STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2022-0234

TODD H. MADDOCK, ET AL.

PLAINTIFFS/APPELLANTS

v.

MICHAEL J. HIGGINS

DEFENDANT/APPELLEE

APPELLEE'S RESPONSE TO APPELLANTS' REPLY BRIEF

William D. Woodbury, Esq.
N.H. Bar # 16195
Normandin, Cheney & O'Neil, PLLC
213 Union Avenue
P.O. Box 575
Laconia, N.H. 03247
(603) 524-4380
wwoodbury@nco-law.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

ARGUMENT

I. The Appellants' Reply Brief Arguments Under The Heading "Adverse Possession" Rely On Evidence Not Submitted At Trial And Must Be Disregarded In Full

The Supreme Court will consider only evidence and documents presented to the trial court. Flaherty v. Dixey, 158 N.H. 385, 387 (2009). On Page 4 of their Reply Brief, the Appellants introduce what they describe as "*an annotated portion of the Bailey Plan* [*App. 109]",* which they admit was "*not a trial exhibit and is provided for the sole purpose of the discussion in this Reply Brief*." (Appellants' Reply Brief [ARB], Page 4) The Court must disregard this newly created document and any argument contained within the Appellants' Reply Brief which relies upon reference to said document.

Further, the new document is highly misleading as it divides the Disputed Land in this matter into "Driveway Area" and "Steep Area" in a manner not presented, supported or accepted at trial. This constitutes a self-serving attempt to suggest that the entire orange portion depicted is "steep", thus bolstering Appellants' specious argument that the entire orange section of the Disputed Land allowed only limited use. This is refuted with the testimony of the Appellants and their own witnesses.

Appellants' witnesses, the Guyers, both alleged that a fire pit, and the seating area around said fire pit, existed in the region highlighted in orange

in the newly created document. (Tr. Trans. 259, 21- 260, 24; Appellee's Apx. 37) The trial court found the testimony regarding the fire pit to be too weak to support Appellants' argument that Appellees and their predecessors in title were placed on notice of a claim of adverse possession. (App. Adden. 56-57). Even if it were accepted that a fire pit existed in this area, it defies logic for the Appellants to have so heavily emphasized the existence of this firepit in their initial brief and now, following receipt of the Appellee's Brief, allege this same area was "steep". It strains credulity to allege that a fire pit would have been located on a steep incline.

Further, in creating this new document, Appellants ignore the fact that the underlying plan they have annotated includes lines of topography, showing that the much of the "steep area" is comprised of gradual slope, most notably accommodating the shed maintained on the Disputed Land by the Appellants. (App. 109) Appellants' attempt to manipulate the evidence in this matter, by introduction of a newly created document, must not be allowed.

a. The Trial Court Did Not Fail To Analyze The Issue Of Exclusivity

The trial court did not fail to consider, nor did it ignore, the issue of exclusivity with respect to the Driveway Area. The trial court clearly acknowledged that an adverse possessor "*must show 20 years of adverse, continuous, **exclusive**, and uninterrupted use of the land claimed*" in order to

place the record owner on notice. (App. Adden. 54, citing Mastroianni v. Wercinski, 1558 N.H. 380, 382 (2009), emphasis added). The court was equally clear in its acknowledgment that exclusivity need not be present in the context of a prescriptive easement. (App. Adden. 57, citing Greenan v. Lobban, 143 N.H. 18, 22 (1998)).

It was Appellants' burden to show 20 years of exclusive use, yet the trial court clearly did not consider the Appellants' evidence sufficient to sustain findings of adverse possession of the driveway and parking area. Appellants never posted the property, nor did they take any action to exclude Appellee's predecessors-in-title from this area prior to the dispute arising between the Parties. (Tr. Trans. 49,20-50,7 and 307, 22-308,6) Despite their failure to meet their burden, Appellants now seek to inappropriately shift the burden to the Appellee to prove the Appellants' use was not exclusive.

Appellants argue that Appellee's predecessors-in-title did not engage in ouster of Appellants or their predecessors from the driveway and parking area**.** (AB at 32, citing O'Malley v. Little, 170 N.H. 272, 278 (2017). Even if this were deemed factual, this would not preclude a finding that Appellants had not obtained rights exceeding a prescriptive easement over the driveway and parking area. In the context of a prescriptive easement, adverse use does not require hostility between the parties as long as the use is trespassory. Jesurum v. WBTSCC Ltd. P'ship, 169 N.H. 469, 477 (2016).

Further, though Appellants paved the driveway in 2016, this cannot be viewed as an act of exclusion of Appellee or his predecessors falling within the requisite time period. (Appellee's Apx. at 38) Prior to that, it is clear that no reliable record exists showing the true location, width and appearance of the original unpaved driving area sufficient to prove its actual footprint.

b. Appellants Misrepresent The Nature Of The Disputed Land By Referring To The "Steep Area"

This section of the Appellants' Reply Brief specifically relies upon the newly created document Appellants have attempted to submit with their Reply Brief, thus Appellee asserts that this argument must be disregarded in full.

The above notwithstanding, Appellants inappropriately reference the words of Appellee's expert surveyor, James Rines, in an attempt to suggest he is speaking of the entire area that the Appellants' newly created document highlights in orange as "steep". He is not referencing this entire area. Rines specifically states that the developed areas are "relatively level". (Defendant's Appendix, Page 9, emphasis added.) As discussed in Part I of this Response, the area Appellants highlight in orange as "The Steep Area" includes a significant portion of developed land, including the area upon which the Appellants' shed sits, a walkway, and the yard area upon which Appellants allege their predecessors' tenants maintained a fire pit.

One need only look at the topographical lines contained within the underlying document (App. 109), to see that much of the area highlighted in orange on the newly created document is the same grade as that upon which the Appellants' house sits. (App. 109). Again, the inclusion of this newly created document, one that was never introduced at trial constitutes a blatant attempt by the Appellants to manipulate the evidence as to the actual nature of the Disputed Land.

Appellants then proffer an argument that there was "*continued cutting in the Steep Area*" since 1978. (ARB, Page 7) This argument is completely unsupported and takes the testimony of Defendant's Forestry Expert, Dr. Susan Romano, well out of context. At trial, Appellants' Counsel questioned Dr. Romano's reference to historical cutting in the Disputed Area which occurred prior to the Appellee's removal of trees in 2019. (Tr. Trans. 416, 17-21) This line of inquiry was clearly initiated in hopes that "historic" referred to a date prior to the requisite 20 year time period for adverse possession. However, Ms. Romano's use of term "historical" with respect to clearing was clarified upon re-direct by undersigned counsel.[1] (Tr. Trans. 457, 19 through 460, 17.)

Dr. Romano was shown Defendant's Exhibits Q-6 and Q-7, aerial photos of the subject properties, and agreed that the Disputed Area depicted

[1] Undersigned counsel's re-direct examination of Dr. Romano is mislabeled in the Trial Transcript as Re-Cross Examination (TT. 457, Line 15)

therein was well forested as of 2014 and 2015 respectively. Dr. Romano was then asked:

> *Q: When you refer to historical clearing, isn't it true that* ***the clearing could've been the clearing that happened after 2015?***
>
> *A:* ***Yes.***

(Tr. Trans. 460, 14-17, emphasis added.) The Appellants' attempt to use Dr. Romano's testimony on "historical clearing", to suggest "continual cutting" since 1978, is a dramatic misuse of said testimony.

The remaining arguments set forth in this section of Appellants' Reply Brief are self-contradictory. Appellants suggest that the trial court erred by finding that Appellants', and their predecessors', use of the Disputed land "*was not sufficiently notorious to justify a presumption that the owner was notified of it*." (ARB at 7) Appellants then state: "*The Guyers used the Disputed Land by putting in a shed, burning in a fire pit, stacking firewood, cleaning up brush, walking the property on a trail and cutting to maintain the view*." ARB, Page 7. All this is alleged after they suggest that the area, they now deem "The Steep Area" on a newly created document, is too steep to have allowed significant use. Put simply, Appellants wish to have it both ways. They proffer the argument that best suits their purpose in the moment. The trial court did not err as it was clear Appellants proffered implausible and inconsistent arguments.

II. Appellants Provide No Persuasive Support For Their Color of Title Argument

Appellants' position that "*adverse possession of the Driveway Area extends their claim to the entire Disputed Land*" is unsupported by New Hampshire law. ARB, Page 7, citing, generally, Pease v. Whitney, 78 N.H. 201 (1916). Appellants allege that Appellee provides no authority for the position that the documents relied upon by Appellants containing hand-drawn sketches are not of the type acceptable to confer color of title under New Hampshire law. This is incorrect.

Appellee's Brief specifically sets forth that in Lawrence v. Tennant, the court states:

> "*An ancient map or plan may be received in evidence to prove public boundaries,* ***if it appears that it was an authorized survey. If it purports to be an authorized survey****, or it be proved aliunde to be official, and is produced from an appropriate place, as in State v. Vale Mills, 63 N.H. 4, there may be little doubt of its admissibility*."

(Lawrence v. Tennant 64 N.H. 532, ***6 (1888) emphasis added, Appellee's Brief, Page 28). Further:

> "***Maps, surveys, plans and plots*** *which are thirty years old,* ***free on their face of suspicion*** *and found in proper custody are admissible as exception to hearsay . . .*"

Perry v. Parker, 101 N.H. 295, 296 (1958), citing Lawrence v. Tennant 64 N.H. 532, (emphasis added).

Appellee's Brief also referenced a passage from the 1865 Vermont case of Hodges v. Eddy, cited by Appellants, that falls well short of supporting their position that the Hall documents confer color of title. (AB at 35-36). The passage cited is as follows:

> "*So where one enters upon an unoccupied lot under color of title, and actually occupies a part, claiming the whole, his actual possession is extended by construction to all that* ***his deed covers****, and if he continues such possession for fifteen years, he acquired a title not only to the part actually occupied, but to the whole lot.* ***The term color of title, as it is used in the cases on this subject, means a deed or survey of the land****, placed upon the public records of land titles, whereby notice is given to the true owner, and all the world, that the occupant claims title*."

Hodges v. Eddy, 38 Vt. 327, 345 (1865), (emphasis added by Appellee). Here, Appellants are relying upon hand-drawn sketches, not deeds or surveys of land. The fact that documents containing color of title must be of a character more trustworthy than a layperson's hand-drawn sketch is readily derived from the frequently referenced case law cited above.

Appellants attempt to cure the many inconsistencies and errors found within the hand-drawn sketches upon which they rely by stating that "*the experts agree that they depict boundary lines in relation to improvements on the Maddock property*." (ARB at 7) This is an attempt to draw the Court's attention away from the fact that both Appellants' expert, Bryan Bailey, and

Appellee's expert, James Rines, stated, unequivocally, that none of the elements depicted in the hand-drawn sketches are reliable.

Appellee's expert, surveyor and engineer, James Rines, was questioned in detail at trial with respect to the hand-drawn sketches. (See generally, Tr. Trans. 347-393). Rines created and presented overlays comparing the information in the Bailey Plan to the 1978 Septic Plan and the 1983 Site Plan. (Appellee's Apx. 15 and 19) The enlargements of these overlays were discussed during testimony and accepted as Exhibits MM and NN respectively. (Appellee's Apx. 20 and 21) Mr. Rines testified that he would not rely on the hand-drawn sketches within the 1978 or 1983 plans with respect to the depiction of boundaries. (Tr. Trans. 360, 17 through 361, 1; Tr. Trans. 379, 17-21). He further testified that he would never recommend that a homeowner rely on them. (Tr. Trans. 361, 6-9). Rines further testified that none of the hand-drawn sketches depict the elements within boundaries in the same way. (Tr. Trans. 392, 23-25)

Appellants' expert, Bryan Bailey, was questioned regarding the hand-drawn sketches presented by Appellant appearing at trial Exhibits 8, 9, 10, 14, and 15 [Apx. 34, 36, 37, 48 and 49 respectively]. (Tr. Trans. 176-177) Bailey testified that none of the referenced Exhibits had the purpose to accurately depict the boundaries. (Tr. Trans. 177, 8-12) Bailey confirmed that he would never rely on any of these to determine the location of a

boundary, nor would he ever encourage the purchaser of a home to do so. (Tr. Trans. 178, 15-23). The trial court was persuaded by Bailey's testimony and recalled his opinion that:

> "*[N]one of these exhibits had the purpose of accurately portraying the property boundaries*."

(App. Adden. 48).

III. Monuments In The Field Do Not Control In This Case

Contrary to Appellants' assertions, Heywood v. Wold River Lumber Company is a case that bears little similarity to the case at bar. (ARB, 9, citing Heywood v. Wold River Lumber Co., 70 N.H. 24 (1899). Heywood addressed the northern border of the Town of Jackson as it extended to the northwest corner boundary of the Town of Chatham. Heywood v. Wold River Lumber Co., 70 N.H. at 29. Controversy arose when it was discovered eighty-five years after the original grant that the line described therein did not connect as expected with the northwest corner of Chatham, but ran approximately 1000 meters to the north. Id. Heywood is readily distinguishable from the instant case in that the Heywood court was faced with significant ambiguity with respect to the descriptions of the location of the border over time and looked to the intention of the parties to aid in their analysis. Heywood v. Wold River Lumber Co., 70 N.H. at 31. The court asked:

> "*What did the parties mean, in 1832 and 1835, by the north line of Jackson? It is "an established principle in this state, that the construction of the written contract is the ascertainment of the fact of the parties' intention from competent evidence."'*

Id., citing Kendall v. Green, 67 N.H. 557 (1893). Here, there is no ambiguity as to where the intended boundary is as the same is readily described in the applicable deed. (App. 20-23) Further, Heywood specifically states that the notion that the location of monuments, however erroneously placed, control over deed descriptions:

> *"[O]ften erroneously referred to as a rule of law rather than a recognition of the fact that upon the question of intent the fact must be found according to the weight of the evidence, --* ***is merely the statement of the general result from the weight of evidence****."*

Id., **(**emphasis added). The location of boundaries set forth by the terms of a deed is a question of fact. (App. Adden. 51, citing MacKay v. Breault, 121 N.H. 135, 140 (1981)). The general rule, when interpreting deeds, is to determine the intent of the parties at the time of conveyance in light of the surrounding circumstances. Id., citing MacKay, supra, at 139. The construct that monuments prevail over courses and distances is merely an aid used to determine the intent of the grantor and is not mandatory in the face of convincing proof of contrary intent. Id., citing Chao v. Richey Co., 122 N.H. 1115, 1119 (1982)

IV. The Appellants Failed To Meet Their Burden To Show Acquiescence On The Part Of The Defendant Or His Predecessors In Title

Appellants maintain that the attendance of the Appellee's predecessors in title, Nancy and Christopher Ramsdell, at the 1992 ZBA hearings constituted "public acquiescence" to the boundaries depicted on hand-drawn sketches, sketches which were not created for the purpose of showing the accurate location of boundary lines. This is unsupported by the evidence introduced at trial and by New Hampshire law.

Appellants would have the Court believe that MacKay v. Breault supports the untenable assertion that "*an abutters [sic] attendance at a planning board meeting without objecting to the boundaries shown*" on a hand-drawn plan is a "*public acquiescence*" to the boundaries alleged therein. (ARB, 10) MacKay says nothing of the kind. Appellants misapply the following quote from MacKay:

> "***Testimony concerning Mr. Breault's statement of his understanding of his property boundaries****, and testimony concerning Mr. Breault's public acquiescence to a subdivision plan showing boundaries consistent with plaintiff's construction of the deed, are evidence of the defendants' practical construction of the deed*."

ARB, Page 10, citing MacKay v. Breault, 121 NH 135, 140 (1981), (emphasis added).

This passage specifically references Mr. Breault's *"statement of his understanding of his property boundaries"* and Mr. Breault's "*public acquiescence to a subdivision plan*." Id. This is readily distinguishable from the Ramsdells' not objecting to hand drawn sketches that were not submitted for the purposes of depicting boundaries. Under no circumstances can this passage be reasonably interpreted to suggest that mere attendance by an abutter at a public meeting, especially a meeting where the issue of property boundaries is not at issue, can constitute "public acquiescence" to property boundaries depicted on a hand-drawn sketch. Appellants would have this Court set an absurd precedent that silence by attendees at public meetings with respect to inaccurately depicted, collateral subject matter on hand-drawn plans would forever prove that the attendee had acquiesced to these inaccuracies. There is no support in New Hampshire law for the Appellants' position.

CONCLUSION

Appellee respectfully requests that the Court affirm the rulings of the Superior Court and hold that Appellants failed to meet their burdens with respect to Adverse Possession, Color of Title, Monuments and Acquiescence; that the issue of Timber Trespass is moot, and that witness, Nancy Ramsdell, testified truthfully.

RULE 16(11) CERTIFICATION

I hereby certify that, in compliance with New Hampshire Supreme Court Rule 16(11), this brief contains 2,984 words, exclusive of title page, table of contents, tables of authorities and post-conclusion information.

Respectfully submitted,
Appellee, Michael J. Higgins
By his Attorneys
Normandin, Cheney & O'Neil, PLLC
213 Union Avenue
P.O. Box 575
Laconia, N.H. 03247
(603) 524-4380

Date: 01/19/2023 /s/ William D. Woodbury

William D. Woodbury, Esq.
NH Bar No.: 16195
wwoodbury@nco-law.com

CERTIFICATION OF SERVICE

I hereby certify that copies of this brief were served upon all Parties via the Supreme Court's electronic filing system.

Date: 01/19/2023 /s/ William D. Woodbury