STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0151

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

and

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

BRIEF OF THE DEFENDANT-APPELLEE AND CROSS APPELLANT DWIGHT K. STOWELL, JR.

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

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KATHLEEN M. MAHAN (#17124)
COOK, LITTLE, ROSENBLATT &
MANSON, pllc
1000 Elm Street
Manchester, NH 03101
(603) 621-7100
k.mahan@clrm.com

NICHOLAS M. O'DONNELL
(admitted pro hac vice)
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800
nodonnell@sandw.com

Counsel for Appellee/Cross-Appellant
Dwight K. Stowell, Jr.

Oral Argument by Nicholas M. O'Donnell, Esq.

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QUESTIONS PRESENTED

1. Whether the trial court erred in in ruling in its post-trial order that only those Plaintiffs who testified satisfied the elements of establishing a prescriptive easement over Defendant Dwight Stowell's property. (Issue preserved by *Defendant's Post Trial Brief* filed November 4, 2016).

2. Whether the trial court erred in in ruling in its post-trial order Defendant Dwight Stowell's relocation of the path providing Plaintiffs access across his property was justified. (Issue preserved by *Defendant's Post Trial Brief* filed November 4, 2016).

3. Whether the trial court erred as a matter of law when it ruled that common easement language granting a right to travel by footpath "to get to the steamboat wharves," granted to perimeter lots in the late 1890s and early 1900s when steamship travel in Lake Sunapee was prominent and two steamship wharves existed on Great Island, was not extinguished as a matter of law because the deeds granted a right to a particular location, rather than a right for the particular purpose of steamboat travel, even though steamboat travel has not existed on Lake Sunapee since the 1920s and the steamboat wharves were destroyed by the Hurricane of 1938. (Issue preserved by the *Motion for Partial Summary Judgment that the Deeded Easements to Reach the Steamboat Wharves are Now Extinguished as a Matter of Law* filed January 22, 2016; denied by the Trial Court on June 29, 2016.)

STATEMENT OF THE CASE / COUNTERSTATEMENT OF FACTS

Plaintiffs seek review of the decision and order dated December 28, 2016 (the "Decision") of the Superior Court (J. McNamara, R) (the "Trial Court") following a six-day bench trial (the "Trial"). Dwight K. Stowell, Jr. ("Dr. Stowell" or "Defendant") seeks review of the Trial Court's June 29, 2016 Memorandum and Decision granting Plaintiffs summary

judgment on the interpretation of the deed easements over Dr. Stowell's property in Newbury that they seek to enforce.

Before 1890, the Newbury portion of Great Island in Lake Sunapee was owned by Norman S. Brockway, David A. Jennison, Louisa Jennison, Frank J. Browning and Fannie Browning (the "Original Grantors"). An 1890 plan entitled "Plan of Cottage Lots on Great Island in Lake Sunapee, N.H. (the "Plan") subdivided their property into forty-five lots: forty-two shoreline lots, numbered 1 through 42; two unnumbered shoreline lots, one between lots 8 and 9, and one between lot 1 and the Sunapee town line; and a large, unnumbered, interior lot with no shoreline access. Appellee's Appendix p. 002 (*Second Affidavit of Carol Magoon* dated January 22, 2016, hereinafter "Magoon Aff.", ¶¶ 7-8). The 1890 Plan does not designate any footpaths or steamboat wharves.

Over the next twenty-two years, the lots along the shore in Newbury were conveyed to various people. Twenty-eight deeds (except one, the deed to Lot 12), contain a grant to cross other lots and a reservation of a reciprocal right of the others to cross the lot granted (the "Easement Clauses."). Appellee's Appendix p. 002 (Magoon Aff. ¶ 10).

The properties were all on an island, of course, requiring some conception for access to them. The first deed out conveyed Lot 16 to Caleb Dodge, on or about October 27, 1892 with a *conditional* easement grant. Its Easement Clause stated:

> Hereby conveying to said grantee and his assigns 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 reserving to ourselves and assigns the right of a similar foot path through or over the within named lot No. 16.

Appellee's Appendix p. 002 (Magoon Aff. ¶ 11) (emphasis added).

Had there been a wharf in existence at the time of this conveyance, the language would have made no sense. It can therefore be assumed that no such wharf existed. The Original

Grantors conveyed an easement only across the numbered lots, not the large, interior unnumbered lot, and only across property in Newbury, not Sunapee.[1] The first reference to the construction of a wharf appears in the Original Grantors' second deed out, conveying Lot 12 to the Woodsum Steamship Company, on or about March 8, 1893, for the purpose of constructing and maintaining a public wharf:

> As part consideration hereof said grantee does hereby agree and assume to construct and maintain a public wharf on the westerly side of the lot hereby conveyed, on the shore of said Lake.

Appellee's Appendix p. 003 (Magoon Aff. ¶ 12).

Notably, that deed makes no reference to an easement of any kind. The wharf on Lot 12 (later referred to as the Auburn Landing) was built by April 17, 1906, when the Woodsum Steamship Company conveyed the lot to John Palmer and the wharf is mentioned in the deed. Appellee's Appendix p. 003 (Magoon Aff. ¶ 13). The deed from the Woodsum Steamship Company also reserved a clearly defined right of way "to be used in common by all persons wishing to pass along said shore to and from said wharf," language that never again appears in other deeds on the island. *Id.* This right of way was never conveyed by deed to the other island lot owners.

The Original Grantors conveyed Lot 31 to the Woodsum Steamboat Company on October 16, 1902. Appellee's Appendix p. 003 (Magoon Aff. ¶ 14). As with Lot 12, Woodsum Steamboat Company was required to build and maintain a wharf as part of the consideration for the lot. The Lot 31 wharf became known as the Melrose Landing. With the completion of the Melrose Landing, the Original Grantors had now established two wharfs, constructed and

[1] The only easement rights the Original Grantors conveyed related to certain of the shoreline lots in Newbury. Plaintiffs conceded these at and before trial (*See, e.g.*, Appellee's Appendix p. 031 – 033 (Testimony of Lois Logan, Tr. 52:21-54:11)), though they seem to try to resurrect an argument that they clearly already waived.

maintained by the Woodsum Steamboat Company, one on the East Side and one on the West side, for their purchasers to get to and from their lots on Great Island, along with the luggage, food and other supplies.

The Original Grantors then sold the remaining lots along the shoreline. The Easement Clauses for the remaining original deeds out are restricted to the purpose "to reach the steamboat wharves." While the language of the deeds differs slightly, the substance is the same or substantially the same, pursuant to the common subdivision plan of 1890. The relevant language of the original deeds out is summarized in the Magoon affidavit and exhibits that were filed with the Hoffmeister Parties' Motion for Summary Judgment, joined by Dr. Stowell. The construction of steamboat wharves and the easement grant "to reach the steamboat wharves" were practical necessities to allow the development to thrive in an era of railroad travel.

The Woodsum Steamboat Company was administratively dissolved in 1939, and never re-instated. Before it ceased business, however, the Company transferred the Melrose wharf in October 1937 to Leo Osborne. That deed included the following language: "also conveying all rights of the Woodsum Steamboat Co." Appellee's Appendix p. 004 (Magoon Aff., ¶ 16).

The parties agree that what remained of the steamboat wharves were destroyed in the Hurricane of 1938. Addendum hereto at p. 15. Moreover, it is undisputed that all of the properties on Great Island now owned by the plaintiffs and defendants each now have their own individual docks.

Dr. Stowell bought his property on Great Island in 1982. It straddles Newbury, where his property consists of lots originally conveyed out by the Original Grantors that burdened with the Easement Clauses, and later also in Sunapee, which is unburdened by any recorded easement. Appellee's Appendix p. 006 (Magoon Aff., ¶ 30). Concerned through personal experience about

the possibility of liability to trespassers, Dr. Stowell immediately took measures to reduce the risk of harm and limit his potential liability to passers-by. Appellee's Appendix p. 034, Testimony of Dr. Dwight Stowell, Tr. 454:5-18. Dr. Stowell also found evidence of break-ins and thefts of alcohol. *Id.* Accordingly, Dr. Stowell sought advice from Eastern New York (Troy) District Attorney Charles Wilcox, and Steven Pierce (Justice of the Land Court of Massachusetts), who together suggested that four things were essential: 1) put up barriers; 2) post no trespassing signs; 3) hire security; and 4) make arrests if necessary. *Id.* at 455:10-14. Dr. Stowell did so immediately, hiring Keith Phillip, a former Marine with a German shepherd who was guarding Steven Tyler's nearby house at the time. *Id.* at 455:22-456:2.

For years, these self-help measures were largely successful without incident. Occasionally Dr. Stowell needed to call the police to dispel trespassers from crossing his property, yet for the most part, the residents of Great Island complied with Dr. Stowell's requests. *See, e.g.*, Appellee's Appendix p. 037 – 040, Testimony of Dr. Dwight Stowell, Tr. 471:6-23; 495:14-497:24. In any event, the question of the Plaintiffs' use of the paths on Dr. Stowell's property was the subject of considerable—and disputed-evidence at trial. *See, e.g.*, Appellee's Appendix p. 041 - 042, Testimony of Dr. Dwight Stowell 464:7-465:8; Appellee's Appendix p. 043 – 044, Testimony of Alexander Keith Philip, Tr. 506:6-10; 513:12-18; Appellee's Appendix p. 045, Testimony of Lindsey Holmes, Tr. 536:13-18; Appellee's Appendix p. 046, Testimony of Thomas Hoffmeister, Tr., 561:15-25.

In 2013, Plaintiffs filed suit against Thomas E. Hoffmeister, Leslie Hoffmeister, 1085 North Broadway, LLC, and the Great Island Realty Trust (hereinafter, the "Hoffmeister Parties") in response to a fence that Mr. Hoffmeister had installed surrounding his property. Principally, Plaintiffs argued that easements in their deeds to use footpaths "to reach the steamship wharves"

rendered the Hoffmeister Parties' blockage of the paths impermissible. The Plaintiffs sought injunctive relief against Hoffmeister Parties, which the Trial Court granted on October 23, 2014 (Smukler, J.) (the "PI Order") Appellants' Appendix p. 001. The Trial Court concluded that "the easements [contained in the deeds] are granted for transit to a location—not for a purpose." Appellants' Appendix p. 002. The Trial Court effectively treated this ruling as the law of the case thereafter. Dr. Stowell ultimately became a counterclaim defendant in a related suit related to the parties' use of and statements about the footpaths (since resolved by settlement), which was subsequently consolidated. The initial dispute with the Hoffmeister Parties was ultimately resolved by settlement shortly before trial.

On January 22, 2016, the Hoffmeister Parties filed a Motion for Partial Summary Judgment that the Deeded Easements to Reach the Steamboat Wharves had been extinguished (the "Purpose SJ Motion") and accompanying memorandum of law (the "MISO Purpose SJ Motion"), which Dr. Stowell joined. The motion and argument contended and argued that Judge Smukler's initial conclusion was erroneous, and in the alternative that the easements were ambiguous and should be interpreted with the benefit of extrinsic evidence.

On June 29, 2016, the Trial Court issued an order (the "Purpose SJ Order") denying the Hoffmeister Parties' Purpose SJ Motion, relying on the prior conclusion in the PI Order. *See* Addendum hereto (Purpose SJ Order) p. 15 ("The easements, therefore, are granted for transit to locations—the steamboat wharves--, rather than for a specific purpose .... As a result, the Plaintiffs' easements to use the Circle Trail footpath have not been extinguished.").

The Trial Court then tried the remaining issue: the claimed prescriptive easements and Dr. Stowell's relocation of the paths claimed by Plaintiffs pursuant to the Easement Clauses. At trial, Plaintiffs called thirteen witnesses and Defendant Stowell called four witnesses, including

himself. The Trial Court also participated in a walk-through of Great Island and the "Circle Path" to allow the Judge opportunity to observe the Circle Path, including the relocated path, firsthand. The trial concerned the Plaintiffs' assertion of prescriptive rights and the factual question of whether Dr. Stowell's relocation of a portion of the footpath on his property away from a narrow and dangerous wall was within his rights. Dr. Stowell explained his reasons for doing so (Appellee's Appendix p. 034 – 036, Testimony of Dr. Dwight Stowell, Tr. 454:5-456:16), while the Plaintiffs disputed the necessity of the relocation and attacked the viability of the newer path. *See, e.g.*, Appellee's Appendix p. 047, Testimony of Thomas Richards, Tr. 205:12-19.

In the Decision, the Trial Court made the following factual findings after weighing the competing evidence: (1) the individual Plaintiffs who did not testify at trial failed to meet their individual evidentiary burdens to support prescriptive rights; (2) the "vague", imprecise testimony from certain witnesses about what "everyone" did was insufficient to overcome the lack of trial testimony for the non-testifying Plaintiffs to meet their evidentiary burdens; (3) the Newbury Plaintiffs' deeds are ambiguous as to the location of the footpaths; (4) the location of the footpaths have changed on numerous occasions over time; (5) Dr. Stowell's desire to relocate the path was largely motivated by his well-founded safety/liability concerns; and (6) the relocated path behind Dr. Stowell's house is safe, not unduly burdensome, and a "reasonably convenient and suitable" location.

SUMMARY OF THE ARGUMENT

This appeal presents in the first instance the simple task of reviewing the Trial Court's findings of fact after a two-week trial, conclusions that Plaintiffs offer no reason whatsoever to disturb apart from Plaintiffs' dissatisfaction with the result. It presents further the review as a matter of law of the Trial Court's interpretation of easements recorded at the outset of the 20th

century for travel connected inextricably to the technology of the day, travel that ceased in that manner more than 75 years ago. That legal interpretation by the Trial Court erred in confirming easement rights for Plaintiffs which, properly construed, should be held unenforceable.

The Trial Court's factual findings regarding prescriptive easements and the nature of the relocated path were based on the Trial Court's assessment of two weeks of live testimony and substantial documentary evidence. The Trial Court's holdings about who acquired prescriptive easements—and who did not—and where they acquired them could only be disturbed if the Trial Court had abused its discretion or rendered an arbitrary decision unconnected to any principle of law. Plainly this is no such case, and the Trial Court's rulings about prescriptive easements must be affirmed in their entirety. Plaintiffs' request to affirm only the factual findings that they prefer is unsupported by the controlling standard. The parties had their day in court and must respect the results.

By contrast, the Trial Court erred as a matter of law in its interpretation at summary judgment of the language of the Easement Clauses, a conclusion of law that must be reviewed *de novo*. The Easement Clauses were clearly granted to facilitate steamship travel. Once that travel became obsolete and impossible when the steamboat wharves were destroyed in the hurricane of 1938, the easements were extinguished as a matter of law. If there were any ambiguity in the language of the Easement Clauses, then the Trial Court should have entertained extrinsic evidence. It declined to do so. To the extent the Court finds the Easement Clauses ambiguous, that extrinsic evidence also compels a ruling as a matter of law that Plaintiffs hold no easements in Newbury.

Accordingly, Dr. Stowell respectfully requests that the Court: (I) uphold the Trial Court's factual findings regarding adverse possession; (II) uphold the Trial Court's conclusion that Dr.

Stowell was entitled to relocate any easements held by Plaintiffs to the "reasonably convenient and suitable" location behind his home; but (III) reverse the Trial Court's decision on summary judgment and instead find that the easements contained in the Newbury deeds were extinguished when the purpose of such easements was frustrated and rendered impossible; and (IV) grant such other and further relief as this Court deems just and proper.

As a result, the proper result of this appeal is to confirm that only the Plaintiffs who testified have prescriptive easements over Dr. Stowell's Sunapee property, and no more.

ARGUMENT

I. STANDARD OF REVIEW

On appellate review of a decision following a trial on the merits, the Court shall employ a deferential standard of review:

> Under this standard, we uphold the trial court's factual findings and rulings unless they lack evidentiary support or are legally erroneous. We do not decide whether we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. Thus, we defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. Nevertheless, we review the trial court's application of the law to the facts *de novo*.

Jesurum v. WBTSCC Limited Partnership, 169 N.H. 469, 476 (2016) (internal citations omitted); *Cook v. Sullivan*, 149 N.H. 774, 780 (2013).

II. THE TRIAL COURT'S FINDINGS AFTER TRIAL OF WHICH PLAINTIFFS ACQUIRED PRESCRIPTIVE EASEMENTS ARE WELL-SUPPORTED BY THE RECORD

On appellate review, the Trial Court's explicit factual findings – regarding witness credibility and that certain Plaintiffs' failures to meet their evidentiary burdens – are entitled to deference and shall only be disturbed if unsupported by the record. *See, e.g.*, *Jesurum*, 169 N.H. at 476 ("[W]e defer to the trial court's judgment on such issues as resolving conflicts in the

testimony, measuring the credibility of witnesses, and determining the weight to be given evidence.").

This was fundamentally a case of competing evidence and conflicting testimony. The Plaintiffs and Dr. Stowell testified and introduced photographs and documents about the historical use of the island, Dr. Stowell's response to it, and conditions on the ground. Each side offered very different versions of events. Thereafter, the Trial Court made explicit, factual findings regarding each individual Plaintiff's ability to satisfy (or fail to satisfy) the various elements of adverse possession. While the Trial Court found that certain Plaintiffs met their evidentiary burdens (those Plaintiffs who testified at trial), Decision at 14, the Trial Court also found that other Plaintiffs failed to do so (those that did not testify at trial). Decision at 15.

Critically as to the non-testifying Plaintiffs, the Trial Court found that "these vague statements failed to specify when, for how long, or what portions of the footpaths were used by 'everyone.'" Decision at 15. Accordingly, the Trial Court concluded that "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." Decision at 15.

Through the course of the trial, the Trial Court heard and considered testimony that "'everyone' used the footpaths," and Dr. Stowell's rebuttal that relatively few Plaintiffs (testifying or otherwise) had done so. Befitting its role as the trier of fact, the Trial Court evaluated the strength and credibility of the witnesses after watching the witnesses' demeanor and weighing their credibility. Based on this, the Trial Court made factual findings—some in accordance with Plaintiffs' testimony (like the testifying Plaintiffs' historical use) and some in accordance with Dr. Stowell's (like the need for a new path for safety reasons). Neither Plaintiffs nor Dr. Stowell may now pick and choose among those findings that they like and

discard those that they do not. The Trial Court's ultimate, reasoned conclusions regarding these hotly contested questions of fact must not be disturbed.[2]

When witnesses were pressed for detail about *who* specifically they saw cross Dr. Stowell's property, they could not supply details to support their vague assertions. *See, e.g.*, Appellee's Appendix p. 048, Testimony of John "Jamie" McLeod, Tr. 298:1-6 ("Well, I know Gary Forrest has [walked the Circle Trail], because I walked with him recently. I know my brother has. ***And I don't know specifically others who have walked the path.***") (emphasis added); Appellee's Appendix p. 049, Testimony of Anthony Carter, Tr. 200:8-11 ("Q: But your competent [sic] that everyone on the island has walked on your property? A: From each of their houses, yes, ***perhaps not every individual.***") (emphasis added). The Trial Court properly acknowledged that hearsay testimony about *what others said they did* was only admissible as to the witnesses' state of mind, not to the underlying facts relayed. Appellee's Appendix at p. 050, Tr. 296:16-22.

Further, the Trial Court heard substantial evidence that much of this use (if not all of it) was permissive and not adverse. *See, e.g.*, Appellee's Appendix p. 051, Testimony of Chester Andrews, Tr. 236:2-3 ("[W]e didn't tell [our children] the[y had] permission [to use the Circle Trail], because ***we knew they had permission***. It was just an assumption.") (emphasis added); Appellee's Appendix p. 58, Testimony of Jeffrey Andrews, Tr. 250:14-15 ("[We were] ***invited*** and encouraged to use the paths by community.") (emphasis added).

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[2] Importantly, Dr. Stowell moved for a directed verdict after the close of the Plaintiffs' case, which was considered by the Trial Court and ultimately denied because the Trial Court concluded that issues of fact remained to be decided. Appellee's Appendix p. 052 – 057, Tr. 435:19-440:12. Such factual findings must not be disturbed absent compelling reasons not offered by Plaintiffs.

Finally, _all_ testifying Plaintiffs acknowledged that they ultimately accepted Dr. Stowell's invitation to use the relocated Circle Trail, at least on occasion. *See, e.g.*, Appellee's Appendix p. 059, Testimony of Lois Logan, Tr. 46:15 ("I typically did the diversion"); Appellee's Appendix p. 060 - 061, Testimony of Ronald Wyman, Tr. 93:23-94:1 ("Q: [Y]ou took the relocated route most of the time, didn't you?" A: I believe I did."); Appellee's Appendix p. 047, Testimony of Thomas Richards, Tr. 205:12-15 ("A: 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..."); Appellee's Appendix p. 062, Testimony of Jeffrey Andrews, Tr. 245:13-16 ("Q: [Y]ou've taken both what you think of as the more traditional path as well as the relocation? A: I have."); Appellee's Appendix p. 063, Testimony of Edgar Forrest, Tr. 362:17-18 ("I stopped [crossing the Circle Trail in front of Dr. Stowell's house] at that point and I took that new re-routed path."); Appellee's Appendix p. 064, Testimony of Brant Fagan, Tr. 429:23-25 ("Q: But you had to, at least on some occasions, taken the longer path inland, yes? A: On occasion, yes.").

As the Court stated, "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." Decision at 14. Prescriptive rights are by definition dependent on the conduct of the person claiming them, *i.e.*, personal.[3] *See, e.g.*, *Sandford v. Town of Wolfeboro*, 143 N.H.

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[3] Plaintiffs did not assert a claim for a public easement (nor would they desire that result), and thus such claim is waived and should not be considered on appeal. Regardless, the facts of this case do not support the public obtaining an easement by prescription. *See Op. of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 92 (1994) (expressing doubt that the public would be able to establish "factual evidence of the specialized type of adverse use for the requisite period of time") (citing 3 R. Powell, Powell on Real Property § 34.11[6], at 34-171 (1994)); *Wason v. Nashua*, 85 N.H. 192, 198 (1931) (finding the public can only acquire a prescriptive easement if "[i]t could be found on the evidence that the use of the space by the general public was not of a character or extent to interfere with that of the [landowners], but, on the other hand, was so far incidental thereto that reasonable men in the place of the [landowners] would not have supposed that the public was occupying it under a claim of right.").

481, 486 (1999) ("***The claimant*** must always satisfy the burden of persuasion to succeed on a prescriptive easement claim...") (emphasis added); *Town of Warren v. Shortt*, 139 N.H. 240, 244, (1994) ("[A]n ***individual*** may establish an ***independent claim of right***, adverse to the owner, even if another ***individual*** is using the way permissively.") (emphasis added).

The cases cited by Plaintiffs in their appellate brief do not compel a different result. For example, Plaintiffs cite *Carveth v. Latham*, 110 N.H. 232, 233 (1970) to support the obvious proposition that a civil plaintiff need not attend trial in order to prevail. This is irrelevant to Plaintiffs' evidentiary burdens to prove their individual claims. The fact of their failure to testify[4], alone, did not disqualify them from potential relief, nor did the Trial Court say any such thing. Rather, the Trial Court explicitly found the that "vague," imprecise testimony from other witnesses about what "everyone" did was insufficient to overcome their lack of trial testimony (and, to acknowledge the obvious, was an implausible generalization at best).

In their brief here, Plaintiffs argue at length that easement rights are "appurtenant." This misunderstands the meaning of the term entirely. First and foremost, Plaintiffs' entire argument is sleight of hand: in arguing that their <u>prescriptive</u> easements are appurtenant, they cite to the language in the Newbury <u>deeds</u> (*i.e.*, the Easement Clauses). Those rights—by deed dating to the 1890s—are what they are by their own terms (see below). They have nothing at all to do with the scope of whatever rights individual persons acquired in the last 20 years through personal conduct. Moreover, as explained in the very cases cited by Plaintiffs, an "appurtenant"

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[4] Indeed, Dr. Stowell advised Plaintiffs at every juncture in this case that his position was that these rights were personal and required personal testimony—requiring Dr. Stowell to take dozens of depositions, discovery that Plaintiffs unsuccessfully moved to limit. Nonetheless, numerous Plaintiffs declined to testify. They did so advisedly and now must abide the consequence of that decision. The Court was correct to require that each Plaintiff demonstrate his or her personal use with clear and specific evidence. Plaintiffs' reiteration of select evidence from the trial is unavailing and the Trial Court's factual determinations should be upheld.

right is "is incapable of existence separate and apart from the dominant estate. The benefit of an appurtenant easement can be used only in conjunction with ownership or occupancy of a particular parcel of land." *Tanguay v. Biathrow*, 156 N.H. 313, 315 (2007). Plaintiffs' prescriptive easements fail this test completely. Not a single Plaintiff would be constrained in their ability to reach their own property without their prescriptive easements. And not a single plaintiff abuts Dr. Stowell in a manner that even allows them to cross from their own property onto Dr. Stowell's on the paths they wish to use. Put another way, even to use their easements, Plaintiffs already need to be on someone else's property. Their prescriptive rights bear no relationship at all to the putative dominant estate elsewhere on the island any more than their easements are "incapable of existence separate and apart" from their homes in California and Ohio. And, of course, Plaintiffs cite to no case (because there are none) where an easement acquired by prescription across a non-adjacent property is appurtenant to anything.

III. THE TRIAL COURT'S FINDING AFTER TRIAL THAT DR. STOWELL'S RELOCATION OF PLAINTIFFS' DEEDED EASEMENTS SHOULD BE AFFIRMED.

Because neither the deed language nor any easements gained by prescription were unambiguously tied to a definite location, Dr. Stowell was (and is) entitled to relocate any such easements to a "reasonably convenient and suitable" location elsewhere on his property. Decision at 15-16; *Barton's Motel v. Saymore Trophy Co.*, 113 N.H. 333, 335 (1973) (holding that when the language creating an easement is ambiguous, only "a reasonably convenient and suitable way across the servient land is presumed to be intended"); *Seward v. Loranger*, 130 N.H. 570, 576 (1957) ("The right-of-way is a limited right to use property … and, in the absence of a specified location, entitles the [owner] to only a reasonably convenient and suitable way across the land."); *see also* Restatement (Third) of Prop.: (Servitudes) § 4.8 (2000) ("[T]he owner of the servient estate is entitled to make reasonable changes in the location or dimensions

of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not: (a) significantly lessen the utility of the easement; (b) increase the burdens on the owner of the easement in its use and enjoyment; or (c) frustrate the purpose for which the easement was created.");[5] *M.P.M. Builders, L.L.C. v. Dwyer*, 809 N.E.2d 1053, 1057 (Mass. 2004) ("We are persuaded that § 4.8 (3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights.").

The Trial Court's explicit factual findings make the conclusion that Dr. Stowell was entitled to relocate the easements behind his home unavoidable. First, the Trial Court explicitly found that "[t]he easements contained in the Newbury Plaintiffs' ***deeds are ambiguous as to the location of the footpaths***." Decision at 15 (emphasis added). This explicit finding of ambiguity is a finding of fact entitled to deference by this Court.

"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." Decision at 15 (emphasis added); Decision at 4 ("[T]he location of the footpaths was not necessarily fixed.").

Plaintiffs repeatedly acknowledged at trial that the Circle Trail has been relocated numerous times, and they even provide four examples of such relocation in their appellate brief ("Plaintiffs' Brief"). Plaintiffs' Brief at 11 ("[T]he Circle Trail path detoured...when a tree had

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[5] To the extent that this Court has not yet adopted this portion of the Restatement, it may here and Dr. Stowell urges the Court to do so. That adoption, however, is unnecessary to the result that the Trial Court reached based on the prior holdings of this Court, and the Decision can and should be adopted regardless of whether the Court elects now to take a position on the Restatement.

fallen and blocked it (Andrews testimony, Tr. p. 247), when Dr. Stowell placed brush on the trail...(Richards testimony, Tr. p. 205),...when Dr. Stowell did construction on a stone wall (Wyman testimony, Tr. p. 83)" and "when Robert Schmitt built his home." This finding, that the Circle Trail was relocated numerous times throughout the history of Great Island, is supported by witness testimony at trial. *See, e.g.*, Appellee's Appendix p. 065, Testimony of Lois Logan, Tr. 70:8-11 ("Q: In your experience on the island, the location of the path in Sunapee north of Dr. Stowell's property has not always ben in the same place? A: That's correct."); Appellee's Appendix p. 066, Testimony of Ronald Wyman, Tr. 107:7-13 ("Q: Since you bought your property in 1971, the perimeter trail has changed locations on properties other than Dr. Stowell's, right? A: It has in – there were three cottages built very close to the water and because they were built over where the path or whether the original path had gone, two cottages, I know, the path had to be relocated in back of their cottages."); Appellee's Appendix p. 067, Testimony of Robert Schmitt, Tr. 115:3-6 ("Q: Do you know if the path ever moved on your property? A: It did. When we built the house, the path moved from what would have been right on the shoreline to the back of the house."); Appellee's Appendix p. 068, Testimony of Jeffrey Andrews, Tr. 247:6-12 ("Island paths morph and they move depending on trees and fallen limbs and maintenance, so an island path, the circle path, like a stream is going to move over decades. . . ."); Appellee's Appendix p. 069, Testimony of Brant Fagan, Tr. 434:15-17 ("Q: There was also a relocation of the path in this vicinity on northwest of the island in the 1980s, right? A: For the new construction, yes."); Appellee's Appendix p. 070, Testimony of Dr. Dwight Stowell, Tr. 480:2 (describing some of the "at least ten changes" to the Circle Path the Dr. Stowell could recount from the past several years). There is nothing sacrosanct about the location of the footpaths to the Plaintiffs when *they* want to move it.

Further, the Trial Court found Dr. Stowell's testimony "credible" and believed that his desire to relocate the path was largely motivated by well-founded safety/liability concerns. Testimony of Dr. Dwight Stowell, Tr. 454:5-18; Decision at 16 ("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."). This is hardly a surprise. The Plaintiffs preferred location is a narrow path on a wall precariously above the lakeshore bounded by patches of poison ivy on the inland side. *See* Appellee's Appendix p. 024, Plaintiffs Exhibit 19 ["Stowell front yard facing north"]; *see also* Appellee's Appendix p. 025, Stowell 283.13 (Stowell Property, directly inland from stone wall); Appellee's Appendix p. 026, Stowell 283.14 (Stowell Property, stone wall looking south); Appellee's Appendix p. 027, Stowell 283.15 (Stowell Property, stone wall looking south); Appellee's Appendix p. 028, Stowell 283.16 (Stowell Property, stone wall looking north); Appellee's Appendix p. 029, Stowell 283.17 (Stowell Property, southern end near shore); Appellee's Appendix p. 030, Stowell 283.20 (Stowell Property, southern end inland). The Trial Court judge observed all this personally, as well as the boathouse in which Dr. Stowell had to protect the safety of trespassing children.

As a result, the Trial Court explicitly found that the relocated path behind Dr. Stowell's house was a "reasonably convenient and suitable" location. Decision at 16 ("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.").

As noted above, this factual finding was supported by the Trial Court's review of all evidence presented in this case[6], including Judge McNamara's ***personal observations*** of the relocated path during a view of Great Island on October 6, 2016. Judge McNamara, accompanied by counsel for all parties, physically walked the relocated path behind Dr. Stowell's home, which provided the Trial Court all the information needed to assess the safety and relative burden of this alternative path. *O.K. Fairbanks Co. v. State*, 108 N.H. 248, 251, (1967) (finding it is proper for the trial court to consider any "knowledge and information gained thereby could constitute evidence to be considered by them…"). The Plaintiffs' various exaggerations at trial about the supposedly perilous condition of the trail were easily dispelled by what the Trial Court saw for himself, a minor relocation of a few dozen yards away from the more scenic route that Plaintiffs wish to use (for free, of course). Accordingly, the Trial Court's factual finding that the relocated path is "reasonably convenient and suitable" cannot be disturbed.

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[6] Further, Plaintiffs acknowledged that they never been unable to cross Dr. Stowell's property by using the relocated path, i.e., to pass under their interpretation of the Easement Clauses. *See, e.g.*, Appellee's Appendix p. 071, Testimony of Lois Logan, Tr. 69:25 ("Q: Since the relocation, whenever it was, you have always been able to get from one side of Dr. Stowell's property to the other by one means or another, correct? A: Correct."); Appellee's Appendix p. 066, Testimony of Ronald Wyman, Tr. 107:17-20 ("Q: There's never been a time, has there, when you've been unable to get from one end of Dr. Stowell's property to the other? A: There's always been a way to get there, I suppose."); Appellee's Appendix p. 072, Testimony of Robert Schmitt, Tr. 134:12-14 ("Q: So you haven't walked the shoreline route since the late 90s? That's right, isn't it? A: Right."); Appellee's Appendix p. 073, Testimony of Janet Fenwick, Tr. 178:18-23 ("So it's fair to say that in the last 20 years . . . you've been able to get from one side to the next at Dr. Stowell's property? A: That's correct."); Appellee's Appendix p. 074, Testimony of Anthony Carter, Tr. 198:16-18 ("Q: [Y]ou yourself have taken the longer island route? A: That's correct."); Appellee's Appendix p. 075, Testimony of John "Jamie" McLeod, Tr. 314:10-16 ("And there was always some other option available to you, distinct from your view of the original footpath, right? A: Yes. . . You didn't have to turn around and go back."); Appellee's Appendix p. 076, Testimony of Edgar Forrest, Tr. 364:5-20.

In fact, certain Plaintiffs even suggested that that relocation of the Circle Trail actually *increased* the overall utility of the path. *See, e.g.*, Appellee's Appendix p. 077, Testimony of Susan Schultz, Tr. 334:12-14.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW AT SUMMARY JUDGMENT IN UPHOLDING THE ENFORCEABILTY OF DEEDED EASEMENTS THAT HAVE BEEN IMPOSSIBLE SINCE 1938.

A) Standard of Review.

The Trial Court's legal conclusions, including that made in the Purpose SJ Order, are reviewed *de novo* by this Court on appellate review. *See, e.g., Crown Paper Co. v. City of Berlin*, 142 N.H. 563, 566 (1993) ("This court reviews questions of law *de novo*.").

B) The Easement Clauses Were Solely for a Purpose That is no Longer Possible.

Pursuant to RSA 491:8-a, II (2010), summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, and all inferences properly drawn from them, considered in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bel Air Assocs. v. N.H. Dep't of Health & Human Servs.*, 158 N.H. 104, 107 (2008). Because there was no meaningful fact dispute that steamship service no longer exists, the steamship *wharves* no longer exist, and the purpose for the easement grant—"to reach the steamboat wharves"—is therefore impossible, the Trial Court should have awarded summary judgment that the Easement Clauses are no longer enforceable by the Plaintiffs.

The interpretation of a deeded right of way is a question of law for the court to decide by determining the intention of the parties at the time of the deed in light of the surrounding circumstances. *Austin v. Silver*, 162 N.H. 352, 354 (2011); *Dumont v. Town of Wolfeboro*, 137 N.H. 1, 5 (1993) ("Defining the rights of the parties to an expressly deeded easement requires determining the parties' intent in light of circumstances at the time the easement was granted."). If the language of the deeds is clear and unambiguous, the court will interpret the intended meaning from the deeds themselves without resort to extrinsic evidence. *Austin,* 162 N.H. at 354;

Boissy v. Chevion, 162 N.H. 388, 391 (2011). The Trial Court was not free to rewrite the terms of the deeds by giving them a meaning which they never had. *See Catholic Med. Ctr. v. Executive Risk Indem., Inc.*, 151 N.H. 699, 703 (2005) (quotes omitted); *see also LeBaron v. Wight*, 156 N.H. 583, 585 (2007) (recognizing that a deed is a contract). When a deed's meaning and intent are clear, it should not be rewritten to avoid a particular result. *Id.*

The claimed rights of the Plaintiffs by the grants and reservations in the deeds from the Original Grantors are now extinguished because the steamboat service to Great Island ceased and the steamboat wharves no longer exist. The deeds made by the Original Grantors established a limited right to cross certain lots around the perimeter of Great Island in Newbury for the unique purpose of reaching the steamboat wharves at Lot 12 and Lot 31 to gain access to and from the island by steamboat. The easements were extinguished by application of the impossibility of purpose doctrine because steamboat service to the island terminated, the steamboat wharves cease to exist, and the purpose for the easement grant—"to reach the steamboat wharves"—is no longer possible.

The Trial Court's interpretation of the Easement Clauses also fails as against Dr. Stowell under the weight of its own logic. Dr. Stowell's property is the northernmost of those conveyed by the Original Grantors on the western side of Great Island, and the last in Newbury on that side. Unlike the Hoffmeister Parties property, Dr. Stowell's property does not lie between any of the Newbury Plaintiffs and either former location of a steamship wharf. Put another way, even if the Newbury Plaintiffs held a right to reach the location, as the Trial Court held, they could never arrive there by passing over Dr. Stowell's property on the perimeter path unless they walked past the wharf location to reach Dr. Stowell's property, turned around, and went back. No reading of the Easement Clauses would support such an interpretation, yet the Trial Court held to the

contrary. Purpose Order at p. 14 ("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"). As with the underlying purpose, the limitation that the Trial Court held would have been necessary would be redundant almost thrice over.

This Court adopted the concept of extinguishment of purpose of easements in *Boissy v. Chevion*. In that case, the Court cited approvingly the Restatement (Third) of Prop.: Servitudes concerning the cessation of purpose doctrine, stating:

> "[T]he common law rule [is] that an easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended." [Citations omitted.] "This cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose." [Citations omitted.]
>
> Under the impossibility of purpose doctrine as set forth in the *Restatement (Third) of Property (Servitudes)*,...:
>
> When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude. Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude.
>
> Inquiry in the cessation of purpose cases begins with determining the particular purpose of the easement in question. [Citation omitted.] Next, one must decide whether the contemplated purpose still exists. If not, the easement is considered to have expired. [Citation omitted.]

Boissy, 162 N.H. at 393-94.

In *Boissy*, the right to a well[7] which no longer could be located was a right for a particular purpose that had, as a result of its inability to be found and long-term non-use, been

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[7] The second easement in *Boissy* was a right of access to an ice pond. The easement did not specify a right to take ice from the pond. The servient tenement owner had appealed the trial court's decision that the easement to the ice pond along a defined path survived, despite changed conditions that the remaining, marsh-like, body of water could no longer be used as an ice pond.

extinguished. *Id.* at 394. It also held that a second easement to a pond along a defined path had not been extinguished, even though the pond was not as large as it once had been. *Id.* at 397-98.

The sequence of development explained above, along with the repeated phrase "to reach the steamboat wharves," in light of the pervasive use of steamboat travel at the time, makes clear the sole purpose of the easements: to allow purchasers to get to docks for steamship transportation. The right of passage is defined by a series of limitations. The "right to cross" is limited to a "foot path." The right is limited in location: "all the lots in this range" or the numbered lots, or some variant. The right is limited in purpose: "to reach the steamboat wharves." Because of the dependence on steamboat travel at the time, the purpose in reaching the steamboat wharves was for the purchaser to gain access to (or to depart from) his new property by steamboat, not coincidentally to the benefit of later grantor steamship company.

This language in the creation of Lot 16 makes clear that the Original Grantors did not intend to convey a right to access the steamboat wharves via a path at a particular place. Rather, the right to a footpath was to reach the steamboat wharves on the lots in the Original Grantors' subdivision where they might be established. In the absence of any wharves at the time of that conveyance, the language in Lot 16's deed and the other deeds would not have created any rights because the purpose of the language, to reach the steamboat wharves for steamboat travel, would have been impossible. But for the later sale of Lots 12 and 31 to a steamship company to develop and maintain the wharves for steamship travel, there would have been no reason to convey easements to other property owners "to reach the steamboat wharves."

At oral argument, however, the servient tenement owner waived the issue. The Court did not decide whether the pond easement purpose had extinguished by changed circumstances. *Boissy*, 162 N.H. at 397-98.

Moreover, the Original Grantors used a consistent term in all deeds, limited to a single purpose: "to reach the steam boat wharves." This was not a generic term. Giving this phrase its plain English meaning limits the parties' use of the easement to access the steamboat wharves. In the historical context of the deed grants, it would not make sense to require that the Easement Clauses read, "to reach the steamboat wharves to use the steamboats," it would be redundant.

Lastly, the deed to Lot 12, which eventually became Auburn Landing, is conclusive because it conveys no rights of passage. Because Lot 12 was the destination contemplated in the Easement Clauses, it was unnecessary for the grantees to have the right to pass over other lots to get to it. Had the right to cross the lots of others been general as the plaintiffs contend, and not restricted to the purpose of reaching the steamboat wharf, the Easement Clause would have been included with Lot 12.

Had they wished, the Original Grantors could have retained and conveyed a broad, general right to cross the other lots, or a more limited, additional right to cross the other lots for safety or commerce, or an additional right to cross the lots for recreational purposes. They chose not to grant such rights, however, and neither the original grantees nor their current successors received such rights. The Trial Court's reading of the deeds expanded the rights that the Original Grantors created, which was beyond its power to do. *Compare Catholic Med. Ctr.*, 151 N.H. at 703 ("[I]t is not the prerogative of the courts to create ambiguities where none exist or to rewrite the contract in attempting to avoid harsh results.").

The limitation of purpose in this case contrasts with the inclusive language at issue in the matter of *Heartz v. City of Concord*, 148 N.H. 325 (2002). In *Heartz* an easement was created in an 1847 deed and later revised in an 1854 deed. In *Heartz,* the right of way led from a public street, past an apartment house, to a single family residence. PRC proposed to tear down the

single family home to build a twenty space parking lot for a church, which abutted PRC's property. The owner of the servient tenement, Johnson, objected to the change in use of the easement by PRC from one to get to a single family home to one to get to a parking lot. *Id.* at 332. This Court concluded that the language "at all times and for all purposes" was clear and unambiguous. It refused to look outside the deeds and apply the rule of reason in interpreting the deed to allow use of the easement over the servient tenement for the benefit of a third property. It held that the deed language was broad enough to cover the proposed use. *Id.* at 332-33.

The same rule must be applied in this case, but, because the language creating the easement in this case is restrictive and not expansive, it leads to the opposite result. The easement conveyed by the Original Grantors was limited to use of a foot path to access the steamboat wharves. The steamboats and wharves are now gone. Because the grants creating the easements were limited, not broad and inclusive as in *Heartz*, the easements in this case were extinguished when there were no longer any steamboat wharves to reach.

Against this deed history and the undisputable importance of steamboat travel in Lake Sunapee at the time of the Great Island subdivision, the Trial Court held that the easement is for access to a place. This interpretation makes the phrase "to reach the steam boat wharves" a nullity, however. Such a result is contrary to the canon that all the words of a deed be given the meaning most likely intended by the parties. *Flanagan v. Prudhomme*, 138 N.H. 561, 565-66 (1994). In addition, this interpretation is not supported by the deeds. When Lot 16 was conveyed, no steamboat wharf existed in Newbury, the only town in which the Original Grantors could convey easement rights. The deed to Lot 16 did not convey rights to a particular place, but rather, for a particular purpose, the location of which had not yet been determined.

Boissy is the only authority of this Court on point, but the Court cited with approval the impossibility cases of *American Oil Co. v. Leaman*, 101 S.E.2d 540 (Va. 1958) and *Makepeace Bros. v. Barnstable*, 198 N.E. 922 (Mass. 1935). In *Leaman*, the owner of the dominant tenement held in common with others an easement along a specific road that was subsequently abandoned and closed by the municipality and the servient tenement owner filled in and built upon the roadbed. Relying on the local variant of the impossibility doctrine,[8] the Virginia Supreme Court held that the easement was extinguished because its purpose, to reach Goodwyn's Neck Road, had ceased. *Leaman* 101 S.E.2d at 546.

In *Makepeace,* the town had created various lots on the seashore reserving easements for "try-yards, liberties of try-yards, whaling houses and ways leading to and from these houses." 198 N.E. at 927 (try-yards are used in the processing of whale oil). Although the locations where ways and try-yards could be built still existed, the court held that the purpose of these easements, including the rights of ways, had ceased because whaling no longer existed; pursuant to the doctrine of impossibility of purpose, the easements were extinguished. *Id.*

C) In the Alternative, the Trial Court's Should Have Considered the Extrinsic Evidence that Shows the Easement Clauses Were for a Purpose, not a Location.

As noted above, the plain meaning of the language in the Newbury deeds compels a finding that none of the Plaintiffs have <u>any</u> rights over Dr. Stowell's Newbury property. To conclude otherwise would only be possible if one considered the language of the deeds to be ambiguous. In that event, extrinsic evidence should have been considered, but the Trial Court declined to do so. That extrinsic evidence proved beyond dispute that the Easement Clauses

[8] Virginia refers to the doctrine as "cessation of purpose" but the elements are the same: "when an easement is created for a particular purpose, it comes to an end upon a cessation of that purpose, which means, apparently, that an easement which is created to endure only so long as a particular purpose is subserved by its exercise, comes to an end when it can no longer subserve such purpose." *Leaman,* 101 S.E. 2d at 552.

were for steamship travel, not visitation of points on the island. When the steamboat wharves were destroyed in the hurricane of 1938 and transportation to-and-from the island by steamboat ceased (never to be restored), the purpose of the easement was frustrated, rendered impossible, and extinguished. *See* Appellee's Appendix p. 001 - 006 (Magoon Aff., *supra*). Accordingly, the Purpose Order should be reversed on these grounds as well. *See, e.g.*, *Burke v. Pierro*, 159 N.H. 504, 509 (2009) ("In construing the language of a deed, the finder of facts must place himself as nearly as possible in the position of the parties at the time of the conveyance and gather their intention in light of the surrounding circumstances.") (citing *Robbins v. Lake Ossipee Vill., Inc.*, 118 N.H. 534, 536 (1978)).

CONCLUSION

For the foregoing reasons, the Defendant-Appellee and Cross-Appellant Dr. Dwight K. Stowell, Jr. respectfully requests that the Court (I) uphold the Trial Court's factual findings regarding adverse possession; (II) uphold the Trial Court's conclusion that Dr. Stowell was entitled to relocate any easements held by Plaintiffs to the "reasonably convenient and suitable" location behind his home; and (III) reverse the Trial Court's decision on summary judgment and instead find that easements contained in the Newbury Deeds were extinguished when the purpose of such easements was frustrated and rendered impossible; and (IV) grant such other and further relief as this Court deems just and proper.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee and Cross-Appellant Dr. Dwight K. Stowell, Jr. respectfully requests that Nicholas M. O'Donnell be allowed to present fifteen minutes oral argument before the full Court. Mr. O'Donnell will argue on Dr. Stowell's behalf.

CERTIFICATE OF DECISIONS APPEALED

Undersigned counsel hereby certifies that the decision of the Merrimack County Superior Court appealed from by the Appellee / Cross Appellant is in writing and that a true copy is attached hereto as an Addendum to Appellee's Brief.

Respectfully submitted,

Dwight K. Stowell, Jr.
By his attorneys,

KATHLEEN M. MAHAN (#17124)
COOK, LITTLE, ROSENBLATT &
MANSON, pllc
1000 Elm Street
Manchester, NH 03101
(603) 621-7100
k.mahan@clrm.com

NICHOLAS M. O'DONNELL
(admitted pro hac vice)
nodonnell@sandw.com
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2800

October 4, 2017

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Appellee's Brief and accompanying Appendix were hand delivered on this day to counsel for Appellants:

Barry C. Schuster, Esq.
Schuster, Buttrey & Wing, P.A.
79 Hanover Street, P.O. Box 388
Lebanon, NH 03766
(603) 448-4780

KATHLEEN M. MAHAN (#17124)
COOK, LITTLE, ROSENBLATT & MANSON, pllc
1000 Elm Street
Manchester, NH 03101
(603) 621-7100
k.mahan@clrm.com

Date: October 4, 2017

ADDENDUM

Decisions Appealed From:

1. June 29, 2016 Order (McNamara, J.)

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Kathleen M Mahan, ESQ
Cook Little Rosenblatt & Manson PLLC
1000 Elm Street 20th Floor
Manchester NH 03101

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 June 29, 2016 relative to:

ORDER

June 29, 2016

Tracy A. Uhrin
Clerk of Court

(485)

C: Barry Charles Schuster, ESQ; Mark C. Rouvalis, ESQ; Adam M Dumville, ESQ; Geoffrey Judd Vitt, ESQ; Jennifer B. Hartman, ESQ; Nicholas M. O'Donnell, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Great Island Footpath Association, *et al.*

v.

Thomas Hoffmeister, *et al.*

and

Dwight K. Stowell, Jr.

v.

Jeffrey Andrews, *et al.*

Nos. 217-2014-CV-375 and 220-214-CV-53

ORDER

The Plaintiffs, various residents and direct or beneficial owners of real property on Lake Sunapee's Great Island, assert the Defendants/Counterclaim Plaintiffs ("the Hoffmeister Parties"), also direct or beneficial owners of real property on the island, have interfered with their deeded or common law rights to maintain and traverse three footpaths on the island. Before the Court are the Hoffmeister Parties' Motion for Summary Judgment regarding Anne Montgomery, to which the Plaintiffs object; the Hoffmeister Parties' Motion for Summary Judgment that Laura and David Davenport cannot demonstrate they are entitled to prescriptive easements, to which the Plaintiffs object; and the Hoffmeister Parties' Motion for Partial Summary Judgment that the deeded easements to reach the steamboat wharves are extinguished as a matter of law and the Plaintiffs' Cross-Motion for Partial Summary Judgment regarding the deeded easements. A hearing on the motions was held on May 2, 2016. Based on the following,

the Hoffmeister Parties' Motion for Summary Judgment regarding Anne Montgomery is GRANTED; the Hoffmeister Parties' Motion for Summary Judgment regarding the Davenports is DENIED; and the Hoffmeister Parties' Motion for Partial Summary Judgment regarding the deeded easements to reach the steamboat wharves is DENIED and the Plaintiffs' cross-motion is GRANTED, in part, and DENIED, in part.

I

The Court first addresses the Hoffmeister Parties' Motion for Summary Judgment regarding Anne Montgomery. To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, 'sufficient . . . to indicate that a genuine issue of fact exists so that the party should have an opportunity to prove the fact at trial. '" Phillips v. Verax Corp., 138 N.H. 240, 243 (1994) (quotation omitted). A fact is material if it affects the outcome of the case under the applicable substantive law. Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the Court considers the evidence, and all inferences properly drawn from it, in the light most favorable to the nonmoving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002). Mindful of this standard, the Court sets forth the undisputed facts below.

Anne Montgomery is one of Dean Andrews Halliwell's grandchildren. (Montgomery Aff. ¶ 10, Feb. 13, 2016.) Halliwell owned property on Great Island and her grandson Dean Montgomery held her durable power of attorney ("POA"). (Montgomery Aff. ¶ 2.) In 1983, under the POA, and prior to Halliwell's death, Dean Montgomery used a quit claim deed to transfer his grandmother's Great Island property

to Bentley, Lane, Mosher, & Babson, P.C. ("BLMB"), his former law firm, as "trustee" to avoid a separate probate action of Halliwell's estate in New Hampshire upon her death. (Montgomery Aff. ¶ 3.) There was no trust document or other writing evidencing the trust.

Under Halliwell's will, her estate passed to her two daughters, and from the daughters to their children. (Montgomery Aff. ¶ 8.) However, Halliwell's daughters did not want the Great Island property, but desired it to go to their children— Halliwell's grandchildren. (Montgomery Aff. ¶ 9.) Halliwell's grandchildren—Dean Montgomery, Anne Montgomery, Barry Montgomery, James Rogers, John Rogers, and Deana Rogers— have used the Great Island property and paid the taxes and maintenance expenses with the understanding that they have a beneficial interest in the property. (Montgomery Aff. ¶ 10.) Eventually, Anne Montgomery purchased the shares of Barry Montgomery, John Rogers, and Deana Rogers, and had BLMB convey the property into her individual name. (Montgomery Aff. ¶ 11.)

In its Order dated March 7, 2016, the Court dismissed Plaintiffs Dean Montgomery, Barry Montgomery, and Abby Gordon's claim that they hold property on Great Island under a Connecticut "naked title" theory. In their Motion for Summary Judgment regarding Anne Montgomery, the Hoffmeister Parties argue Anne does not possess valid title to the Great Island property Halliwell previously owned and that she lacks deeded easement rights to the footpaths. In response, the Plaintiffs argue the Hoffmeister Parties lack standing to challenge Anne Montgomery's title; Dean Montgomery's transfer of the Halliwell property to BLMB was valid under both Connecticut and New Hampshire trust law; even if the trust was invalid, the

circumstances here satisfy the requirements for an implied trust; and BLMB's transfer of the Halliwell property to Anne was valid.

Trusts concerning land require a writing, unless they arise by implication of law. See RSA 477:17 ("No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same or by his attorney."). As the Court discussed in its March 7, 2016 Order, although BLMB was named as a "trustee" when Dean Montgomery used the quit claim deed to transfer Halliwell's property, there is no writing evidencing the trust at issue here. The Plaintiffs claim this transfer constitutes a valid "naked title" under Connecticut law, but in neither their complaint, nor their subsequent amendments, do the Plaintiffs mention a "naked title" or provide legal authority for their proposition.

Additionally, the Plaintiffs have not provided sufficient evidence to support an implied trust. The Plaintiffs argue the Court may imply a resulting or constructive trust when an oral trust fails due to the statute of frauds.

> Generally, a resulting trust arises when a private or charitable trust fails in whole or in part; or a private or charitable trust is wholly performed without exhausting the trust estate; or property is purchased and the purchase price is paid by a person who directs the vendor to transfer title to the property at that time to another person.

Wheelen v. Robinson, 117 N.H. 1032, 1036 (1977).

> [A] constructive trust will arise when there has been a conveyance of an estate upon an oral promise to reconvey, and the conveyance was procured by fraud, duress or undue influence; or made as security for a loan, or between parties standing in a confidential or fiduciary relationship to each other. The device of a constructive trust is based upon principles of restitution, to prevent unjust enrichment of one person at the expense of another. Evidence of an oral agreement, otherwise unenforceable because of the Statute of Frauds, can be shown for the purpose of preventing unjust enrichment.

Cornwell v. Cornwell, 116 N.H. 205, 208—09 (1976) (internal citations omitted).

Here, the Plaintiffs have provided evidence that Halliwell's grandchildren have paid the taxes and maintenance expenses on the Great Island property and claim that BLMB solely holds legal title. This is insufficient to support the imposition of a resulting or constructive trust.

The Plaintiffs also argue the Hoffmeister Parties lack standing to challenge Anne Montgomery's title. "[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642–43 (2014) (internal citations omitted). As a plaintiff in this action, Anne Montgomery is claiming the right to use a deeded easement. The Court must determine the validity of her title when determining the validity of such a right. The Hoffmeister Parties, therefore, have standing to challenge the validity of Anne Montgomery's title. Accordingly, the Hoffmeister Parties' Motion for Summary Judgment regarding Anne Montgomery is GRANTED.

II

The Court next turns to the Hoffmeister Parties' Motion for Summary Judgment regarding the Davenports. In their motion, the Hoffmeister Parties argue Plaintiffs Laura and David Davenport cannot meet their burden to establish their entitlements to prescriptive easements because they have not owned their Great Island property for twenty years and they did not identify any predecessors-in-interest upon whom they could base a claim. In response, the Davenports argue they are relying on their predecessors-in-interest for their prescriptive easement claims.

The Davenports have owned property in the southeast portion of Great Island since September 29, 2006. (Hoffmeister Parties' Mem. Supp. Summ. J. Re. Davenports

Ex. A, Ex. B.) When asked in interrogatories to identify any predecessors-in-interest they intend to rely upon to prove their prescriptive easement claims, the Davenports did not provide an answer. (Id. at Ex. B, Ex. C.) In their affidavits, both Laura and David Davenport state, "At the time I filled out the interrogatories, I did not understand the necessity of relying on my predecessors-in-interest because I thought my use of all the footpaths was based on my deed." (Laura Davenport Aff. ¶ 3, Mar. 17, 2016; David Davenport Aff. ¶ 3, Mar. 17, 2016.) They go on to state, "The right to use the footpaths is tied to our property and our predecessor's use of the footpaths." (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.)

The Davenports bought their Great Island property from Stephen and Susan Davis. (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.) The Davis family had owned the property since the early 1900s and used the footpaths often. (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.) Since purchasing the property in 2006, the Davenports have gone to the island every year. (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.) Someone from their family typically uses the cottage almost every weekend from mid-April to November, and the family often goes to the cabin in the winter as well. (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.)

The Davenports claim they have walked the footpaths without consent or permission since they bought their property and that they "walk the footpaths almost every time [they] go to the cottage." (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.) In particular, they allege the following: "The use of the footpaths on the island has never been with permission, but instead because everyone claimed a right to use them based on the language in our deeds." (Laura Davenport Aff. ¶ 4; David Davenport Aff. ¶ 4.)

During her deposition on May 30, 2016, Laura Davenport provided a different explanation than the one she gave in her affidavit for not mentioning her predecessors-in-interest in her interrogatories. During her deposition, she testified that she understood the interrogatory question regarding her predecessors-in-interest but that she thinks she did not answer it because she got interrupted while answering the interrogatories and did not go back to that question. (Davenport Dep. 27:10–28:11, May 20, 2016.) The Hoffmeister Parties now seek summary judgment against the Davenports, arguing they cannot establish they are entitled to prescriptive easements and that Laura Davenport's affidavit should be struck as unreliable.[1]

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).

Here, the Davenports have owned their Great Island property since September 29, 2006 and have not used the paths at issue before that time. Thus, they have not used the paths for the necessary 20 years. The Davenports, therefore, are relying on the use of the paths by their predecessors-in-interest to establish a prescriptive easement through the doctrine of "tacking." The doctrine of tacking "permits an adverse possessor to add

[1] The Hoffmeister Parties also argue the Davenports' affidavits contain inadmissible hearsay. "While the moving party must file at least one affidavit based on the personal knowledge of a person who would be competent to testify at trial, the opposing party may file an affidavit which only shows reasonable and specific grounds for believing that evidence disputing the moving party's affidavits can be produced at trial." Omiya v. Castor, 130 N.H. 234, 237 (1987). The Court finds the affidavits at issue here to meet this standard.

his period of possession to that of a prior adverse possessor, in order to establish continuous adverse possession for the prescriptive period." Fagan v. Grady, 101 N.H. 18, 21 (1957) (citation omitted).

The Davenports have provided differing information in their answers to interrogatories, affidavits, and the deposition regarding their predecessors-in-interest. The fact that a party's affidavit or deposition contains information that an answer to an interrogatory does not goes to the credibility of the evidence and is insufficient in itself to support summary judgment for the opposite party unless the discrepancies cannot be explained. See Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 253 (3d Cir. 2007) (noting a credibility determination is impermissible at the summary judgment stage); Am. Civil Liberties Union of Florida, Inc. v. Dixie Cty., Fla., 690 F.3d 1244, 1249 (11th Cir. 2012) ("If an affidavit differs from the statements made in a deposition, the two in conjunction may disclose an issue of credibility.") (quotation omitted); Crawford v. George & Lynch, Inc., 19 F. Supp. 3d 546, 556–57 (D. Del. 2013) ("[S]tatements which conflict with an individual's deposition testimony do not raise a genuine issue of material fact and can properly be disregarded when the conflict is unexplained or unsupported by other record evidence.") (quotation omitted); Arce v. Chicago Transit Auth., 311 F.R.D. 504, 510 (N.D. Ill. 2015) ("Only when the changed testimony is 'incredible and unexplained' may courts disregard the affidavit, because when the change is plausible and the party offers a suitable explanation..., the fact of contradiction affects only [the testimony's] credibility, not its admissibility.") (quotations omitted); Pierce v. Washington Mut. Bank, 226 S.W.3d 711, 717–18 (Tex. App. 2007) (holding inconsistencies or conflict between an individual's interrogatory

answers and affidavit is insufficient to exclude the affidavit evidence at the summary judgement stage, but creates an issue of fact that a jury should resolve).

Here, the Davenports' interrogatories did not set forth any facts regarding the use of the paths on Great Island by their predecessors-in-interest because they did not answer the question regarding that issue. During her deposition, Laura Davenport testified that she did not answer the question because she was probably interrupted when going through the interrogatories and thus her failure to answer was an oversight. However, Laura Davenport did not provide this explanation in her affidavit, which stated she did not understand the importance of relying on her predecessors-in-interest and that her right to use the footpaths is tied to her predecessors, who had used the paths since the early 1900s. During her deposition, Laura Davenport went on to explain that she did not fully understand the affidavit she signed, although she thought she understood it at the time. (Davenport Dep. 39:10–16.) The Court finds this to be a sufficient explanation for any discrepancies between the interrogatories, affidavits, and deposition. Any discrepancies, therefore, are an issue of credibility not to be decided on summary judgment. Thus, because there is a dispute of material fact regarding the adverse use of the paths, the Hoffmeister Parties' Motion for Summary Judgment regarding the Davenports is DENIED.

III

Finally, the Court turns to the parties' cross-motions for summary judgment regarding the deeded easements. In ruling on cross-motions for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." N.H.

Ass'n of Counties v. State, 158 N.H. 284, 287–88 (2009) (quotation omitted). Mindful of this standard, the Court sets forth the undisputed facts below.

In 1890, Norman Brockway, David Jennison, Louisa Jennison, Frank Browning, and Fannie Browning ("the Original Grantors") owned the portion of Great Island located in the Town of Newbury. (Magoon Aff. ¶ 7, Jan. 22, 2016.) The Original Grantors did not own any land on the Town of Sunapee side of Great Island. (Magoon Aff. ¶ 30.) According to the 1890 "Plan of Cottage Lots on Great Island in Lake Sunapee, N.H." ("the Plan"), the Original Grantors subdivided the Newbury portion of the island into 45 lots. (Magoon Aff. ¶¶ 7–8.) The Plan does not identify any footpaths or wharves. (Magoon Aff. ¶ 9.) Beginning in October 1892, the lots along the shore in Newbury were conveyed to various individuals through deeds, most of which contained an easement clause. (Magoon Aff. ¶ 10.)

The first deed, issued on October 27, 1892, conveyed Lot 16. (Magoon Aff. ¶ 11.) Its easement clause states as follows:

> Hereby conveying to said grantee and his assigns 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 reserving to ourselves and assigns the right of a similar foot path through or over the within named lot No. 16.

(Magoon Aff. ¶ 11.)

On March 8, 1893, the Original Grantors conveyed Lot 12 to the Woodsum Steamboat Company. (Magoon Aff. ¶ 12.) The deed did not contain an easement clause, but did state: "As part consideration hereof said grantee does hereby agree and assume to construct and maintain a public wharf on the westerly side of the lot hereby conveyed, on the shore of said Lake." (Magoon Aff. ¶ 12.) The wharf subsequently built on Lot 12 was known as Auburn Landing. (Magoon Aff. ¶ 12.)

On April 17, 1906, the Woodsum Steamboat Company conveyed Lot 12 to John Palmer, reserving to itself and its successors and assigns "the wharf at and on said lot, with the right to enter upon said lot, at all times" for the purpose of maintaining the wharf. (Magoon Aff. ¶ 13.) Additionally, the deed reserved a right of way "to be used in common by all persons wishing to pass along said shore to and from said wharf." (Magoon Aff. ¶ 13.)

On October 16, 1902, the Original Grantors conveyed Lot 31 to the Woodsum Steamboat Company. (Magoon Aff. ¶ 14.) As with Lot 12, as part consideration for the property, the Woodsum Steamboat Company was required to build and maintain a wharf on the lot. (Magoon Aff. ¶ 14.) This wharf was known as Melrose Landing. (Magoon Aff. ¶ 14.) In 1937, the Woodsum Steamboat Company conveyed Lot 31 and Melrose Landing to Leo Osborne. (Magoon Aff. ¶ 16.)

Between the conveyances of Lot 12 in 1893 and Lot 31 in 1902, the Original Grantors also conveyed 11 other properties. (Magoon Aff. ¶ 15.) Once the two wharves were established, the Original Grantors conveyed the remaining shoreline lots. (Magoon Aff. ¶ 17.) The easement clauses in these deeds differ slightly, but the substance is substantially the same. (Magoon Aff. ¶ 17.)

A deed for Lot 42 dated January 22, 1896 states, "also conveying the right to cross the other lots by foot path to reach the steam boat wharves, reserving to ourselves our heirs and assigns the right to cross said lot 42 to reach the steamboat wharves." (Magoon Aff. ¶ 18.) The 1898 deeds conveying Lots 34, 35, and 37 contained the following language, or a small variant thereof: "also conveying the right to cross all the lots north or south of this lot by foot path to reach the steamboat wharves. Reserving to ourselves our heirs and assigns the right to cross this lot by foot path to reach the

steamboat wharves." (Magoon Aff. ¶ 19.) The 1900 deeds conveying Lots 11 and 32 contained similar language, as did the deed for Lot 33. (Magoon Aff. ¶ 20; Magoon Aff. Ex. G.)

Between September 1899 and September 1906, the Original Grantors conveyed Lots 1-8, an unnumbered lot between Lot 8 and 9, and Lots 9, 13-15, 22-30, 36, and 38-41. (Magoon Aff. ¶ 22.) The deeds for these lots contained the following language, or a small variant thereof: "also conveying the right to cross by foot path all of the lots in this range to reach the steamboat wharves reserving the right to cross by footpath the land herein conveyed to reach the steamboat wharves." (Magoon Aff. ¶ 23.) The deed for Lot 19, conveyed by Louisa Jennison in 1914, contained similar language. (Magoon Aff. ¶ 23.)

The Original Grantors conveyed Lots 10, 17, and 31 on October 16, 1902. (Magoon Aff. ¶ 24.) The deeds for these lots contained the following language, or a small variant thereof: "Also conveying to him his heirs and assigns the right to cross all the lots by foot path to reach the steam boat wharves. Reserving to ourselves our heirs and assigns the right to cross this lot by foot path to reach the steam boat wharves." (Magoon Aff. ¶ 24.)

In October 1913, Norman Brockway conveyed Lots 20 and 21 with deeds stating, "also conveying the right to cross by footpath all the lots on either side of these lots to reach the steamboat wharves, and reserving the right to cross these lots by foot path for ourselves our heirs and assigns to reach the steamboat wharves." (Magoon Aff. ¶ 26.) Frank and Fannie Browning conveyed Lot 18 in 1914 with a deed stating, "also conveying the right to cross all the adjoining lots by foot path to reach the steamboat wharves, reserving the right to cross this lot by foot path for ourselves our heirs and

asignes [sic]." (Magoon Aff. ¶ 25.) An unnumbered lot between the town line and Lot 1 was conveyed without any easement language. (Magoon Aff. ¶ 27.)

In addition to the two steamboat wharves on the Newbury side of Great Island, the Breen Family Wharf was located at the tip of the Sunapee side of the island and also serviced steamboats. (Pl's. Mem. Supp. Cross. Mot. Summ. J. Ex. 3.) In the late 1800s and early 1900s, people used steamboats to move around Lake Sunapee and travel to Great Island. (Hoffmeister Parties' Mem. Supp. Summ. J. Re. Deeded Easements Ex. 1.) By 1907 the Woodsum Steamboat Company had five steamboats on Lake Sunapee. (Id. at Ex. 3.) However, steamboat service on Lake Sunapee ended by the 1930s following the rise of the automobile. (Id. at Ex. 1.) The Woodsum Steamboat Company dissolved in 1939. (Id. at Ex. 6.) The remains of the steamboat wharves were destroyed in the Hurricane of 1938. (See id. at Ex. 1.) The properties on Great Island now have their own individual docks for motorboats in order to get to and from the island.

Great Island does not have any public roads so footpaths are used to get from one place to another on the island by land. (Logan Aff. ¶ 4, Feb. 25, 2016.) After the steamboat wharves were destroyed and before electricity came to the island in the mid-1900s, various staples such as bread, milk, ice, and mail were delivered to the island via boat and the delivery man would use an island resident's personal dock and then travel on the footpaths to various cottages. (Logan Aff. ¶ 6.) The footpaths have also been used to travel to island gatherings, attend island meetings, visit with neighbors, conduct island business, get to cottages if there is a boating emergency, and for exercise/pleasure. (Logan Aff. ¶ 8.)

The Hoffmeister Parties argue they are entitled to summary judgment because there have been no steamboat wharves on Great Island since the 1930s and the footpath

easements exist only for the purpose of reaching the steamboat wharves, thus the purpose of the easements has been extinguished. In response, the Plaintiffs argue the Original Grantors did not convey the easements for the purpose of using the steamboats, but for reaching the location of the wharves and that the absence of the wharves does not mean the easements are extinguished. Although there are three footpaths at issue in this case, only the Circle Trail, which provides a path along the outer perimeter of Great Island and is the sole trail that passes by the locations of the former wharves, is at issue in these cross-motions for summary judgment.

Resolving this issue requires the Court to interpret the relevant deeds. The Court's interpretation of a deed "is based upon the parties' intentions gleaned from construing the language of the deed from, as nearly as possible, the position of the parties at the time of the conveyance and in light of surrounding circumstances." Boissy v. Chevion, 162 N.H. 388, 391 (2011). "If the language of the deed is clear and unambiguous, [the Court] will interpret the intended meaning from the deed itself without resort to extrinsic evidence." Id.

Because the deeds at issue here are not ambiguous, the Court need not look at extrinsic evidence. The language in the deeds varies slightly, but in general the easements in the deeds convey the right to cross lots "by footpath" in order "to reach the steamboat wharves." The lots to be crossed are variously referred to as the "lots in this range," "any of the lots," "the other lots," "all the lots north or south of this lot," "all the lots," "all the adjoining lots," and "all the lots on either side of these lots." 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 easement language does not limit what may be done once an individual reaches the location of a wharf via footpath or what footpath route must be used to get to a wharf. Additionally, the easements mention "wharves" in the plural, rather than the singular "wharf."

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 locations of the former wharves. "[A]n easement for a particular purpose terminates when it becomes impossible to use the easement for the purpose intended." Id. at 393 (quotations omitted). 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. As a result, the Plaintiffs' easements to use the Circle Trail footpath have not been extinguished. See id. at 398.

Having determined the footpath easements are not extinguished, the Court now turns to the parties' dispute over the scope of the easements. The Plaintiffs claim a right to use the portion of the Circle Trail that cuts through the Hoffmeister Parties' and Dwight Stowell's properties in Newbury. Because the Original Grantors did not own property in Sunapee, the Plaintiffs cannot claim a deeded right to use the footpaths on the Sunapee side of the island. The Court, therefore, will limit its analysis to the Newbury side of the island.

The Plaintiffs argue the easements should be interpreted to include not only the historic Melrose and Auburn wharves, but also all "wharves"— i.e. the island residents' individual docks— on the Newbury side of the island. The Court finds this interpretation

to be overly broad. Although the first deed, for Lot 16, only mentioned the construction of wharves— not steamboat wharves— the subsequent deeds all mention steamboat wharves, indicating a place for a larger boat to be moored rather than an individual property owner's personal dock. Instead, the Court finds the Plaintiffs have the deeded right to use the portion of the Circle Trail footpath in Newbury to reach the locations of the former Melrose and Auburn wharves.

The Hoffmeister Parties argue the deeded easement rights to use the footpath were abandoned when the Great Island residents began using their personal docks and stopped using the steamboat wharves. However, use of other docks does not indicate abandonment and there is no dispute that the island residents have continued to use the footpaths, including the Circle Trail, following the development of personal docks.

The Hoffmeister Parties further argue the Plaintiffs have failed to include all necessary parties and that the Court, therefore, cannot determine the scope of the easements. In particular, the Hoffmeister Parties, citing RSA 498:5-a, contend that plaintiffs in an action to quiet title must sue all parties who may claim an adverse interest against the plaintiffs. However, the Plaintiffs are seeking declaratory and injunctive relief against the Hoffmeister Parties and Stowell and have not filed an action to quiet title. The Plaintiffs, therefore, need not include in their suit all island residents whose properties contain the Circle Trail. As a result, the Hoffmeister Parties and Stowell may not bar the Plaintiffs from using the Circle Trail based on the Plaintiffs' deeded easement rights. Accordingly, the Hoffmeister Parties' Motion for Partial Summary Judgment regarding the deeded easements to reach the steamboat wharves is DENIED and the Plaintiffs' cross-motion is GRANTED, as it relates to the Plaintiffs' use

of the Circle Trail footpath in Newbury to reach the locations of the former Melrose and Auburn wharves, and DENIED, as it relates to other footpaths.

IV

Based on the foregoing, the Hoffmeister Parties' Motion for Summary Judgment regarding Anne Montgomery is GRANTED; the Hoffmeister Parties' Motion for Summary Judgment regarding the Davenports is DENIED; and the Hoffmeister Parties' Motion for Partial Summary Judgment regarding the deeded easements to reach the steamboat wharves is DENIED and the Plaintiffs' cross-motion is GRANTED, in part, and DENIED, in part.

SO ORDERED

6/29/16
DATE

Richard B. McNamara,
Presiding Justice