STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. YOR-12-599

ROBERT F. ALMEDER, et al.,

Plaintiffs-Appellants

vs.

TOWN OF KENNEBUNKPORT, et al.,

Defendants-Appellees

On Appeal from Maine Superior Court
(York County)

BRIEF OF THE MAINE SNOWMOBILE ASSOCIATION

Brian P. Winchester, Bar No. 3077
Attorney & Counselor at Law
116 State Street
Augusta, Maine 04330
(207) 623-1915

Attorney for Amicus Curiae
Maine Snowmobile Association

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal of the partial summary judgment rendered by the York County Superior Court dated October 16, 2012. The facts of the case and the procedural history have been more than adequately presented in the brief of the appellants, which the Maine Snowmobile Association ("MSA") adopts by reference. However, reference is made to a few factual matters which are important to its argument.

In its decision, the superior court made findings regarding the public's use of Goose Rocks Beach in Kennebunkport. The Superior Court's findings as to the use of Goose Rocks Beach as stated on pages 5 to 7 indicate normal beach uses such as beach-walking, bathing and games. If somebody wanted to do something beyond normal daytime beach activities such as storing a boat or having a large party, permission was usually sought from the beachfront owner. Persons engaging in disruptive behavior were normally asked to leave, and they did leave. The police would assist if a member of the public would not cooperate with requests made by a beachfront owner. There was nothing in the findings indicating an intent by the public using the beach to act in an antagonistic way or with hostile intent toward the beachfront owners during the prescriptive period. The first indication of hostile intent was in August, 2005 when John Harris, a "backlot" owner, challenged Ms. Rencurrel's right to exclude him from her beachfront property. A.2092-94. The Town of Kennebunkport then decided to make a prescriptive easement claim, among other claims.

ARGUMENT

Maine has a long standing tradition of fostering a legal environment which encourages landowners to allow others access to their land for recreational purposes. See Lyons v. Baptist School of Christian Training, 2002 ME 137 at ¶19. In Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984) at 1130 the court stated that the recreational use of unenclosed, wild or uncultivated land raises a rebuttable presumption that the use was permissive. This doctrine was later clarified in Lyons at ¶24 where the court indicated " the presumption that public recreational uses of open, unposted land are permissive applies equally to children playing on a vacant lot in town, hunters and snowmobilers crossing a cultivated field after the harvest, or families camping on privately owned wood lots…". The court indicated the focus should be on the use of the land, not the nature of the land alone.

In this case, the property at issue is a beach on the ocean. Under the Massachusetts Bay Colony Colonial Ordinance of 1641-47 and common law, the public has the right to enter the intertidal zone to "fish, fowl and navigate" even though the upland owner has a fee to the low water mark. Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) at 173. Thus, the public already had a right to enter the beachfront owners' property in the intertidal zone, but that right does not include general recreational use. Bell at 175-176. However, in the more recent decision rendered in McGarvey v. Whittredge 2011 ME 97, the court split on its analysis of the extent of the public's rights in the intertidal zone. Three justices articulated a balancing test between the rights of the upland owner versus the rights of the public (¶57), while the other three justices stated

that the traditional "fish, fowl and navigate" test should remain the law of the state, subject to a "generous" interpretation of those terms (¶59).

Although the Town of Kennebunkport apparently did not argue that "fish, fowl and navigate" includes a recreational use of the intertidal zone, the court may still have an opportunity to determine how the traditional rights of "fish, fowl and navigate" should apply to the facts of this case. The superior court took the position that "ocean-based" activities such as knee-boarding, rafting, tubing and snorkeling are permitted, but that swimming, bathing, wading and walking are not. The superior court has done anything but settle the issue as to the rights of the public in the intertidal zone. It certainly is not clear how a person reading the decision would be able to distinguish snorkeling from swimming. The Maine Snowmobile Association takes no position as to the rights of the public in the intertidal zone as snowmobile trails are mostly in wooded areas and fields. Access to the ocean is not a usually a concern of the MSA[1]. How the superior court treated the issue of a public prescriptive easement on Goose Rocks Beach is.

The Superior Court's Disregard of the Rebuttable Presumption of Permissive Use Is Reversible Error

In order to find a public prescriptive easement, there must be 1) continuous use; (2) by people who are not separable from the public generally; (3) for at least twenty years; (4) under a claim of right adverse to the owner; (5) with the owner's knowledge and acquiescence; or (6) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. Lyons at ¶15, citing Eaton v. Town of Wells, 2000 ME 176 at ¶32. However, when the public use is for recreational purposes,

[1] In far northern regions such as Labrador where reliable sea ice forms, snowmobile access to the ocean is desired for winter transportation between coastal native communities. In Maine, safe sea ice is not normally encountered.

there is a rebuttable presumption of permissive use which, unless overcome, precludes a public prescriptive easement. Lyons at ¶19, Town of Manchester at 1130. See also S.D. Warren Co. v. Vernon, 1997 ME 161 at ¶16. When the rebuttable presumption of permissive use applies, as it does in this case, the burden is on the claimant to prove adversity and acquiescence, as more fully briefed below. Lyons at ¶26. There is no question that the public has been continuously using Goose Rocks Beach for at least 20 years with the knowledge of the beachfront property owners. However, there is no evidence that the owners acquiesced to a claim of right that is adverse to them for the prescriptive period.

The analysis is complicated by the fact the public has a common law right to "fish, fowl and navigate" in the intertidal zone. The superior court relied on a finding that the property owners did nothing to prevent access to the beach. In particular, at page 9 of its partial summary judgment, the court cites the testimony of William Forrest, who said it was impractical to ask people engaged in recreational activities to leave his property. Of course it was impractical-the public has a limited right of access to the intertidal zone. At what point does a property owner say that the persons on her property have crossed the line from fishing, fowling and navigating to recreational activities? Presumably these owners, or most of them, are not lawyers and are not equipped or inclined to monitor the activities of the public for the purpose of determining whether they have exceeded their common law right to the intertidal zone. Instead, it is more practical to permit general access to the beach but exclude members of the public when their activities, such as rowdiness, interferes with the beachfront property owners' use and enjoyment of their land. Such an approach comports with Maine's long standing tradition of landowners

allowing recreational access to their land. The approach of the Goose Rocks Beach landowners worked well until a backlot owner, and then the town, decided to become aggressive in 2005 and claim a public prescriptive easement.

Beachfront owners have a right to exclude the public from the "dry sand" area of their property. To do so, they likely would have to put up a fence to keep the public in the intertidal zone. Property owners are not going to want to fence in the dry sand as it would destroy the beauty of the beach and interfere with their own desire to walk on it.

In its decision, the superior court makes a passing reference to the presumption of permissive use at the bottom of page 10, stating that the presumption applies when the land is "wild and uncultivated". The court then went on to disregard the presumption. This was an error. In Town of Manchester v. Augusta Country Club, the issue was public access to a private beach as well, albeit on Cobbosseecontee Lake. As in the instant case, the Town of Manchester provided funding to help with the security of the beach, and the public had used it for many years. When use by the public dramatically increased the Augusta Country Club decided it had to restrict access to the beach to club members. The town then attempted to establish a public prescriptive easement. Manchester at 1126-1127. The court in Town of Manchester did apply the presumption of permissive use and found that the town had failed to overcome the presumption and did not prove acquiescence. In applying the presumption of permissive use, the court stated:

> "This rule is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the rights of the owner in his land "

Manchester at 1130. Thus in Manchester, the court found it appropriate to apply the presumption of permissive use to a beach as well as the right of way to it, even though it

was not "wild and uncultivated land". The court in Lyons cited with approval the court's reasoning in Manchester, and went on to say at ¶24:

> "These later cases make it evident that it is the public recreational uses of land, not the nature of the land alone, that triggers application of the rebuttable presumption of permissive use in public prescriptive easement cases".

It was clear error for the superior court to disregard the presumption of permissive use in this case. The precedents demonstrate that it should have been applied. Instead, the superior court went straight to an analysis as to whether the Town of Kennebunkport proved the existence of a public prescriptive easement, without making any findings as to whether the presumption of permissive use had been overcome. For this reason alone, the superior court's ruling on this issue should be reversed. For the reasons stated below, the court misapplied the law as to two elements which the Town had to prove to prevail on its public prescriptive easement claim.

The Superior Court Misapplied the Law as to Adversity and Acquiesence

One of the elements in a public prescriptive easement claim is that the claimant must prove a claim of right adverse to the owner. In Lyons at ¶26, the court stated:

"The plaintiffs must prove that their actions in using the way demonstrated hostility or antagonistic intent in order to impose a public, prescriptive easement and deprive the Baptist School of its capacity to limit use of the property. In the context of an adverse possession or prescriptive easement claim, hostility does not require a "heated controversy or a manifestation of ill will" toward the owner. *Striefel v. Charles-Keyt-Leaman P'ship*, 1999 ME 111, ¶ 13, 733 A.2d 984, 991. But proving the hostile claim of right element does require a showing that the use was: (1) without the express or implied permission of the owner, *id.*; *(2) with the intent to displace or limit the owner's rights to the land, id. ¶ 14*; and (3) undertaken in a manner that provided the owners with "adequate notice . . . that the owner's property rights are in jeopardy." *Id.* ¶ 11. *See also Emerson*, 560 A.2d at 2–3. *To demonstrate adverse use, a claimant must show disregard of the owner's claims entirely and use of the land as though the claimant owned the property. See Stickney*, 2001 ME 69, ¶ 21, 770 A.2d at 602." (Emphasis Added).

Nothing in the court's findings indicate an intent by the public to displace or limit the beachfront property owner's rights or an intent to act as though they owned the property. Instead, the record indicates that the public has been using the beach in a concurrent or co-existing manner with the property owners. In fact, at page 7 of the partial summary judgment the court found that permission was asked if somebody wanted to store a boat or have a large gathering. This is inconsistent with the actions of a person that "disregards the owner's claims"

As to acquiescence, the superior court has essentially put the beachfront owners in a Catch-22 situation. On the one hand, they must allow limited access to the intertidal zone of their properties, but then to defeat a claim of a public prescriptive easement they must demonstrate that they maintained control over the beach in some manner, such as putting up a fence or shooing people off the dry sand. This makes no sense and will lead to the exact problem for which the MSA is concerned, which is landowners shutting recreational access to their property to protect themselves from an easement claim.

If the decision of the superior court with respect to a public prescriptive easement is allowed to stand without reversal or modification, the MSA is very concerned that the genie will be out of the bottle and prescriptive easement claims will be filed all over the state by persons who have recreated on the property of another for at least 20 years. As stated in the motion seeking leave to file a brief of amicus curiae, there are many snowmobile trails around the state that have been in existence for more than 20 years. With the exception of some abandoned railroad beds owned by the State of Maine, virtually the entire 14,000 mile trail system is on privately owned land[2]. While the MSA

[2] The state owns abandoned railbeds between Houlton and Presque Isle, separately Presque Isle to Van Buren, Fort Kent to Allagash, Newport to Dover, Jay to Farmington and the new Sunrise Trail in

and its member clubs as matter of policy would never attempt to assert a public prescriptive easement claim against any landowner, there are other individuals or groups that might. For example, a snowmobiler who has gone across the land of his neighbor(s) to access a state funded groomed snowmobile trail who suddenly is told he may no longer cross that land, might claim an easement if he believes that recent decisions support such a claim. Hunters who have used the same piece of land for decades could do the same, as could hikers. It is very important to the MSA and the generous landowners in general that any decision issued by the Law Court in this case make it crystal clear that recreational use of land does not lead to a prescriptive easement absent a demonstration by the claimant with substantial evidence of an intent to displace the owner from his land or to limit his rights. The simple open use of land for recreation for an extended period of time, with the landowner's knowledge, such as a decades old snowmobile trail, is not enough to establish an easement, as the superior court's conclusions would suggest. Anything less would lead to an environment where landowners are unwilling to allow the public access to their land for recreational purposes, which would be disastrous for the snowmobile industry and the businesses that depend on it.

The Law Court Should Reject The Doctrine of Public Easement by Custom

In its decision at pages 13 and 14, the superior court correctly acknowledged that no Law Court cases have adopted easement by local custom, and that it is disfavored in Maine law. It nevertheless made findings that the Town of Kennebunkport had proven all the elements of public easement by custom "if easement by custom is a viable claim".

Washington County which are groomed by MSA member clubs. The State also owns trails on Frye Mountain and Mt. Blue State Park, and there are trails on some other public land. Maine Bureau of Parks and Lands, Off-Road Vehicle Division. Although these trails are substantial, they are still a small percentage of the total snowmobile trail mileage in Maine.

The appellants have thoroughly briefed this issue in their brief, and the MSA joins in their arguments, including the assertion that the town failed to prove all the elements. The MSA would add that the Law Court should use the opportunity to once again reject the doctrine as it did in Bell v. Town of Wells at page 179. There is no reason that it should be adopted and adopting the doctrine would conflict with the rebuttable presumption of permissive use and essentially lower the standard for proving a public easement by prescription with the resulting chilling effect on landowners' willingness to allow recreational access to their land.

CONCLUSION

There may be room within the rights of the public to fish, fowl and navigate in the intertidal zone to grant the town and other defendants the relief they requested. The court made it clear in McGarvey at par. 59 that the interpretation of the public's rights in the intertidal zone should be "generous". Although the issue of the public's right to the intertidal zone was apparently not pursued by the Town of Kennebunkport, the issue has been raised and briefed. The superior court should be completely reversed, but if the Law Court were inclined to affirm, the MSA would urge that the basis be solely on the public's intertidal zone rights and not on the basis that the public has a right to a public prescriptive easement. As stated herein, the public's right to the intertidal zone is of no concern to the MSA.

The superior court completely misapplied the law as to the presumption of permissive use and the doctrine of public prescriptive easements, in the process creating a dangerous precedent if it is not reversed, as it could have negative repercussions for landowners across the state that allow recreational use of their land. The MSA

respectfully submits that the best course would be that the Law Court reverse the superior court as to its finding of the existence of a public prescriptive easement on Goose Rocks Beach, and declare that public easement by custom does not exist in Maine.

Dated: August 5, 2013

Brian P. Winchester
116 State Street
Augusta, Maine 04330
(207) 623-1915
Bar No. 3077

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have this 5th day of August, 2013, caused two copies of the foregoing Brief of The Maine Snowmobile Association to be served on each of the full parties who are separately represented or unrepresented listed below, by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

Brian Willing, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480

Paul Stern, AAG
Deputy Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Gregg Frame, Esq.
Andre G. Duchette, Esq.
Taylor McCormack & Frame, LLC
30 Milk Street, 5th Floor
Portland, Maine 04101-4164

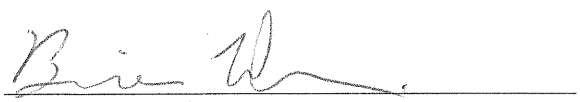
Christopher E. Pazar, Esq.
Drummond & Drummond
One Monument Way
Portland, ME 04101

Alexander M. and Judith A. Lachiatto, *pro se*
12 Bel Air Avenue
Kennebunkport, ME 04046

Richard J. and Margarete K.M. Driver, *pro se*
6 Marshview Circle
Kennebunkport, ME 04046

Benjamin M. Leoni, Esq.
Curtis Thaxter, LLC
One Canal Plaza, Suite 1000
PO Box 7320
Portland, ME 04112-7320

Dated: August 5, 2013



Brian P. Winchester
Attorney for Maine Snowmobile Association
116 State Street
Augusta, ME 04330
(207) 623-1915
Bar No. 3077