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October 5, 2012

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160

RE: *Almeder, et al. v. Town of Kennebunkport, et al.*
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above matter please find TMF Defendants' Post Trial Brief.

A copy of the same was served upon the parties noted below.

Sincerely,

André G. Duchette

AGD:rl
enclosure

cc: (with enclosure)
Justice G. Arthur Brennan
Sidney St. F. Thaxter, Esq. (electronically)
Amy K. Tchao, Esq. (electronically)
Neal L.Weinstein, Esq. (electronically)
Paul Stern, Esq. (electronically)
Christopher E. Pazar, Esq. (electronically)
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Michael and Donna Kelly
William Lee Joel, II
Robert and Lois Baylis
Allison W. Phinney
Barbara Russell
Peter Wasserman Trust of 1993
Jennifer B. Wasserman Trust of 1993
Anthony J. Aversa, M.D.
Carolyn Sherman
Joanne Gustin
Luanne Paley

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,

Defendants

TMF DEFENDANTS' POST-TRIAL BRIEF

I. INTRODUCTION

For over 100 years, residents of Goose Rocks Beach, back-lot owners and beachfront owners alike, have used the entirety of the beach, from the Batson River to the Little River, on both the wet sand and the dry sand, for general recreational purposes. Residents of Goose Rocks Beach are a defined class of persons as contemplated under 14 M.R.S.A. § 812 (2012). The Goose Rocks residents are those property owners residing in the area bordered by Route 9, the Little River, the Batson River, and the Atlantic Ocean in Kennebunkport, Maine. These are the facts that are not in dispute.

In addition, there appeared to be no dispute at trial that the TMF Defendants, as a class, have satisfied their burden of demonstrating continuous use of Goose Rocks Beach over a twenty (20) year period. Twenty-seven (27) witnesses over a course of four days testified on behalf of the class. Each witness testified to over twenty years of continuous, uninterrupted use. In addition, witnesses for the Town of Kennebunkport, such as Wayne Fesseden, Richard Johnson and Ralph Smith, who either lived or had family living in the Goose Rocks Zone, testified to

continuous, uninterrupted use for a period exceeding twenty years. These witnesses testified that the beach was the focal point of their recreational activity at Goose Rocks and the TMF Defendants submitted into evidence 177 deeds (including those of Defendants Lachiatto and Driver) demonstrating ownership in the Goose Rocks Zone and also depicting the various rights of ways that the TMF Defendants have to access the beach. See TMF Defendant Exhibits 1-175, 364, 367. Many of these rights of ways are private rights of ways and not relegated to only those rights of ways that are owned by the Town of Kennebunkport.

Judicial economy (and a three week trial limit) dictated not being able to have each class member testify to his or her use. Given the consistent evidence of back lot and beachfront owners using the beach for recreational activities, and the evidence that activities were occurring up and down Goose Rocks Beach depending on the activity, the tides, and where friends were congregating, the Court can certainly draw a reasonable inference that any additional testimony would mirror what was already presented, and the only difference would be the lot that was circled on the TMF Defendants' demonstrative exhibit. The deeds submitted into evidence demonstrate ownership along the entirety of Goose Rocks Beach and include both back-lot properties and beachfront properties as well. Indeed, several non-Plaintiff beachfront owners testified that their use is not strictly limited to the beach in front of their homes, but rather their use extended the entire length of Goose Rocks Beach depending on the activity they were engaging in.

The remaining issues before the Court are as follows:

1. Does the presumption that the prescriptive use by the TMF Defendants is under a claim of right adverse to the owner apply in this case?

2. Did the TMF Defendants meet their burden of demonstrating that the Plaintiffs were on notice of their use giving rise to a prescriptive easement claim?

II. DISCUSSION OF LAW

A. Does the presumption that the prescriptive use by the TMF Defendants is under a claim of right adverse to the owner apply in this case?

Yes. "[A] party asserting an easement by prescription must prove (1) continuous use (2) for at least 20 years (3) under a claim of right adverse to the owner, (4) with his knowledge and acquiescence, or (5) a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed." Eaton v. Town of Wells, 2000 ME 176, ¶32, 760 A.2d 232, 244. "[T]he permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period." Id. at ¶ 41 (quoting Gutchen v. Becton, 585 A.2d 818, 822 (Me. 1991)). There is no doubt that Goose Rocks Beach has been used for recreational purposes for well over 100 years.

"In cases involving claims of private, prescriptive easements, [the Court has] stated that where there has been unmolested, open and continuous use of a way for twenty years or more, with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right." Lyons v. Baptist Sch. Of Christian Training, 2002 ME 137, ¶ 18, 804 A.2d 364, 370. The Lyons Court did not state, as the Plaintiffs would like us to believe, that there is a presumption that the property owners have given implied permission for the recreational use and it is the TMF Defendants' burden to overcome this presumption. The Plaintiffs' use of the Lyons case in support of this proposition is inappropriate. The Plaintiffs cite to Lyons as an example of Maine case law recognizing that recreational use of open, unenclosed land is presumed to be permitted by property owners. Id. at

¶¶ 18-24. However, the Court in Lyons was clear to point out that the application of this permissive use only applies to "a *public*, prescriptive claim…to open fields or woodlands." Id. at ¶ 18 (emphasis added). A careful reading of Lyons is warranted, as the Plaintiffs continue to use it for the proposition that the presumption that the use was under a claim of right adverse to the owner does not apply in this case. In fact, this is not what Lyons stands for. Lyons is not a departure from past Maine precedent that applied to *private*, prescriptive claims. See e.g. S.D. Warren v. Vernon, 1997 ME 161, ¶¶ 15-17, 697 A.2d 1280, 1283-84 (affirming a finding of a private prescriptive easement, but vacating a finding of a public prescriptive easement based on evidence of use of a way for hunting or *recreational*, woods work and access by abutting *landowners*) (emphasis added).

The Plaintiffs also cite to Weeks v. Krysa for the proposition that the ruling in Lyons now applies to private prescriptive claims, but this is an unsupported application of the Weeks holding. 2008 ME 120, 955 A.2d 234. Weeks only established what has been generally regarded in the law of servitudes, namely, that if the use of an easement has been unexplained for twenty years, it is presumed that the use is adverse and is sufficient to establish title by prescription unless controlled or explained. Id. at ¶¶ 2, 13 (use of an undeveloped waterfront lot approximately twice a year which was *never witnessed by the landowner* was not "sufficient to put a person of ordinary prudence, and particularly the true owner, on notice that the land in question is actually, visibly, and exclusively held by a claimant"). The responsibility rests on the record owner to show that the use of the easement was somehow explained by some unique circumstance or was a result of a "license, indulgence, or special contract inconsistent with a claim of right by the other party." See e.g. White v. Chapin, 94 Mass. 516, 518 (1866). While permission by the owner will prevent a claim for a prescriptive easement, acquiescence is not

sufficient to prevent acquisition of prescriptive rights. Id. Permission is more than acquiescence. "Acquiescence... means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as...by means of the positive grant of a license or permission." See Jacobs v. Boomer, 267 A.2d 376, 378 (Me. 1970). The ample testimony in the case by TMF Defendants and Plaintiffs alike point to passive assent on the part of Plaintiffs with respect to the TMF Defendants' recreational use of Goose Rocks Beach. In those instances where a positive grant of a license or permission was given, it was with respect to some unique circumstance such as storage of a boat or kayak, use of the beach access stairs on the beachfront owner's upland property or to hold a wedding. Permission was never asked and never given with respect to general recreational activities on the beach.

Furthermore, Weeks is distinguishable in that it involved a claim for adverse possession, not a prescriptive easement. Id. at ¶ 2. The other example in Maine where the Court has looked to whether the use was controlled or explained was in the case of Androkites v. White. 2010 ME 133, ¶ 16, 10 A.3d 677, 682 (holding that the prescriptive use was not adverse to the owner due to the fact that at one point the servient estate was owned by a *family member* and thus, the use was deemed permissive) (emphasis added)). To buttress their argument, the Plaintiffs can only point to two separate family members as between the Plaintiffs and TMF Defendants out of over 177 TMF Defendants and over 27 Plaintiffs. This is not enough (under any analysis) to overcome the presumption, especially in light of the fact that more than just these family members used the Plaintiffs' property in question. Permissive use by one individual does not in and of itself prevent any other user from establishing an independent claim of right. Blackmer v. Williams, 437 A.2d 858, 862 (Me. 1981).

Plaintiffs point to the testimony in Lyons as support for their argument that the presumption does not apply to the TMF Defendants, but by way of example, in Lyons the party seeking the prescriptive easement testified that if a no trespassing sign had been posted they would have respected the signs and not used the road and stayed off the property. 2002 ME 137 at ¶ 9, 804 A.2d at 368. That is not the case here. The TMF Defendants testified that they would continue to use the beach despite any presence of no trespassing or private property signs and even the Plaintiffs' own witness, Norman Merrill, testified that if permission was revoked he would continue to use the beach.

The only matter left to address on this point is with respect to asserting a prescriptive right as a "class of persons." As stated in the TMF Defendants' Findings of Facts and Conclusions of Law, the only case which gives the Court guidance on this point in Maine is Flaherty v. Muther. 2011 ME 32, 17 A.3d 640. In Flaherty, the Court noted that it had "decided numerous cases regarding acquisition of prescriptive easements by individuals and the public." Id. at ¶ 81 (citing Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, 804 A.2d 364 (discussing public prescriptive easements); Blackmer v. Williams, 437 A.2d 858 (Me. 1981) (affirming an individual's easement by prescription); Town of Kennebunkport v. Forrester, 391 A.2d 831, 833 n.2 (Me. 1978). However, the Law Court, until that point, had never discussed how a class of persons that is separate from the public can establish the prescriptive element of continuity. In providing guidance, the Law Court stated that "[i]n the absence of relevant prior decisions, [the Court] seeks guidance from the Restatement, which provides: 'A servitude should be interpreted to give effect to the intention of the parties ascertained from . . . circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.'" Id. at ¶83 (citing Restatement (Third) of Prop.: Servitudes § 4.1(1)). "When the circumstances

surrounding the creation of an easement are prescriptive in nature, 'the adverse use that leads to creation of the servitude provides the basis for determining its terms.'" Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a.).

> Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run.

Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. h.).

"This approach is consistent with the idea that the 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" Id. (citing Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)).

Adopting this view, the objective expectations of the Plaintiffs *and not the type of use* becomes central to determining whether, as a matter of law, the conduct by the TMF Defendants established a prescriptive easement as a class of persons in Goose Rocks Beach. "Those expectations rest on the actual use of [Goose Rocks Beach] during the prescriptive period." Id. at ¶ 89. The objective expectations of the Plaintiffs should rest on the twenty-plus years of continuous, uninterrupted, recreational use of Goose Rocks Beach as testified to by the TMF Defendants, which was clearly observed by the Plaintiffs as owners of beachfront property.

An analogous case which might give the Court further guidance in this instance is Cordrey v. Dorey, which involved the use of a pier and grove regarded and used by the owners of the surrounding lots as a common area. 1996 De. Ch. LEXIS at *6. Cordrey is particularly on point in that the Court of Chancery of Delaware applied the presumption that the use was under a claim of right to a class of persons when that use was open, notorious visible and uninterrupted.

In Cordrey, both the Plaintiffs and Defendants used the prescriptive area in a like manner, without objection by anyone and the state of affairs giving rise to the prescriptive claim existed from 1923 until 1988, when the Plaintiffs executed (through straw parties) quitclaim deeds to themselves, and thereafter claimed the right to exclusive possession of the pier and the grove. Id. Coincidentally, this is not unlike what some Plaintiffs (e.g. Almeder) did in this case. See Chain of title for Plaintiffs Robert and Virginia Almeder and Plaintiffs' Exhibit No. 25. Like this case, the Defendants, together with the Plaintiffs, in Cordrey constitute a majority (though not all) of the lots surrounding the grove. In addition, the prescriptive rights Defendants sought to vindicate in Cordrey were broader than their own individual rights of access to the disputed property. Because the Cordrey Defendants presented their claim largely in terms of their own personal use, the evidence was sufficient to support a finding that easement rights exist in a broader *class of persons*. Id. at *7 (emphasis added).

In Cordrey, the Court of Chancery of Delaware found that the use of the pier and the grove was open and notorious. Id. at *8. The facts laid out various uses such as sunbathing, crabbing and parking cars on the grove over time consistently. Id. The only contrary evidence was testimony by one of the Plaintiffs that no cars were ever parked on the grove, which testimony was contradicted by photographs which showed that the grove was used to park cars. Id. This is not dissimilar to the Plaintiffs' claims in this case that no one used the beach, claims buttressed by showing sample photographs in support of this claim. These claims were contradicted by testimony and photos of several back lot owners using the beach dating back to the 1940s. See TMF Defendants' Exhibits No. 279, 282, 284, 298, 302, 310, 315-16, 318, 326, 330, 335-36, 342, 348-49, 361.

Where the use of the disputed property is open and visible, as was the case in Cordrey, and where "there is no semblance of proof that the use was permissive," the adverse character of the user may be presumed. Id. at *10. In Cordrey, the Chancery Court found that the use of the pier and the grove was open and visible, and there was no evidence of permission was given or asked. Id. The little testimony of permission that was afforded was given no weight because it was unspecific, conclusory, undocumented and self-serving. Id. at *11. The facts in Cordrey are very similar to the facts here, and the Court in Cordrey found that the presumption applied with respect to a prescriptive easement asserted by a class of persons. Based on the facts of the case at hand, this Court can and should reach the same conclusion.

B. Did the TMF Defendants meet their burden of demonstrating that the Plaintiffs were on notice of their use giving rise to a prescriptive easement claim?

Yes. When determining whether or not the Plaintiffs had knowledge and acquiesced to the recreational use of the beach in front of their property, the test is not whether Plaintiffs subjectively knew their rights were at jeopardy, as they contend in this case, but rather the test is objectively when would the property owner be on notice. When the use is so open, notorious, visible and uninterrupted, *knowledge* and acquiescence will be presumed. Eaton v. Town of Wells, 2000 ME 176, ¶32, 760 A.2d 232, 244 (emphasis added). The Goose Rocks Beach property owners and their predecessors in title were on notice dating back to the 1920s and likely earlier. To sit idle for over eighty (80) years and claim that such use was permissive despite any credible testimony that permission was given (before the lawsuit was filed) or objection was made as to recreational use is by its very nature acquiescence, which is one of the prescriptive elements to be satisfied by the TMF Defendants.

The Plaintiffs cites to Flaherty as proof of lack of notice. In Flaherty, only 3 out of the 19 witnesses were able to establish a prescriptive claim. 2011 ME 32, 17 A.3d 640. However, this argument understates the facts in Flaherty, which are quite different to the overwhelming facts at hand in the instant case. In Flaherty, the use of the easement in question only dated back to the 1970s and out of the 19 lot owners, only 2 had potentially met the prescriptive period and one of the three that testified to over 20 years of use was not a part of the class. Id. The property owner in Flaherty did not have "notice" because the elements of a prescriptive claim by the class could not be met. In this instance, 30 people, including some of the Town of Kennebunkport witnesses who were a part of the class, testified with respect to over 20 years of continuous use, under a claim of right adverse to the owner, with the owner's knowledge and acquiescence, or a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed. If the TMF Defendants did not heed the Court's admonitions regarding trial time, another 140 plus witnesses would have testified similarly.

The testimony presented at trial established that back lot owners live at all areas of the beach, and while certainly some areas are more congested than others, back-lot properties encompass the entirety of Goose Rocks Beach. It is not enough for Plaintiffs to contend that backlot owners only access via certain rights of way and go only a few houses over in either direction when there are over 27 rights of ways providing access to the beach and at its largest point only 15 lots separate the rights of ways. No Plaintiff testified to not seeing back lot and beachfront owners using the beach in front of their property, as was the case in Weeks. Plaintiffs testified to back lot owners and beachfront owners using the beach for recreational purposes without permission and without interruption. The Plaintiffs even testified as to their own recreational use without permission in front of other beachfront owner's homes. The Plaintiffs

essentially are sticking their heads in the sand and ignoring the fact that the beach in front of their property was used by Goose Rocks residents for a period well exceeding twenty (20) years. A few isolated instances of objection to non-recreational use or permission, many of which occured after the case was filed, cannot defeat the valid prescriptive claim brought by the TMF Defendants. Indeed, some of the Plaintiffs did not even rebut the testimony of the prescriptive use on their property. These Plaintiffs cannot now claim that the TMF Defendants did not meet their burden of proof.

The Plaintiffs in one breath argue with respect to the Town of Kennebunkport's claim for a public prescriptive easement that "everyone knew it was private property," but in the next breath say that with respect to the TMF Defendant's claim, the use was not adverse because the Plaintiffs did not have knowledge. If the beach was indeed private as the Plaintiffs contend, and everyone did in fact know it, but still used it without objection or permission, the use by its very nature is adverse and the Plaintiffs had knowledge of the use.

Finally, the TMF Defendants did present testimony as to use on each of the Plaintiffs' property for the prescriptive period. While this use was not every day, this use was continuous for the prescriptive period and the use does not have to be made by each member in the class. Rather, as stated in Flaherty v. Muther, 'the adverse use that leads to creation of the servitude provides the basis for determining its terms.'" 2001 ME 32 at ¶ 83 (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. a.).

> Since the servitude created by adverse use arises from the failure of the landowner to take steps to halt the adverse use, interpretation of the prescriptive servitude focuses on the reasonable expectations of the landowner. The relevant inquiry is what a landowner in the position of the owner of the servient estate should reasonably have expected to lose by failing to interrupt the adverse use before the prescriptive period had run.

Id. (citing Restatement (Third) of Prop.: Servitudes § 4.1 cmt. h.).

"This approach is consistent with the idea that the 'open, notorious, [and] visible' element of establishing a prescriptive easement is required 'to give notice to the owner of the servient estate that the user is asserting an easement.'" Id. (citing Great N. Paper Co. v. Eldredge, 686 A.2d 1075, 1077 (Me. 1996)). The recreational use by the TMF Defendants at Goose Rocks Beach was open, notorious and visible such that notice was provided to the Plaintiffs that the TMF Defendants were asserting a right to use the beach for recreational purposes.

In sum, the testimony presented at trial proves by a preponderance of the evidence that the TMF Class has established a prescriptive easement to the entirety of Goose Rocks Beach for recreational purposes.

DATED: October 5, 2012

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