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November 6, 2017

VIA HAND DELIVERY

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, New Hampshire 03301

Re: Loon Valley Homeowner's Association v. Lewis G. Pollock and Edward Wallack, Executor of the Estate of Norman Wallack
Docket # 2017-0198

Dear Clerk Fox:

I enclose an original and eight copies of the Brief of the Defendants/Appellees Lewis G. Pollock and Edward Wallack, Executor of the Estate of Norman Wallack for filing in connection with the above-referenced matter.

Additionally, the brief has been e-mailed to ebriefs@courts.state.nh.us in PDF Format.

Thank you for your attention to this matter. Please feel free to contact me should you have any questions.

Very truly yours,

CLEVELAND, WATERS AND BASS, P.A.

By: _____
William B. Pribis

WBP/smm
Enclosures
cc: Mr. Lewis G. Pollock (w/enclosure)
Mr. Edward Wallack (w/enclosure)
Paul T. Fitzgerald, Esquire (w/enclosures)(x2)

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NOVEMBER 2017 TERM

DOCKET NO. 2017-0198

LOON VALLEY HOMEOWNER'S ASSOCIATION

V.

LEWIS G. POLLOCK AND EDWARD WALLACK,
EXECUTOR OF THE ESTATE OF NORMAN WALLACK

APPEAL FROM FINAL ORDER OF THE GRAFTON COUNTY SUPERIOR COURT

BRIEF OF THE DEFENDANTS/APPELLEES LEWIS G. POLLOCK AND EDWARD WALLACK, EXECUTOR OF THE ESTATE OF NORMAN WALLACK

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STATEMENT OF THE CASE

Supreme Court Rule 16 governs briefs. It requires that the appealing party's brief include a concise statement of the case and a statement of facts material to the consideration of the questions presented, with appropriate references to the appendix or to the record. Loon Valley Homeowner's Association's (the "Association" or "Loon Valley") brief purports to fulfill this requirement with a "Factual Summary".

However, in this appeal of a fact-intensive adverse possession case, the Association's Factual Summary omits or misstates significant facts that are very material to this Court's consideration of this appeal. The Association omits any reference whatsoever to the important testimony of the defendant, Lewis G. Pollock ("Mr. Pollock"), which the Trial Court found to be "credible and persuasive" and that provides overwhelming support for the Trial Court's decision. The Association's Factual Summary does not contain a single reference to the trial transcript. Instead, the Association cherry picks discredited "facts" from the Association's own evidence and relies on the Association's own version of the "facts" that support its position. The Association's Factual Summary completely ignores facts found by the Trial Court, based on evidence that the Trial Court found to be "credible and persuasive". Those ignored facts and evidence provide overwhelming support for the Trial Court's decision.

By way of example, the Association's Factual Summary cites the Trial Court's decision and states "Neither Mr. Pollock nor Mr. Wallack ever discussed their ownership of Lot 12 with Mr. Northfield" as if this was a decided "fact" for purposes of this appeal. Brief at 7. The Trial Court did comment that Mr. Northfield testified to that effect. However, the Association conspicuously fails to inform that the Trial Court also stated that Mr. Northfield's testimony was

"...contrary to Mr. Pollock's account" and that the Trial Court specifically found Mr. Pollock's account to be "credible and persuasive".

This is but one example of how the Association's recitation of "facts" for purposes of this appeal is anything but factual. However, given that the "facts" alleged by the Association are simply not a basis for reversal, the defendants' Statement of the Case will focus on bringing to this Court's attention the critical relevant facts that the Association omits or misstates. By doing so, the defendants are not agreeing to, or waiving any arguments with respect to, the Association's Factual Summary.

As stated, the Association's Factual Summary makes no mention of the substance of Mr. Pollock's testimony. Mr. Pollock is a lawyer in good standing with the bar of the Commonwealth of Massachusetts. He obtained his undergraduate degree from Yale University and his law degree from Harvard Law School. After serving his country honorably in the Army for two years, Mr. Pollock enjoyed a long and distinguished career until he retired from the Boston firm of Choate, Hall & Stewart in 1990. Trial Transcript ("TT") at 162-165.

Mr. Pollock has two younger brothers, Harry and Eddie. The brothers come from a very humble background and Mr. Pollock has been very close to Harry and Eddie for their entire lives. TT at 168. In 1968, Mr. Pollock decided to purchase an old Victorian home in downtown Lincoln, New Hampshire, in order to provide a place for his family and his brothers' families to enjoy as a vacation home. TT at 167.[1] Eventually, the Pollock brothers' extended family of 14 people outgrew the old Victorian and an opportunity arose to purchase property across the street. TT at 169. Mr. Pollock purchased that property (the so-called "Boyle Land"), and contributed it to a trust in which his brothers and their wives also held an interest. In 1972-1973, Mr. Pollock

[1] Mr. Pollock's younger brothers, their wives and children lived in the house with Mr. Pollock's blessing and permission – but they did not participate financially in the purchase or on the mortgage. TT at 168.

developed the Boyle Land into 9 townhouse units and formed the Loon Valley Homeowner's Association (who is, ironically, the plaintiff in this case). Those 9 townhomes plus the original house on the Boyle Land then and now comprise the Loon Valley Homeowner's Association. TT at 169-176. Mr. Pollock and his brothers were sole officers and directors of the Association at least through 1989. TT at 179.

After the townhomes were built, Mr. Pollock turned to the task of selling the 9 townhomes and the original house that comprised the Association. Mr. Pollock is a lawyer – not a real estate developer – and sales of the townhouse units went slowly. TT at 176. The original house on the Boyle Land was purchased by one of Mr. Pollock's brothers, Harry Pollock, and townhouse Unit 9 was purchased by Mr. Pollock's other brother, Eddie. TT at 176. Mr. Pollock himself purchased townhouse Unit 7 for his own family. The remaining seven townhouses were eventually bought by Mr. Pollock's long-standing clients, law partners and friends. These were all people Mr. Pollock considered to be close to him. They included Norman Wallack (whose estate is the other defendant in this case) and Mr. Pollock's friend and then-client, William Northfield. TT at 177. Mr. Northfield remains a member of the Association and was the principal witness for the Association in this case.

Mr. Pollock did not make money on the venture but "everybody was very happy, like family – it was idyllic, it was exactly what I envisioned would happen, everybody was very, very happy and there was no dissension whatsoever. I was the boss, I ran the place, I was president of – and it was very informal, a good time". TT at 178. Mr. Northfield, on behalf of the Association, agreed that the tight-knit Boston crowd shared a "community of interests." TT at 55-56.

By 1978, all of the units at the Association had been sold. At that time, a home on a lot that abutted Loon Valley's property, the so-called "Asselin Property"[2] came on the market. TT at 181. Mr. Pollock was interested in having the Association purchase that property with the hope of adding more land and additional units to Loon Valley. TT at 181. However, the Association members (with the exception of Norm Wallack) were not interested in incurring the additional expense. TT at 181-182.

After Loon Valley rejected Mr. Pollock's idea, Mr. Wallack and Mr. Pollock purchased the Asselin Property in their own names for approximately $60,000, using their own funds. TT at 181-182 and Brief at 20-21. Unfortunately, Mr. Pollock quickly realized that it was not financially feasible to adapt the house on the Asselin Property into units that could be added to Loon Valley. TT at 182-183. Messrs. Pollock and Wallack put the house on the Asselin Property back on the market and eventually sold the house along with some of the Asselin Property land. TT at 182-183. However, when the house sold, Messrs. Pollock and Wallack retained title to a portion of the original Asselin Property. That retained land is the so-called "Lot 12" that is the subject of this litigation. TT at 183-184. Lot 12 abuts The Association's property.[3]

Messrs. Pollock and Wallack took a significant loss (approximately $12,000 - $13,000 in 1979 dollars) (TT at 199) on the purchase and sale of the Asselin house. TT at 185. They hoped that they could get back some or all of their loss by selling their retained Lot 12 to the Association. TT at 185. However, when he and Mr. Wallack proposed selling the vacant land of Lot 12 to the Association at cost (about $12,500), Mr. Pollock's brothers, friends, clients and law partners were not interested. TT at 186.

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[2] "Asselin" is incorrectly spelled as "Asland" in the Trial Transcript.

[3] Lot 12 has its own street access as well as an easement over the driveway of another abutting property.

At this point, Messrs. Pollock and Wallack decided to make the best of an unfortunate situation. Accordingly, as Mr. Pollock testified, an arrangement was made between the owners of Lot 12 and the Association in 1979:

> So I met with my brothers [the other Association directors] and said, well, you know, what are we going to do? And, you know, I said - - they said, what are you going to do? I said, Norm and I want to enjoy that land [lot 12], our families want to enjoy the land and they said, what about us? I said, look Loon Valley - - everybody in Loon Valley - - Loon Valley itself can enjoy the land, but I think in fairness to Norm and me, Loon Valley ought to pay for moving the fence and Loon Valley ought to pick up our tax bill, which is about $150 a year.[4] I mean, I think it would sort of be ridiculous if we have to pay the taxes and move the fence at our expense. I think Loon Valley ought to do it, so. They said fine with us - - - so they said, good deal, Lou [sic]. I said, Harry, move the fence. So Loon Valley moved the fence and start paying the tax bill.

TT at 187.

Loon Valley also agreed to take over the obligation to maintain Lot 12. TT at 188. Mr. Pollock characterized the Association's obligations under this permissive arrangement as being "...in lieu of rent." TT at 214. Both the Association and the defendants agree that in 1979, the Association indeed moved the fence pursuant to Mr. Pollock's directions, and began maintaining the vacant land and paying the taxes on Lot 12. TT at 64 and Brief at 22, 27. Mr. Pollock's testified that the Association agreed to this permissive use arrangement, "and that the arrangement was well known to the members of the Association [in 1979], including Mr. Northfield." The Trial Court found such testimony by Mr. Pollock to be "credible and persuasive." Association's Brief ("Brief") at 21-22. The Trial Court further observed that a 1979 letter produced by Mr. Northfield (the only original Association member who testified) contradicted Mr. Northfield's claim that he knew nothing about Mr. Pollock's and Mr. Wallack's ownership of Lot 12. Brief at 22 (note 4).

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[4] In 1979, when Mr. Pollock's brothers and partners refused to purchase Lot 12, there was a fence separating Lot 12 from Loon Valley's property, and Mr. Pollock was referring to moving this fence so that Loon Valley property would not be fenced off from Lot 12. TT at 187.

Mr. Northfield claimed that he never questioned why the distance from his unit to the border fence suddenly increased in 1979 from a few feet to a distance large enough to accommodate football and baseball games[5]. TT at 66 and 16. He testified that he was never made aware that the owners of Lot 12 had given the Association permission to use Lot 12. TT at 20. Mr. Northfield acknowledged that he knew that Lot 12 had not been sold, gifted or transferred to the Association, and yet he could offer no substantive alternative reason (to Mr. Pollock's explanation of permissive use) as to why Mr. Pollock and the Association agreed to move the border fence for Lot 12 in 1979. TT at 69-71. A portion of the Transcript of Mr. Northfield's deposition was read into evidence in which he testified that he believed that the moving of the fence constituted "permission [being] given by action." TT at 72.

Mr. Pollock and Mr. Wallack, (and later Mr. Wallack's estate) continued to allow Loon Valley to use Lot 12 in exchange for maintaining it and paying the real estate taxes until 2014. TT at 191. The Trial Court found that "the evidence overwhelmingly demonstrates that the Association fully complied with the defendants' conditions" of permissive use. Brief at 28. Moreover, Mr. Pollock and Mr. Wallack had every reason to continue to be generous to Loon Valley during this period: Mr. Pollock's brother, Harry, and his wife were members of Loon Valley until 2007 (Brief at 45), and Mr. Wallack's daughter and son-in-law were members of Loon Valley through 2014. Brief at 28-29 and 50.

On the issue of the Association's use of Lot 12 to the exclusion of the true owners, Mr. Northfield, on behalf of the Association, testified as follows:

Q: The Association's use of lot 12 was not exclusive to the owners of lot 12, correct?

A: No, not at all.

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[5] The fence in its original position was 10 feet from Mr. Northfield's unit. After the fence was moved, it was 80 feet from Mr. Northfield's unit. TT at 67.

Q: Those owners [Mr. Pollock and Mr. Wallack] were using it right alongside with everybody else up there, correct?

A: And I thought that's where their usage rights came from, their ownership in Loon Valley.

Q: And in the case of Mr. Wallack, that use continued right up until 1998, which is approximately 18 years ago, correct?

A: Approximately, yes.

TT at 80-81.

In January 2015, just after all Pollock and Wallack family members left Loon Valley, the Association threatened to sue Messrs. Pollock and Wallack unless they signed a quitclaim deed for Lot 12 over to Loon Valley.[6] Brief at 26 and Defs. Ex. 4. At the time of that threat, all of the 1979 members of the Association, except for Mr. Northfield, had left Loon Valley. After the Association carried through on its threat and filed this lawsuit with a claim of adverse possession, Mr. Pollock and the Estate of Mr. Wallack revoked their permission and informed the Association that it no longer had permission to use Lot 12.

The three "new"[7] individual members of the Association who testified at trial all claimed to be unaware of the legal boundaries of Loon Valley or any permissive use arrangements. Each testified that he just assumed that the Association held title to Lot 12 because it looked like Lot 12 was part of Loon Valley, and that no one told them otherwise (despite the fact that a routine review of their deeds would have told them otherwise). Each testifying member of the Association acknowledged receiving a deed that did not include Lot 12 as part of Loon Valley

[6] Mr. Northfield testified that his email to Mr. Pollock stating the Association "...may be required to bring a claim for adverse possession" if Mr. Pollock did not voluntarily deed Lot 12 to the Association was not a threat to sue him (TT at 46-47) but rather a "friendly notice of the intent." TT at 82.

[7] Other than Mr. Northfield, all Association members who testified acquired their membership interest a decade or much more after the fence was moved in 1979. Mr. Pollock did not overlap with any of these "new" individual members. See e.g. TT at 114.

land, and each acknowledged that he never read his deed or examined the publicly filed site plans that clearly showed that the Association did not own Lot 12. See e.g. TT at 132-133.

Following the trial, the Trial Court ruled in favor of the defendants, finding that the Association's use of Lot 12 was neither adverse nor exclusive. This appeal followed.

SUMMARY OF THE ARGUMENT

The Association posits three arguments in favor of reversal. First, the Association seems to fault the Trial Court for not making a specific finding with respect to its burden of production. Second, the Association argues that there was insufficient evidence showing that the Association's use of Lot 12 was permissive. Third, the Association argues that there was insufficient evidence supporting the Trial Court's ruling that the Association's use of Lot 12 was not exclusive to that of the true owners.

With all due respect to the Association and its counsel, these arguments border on the frivolous and the defendants should not have had to incur the expense of this appeal. With respect to the Association's first argument, this Court has never required trial courts to articulate specific findings regarding burdens of proof and production in an adverse possession case. If the Association wanted the Trial Court to make specific findings in that regard, it was incumbent upon the Association to submit specific requests for findings and rulings. Otherwise, it is presumed that the Trial Court made the necessary findings in support of its decision.

Moreover, the record reflects that the Trial Court did consider whether the Association met its initial burden of production. At trial, the Trial Court made a bench ruling on the defendants' motion for a direct verdict. The Trial Court specifically, and on the record, considered whether the Association had met its burden of production, specifically citing and quoting the Sandford case that the Association claims the Trial Court ignored. The Trial Court ruled that "...at this juncture I find that – without weighing the evidence, just as to what's been produced by the plaintiff, that they've presented a prima facie case." TT at 161. The Trial Court proceeded to require the defendants to put on their evidence of permissive use. The

Association's claim that the Trial Court did not utilize the Sandford "burden shifting" analysis is simply wrong.

As to the Association's remaining arguments, the evidence – both direct and circumstantial – overwhelmingly supported the Trial Court's finding of permissive use. The defendants simply argue that the Trial Court should not have believed that evidence. Likewise, on the issue of exclusive use, when the Association's own witness was asked if whether the Association's use of Lot 12 was exclusive to the record owners of Lot 12, he answered "No, not at all" and agreed that those owners "...were using it right alongside with everybody else up there". Not only did the evidence support the Trial Court's findings of permissive and non-exclusive use – it is difficult to see how a reasonable fact finder could have reached a contrary conclusion.

ARGUMENT

I. ARGUMENT

A. The Trial Court was not required to articulate specific findings regarding the Association's burden of production, and the record clearly demonstrates that the Trial Court did in fact apply the Sandford "burden shifting" analysis.

Relying upon a quote from an unpublished superior court case with no context provided, the Association argues that the Trial Court erred because it "...failed to apply the burden-shifting framework of Sandford to the facts of the present case." The Association's "burden shifting" argument and odd reliance on an unpublished case (one that does not even seem to support the Association's position) are not clear or persuasive. The Association seems to be arguing that the Trial Court judge was required to articulate specific findings in its written decision along the lines of, "I am convinced that the Association has produced sufficient evidence so as to create an inference that its use of Lot 12 was adverse. I will now consider whether Mr. Pollock has produced evidence of permission, keeping in mind that it remains the plaintiff's burden to persuade me that its use was adverse..." Sandford (which was decided at the trial court level on summary judgment, and not after a merits hearing) did not hold that a trial court is required to enumerate in its findings who had what burden with respect to each such finding. Indeed, this Court has never issued a decision requiring a trial court to make specific findings on a rote "burden shifting analysis" in an adverse possession case. If the Trial Court's analysis of each finding was important to the Association, it was incumbent on the Association to submit specific requests for findings and rulings to the Trial Court. Howard v. Howard, 129 N.H. 657, 659 (1987) (trial court under no obligation to make specific findings in support of decree unless party asks for them). The fact that the Trial Court's written decision did not follow the Association's desired format for analyzing burdens of proof and persuasion is not reversible error.

Moreover, the Trial Court did apply Sandford's "burden shifting" analysis. At trial, when ruling from the bench on the defendants' motion for a directed verdict, the Trial Court specifically discussed the Sandford analysis, considered whether the Association had met its initial burden of production, and found that the plaintiff had presented "a prima facie case." TT at 160-161. By denying the defendants' motion for a directed verdict and requiring the defendant to put on evidence of permission, the Trial Court did exactly what the Association claims Sandford required the Trial Court to do. Moreover, the Trial Court's written decision discusses the testimony of every single one of the plaintiff's witnesses. The Trial Court clearly weighed that testimony against the "credible and persuasive' testimony of Mr. Pollock. While not necessarily organizing its written decision in a "burden shifting analysis" format, it is clear that the Trial Court properly applied this analysis and ultimately found that the Association's use of Lot 12 was permissive and therefore not adverse.

Finally, the Association claims that had the Trial Court made findings regarding its initial burden of persuasion then "...the burden would have then shifted to the landowner to produce evidence of permission". Brief at 12. This statement, which suggests the defendants did not meet a burden to produce evidence of permissive use, completely ignores the overwhelming direct and circumstantial evidence of permission that was before the Trial Court. This evidence included, but was not limited to:

a. Direct evidence through Mr. Pollock's testimony, which the court found to be "credible and persuasive";

b. Direct and indirect evidence through the undisputed facts that in 1979 Mr. Pollock caused the fence to be moved and the Association started paying the taxes on Lot

12 and maintaining Lot 12, all consistent with Mr. Pollock's testimony as to the arrangement for permitted use;

c. Indirect evidence in that no witness could offer an alternative explanation (other than permission) as to why the fence was moved and why the Association began paying taxes on and maintaining Lot 12;

d. Indirect evidence in the form of the close relationships Mr. Pollock had with all the original owners at the Association, therefore making it logical that he would want to give them permission to use his land.

In short, the suggestion that there was insufficient evidence before the Trial Court for the defendants to meet a burden to produce evidence of permission borders on the ludicrous.

The real question, in any event, is not one regarding the technical drafting of the Trial Court's findings. Instead, the real question facing this Court is simply: "Was there sufficient evidence to support the Trial Court's finding that Loon Valley's use of Lot 12 was permissive?" See McNeal v. Lebel, 157 N.H. 458, 461 (2008) (Supreme Court will uphold trial court's factual findings unless they lack evidentiary support). The answer to this question is an unequivocal "yes".

B. The evidence overwhelmingly supported the Trial Court's finding of permissive use.

The Association complains that, "...the Trial Court misconstrued the evidence, which tends to show that the Association members' use was adverse from 1995 to 2015." Brief at 12. The Association faults the Trial Court for giving weight to Mr. Pollock's "uncorroborated"[8] and "self-serving" testimony. Brief at 12, 13.

[8] One of the reasons Mr. Pollock's testimony was "uncorroborated" was because one of his brothers could not attend the trial because he was suffering from cancer, neuropathy and walking pneumonia. The other had suffered a stroke and has significant dementia. TT at 188-189.

However, like the defendants, the Association offered only a single witness – William Northfield – who could have had personal knowledge about the events at the Association in 1979. Brief at 23. One could argue that Mr. Northfield's testimony was also "uncorroborated" and "self-serving". In any event, it was clear that the Trial Court did not believe Mr. Northfield's testimony. There is nothing improper about that. See Cook v. Sullivan, 149 N.H. 774, 780 (2003) (Supreme Court defers to a trial court's judgment on such issues as resolving conflicts in testimony and measuring credibility of witnesses); Brent v. Paquette, 132 N.H. 415, 418 (1989) (fact finder may accept or reject, in whole or in part, testimony of any witness or party and is not required to believe even uncontroverted evidence). This is the primary flaw in most of the Association's arguments – they are based on the premise that the Trial Court did not credit or interpret certain testimony or evidence as the Association would have liked. For example, the letter from Mr. Pollock to his lawyer that the Association argues is crucial support for its claims was not perceived by the Trial Court as supportive of the Association's case at all. The Trial Court noted that Mr. Northfield's long-standing possession of this letter actually contradicted his testimony that Mr. Pollock never discussed Lot 12 with him. Brief at 22 (footnote 6).

The remaining Association witnesses were individual members who joined the Association at least a decade after Mr. Pollock and Mr. Wallack gave their permission to use Lot 12 and the other events of 1979. The testimony of each Association witness was, in essence, that the witness was "never aware" (Brief at 13) of this permissive arrangement for the Association's use of Lot 12. However, each Association witness also testified that he never did any diligence at all to determine the boundaries of Loon Valley. Brief at 23, 24. A quick search of the Grafton County Registry of Deeds or the Town of Lincoln records would have shown each incoming

member that the Association's common area did NOT include Lot 12. That simple search should have alerted these members that the Association did not own Lot 12 and that the Association's use of Lot 12 must have been per some type of permissive arrangement with the record owners – Mr. Pollock and Mr. Wallack. Indeed, when some of these owners finally performed a simple town records search, they quickly saw that the Association did not have title to Lot 12 (TT at 121-123) and brought this lawsuit. This Court should not reward the Association because certain members were, by choice, willfully ignorant about the boundaries of what the Association owned.

Citing no on-point authority whatsoever, the Association urges this Court to adopt the following concept: Even if permission was given to the *Association* (a corporation) in 1979, by 1995-2015 that permission was voided because three *individual* members of the Association who joined long after 1979 were not aware, due to their own lack of due diligence, of what happened in 1979. The Association does not explain how permission given to the Association in 1979 became non-permissive use by 1995, except to imply that there can be no ongoing permission without the actual knowledge of each incoming member of the Association. The Association suggests that permission given to an entity (i.e., the corporate plaintiff in this case) vanishes unless the owner re-states that permission to every later-joining member/shareholder. This is not the law in New Hampshire. If it were the law, a landlord would never enter into a long-term lease with a corporation or other legal entity. Once there was turnover among the entity's employees, officers, directors and/or shareholders the landlord would be facing a claim for adverse possession if any of these new individuals claimed to be unaware of the existence of the lease, and instead assumed that the corporation owned the leased property.

In fact, under New Hampshire law, once permission is given (as it was given to the Association in 1979), the occupant's use of the owner's land cannot ever become adverse "...without an explicit repudiation of the earlier permission." Town of Warren v. Shortt, 139 N.H. 240, 244 (1994). While Shortt suggests that a change in the nature of the occupiers' use can serve as a repudiation of permission, that change in use must clearly alert the true owner that the occupant is now asserting a "claim of right." Id. at 245. Moreover, Shortt specifically held that it was not necessary for the true owner to police the public's use of an easement so long as the ongoing use appeared consistent with the permitted use. Id. Shortt, which involved a public claim of prescription, does not even remotely suggest that a true owner must formally express their previously granted permission to each and every subsequent user of the subject property. No New Hampshire case supports this notion. Indeed, in the context of a public claim of prescription, Shortt makes clear that the opposite is true – a true owner does not need to police the use of the property to ensure that every user is aware that their use is permissive.

Applied to this case, the law in Shortt means it was not necessary for Mr. Pollock or Mr. Wallack to "police" individual members' use of Lot 12 by, for example, informing them of the arrangement for permissive use. So long as the Association's use of Lot 12 did not exceed what Mr. Wallack and Mr. Pollock originally permitted, no claim for adverse possession could arise. It was undisputed that the Association's members' use of Lot 12 never exceeded the recreational use that Messrs. Pollock and Wallack permitted. Per Shortt, the fact that three late-joining Association members weren't aware of the permissive nature of the Association's use of Lot 12 is nearly irrelevant.

Throughout its brief, the Association incorrectly asserts or implies that there was no evidence that any member of the Association was aware of this permissive use arrangement.

Brief at 8, 13. The Association goes so far as to claim that there was "***no*** testimony produced at trial that any Association member was aware of this 'permissive arrangement' between 1995 and 2015." [emphasis added] Yet Mr. Pollock himself provided "credible and persuasive" (Brief at 21-22) testimony at trial that he told "everyone" in 1979 (including Mr. Northfield) about the permissive arrangement. TT at 189-190. Many of those same 1979 members with whom Mr. Pollock discussed the Lot 12 arrangements undisputedly remained Association members during the 1995-2015 period including Harry and Susan Pollock, Mr. Wallack and Mr. Northfield. It is surprising that the Association would allege that even the late Mr. Wallack, an owner of Lot 12 and an Association member through 1998, was "unaware" of the permissive use arrangements or his own ownership of Lot 12.

In repeatedly denigrating the testimony of Mr. Pollock, the Association (which Mr. Pollock created, developed, ran as President, and clearly loved for so many years) essentially argues that the Trial Court should have found that Attorney Pollock's testimony was simply a series of lies told under oath in a court of law. The not-so-subtle suggestion by the Association that Mr. Pollock, an officer of the Court, would travel over 5,000 miles round-trip from his home to northern New Hampshire in order to lie under oath at a trial in the Grafton County Superior Court in a dispute over a quarter acre of land is not just absurd. It is offensive.

The Association asserts that "...the Trial Court's holding runs afoul of the common law purpose of the doctrine of adverse possession" and claims that the Trial Court's result "is not only unjust but stands in stark contrast to the historic foundation and purpose of adverse possession." Brief at 14. The Association's arguments in support of this are not persuasive:

(a) The Association claims that the Trial Court "...essentially held that the Association's inability to adversely possess Lot 12 would have continued in perpetuity and the

Association would be forever unable to succeed on a claim of adverse possession." Brief at 14. This is simply wrong. If, in accordance with the law, the Association had used Lot 12 for the requisite 20 years after articulating their "claim of right", the Association could have prevailed on a claim of adverse possession. But the law is not that permissive use eventually confers title on the permissive user. The opposite is true - it never does.

(b) The Association argues that "[t]he defendants abandoned Lot 12, had no practical use for it for several decades, and in all likelihood did not recall their record ownership thereof before being reminded by Mr. Northfield." Brief at 14. This argument is completely contradicted by the record. Mr. Northfield himself testified that Mr. Wallack used lot 12 along with all members up until 1998. Other members of the Pollock and Wallack families were members of the Association long after 1999. TT at 210. Mr. Pollock testified, and the Trial Court agreed, that Mr. Pollock always knew he owned Lot 12 and was conversant with regard to the details of his ownership. TT at 199, Brief at 26.

(c) The Trial Court's ruling was not a "perceived windfall" for Mr. Pollock. Brief at 14. Mr. Pollock and Mr. Wallack bought and paid for Lot 12. The Association rejected two opportunities to buy Lot 12. Record title has always been in Messrs. Wallack's and Pollock's names. Since 1979 the Association has paid nothing for the use of Lot 12, other than a nominal fee through payment of the small tax bill. Allowing Mr. Pollock and Mr. Wallack's estate to keep property that they purchased with their own funds hardly creates a windfall. Awarding Lot 12 to the Association would fly in the face of the most basic concepts of property ownership and fairness.

Finally, the Association relies upon a philosophical (not legal) treatise on adverse possession to support its claim that the Trial court's ruling "runs afoul of the common law

purpose of adverse possession." Brief at 14. The Association offers this Court a quote from that treatise: "The adverse possessor would experience the deprivation of property as a diminishment of his wealth; the original owner would experience the restoration of the property as an increase in *his* wealth." However, the Association fails to put that quote in context for this Court and neglects to inform this Court that the treatise says, immediately after that quote, "the same sort of logic would appear to justify leaving stolen cash in the hands of the thief". See Stake, Jeffrey E., "The Uneasy Case for Adverse Possession" at 2458. The Association also fails to call attention to the treatise's conclusion: "In short, the doctrine of adverse possession creates an opportunity to steal land, a behavior we do not want to encourage." Id. at 2433.

What this Court has said demonstrates that the Trial Court's decision is completely consistent with how courts should apply concepts of permissive use and adverse possession:

> The law is very rigid with respect to the fact that a permissive use in the beginning can be changed into one that is hostile and adverse only by the most unequivocal conduct on the part of the user. The rule is that the evidence...must be positive, must be strictly construed against the person claiming a prescriptive right, and that every reasonable intendment should be made in favor of the true owner.

Shortt, 139 N.H. at 245. In this case, the evidence overwhelmingly demonstrates that (a) permission was given to the Association; and (b) once given, it was never repudiated. Against this evidence, the claim by a few individual Association members that "we didn't know permission was given to the Association, therefore, it must not have been given" hardly meets the well-established standard of Shortt. There was no error by the Trial Court.

C. The Trial Court did not err when it ruled that the Association's use of Lot 12 was nonexclusive until 1998.

The Association claims that "there is no evidence in the record, and the Trial Court did not find, that Mr. Wallack ever actually utilized Lot 12 [from 1995 to 1998]. Brief at 15. The

Association argues that even if Mr. Wallack did occasionally enter Lot 12 from 1995 to 1998, his use of Lot 12 was "a mere casual entry" that did not destroy adverse possession. Brief at 15-16.

The Trial Court specifically found that Mr. Wallack "...maintained a continuous presence at the Association until 1998." Implicit in this finding is a conclusion that Mr. Wallack (a true owner of Lot 12) used Lot 12 in a manner consistent with the other members of the Association. This conclusion was evidentially very well supported. See In the Matter of Aube, 158 N.H. 459, 466 (2009) (absent a lack of record support, Supreme Court will assume that the trial court made subsidiary findings necessary to support its general ruling) (quoting In the Matter of Koesk, 151 N.H. 722, 725 (2005)). The Association's own witness, William Northfield, testified unequivocally that Mr. Wallack used Lot 12 in the same manner as the other Association members and that such use continued until 1998. See Flanagan v. Prudhomme, 138 N.H. 561, 572 (1994) (use by other children with true owners' children not exclusive and therefore not adverse); Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29, 33 (2007) (adverse possessor's use of the land must be exclusive to that of true owner). There is simply no support for the Association's claim that the Trial Court erred on the issue of exclusivity. See In the Matter of Aube, 158 N.H. at 467 ("we will uphold trial court's decision unless record does not support it or it is tainted by error of law").

The Association's reliance upon O'Malley (claiming that Mr. Wallack's use of Lot 12 is not sufficient to interrupt the Association's claim of exclusive use) is misplaced. O'Malley had nothing to do with the issue of exclusive use. The court in O'Malley was trying to decide whether the entry onto land by the owner was a sufficient act of dominion "to put a reasonably prudent person on notice that the true owner's purpose is to resume possession of the land and that such person [the adverse possessor/trespasser] actually has been ousted." O'Malley v. Little,

2017 WL 4016136 at 3 (August 31, 2017). Here, where Mr. Wallack was using Lot 12 on a nonexclusive basis with the Association, and where he had given permission to the Association to use Lot 12, there was no issue of Mr. Wallack trying to "oust" the Association by walking onto and using Lot 12. Mr. Wallack's use of Lot 12 was, as intended, "nonexclusive" with the Association's use. As a result, the language quoted by the Association [relating to notice of an ouster] is not relevant to the question of "exclusivity". Moreover, Mr. Wallack's use was not for a "limited purpose" or "occasional". Instead, according to Mr. Northfield, Mr. Wallack's use of Lot 12 was exactly the same type of use as that of all other Association members.[9] TT at 80.

[9] Mr. Northfield's testimony suggested that when Mr. Wallack used Lot 12 he was using it not in his individual capacity, but as a member of the Association. Crediting this distinction would lead to the absurd result of a landowner's use of his own land creating an adverse possession claim against himself.

CONCLUSION

For all of the foregoing reasons, your defendants request that this Court affirm the Trial Court's decision.

Respectfully submitted,
Lewis G. Pollock and Edward Wallack,
Executor of the Estate of Norman Wallack

By and through their Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: November 6, 2017

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2017, a copy of the foregoing Brief was forward via first-class mail, postage prepaid, to Paul T. Fitzgerald, Esquire.

_____
William B. Pribis, Esq.

ORAL ARGUMENT

William B. Pribis will argue the case for the plaintiff and fifteen minutes are requested for this purpose.

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William B. Pribis