THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

DOCKET NO. 2018-0591

TOWN OF DUNBARTON

V.

MICHAEL GUINEY, DAVID NAULT, JOSHUA N. NAULT & LEIGH D. NAULT

RULE 7 APPEAL FROM THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF APPELLEE DAVID NAULT, JOSHUA N. NAULT & LEIGH D. NAULT

Michael J. Tierney (NH Bar # 17173)
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
(603) 669-4140
mtierney@wadleighlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New Hampshire Statutes

NEW HAMPSHIRE STATUTES

229:1 Highways Defined. – Highways are only such as are laid out in the mode prescribed therefor by statute, or roads which have been constructed for or are currently used for motor vehicle, bicycle, or pedestrian public travel over land which has been conveyed to a city or town or to the state by deed of a fee or easement interest, or roads which have been dedicated to the public use and accepted by the city or town in which such roads are located, or roads which have been used as such for public travel, other than travel to and from a toll bridge or ferry, for 20 years prior to January 1, 1968, and shall include the bridges thereon. Highway does not include any bridge, trail, or path intended for use by off highway recreational vehicles, as defined in RSA 215-A:1, or snowmobiles, as defined in RSA 215-C:1.

I. Statement of Facts and of the Case

Appellants David Nault and Joshua and Leigh Nault own property abutting appellee Michael Guiney's property. David Nault currently owns Lot 7 while his son and daughter-in-law own Lot 8. See Exhibit 55 at Appx. II,[1] p. 20. Both relevant Nault properties are currently accessed by traveling down Kelsea Road, a public road that travels between Guiney's house and barn. *Id*. There is also a deeded 50 foot right of way between Guiney's house and barn that is coterminous with the public road.[2] For several decades prior to 2015, the Town of Dunbarton maintained and plowed snow for the length of Kelsea Road to Guiney's barn. See Order, p. 14-18.

In 2006 Guiney brought a quiet title action against Nault to stop Nault from using a driveway to access Lot 8 by going north after Guiney's barn as opposed to going west and through Lot 7. See Exhibit 55 at Appx. II, p. 20; Order[3], p. 13-14. In that case, Guiney objected to Nault using the driveway going north after the barn and successfully convinced the superior

---

[1] On April 23, 2019, the Appellee Michael Guiney filed seven Appendixes and numbered Appendix I, II, III, etc. References in this Brief are to the Guiney Appendix unless otherwise noted.

[2] This Court has recognized that "the concurrent existence of a highway and a private way along the same line is not impossible although it renders the assertion of such a right or part thereof temporarily unnecessary." *Elmer v. Rodgers*, 106 N.H. 512, 515–16 (1965).

[3] Citations to the Order are to the August 24, 2018 Order of the Merrimack County Superior Court that is under appeal in this case. The August 24, 2018 Order summarized the 2006 case.

court that Nault did not have an easement by implication or necessity in that location as Nault already benefited from a deeded 50 foot right of way to go due west across the Guiney property between his house and barn pursuant to a 1988 Common Boundary Line and Right of Way Agreement. See Appx. II, p. 18 and Appx. VI, 15-23. This 50 foot right of way that Guiney asserted benefitted Nault in the 2006 case is the same 50 foot right of way that Guiney now denies is valid.

Although Kelsea Road was laid out as a 3 rod road (49.5 feet) and the deeded right of way was 50 feet, the actual traveled portion of Kelsea Road has historically been quite narrow. Testimony received at trial indicated that "the road is generally about 12-15 feet wide, the widest point being 18' wide." Order, p. 17. In 2011, Guiney felt that the traveled way was getting too wide near his barn. In response, Guiney put up a post partially blocking access to the areas the Town had used to turn around its snow plow and demanded the Town to "stop using his property." Order, p. 12. After initially taking down the obstructing post, Guiney put more posts up in 2016. Order. p. 12.

On December 23, 2016, the present case was filed by the Town of Dunbarton against Guiney and the Naults. The Town filed an amended petition on August 17, 2017. See Appx. I, p. 7 to 16. The Town asked the superior court for a declaratory judgment as to whether the Disputed Portion was public road by prescription. Attached to both its original and amended petitions is a sketch of the "Disputed Portion" of Kelsea Road that is at issue in this case. See Appx. I, p. 16. It measures 50 feet wide by approximately 163 foot long. See Appx. I, p. 16.

West of the "Disputed Portion" is a 50 foot deed right of way that ends at the Nault property line. See Appx. I, p. 16. On September 13, 2017, Guiney filed a cross claim against Nault asking the superior court to declare the 1988 Boundary Line and Right of Way Agreement invalid and relocate the boundary line and terminate the right of way. Order, p. 1-2.

The Superior Court held a 3 day trial on July 11, 12 and 13, 2018 where it heard from 10 witnesses and reviewed over 40 exhibits. The trial court also took a view of the property. On August 24, 2018, the Superior Court issued a detailed narrative decision finding the facts supported (1) that a public highway by prescription existed over the Disputed Portion, (2) that the boundary line as recognized by the 1988 Common Boundary Line and Right of Way Agreement was valid under the doctrine of boundary by acquiescence, and (3) the 50 foot wide right of way was valid under both judicial estoppel and estoppel by recital in instruments. See Order p. 1-26. Guiney filed a Motion for Reconsideration on September 4, 2018 which was denied on September 19, 2018. This appeal was filed on October 17, 2018.

In Guiney's Brief, he spends 9 pages asserting facts different than the facts found by the trial court. Compare Guiney Brief, p. 9 to 18, with Order, 2-19. In particular, Guiney asserts that testimony of his expert witness Rogers should have been given more weight than the superior court gave to it. This Court will "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." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). This Court should rely on the facts as found by the trial court in its decision.

II. Summary of the Argument

In his Brief, Guiney challenges all three holdings of the Superior Court: (1) that a public highway by prescription existed over the Disputed Portion, (2) that the boundary line as recognized by the 1988 Common Boundary Line and Right of Way Agreement was valid under the doctrine of boundary by acquiescence, and (3) the 50 foot wide right of way was valid under both judicial estoppel and estoppel by recital in instruments. See Order p. 1-26. Guiney essentially argues that the Superior Court should have given greater weight to the evidence he presented and decreased the weight the Superior Court gave to the evidence presented by Nault. See, e.g., Guiney Brief, p. 30 (arguing that the trial court should have given greater weight to the testimony of Guiney's expert witness and less weight to Nault's expert witness) This Court will "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." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). The Superior Court's holdings are supported by the evidence and should be affirmed.

III. Standard of Review

As the appealing party, Guiney bears the "burden of demonstrating reversible error." *Gallo v. Traina*, 166 N.H. 737, 740 (2014). "Whether a highway is created by prescription is a finding of fact." *Gill v. Gerrato*, 156 N.H. 595, 596 (2007). This Court "will be bound by the trial court's findings unless they are not supported by the evidence or are erroneous as a matter of law." *Id; Mahoney v. Town of Canterbury*, 150 N.H. 148, 150 (2003). All of the Superior Court's findings are supported by the evidence.

IV. Nault Benefits From a 50 Foot Right of Way Over Guiney's Property

Nault benefits from a 50 foot wide right of way over the Guiney property. This right of way is granted and referenced in several documents recorded at the Registry of Deeds including: a Boundary Line Agreement recorded on August 24, 1988 and found at Appx. VI, p. 15, a Plan 10558 also recorded on August 24, 1988 and found at Appx. II, p. 18; a second Boundary Line Agreement recorded on January 27, 1989 and found at Appx. VI, p. 18; a "CONFIRMATORY COMMON BOUNDARY LINE AND RIGHT-OF-WAY AGREEMENT" recorded August 19, 1998 and found at Appx. VI, p. 21 and the deed to Guiney recorded on April 8, 1999 and found at Appx. VI, p. 27. Mr. Guiney testified that he received a copy of the Boundary Line Agreement and the Plan prior to purchasing his property in 1999. Order, p. 10-11. Nevertheless, in his Brief to this Court, Guiney now asserts that he "cannot be required to abide by a 50' ROW." Guiney Brief, p. 35. The Trial Court was correct to reject this argument.

a. Guiney is Judicially Estopped from Denying the Validity of the 50 Foot Right of Way

The Superior Court judicially estopped Guiney from denying the validity of the 50 foot right of way. First, Guiney was judicially estopped in the Court's February 15, 2018 Order on Summary Judgment. Guiney did not appeal this decision. Second, in the Court's August 24, 2018 Order, which is the Order Guiney did appeal, the trial court specifically referenced the earlier ruling. See August 24, 2018 Order at 14. Nevertheless, Guiney does not appear to have preserve any challenge to this issue. The Notice of Appeal from the August 24, 2018 Order does not challenge the application

of judicial estoppel. "An argument that is not raised in a party's notice of appeal is not preserved for appellate review." *State v. Blackmer*, 149 N.H. 47, 49 (2003)*(*citing *State v. Blair,* 143 N.H. 669, 672 (1999). Guiney also does not address judicial estoppel in his Brief filed with this Court. This Court will "deem waived issues that are raised in the notice of appeal but are not briefed." *Town of Londonderry v. Mesiti Dev., Inc.,* 168 N.H. 377, 380 (2015). Therefore, it does not appear the trial court's application of judicial estoppel was ever properly preserved for challenge on appeal.

Nevertheless, even if the application of judicial estoppel was preserved for appeal, it was properly applied. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position .... " *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). As the trial Court stated in its February 15, 2018 Order, Guiney successfully argued in 2006 that Nault did not have an easement by necessity over a different part of the property specifically because Nault benefited from the 50 foot Right of Way at issue in this case. The Court noted in its February 15th Order that Guiney had argued in the earlier case that he "has met his burden to show Nault's deeded access rights over Lot 5 are limited to using the 50' ROW to access Lot 1-7." February 15, 2018 Order at p. 8 at Nault Appx. 22. In fact, in the Amended Petition Guiney filed in 2007, he declared "it is undisputed that Nault has a 50-foot right of way over the Guiney property to reach lot 1-7." See Amended Petition, ¶ 40, attached as Exhibit E to Nault's Motion for Summary Judgment at Nault Appx. 9. The Superior Court was correct to judicially estop Guiney from denying Nault has a 50 foot wide right of way in this case.

b. The 50 Foot Right of Way is Enforceable by the Doctrine of Estoppel by Recitals

The Superior Court properly held the 50 foot right of way is enforceable pursuant to the doctrine of estoppel by recitals. "The doctrine of estoppel by recitals in instruments provides that a grantee is estopped to deny the validity of any outstanding interest to which his deed recites that the conveyance is subject." *Kellison v. Mcisaac*, 131 N.H. 675, 682 (1989) (quotation & citation omitted). "This rule applies to recitals concerning easements." *Id.* The Superior Court properly held that Guiney cannot "assert that the 50' right of way is . . . invalid, because it was specifically included in the deed by which Mr. Guiney obtained title to Lot 5." Court's Order, p. 25. In particular, the 1999 deed by which Guiney obtained the property specifically stated that it was subject to "A fifty foot (50') wide right-of-way beginning at the end of Kelsea Road and extending to the nearest point on the boundary between the Gildersleeve [now Guiney] land and the Braverman [now Nault] land, as shown on the above mentioned plan." Order, p. 10; Exhibit 48 -U at Appx. VI, p. 28; see also plan at Appx. II, p. 18. In addition, several other documents recorded at the Registry of Deeds also refer to the Right of Way including: a Boundary Line Agreement recorded on August 24, 1988 and found at Appx. VI, p. 15, a Plan 10558 also recorded on August 24, 1988 and found at Appx. II, p. 18; a second Boundary Line Agreement recorded on January 27, 1989 and found at Appx. VI, p. 18; and a "CONFIRMATORY COMMON BOUNDARY LINE AND

RIGHT-OF-WAY AGREEMENT" recorded August 19, 1998 and found at Appx. VI, p. 21.

Finally, this Court will "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." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). Guiney argues that Boundary Line and Right of Way Agreement is "invalid and unenforceable" because Rogers, a surveyor and the expert witness that Guiney hired, opined that it was "crystal clear" that the western stone wall was the "true" boundary and therefore there was no need for a corrective boundary line agreement. Guiney Brief, p. 30, 34. This testimony was directly contradicted by Nault's surveyor Michael Dahlberg who opined that the eastern stone wall was the true boundary and therefore the 1988 Boundary Line Agreement clarified the boundary to the correct line. See Appx. III, p. 8. The trial court could reasonably take the conflicting opinions of the two surveyors and determine that the line was not in fact crystal clear but ambiguous thereby necessitating a boundary line agreement. Regardless, the Superior Court properly held that it did not even have to reach the issue of whether the Boundary Line Agreements were valid given the inclusion in the 1999 deed to Guiney.

V. A Public Highway by Prescription Was Established Over the 50 Foot Right of Way

In addition to finding a private right of way, the Superior Court's August 24, 2018 Order also held a public highway was established by prescription. Order, p. 19-21. See also RSA 229:1. "Whether a highway is

created by prescription is a finding of fact." *Mahoney v. Town of Canterbury*, 150 N.H. 148, 150 (2003). The Superior Court made its factual findings after considering all of the evidence including deeds for all of the relevant properties, several historical maps,[4] review of 1941 and 1981 aerial photographs, testimony from several factual witnesses and testimony from two competing expert witnesses. See Order 1-20. The bulk of Guiney's brief is spent challenging that factual finding. Guiney Brief, 20-28.

A trial court's findings of fact are entitled to great deference. This Court will "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." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). The allegation that the Superior Court should have found Guiney's expert to be more credible than Nault's expert or that the Superior Court should have given greater weight to evidence supportive of Guiney's position and less weight to evidence supportive of Naults' position does not warrant reversal. The Superior Court properly considered all of the facts in this case and held that the facts supported the existence of a public highway by prescription.

a. There is No Enhanced Level of Adverse Use Required

[4] This includes the 1858 Atlas at Appx II, p. 4, the 1892 Atlas at Appx. II, p. 5, the 1925 State of NH Highway Map at Appx. II, p, 6, the 1925 USGS Map Revised in 1949 at Appx. II, p. 7-8, the 1927 USGS Map Revised in 1949 at Appx. II, p. 9-10, the 1927 USGS Atlas at Appx. II, p. 11, the 1941 Town of Dunbarton Map at Appx. II, p. 12, the 1946 Blister Rust Map at Appx. II, p. 14, the 1969 DRED Map at Appx. II, p. 15,

While the prescriptive area in front of Guiney's house was not subject to a private easement, the prescriptive rights past Guiney's barn include the same area that Nault has a private 50 foot right of way. See Appx. I, at 16. See also, Appx 1, p. 111, at ¶ 18. Guiney argues in his Brief that "When a road is subject to a private easement and the claimant is trying to prove prescription, an enhanced use by the public must be shown. *Warren v. Short*, 139 N.H. 240, 244 (1994)." Guiney Brief, p. 20. This is not accurate. *Warren* involved a case where the permissive use of the deeded private easement was granted *prior* to the prescriptive period. In *Warren*, the prescriptive rights needed to be established over a pre-existing private easement. Those are not the facts in the present case. In the present case, a public highway by prescription was established by 1968, some twenty years before the private easement was created by the 1988 boundary line agreement. Therefore, a 1988 private easement has no effect on whether or not the facts established that the public used the road prior to 1968 as required by RSA 229:1.

b. The 1821 Layout of Kelsea Road is Irrelevant to the Court's Conclusion But if Considered Supports a Public Road to the Nault House

Guiney next argues that "the trial court appears to have overlooked that Kelsea Road continues to the south as a Class VI road" pursuant to an 1821 layout. Guiney Brief, p. 21. The trial court did not "overlook" the 1821 layout but simply did not consider it relevant to location of the road at any time period necessary for the trial court's prescriptive rights analysis.

Regardless of the location of the road in 1821[5] or 1825 or 1827, the only relevant issue for the court's prescriptive rights analysis is the location of the road for a twenty year period prior to 1968. See RSA 229:1. The Trial Court considered all the evidence including testimony regarding maintenance from the 1940s through the 1970s and maps from 1858 (Atlas Map), 1925, 1949 and 1969. See Order, p. 20. See also Exhibits 3, 4, 6, 7, 11, 12, and 14 at Appx. II, p. 4-15.

c. Although Not Required, Evidence Prior to 1944 Was Properly Considered by the Court

Guiney argues that because Lot 5 (Guiney's property) was taken by tax deed and held by the town from 1939 to 1944 that this interrupted any 20 year period and so the 20 year period must be found after 1944. Guiney Brief, p. 21.

First, this is not an accurate statement of the law. "Continuity of use, to establish a prescriptive title, is a relative term. It is never used in an absolute sense." *Jean v. Arseneault*, 85 N.H. 72 (1931). In *Jean*, there was

[5] The 1821 layout describes the road as going to Timothy Johnson's house. See Exhibit 34 at Appx. VII, p. 14. The evidence introduced at trial was that the current Nault house was built at approximately the same location as the historical Timothy Johnson house. See Trial Exhibit 25 at Nault Appx, p. 3. See also Transcript at 348:17 to 350:25. Therefore, had the Court considered the 1821 layout, it could have determined that the road was laid out in 1821 past what is now the Nault house. Nevertheless, where the Court held that the road was a public highway by prescription, there was no need for the Court to determine whether it was also laid out as a 3 rod (49.5 foot) public road pursuant to the 1821 layout.

a 7 year interruption in use as the house was vacant. This Court held that this was not an interruption of the 20 year period as there was no occasion to use the road where the house was vacant from 1905 to 1912. Assuming that Guiney is correct that one cannot establish prescriptive rights during the time it was owned by the Town, this interruption is not an interruption in the continuity of use.

Second, there was sufficient evidence to establish a 20 year period of prescriptive use prior to the 1939 tax deeding. In particular, the Court references the 1858 Atlas Map (exhibit 6), the 1925 State of New Hampshire Highway Department Map (exhibit 3), the 1925 USGS Map (exhibit 4), as well as the 1941 Town Property Ownership Map (exhibit 7). Order, p. 20. Once established, the later ownership by the town cannot undo the prescriptive rights. See *Williams v. Babcock*, 116 N.H. 819, 822 (1976); *Mahoney v. Town of Canterbury*, 150 N.H. 148, 153 (2003)("Even if the public use ceased by 1948 [or 1939], so long as the public had already used the road continuously and uninterruptedly for a period of twenty years, a public highway by prescription may be established.")

Finally, even if prescriptive rights could not be established until after 1944, there was sufficient evidence for the Superior Court to find a public highway by prescription from 1948 to 1968. First, the Court cites in its Order several historical maps including the 1949 revision of the USGS Map at Exhibit 11, the 1969 USGS Map at Exhibit 12 and the 1969 N.H. DRED Map at Exhibit 14. See Order, p. 20. This is in addition to several witnesses who testified regarding the town's maintenance and the public use from the late 1940s through 1968 was sufficient evidence to establish prescriptive rights from 1944 to 1968. See Order, p. 14-17.

d. Ancient Maps Support Public Way by Prescription

Guiney argues in his Brief that maps relied upon by the court "may suggest there is a road on the ground but do not demonstrate public use." Guiney Brief, p. 22. In support of his argument, Guiney cites no cases but only his expert's testimony that the USCG maps are very small in scale. *Id*. Guiney and his expert's opinion is directly contrary to established precedent of this court that ancient maps can in fact be relied upon to infer the use of the road. "In our opinion the inclusion of a road on a map is competent evidence to support the inference of use of the road" *Williams v. Babcock*, 116 N.H. 819, 822 (1976)(looking to 1805 statewide map that was of even smaller scale than USCG maps); see also *Mahoney v. Town of Canterbury*, 150 N.H. 148, 150 (2003). Regardless, even if this Court had not explicitly held that ancient maps could be relied upon to show prescriptive use, the trial court was entitled to disregard Guiney's expert's opinion. "It is within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented, including that of the expert witnesses." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). The Superior Court did not commit reversible error by relying, in part, on historical maps to support the existence of a public way by prescription. Whether the scale of the map was sufficient was a factual determination entitled to great deference.

e. Public Use Was Found by the Court

In his Brief, Guiney argues that "Public use requires showing of persons other than those owning property in the area and their guests." Guiney Brief, p. 23 citing *Elmer v. Rodgers*, 106 N.H. 512 (1965). First,

Guiney does not correctly state the law. While *Elmer* did involve testimony by the general public, it is not required. "[T]he inclusion of a road on a map is competent evidence to support the inference of use of the road." *Williams v. Babcock*, 116 N.H. 819, 822 (1976); *Mahoney v. Town of Canterbury*, 150 N.H. 148, 152 (2003); *Blagbrough Family Realty Trust v. A&T Forest Products, Inc.*, 155 N.H. 29, 36 (2007). In *Williams*, *Mahoney* and *Blagbrough*, this Court repeatedly affirmed prescriptive roads established without any testimony from the general public. In fact, all three cases were decided over 150 years after the end of the relevant 20 year prescriptive period.

Second, even if testimony was a required element, the trial court credits the testimony of Simon Audette who, as a child, would ride along Kelsea Road with his father as his father plowed the road. Order, p. 19-20. In addition to testifying about his own use, Mr. Audette testified that he witnessed members of the general public using the road as well. Transcript 205:18 to 206:1. Therefore, even if testimony from "persons other than those owning property in the area and their guests" was required to establish prescriptive rights, the testimony of Simon Audette was sufficient.

f. The Credibility of Testimony from Witnesses was for the Trial Court to Determine

Next, Guiney argues that the "town plow truck turning around does not demonstrate public use"[6] and suggests that the witnesses who travelled

[6] This Court is reminded that the trial court found that in addition to plowing, Mr. Audette maintained the road including grading, cutting brush and sanding. Order, p. 15.

with or worked as plow truck drivers should not be found to be credible. Guiney Brief, p. 24-26. In particular, Guiney challenges the trial court crediting the childhood memories of town plow truck driver and former road agent Simon Audette alleging that "boyhood memories often become unclear" and Audette should have been at least 16 years old and actually driving prior to the court crediting the clarity of his memory. Guiney Brief, p. 25. Simon Audette was 10 years old at the beginning of the prescriptive period in 1948 and testified that he would "ride along with his father to plow Kelsea road." Order p. 20. The trial court credited this testimony and cited it in the decision. This Court will "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." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). Neither Simon Audette nor the trial court doubted the clarity of his recollection from 70 years ago when he was a ten year old child and riding with his father. Guiney's post hac challenge to his credibility was an issue for the trial court to resolve and Guiney cannot challenge his credibility on appeal.

g. Prescriptive Rights Were Established Prior to Deeding of Private Easement

Guiney argues that when a public highway is created by prescription in the same location as exists a private easement, a heightened level of adversity must be shown. Guiney Brief, p. 26-27. Guiney's argument would be accurate if the prescriptive period for the public highway occurred at the same time that deeded private easement was currently in place. Nevertheless, in this case, the prescriptive period ended in 1968 pursuant to

RSA 229:1. Nault met his burden by providing testimony and ancient maps that demonstrated the public use of the road from 1858 to 1968. Order 19-21. There is no allegation that a private 50 foot wide easement existed from 1858 to 1968. The earliest a deeded private easement existed would be 1988,[7] more than 20 years after the end of the prescriptive period. Therefore, the creation of a private easement more than 20 years after prescriptive rights were created has no effect on the level of adversity required to establish prescriptive rights.[8]

h. The Superior Court Properly Held the Width of the Road is 50 Feet

In his Brief, Guiney argues that width of any prescriptive rights should have been limited to 12.65 feet, (the alleged width of the travelled way as determined by Rogers, Guiney's expert witness, in 2006) and

---

[7] See Boundary Line Agreement recorded on August 24, 1988 and found at Appx. VI, p. 15, a Plan 10558 also recorded on August 24, 1988 and found at Appx. II, p. 18; a second Boundary Line Agreement recorded on January 27, 1989 and found at Appx. VI, p. 18; a "CONFIRMATORY COMMON BOUNDARY LINE AND RIGHT-OF-WAY AGREEMENT" recorded August 19, 1998 and found at Appx. VI, p. 21 and the deed to Guiney recorded on April 8, 1999 and found at Appx. VI, p. 27

[8] This Court has recognized that "the concurrent existence of a highway and a private way along the same line is not impossible although it renders the assertion of such a right or part thereof temporarily unnecessary." *Elmer v. Rodgers*, 106 N.H. 512, 515–16 (1965). Guiney does not, however, argue that the 50 foot deeded right of way was unnecessary because a 3 rod (49.5 foot) public road either as laid out or by prescription already existed in that location.

attached as Exhibit A to the Town's petition in this case. Guiney Brief, 27-28. Guiney is both legally incorrect and factually incorrect.

First, a public highway established by prescription is not limited to the width of the gravel surface. *Hoban v. Bucklin*, 88 N.H. 73 (1936). This Court has explicitly held that "a highway established by prescription is not as a matter of law restricted in width to the track of actual travel." *Id*. In addition to the travelled way, the prescriptive area includes an area for maintenance and snow storage. *Id.* The Court may determine that the width of the public highway is the typical width of public highways in the area. See *Coffin v. Town of Plymouth*, 49 N.H. 173, 173 (1870)("Where a tract of land of the usual width of a highway has been used as a highway, although only part of the width has been used as a travelled path, such use is evidence of a right in the public to use the whole tract as a highway"); see also *Hoban*, 88 N.H. 73(determining the usual width of public highways was 3 rods). In this case, the width of Kelsea Road as laid out is 3 rods wide[9]. See 1821 Layout at Appx. VII, p. 14. Guiney is incorrect to argue that prescriptive rights are limited to the travelled way. The Court properly held that the disputed portion was 50 feet wide.

Second, Guiney's sketch, while purportedly showing the travelled way to be 12.65 feet, was not the only evidence of the width of the public highway. See Sketch at Appx. I, p. 16. As Guiney alleges in his brief, this was a measurement performed by Guiney's expert witness, Rogers, in 2006. Guiney Brief, p. 28. This is 38 years after the prescriptive period ended in 1968. Guiney admitted at trial that the width of the travelled

[9] A rod is 16.5 feet so 3 rods is 49.5 feet or approximately 50 feet.

portion was greater both before and after 2006. See Transcript 17:9 to 18:13. The trial court received testimony that a plow truck would be 12 to 14 feet in each direction. See Order, 16. Furthermore, Guiney admitted that Kelsea Road as laid out was 3 rods, or 49.5 feet wide. Transcript at 25:21 to 28:1, see also 1821 Layout at Appx. VII, p. 14. Guiney also admitted that Nault has a private right of way that entitles him to use the full 50 feet in width. Transcript at 25:21 to 28:1. There is only 127 feet between where Guiney admits Kelsea Road is 49.5 feet wide and where Guiney admits the private easement is 50 feet wide. See Transcript at 25:21 to 28:1, Exhibit A to Petition at Appx. I, p. 16. "Where a tract of land of the usual width of a highway has been used as a highway, although only part of the width has been used as a travelled path, such use is evidence of a right in the public to use the whole tract as a highway." *Coffin v. Town of Plymouth*, 49 N.H. 173, 173 (1870) Nevertheless, Guiney believes the Superior Court should have held that the 49.5 feet rapidly decreased to 12.65 feet in width for these 127 feet before widening again to 50 feet is illogical and the Superior Court did not err in holding the entire Disputed Portion was a public highway by prescription.

Finally, the Superior Court's Order refers to the "Disputed Portion" in total as having been established as a public highway by prescription. The Order refers to the Town's Petition for a definition of what constitutes the "Disputed Portion." Order, p. 2. The Town's Petition, paragraphs 17-18, depict the "Disputed Portion" to be 50 feet in width and mark it on a sketch. Appx. II, p. 11, 12, & 16. The fifty feet on the sketch is approximately the distance between Guiney's house and his barn. See

Appx. II, p. 16. The Superior Court did not err in finding the full 50 feet was a public highway by prescription.[10]

VI. The Superior Court Properly Rejected Guiney's Request to Move the Boundary Line

The boundary line between the western edge of the Guiney property and the eastern edge of the Nault property is marked by a stone wall. There are, however, two stone walls. See Appx. II, at p. 30. In 1988, the parties' predecessors in interest entered into a Boundary Line Agreement recognizing that the "boundary line is in dispute and its location cannot be determined by boundaries and monuments." See Boundary Line Agreement recorded on August 24, 1988 and found at Appx. VI, p. 15. In his Brief, Guiney argues that no Boundary Line Agreement ever should have been

---

[10] In his Brief, Guiney repeatedly alleges that the 1821 Layout of Kelsea Road had the road turn south to the Goffstown border prior to reaching Guiney's house. See Guiney Brief, p. 9. While this was the factual allegation of Guiney's expert, Rogers, it was directly rejected by the Superior Court which held "The maps cited above and introduced into evidence at trial clearly depict Kelsea Road traveling in a westerly direction, as asserted by the Naults, rather than in a southerly direction toward the Goffstown border, as asserted by Mr. Guiney. . . Kelsea Road travels in a westerly direction, reaching the house and barn on Mr. Guiney's property, rather than traveling in a southerly direction towards the Goffstown border." Order, p. 21. This Court "will be bound by the trial court's findings unless they are not supported by the evidence or are erroneous as a matter of law. *Gill v. Gerrato*, 156 N.H. 595, 596 (2007). In addition to the maps cited by the trial court, there was also testimony that Mr. Nault's current house was on the same spot as a 19th century foundation supporting the trial court's determination that the road goes west to the Nault house. Transcript 347:17 to 349:24; Exhibit 5 at Appx. II, p. 9.

entered into because, according to Rogers, Guiney's surveyor and hired expert witness, there could be no genuine dispute as "the true common boundary between Lot 5 and Lot 7 [is] 'crystal clear.'" Guiney Brief, p. 30. Although surveyor Mike Dahlberg, Nault's surveyor and expert witness, testified that the boundary was potentially ambiguous, (see Appx. III, p. 9), Guiney argues in his brief to this Court that his expert should have been found more credible than Nault's witness. See Guiney Brief, 28-31. "It is within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented, including that of the expert witnesses." *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). It was not reversible error to discount Mr. Roger's testimony.[11]

Furthermore, the Superior Court did not directly uphold the 1988 Boundary Line Agreement but held that, even assuming the 1988 Boundary Line Agreement was invalid, the boundary line is established by the doctrine of boundary by acquiescence. See Order, p. 24. In order "to establish a boundary by acquiescence, a party generally must prove that: (1) the parties are adjoining landowners; (2) who have occupied their respective lots up to a certain boundary; (3) which they have recognized as the true boundary separating the lots; and (4) have done so for at least

[11] It is worth noting that while Mr. Rogers testified the boundary was "crystal clear" to him after hours upon hours of research, he admitted on cross examination that Hills, the surveyor in 1988 and the property owners themselves likely had a dispute and an uncertainty as to the actual location of the boundary line in 1988. See Transcript 146:18 to 149:3. Furthermore, while Mr. Dahlberg recognized a potential ambiguity, he opined that the eastern stone wall was the proper boundary while Rogers thought that the western stone wall was the proper boundary. See Appx. III, p. 8.

twenty years." *O'Hearne v. McClammer*, 163 N.H. 430, 435 (2012). The trial court held that between the 1988 Boundary Line Agreement and the filing of Guiney's cross claim in 2017, a period of almost 30 years, "the parties and their predecessors in title have treated the line described in the BLA and shown on Plan #10558 as the true boundary separating Lots 5 and 7. The execution of the BLA [in 1988] is evidence that the Bravermans and Gildersleeves understood this to be the common boundary between their properties." Order, p. 24. Additionally, the trial court recognized that it "is conceivable the Bravermans and the Gildersleeves treated this as the boundary even prior to 1988, given they owned their properties at the same time since 1967." Order, at 24. This would make it a total of almost 50 years.

In his Brief, Guiney challenges the trial court's factual findings and alleges that the trial court should have found that "Gildersleeve had moved to Florida by at least 1986." Brief, p. 33.[12] First, whether or not Gildersleeve lived temporarily or permanently in Florida in 1986 is not relevant to the trial court's finding of acquiescence. The Trial Court expressly held "The execution of the BLA [in 1988] is evidence that the Bravermans and Gildersleeves understood this to be the common boundary

[12] Mrs. Gildersleeve's alleged residence in Florida in 1986 does not appear to have been argued to the Superior Court below and was never addressed in the Superior Court's order. Guiney's sole basis for this allegation appears to be a letter sent to Mrs. Gildersleeve on December 9, 1986 to a Florida address. Nevertheless, there was no evidence that this was not a temporary residence for the month of December or even for December through March as many retired New Hampshire residents will sometimes spend winters or a portion of the winter in Florida.

between their properties." Order, p. 24. Second, even if Mrs. Gildersleeve was residing in Florida in 1986, the trial Court held that there was more than 20 years between 1988 and 2017. During this time period there were several other manifestations of acquiescence including a second Boundary Line Agreement recorded on January 27, 1989 and found at Appx. VI, p. 18; a "CONFIRMATORY COMMON BOUNDARY LINE AND RIGHT-OF-WAY AGREEMENT" recorded August 19, 1998 and found at Appx. VI, p. 21 and the deed to Guiney recorded on April 8, 1999 and found at Appx. VI, p. 27. Mr. Guiney testified that he received a copy of the Boundary Line Agreement and the Plan prior to purchasing his property in 1999. Order, p. 10-11. Finally, in 2015, more than 25 years after the 1988 Boundary Line Agreement, Guiney recorded a plan depicting the boundary pursuant to the Boundary Line Agreement. See Exhibit 55 at Appx. II, p. 20. Therefore, the trial court did not commit reversible error in finding Gildersleeves and Guiney acquiesced to the boundary for more than 20 years from 1988 to 2017.

CONCLUSION

"Whether a highway is created by prescription is a finding of fact." *Gill v. Gerrato*, 156 N.H. 595, 596 (2007). The Superior Court properly credited the several ancient maps as well as the factual testimony of several witnesses. The Superior Court also properly credited the testimony of Nault's expert surveyor, Mike Dahlberg, over Guiney's expert surveyor, Ed Rogers. This Court will "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." *Cook v.*

Sullivan, 149 N.H. 774, 780 (2003). The Superior Court did not commit reversible error by finding the facts supported (1) that a public highway by prescription existed over the Disputed Portion, (2) that the boundary line as recognized by the 1988 Common Boundary Line and Right of Way Agreement was valid under the doctrine of boundary by acquiescence, and (3) the 50 foot wide right of way was valid under both judicial estoppel and estoppel by recital in instruments. See Order p. 1-26. All of the Superior Court's findings are supported by the evidence and the decision should be affirmed in total.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument is necessary in this case as the disputed issues are essentially factual issues for which the trial court's findings are due substantial deference. Nevertheless, should the Court determine oral argument would be helpful, Michael J. Tierney, Esq. will present the case on behalf of the Naults.

Respectfully submitted,

DAVID NAULT, JOSHUA N. NAULT & LEIGH D. NAULT
By their attorneys,

WADLEIGH, STARR & PETERS PLLC

By: /s/ Michael J. Tierney

Michael J. Tierney - NHB#17173
92 Market Street
Manchester, NH 03101
Tel. (603) 669-4140
mtierney@wadleighlaw.com

Dated: June 7, 2019

Certificate of Service

I hereby certify that on the 7th day of June, 2019, a copy of the within Brief of David Nault, Joshua N. Nault & Leigh D. Nault has been sent to parties and counsel of record via the Court's electronic filing system or via first class mail, postage prepaid.

Dated: June 7. 2019 By:/s/ Michael J. Tierney
Michael J. Tierney, Esq.

Certificate of Compliance

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Supreme Court Rule 16(11) because this brief contains 6,846 words, excluding the parts of the brief exempted by Supreme Court Rule 16(11).

2. This brief complies with the typeface requirements of Supreme Court Rule 16(11) and the type style requirements of Supreme Court Rule 16(11) because this brief has been prepared in a proportionally spaced typeface using Times Roman 13-point type in Word.

By:/s/ Michael J. Tierney
Michael J. Tierney, Esq.