discussions over lawsuits regarding use of the trails.

III

The legal issues the Court must decide are as follows: (1) whether or not all of the Plaintiffs have prescriptive rights to use the footpaths over the portion of the Stowell property located in Sunapee; (2) whether or not the Plaintiffs that own property in the Sunapee portion of Great Island have prescriptive rights to use the footpaths on the Stowell property that are located in either Sunapee or Newbury; and (3) whether or not Dr. Stowell has sufficiently blocked the Circle Trail where it crosses his property in order to have prevented or terminated any deeded or prescriptive rights that the Plaintiffs may have. The Court notes that it is not granting relief, but only declaring rights.

To establish a prescriptive easement, a plaintiff must show, by a balance of the probabilities, that he or she used the land in question for 20 years and that the “use was adverse, continuous, and uninterrupted in such a manner as to give notice” to the

defendant that an adverse claim was being made. Sleeper v. Hoban Family P'ship, 157 N.H. 530, 536–37 (2008). “A use of land is adverse when made under a claim of right where no right exists.” Town of Warren v. Shortt, 139 N.H. 240, 244 (1994). Adverse use is defined as a use without license or permission. Id. (citation omitted).

The nature of the use must have been such as to show that the owner knew or ought to have known that the right was being exercised, not in reliance upon the owner's toleration or permission, but without regard to the owner's consent. Yet adverse use does not require hostility between the two [parties], so long as the use is “trespassory.” Use is trespassory if it consists of a wrong which the fee holder can prevent or for which he can obtain damages by means of legal action.

Jesurum v. WBTS CC Ltd. P'ship, ___ N.H. ___ (decided Dec. 9, 2016) (internal quotations omitted).

The Court finds that the Plaintiffs who testified at trial have established that they have a prescriptive right to utilize the portion of the Circle Trail that passes over the part of the Stowell property located in Sunapee. Based on the evidence presented at trial, those Plaintiffs have continuously used the Circle Trail, uninterrupted, for over 20 years. The Plaintiffs used the footpath for such activities as walking around the island and visiting neighbors. Dr. Stowell argues that the historic use of the Circle Trail was permissive and that the Plaintiffs have not produced sufficient evidence to prove their use of the footpath was adverse. The Court disagrees.

Regardless of whether or not use of the Circle Trail before Dr. Stowell purchased his property was permissive, the evidence presented at trial shows that shortly after Dr. Stowell purchased his Great Island property in 1982, he attempted to prevent individuals from walking on the portion of the Circle Trail that crosses his property. As laid out in Dr. Stowell's Post-Trial Memorandum, “beginning in the summer of 1983, Dr. Stowell hired

Mr. Philip to act as security and keep people off his property. Mr. Philip, along with his German Shepard, made clear to any passers-by that they no longer had permission to cross Dr. Stowell's property." (Def.'s Post-Trial Mem. 1, 11.) Dr. Stowell's testimony at trial shows that he was particularly concerned about potential liability issues regarding people crossing his property and that an attorney he consulted in the early 1980s advised him to block the property. Witness testimony, as well as the minutes of the Sunapee Island Association, show that Dr. Stowell placed brush and logs in the path and posted "no trespassing" signs.

Although Dr. Stowell later attempted to relocate the Circle Trail to the back of his property, the evidence shows that the Plaintiffs continued to walk on Dr. Stowell's property without permission as they had in years prior. In particular, when Dr. Stowell unsuccessfully tried to have Ann Montgomery arrested for trespassing in 2008, he told the police that "droves of people" were walking on his property. The Plaintiffs likewise testified that they would step over or around the obstructions that Dr. Stowell put in the way of the footpath. Thus, Dr. Stowell did not successfully block the footpath in order to have prevented or terminated the Plaintiffs' rights to use the footpaths.

Additionally, the Court finds Dr. Stowell's argument that the Plaintiffs did not use the footpaths adversely because they were used for socializing and visiting neighbors to be unavailing. Dr. Stowell's "argument conflates friendly or 'neighborly' relations with permissiveness." Jesurum, ___ N.H. ___ (decided Dec. 9, 2016). The evidence produced at trial indicates the Plaintiffs openly used the footpaths without regard for the property rights of those who owned the land upon which the footpaths crossed. As a result, the Court finds that those Plaintiffs who testified at trial—Lois Logan, Ronald Wyman, Robert

Schmitt, Jan Fenwick, Jeffrey Andrews, Edgar Forrest, John MacLeod, and Brant Fagan—have established a prescriptive right to use the portion of the Circle Trail that passes over the part of Dr. Stowell’s property located in Sunapee.

Based on this reasoning, Robert Schmitt, the sole Plaintiff to testify at trial and also own property on the Sunapee side of Great Island, also has a prescriptive right to use the footpaths on the Stowell property located in Newbury. Because, as noted above, the Plaintiffs who own land on the Newbury side of Great Island have deeded rights to use the footpaths in Newbury, they do not have prescriptive rights to use the footpaths on that side of the island. As the holders of deeded easements to use the footpaths, the Newbury Plaintiffs have permission to use the land. Therefore, the Newbury Plaintiffs’ use of the footpaths located in Newbury is not adverse, which precludes the finding of a prescriptive easement. Schmitt, however, does not have such permission stemming from his deed. Although Schmitt testified that he has rarely used the Ridge and Midway trails, he has established the prescriptive right to cross Dr. Stowell’s property in order to travel around Great Island, which includes the right to use the Ridge and Midway trails because they also facilitate travel around the island. As a result, the Court finds that Schmitt has established a prescriptive right to use the portion of the footpaths that cross over the part of Dr. Stowell’s property located in Newbury.

The Plaintiffs argue that all of them, even those who did not testify at trial, have established prescriptive rights to use the footpaths on Great Island. In response, Dr. Stowell argues prescriptive rights are personal and, thus, those Plaintiffs who did not testify regarding their own personal use of the footpaths have failed to establish prescriptive easements. The Court agrees with Dr. Stowell.

In New Hampshire, the general public may acquire land by prescription. Opinion of the Justices, 139 N.H. 82, 92 (1994). However, there are problems with use of the doctrine in such circumstances. Id. In particular, “prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis.” Id. (quotation omitted). Importantly, the burden of persuasion remains at all times on the individual claiming a prescriptive easement. Jesurum, ___ N.H. ___ (decided Dec. 9, 2016).

Although there was some testimony at trial that “everyone” used the footpaths, these vague statements failed to specify when, for how long, or what portions of the footpaths were used by “everyone.” Thus, those Plaintiffs who did not testify regarding their own individual use of the footpaths at issue have failed to meet their burden and are not entitled to a finding of prescriptive rights.

Dr. Stowell additionally argues that he has the right to relocate the Plaintiffs’ easement to the back of his property as a “reasonably convenient and suitable” location. The easements contained in the Newbury Plaintiffs’ deeds are ambiguous as to the location of the footpaths. Moreover, testimony in the case establishes that the footpaths have changed location over time. For example, the footpaths were relocated after the hurricane of 1938. Robert Schmitt also relocated a portion of the Circle Trail crossing his property shortly after he purchased his home. “In such situation a reasonably convenient and suitable way across the servient land is presumed to be intended.” Barton’s Motel, Inc. v. Saymore Trophy Co., 113 N.H. 333, 335 (1973); see also Seward v. Loranger, 130 N.H. 570, 577 (1988) (“[A] right-of-way is a limited right to use property . . . and, in the absence of a specified location, entitles the [easement holder] to only ‘a reasonably convenient and suitable way across the [] land.’”) (internal citation omitted).

The Court finds Dr. Stowell's testimony that he was concerned about children diving off or going through his boathouse, and walking directly in front of his property to be credible. The purpose of the footpaths is not for aesthetics, but rather for access; there was no evidence in the case that the Circle Trail, as relocated by Dr. Stowell, is not adequate for transit from one point to the other. Dr. Stowell, therefore, is entitled to relocate the Circle Trail, in the circumstances of this case, to the back of his property.

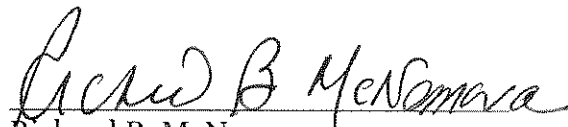
IV

In conclusion, the Court finds: (1) The Newbury plaintiffs have deeded rights to utilize the Circle, Ridge, and Midway footpaths in Newbury to access the areas where steamship wharfs were once located; (2) The Plaintiffs who testified at trial have prescriptive rights to use the footpaths located in the Sunapee portion of Dr. Stowell's property and Robert Schmitt also has a prescriptive right to use the footpaths located in the Newbury portion of Dr. Stowell's property; and (3) Dr. Stowell may relocate the Circle Trail from the front of his property to the back of his property.

SO ORDERED

DATE

12/28/16


Richard B. McNamara,
Presiding Justice

RBM/

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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NOTICE OF DECISION

File Copy

Case Name: **Great Island Footpath Association, et al v Thomas Hoffmeister, et al**
Case Number: **217-2014-CV-00375**

Enclosed please find a copy of the court's order of December 28, 2016 relative to:

ORDER

December 29, 2016

Tracy A. Uhrin
Clerk of Court

(485)

C: Barry Charles Schuster, ESQ; Mark C. Rouvalis, ESQ; Adam M Dumville, ESQ; Kathleen M Mahan, ESQ; Nicholas M. O'Donnell, ESQ; Nathaniel R.B. Koslof, ESQ; Henry R. Klementowicz, ESQ