

Alexander M. and Judith A. Lachiatto

12 Bel Air Avenue, Kennebunkport, Maine 04046

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September 20, 2012

Dianne Hill, Clerk  
York County Superior Court  
45 Kennebunk Road  
P.O. Box 160  
Alfred, Maine 04002-0160

Re: Robert F. Almeder, et als

vs.

Town of Kennebunkport, et als

Docket No. RE-09-111

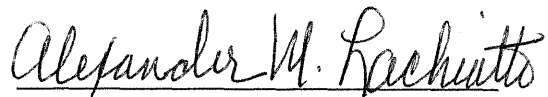
Dear Ms. Hill:

Please find enclosed herewith Defendants Driver and Lachiatto Proposed Findings of Fact and Conclusions of Law in the above captioned matter.

Also enclosed is a Certification indicating that said pleading was forwarded to all Counsels of record.

A copy of said Proposed Findings etc. was mailed directly to Justice Brennan at his home address as per his request.

Very Truly Yours,

  
Alexander M. Lachiatto, Esq.

Enclosures: 2  
Cc: Justice Brennan

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012, I caused to be served by placing a copy of the foregoing document in the U.S. Mail, postage-prepaid, and addressed to the following:

Melissa Hewey, Esq.  
Amy K. Tchao, Esq.  
Brian Willing, Esq.  
Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland, ME 04101-2480

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

Neal Weinstein, Esq.  
Law Offices of Neal L. Weinstein  
32 Saco Ave  
P.O. Box 660  
Old Orchard Beach, ME 04064

Gregg Frame, Esq.  
Taylor McCormack & Frame, LLC  
4 Milk Street, Ste. 103  
Portland, Maine 04101-4164

André G. Duchette, Esq.  
Taylor McCormack & Frame  
4 Milk Street, Suite 202  
Portland, ME 04101

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

Nicholas S. Strater, Esq.  
STRATER & STRATER PA  
266 York Street  
PO Box 69  
York, ME 03909

Alan Shepard, Esq.  
Shepard & Read  
93 Maine Street  
Kennebunk, ME 04043

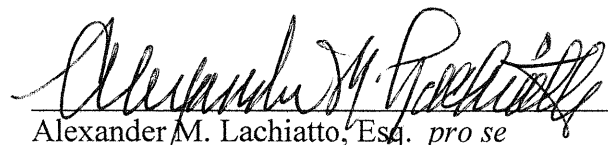
William H. Leete, Jr., Esq.  
Leete & Lemieux, P.A.  
95 Exchange St.  
PO Box 7740  
Portland, ME 04112

Sydney St. F. Thaxter, Esq.  
David P. Silk, Esq.  
Curtis Thaxter LLC  
One Canal Plaza, Suite 1000  
P.O. Box 7320  
Portland, Maine 04112-7320

Robert E. Danielson, Esq.  
Law Offices of Robert E. Danielson  
Two Canal Plaza, Suite 401  
P.O. Box 545  
Portland, ME 04112-054

Charles L. Nickerson, Esq.  
902 Main Street  
Sanford, ME 04073

Dated: September 20, 2012



Alexander M. Lachiatto, Esq. *pro se*  
12 Bel Air Avenue  
Kennebunkport, ME 04046

State of Maine  
York, ss

Superior Court  
Civil Action

Robert E. Almeder and Virginia S. Almeder, et als, )  
Plaintiffs, )  
vs. )  
Town of Kennebunkport and All Persons Who Are )  
Unascertained, )  
Defendants )

Docket No.: RE-09-111

**DEFENDANTS' DRIVER AND LACHIATTO  
PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**Title To Real Estate Is Involved**

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NOW COME PRO SE Defendants, Margarete and Richard Driver and Judith and Alexander Lachiatto and respectfully submit the following supplemental Proposed Findings of Fact and Conclusions of Law. These Defendants join in the Proposed Findings of Fact and Conclusions of Law submitted by and on behalf of the TMF class.

Based upon the evidence presented at trial, these are the Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Goose Rocks Beach (hereinafter GRB) is a residential, beach community that is a geographical section of Kennebunkport, Maine. GRB is a two plus mile family beach.
2. The back lot owners who are parties to the lawsuit are a designated class by court order. The class is referred to hereinafter as the TMF Defendants. The class does include a number of beachfront owners who have entered the lawsuit as defendants.
3. None of the TMF Defendants who testified ever asked permission of beachfront owners to use the beach.

4. None of the TMF Defendants who testified were ever given permission by a beachfront owner to use the beach prior to the filing of the lawsuit in 2009.
5. With the exception of Barbara Rencurrel, no beachfront property owner has insisted that a beach user leave the beach in front of their home except when someone was acting inappropriately.
6. Most of the beachfront owners who testified acknowledged that they used other parts of GRB besides the beach in front of their properties.
7. No beachfront owner who testified ever sought permission from other property owners to recreate on the beach.
8. A number of beachfront owners who testified asserted that they had the right to walk the beach without permission from other owners. (Scribner)
9. People have been engaging in recreation activities on GRB for a multiple of 20 years. The recreation has included merely sunbathing, swimming, walking and jogging and group activities such as volleyball and baseball on both the wet and dry sand and all the recreating has been done without seeking or receiving permission from any beachfront property owners. (Smith, Joel, Scribner, Gray, Vandervoorn, Sotir, Forest, Gustin, W. Junker, M. Junker)
10. It was only after the lawsuit was filed that a few beachfront owners made a point of giving permission to neighbors to use the beach. (Forest)
11. A number of beachfront owners acknowledged that they "acquiesced" to the use of the beach by back lot owners and the general public or gave "tacit permission" for such use. (Scribner, Gray, Rice, Eaton, Sotir, Henriksen, Emmons. In addition, Rencurrel acknowledged that she "acquiesced" to joggers and walkers.)

12. A number of beachfront owners acknowledged that they did not know if a prescriptive easement claim had matured prior to their purchase of their beach property. (Forest, Fleming)

13. There was no testimony from any beachfront owner that he or she had made inquiries as to whether anyone had acquired a prescriptive easement prior to their purchase of beachfront property. (O'Connor, Gallant, Eaton, Lencki, Forest, Fleming, who are more recent grantees of beachfront property.)

14. Barbara Rencurrel is the only plaintiff to testify that she somewhat regularly told people they could not participate in passive or active recreation on the beach in front of her property.

However, she "acquiesced" to joggers and walkers using her property. (Rencurrel)

15. No one testified that he or she was asked to leave the beach in front of Barbara Rencurrel's property. (All of the plaintiffs and defendants who testified.)

16. Barbara Rencurrel testified that she sees walkers and joggers on the beach in front of her property 12 months of the year.

17. Barbara Rencurrel does not tell walkers and joggers that they are trespassing. (Rencurrel)

18. Barbara Rencurrel testified that she gave tacit permission for walkers and joggers to be on her property.

19. When asked to define "tacit," Barbara Rencurrel testified that the word meant "acquiescence" to her.

20. During direct and cross examination on the Kennebunkport Comprehensive Plan, not one Plaintiff, whether a resident of Kennebunkport or a non-resident property owner, testified that he or she had read any of the versions of the Comprehensive Plan.

21. The Plaintiffs defined the "unascertained" defendants as those persons "who claim the right to use...Plaintiffs' Property...and who have trespassed upon Plaintiffs' Property and have used or

claim the right to use Plaintiffs' property for unlawful uses, including, but not limited to bathing, sunbathing, picnicking and other recreational activities." (Para. 29 of the Complaint)

22. The Plaintiffs have pleaded the factual allegation that individual Defendants have recreated on their beach property "under claim of right without plaintiffs' consent...." (Para.40 of the Complaint)

23. The Plaintiffs have pleaded the factual allegation that they have "implicitly granted" permission to recreate on the beach. (Para. 42 of the Complaint)

24. The Plaintiffs have pleaded the factual allegation in support of their quiet title claim for relief that as a "fact" the "individual defendants and the Town have claimed the right to use and continue to use Plaintiffs' Property as a public beach for recreational and other purposes without Plaintiffs' permission, over Plaintiffs' objections and adversely to Plaintiffs' interest...." (Para. 51 of the Complaint)

25. A number of plaintiffs acknowledged that they had read the complaint and that the complaint was accurate as regards the factual statements. (Scribner, Hastings)

26. Other than Barbara Rencurrel's testimony and the few Plaintiffs who testified about inappropriate behavior, no Plaintiff testified that he or she had expressly voiced objections to the use of the beach in front of their properties.

27. Most beachfront owners who are plaintiffs and all of the beachfront owners who are defendants or not participating in the lawsuit as litigants, had no objection to back lot owners or the general public recreating on the beach in front of their properties and neither gave permission for such use or were asked for permission to use the beach.

28. The Plaintiffs in their testimony have acknowledged that they have had notice for many decades that back lot owners and the general public were using the entire beach, from river to river, for both passive and active recreation. (All Plaintiffs who testified.)
29. The Plaintiffs have acknowledged in the pleadings that they viewed the use of the beach in front of their properties by back lot owners and the general public as being "adverse" to their interests.
30. The Plaintiffs have acknowledged in the pleadings and testimony that the back lot owners and the general public were using the beach in front of their properties without their consent.
31. The Plaintiffs have acknowledged in the pleadings that any permission they gave to use the beach in front of their properties was "implicitly granted."
32. A number of Plaintiffs testified that they had given "tacit consent" to the defendants to use the beach in front of their properties. (Rencurrel, Scribner, Eaton)
33. "Tacit" can be defined as "silent acquiescence," "unspoken," and "saying nothing." (Oxford English Dictionary, The Random House College Dictionary)
34. Back lot owners have been investing in their properties for decades and upgrading their homes in what is and has been a beach community for more than 90 years. (Driver)
35. Back lot owners and some beachfront owners who testified said that if there had not been beach access, they would not have purchased their homes. (Case)

### **CONCLUSIONS OF LAW**

The Federal Rules of Civil Procedure (FRCP) and the Maine Rules of Civil Procedure, while not identical, are very similar. Maine is one of the states that tracks the FRCP in both wording

and interpretation. *Bean v. Cummings*, 939 A.2d 676, 680-81 (Me. 2008). Recent U. S. Supreme Court decisions have signaled a move away from mere notice pleading to what has been labeled a "plausibility" standard in interpreting the requirements of FRCP 8 as to factual allegations and requiring plausibility for the conclusionary allegations of a complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* moved the bar further than *Twombly* in terms of applying the pleading standard to civil litigation more generally. The Maine Law Court, following *Twombly*, applied the plausibility standard in a civil case that alleged perjury by one of the parties. *Cummings, supra*. While the cited cases all focus on either FRCP 8 or MRCP 8 and 12b motions to dismiss, they underline the necessity and requirement for the factual allegations in a complaint to be truthful.

FRCP 11 and MRCP 11 are usually looked at as a means to sanction an adversary for unethical, unprofessional or dishonest pursuit of a claim as evidenced by the pleadings and the facts that indicate some form of abuse. So it is clear, Rule 11 is not raised here because there is some abuse that could lead to sanctions. Rule 11 is raised here to underline the truthfulness of some of the factual allegations because they contradict the relief sought by the Plaintiffs.

*Twombly*, *Iqbal* and *Cummings* are referenced here to indicate the increased emphasis that both the Federal and Maine courts are putting on the truthfulness of factual allegations in pleadings.

FRCP Rule 11 provides in part as follows:

Rule 11 Signing of Pleadings, Motions, and other Papers; Representations to Court, Sanctions

(a) Signature.

Every pleading...shall be signed by at least one attorney of record in the attorney's individual name....Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(b) Representations to Court



By presenting to the court...a pleading..., an attorney...is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstance....

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery....

MRCP Rule 11 tracks the FRCP Rule 11 and contains the same requirements for pleadings, although with some variation in articulation. MRCP Rule 11 reads in part as follows:

Rule 11. Signing of Pleadings and Motions; Sanctions

(a) Attorney Signature Required; Sanctions. ...every pleading and motion of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name....Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a representation by the signer that the signer has read the pleading or motion; that to the best of the signer's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.* [Emphasis added.]

The FRCP, specifically at R. 11(b), captions the thrust of signing a pleading as "Representations to Court." The body of R. 11(b) has the attorney "certifying" that the "factual contentions have evidentiary support." R. 11(b)(3).

The MRCP R. 11(a) provides that the signature of the attorney constitutes a "representation." Neither the FRCP nor the MRCP require that the complaint be verified or be accompanied by an affidavit, unless required by rule or statute, thus implying that the signature of the attorney to the representation is made as an officer of the court or as if under oath.

Pleadings in the alternative are permitted, but pleading in the alternative is to theories supporting a claim or alternative claims, not alternative and contradictory facts. MRCP Rule

8(e)(2). It should be noted that the Plaintiffs here did not plead in the alternative and the asserted factual contentions are meant to support the relief demanded. The factual allegations may be plausible by themselves; however they do not lead to the conclusionary allegations of the complaint.

FRCP R. 11 is specific that the representations in pleadings are to the court. The MRCP R. 11 merely states that the pleadings are "representations," but there can be no other conclusion than under the Maine rule, the pleadings are representations to the court as they are in Federal practice

While the representations are to the court, the adverse parties certainly have a right to rely on the factual allegations. If the court and the adverse parties cannot assume that the factual allegations are intended to be the other party's good faith statement of the facts, then why even allege facts? Why do the Rules make the factual allegations "representations" if they are not to be relied upon as the adverse party's understanding of the facts? Here we are not talking about conclusionary allegations. We are talking about the factual allegations that underpin the plaintiffs' case and may or may not support the conclusions and theories of the case. The factual allegations and contentions advanced by the plaintiffs in the pleadings in this case and based on the fact that they are representations to the court, contradict the conclusionary allegations and the theories of relief sought.

The elements of a prescriptive easement are (1) continuous, uninterrupted use; (2) for a minimum of 20 years; (3) under a claim of right adverse to the owner; (4) with the owner's 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*, 760 A.2d 232, 244 (Me. 2000).

The pleadings in this case meet requirements 3 and 4. The testimony of the Defendants, and, for that matter, the plaintiffs, cover a minimum of 90 years and thus meet requirements 1 and 2 for uninterrupted use for a minimum of 20 years. The pleadings constitute admissions in as much as they are representations to the court. The admissions include the factual contentions that the use of the beach by the back lot owners and the general public was adverse under a claim of right, that the use was with the knowledge of the Plaintiffs and that the owners acquiesced with their "implicitly granted" permission.

Alternatively, when the totality of the evidence and the pleadings are weighed, the use of the beach "was so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." Only the Plaintiffs who more recently purchased beachfront property testified as if it is a recent phenomenon that GRB has beach users from away. (O'Connor, Lencki, Fleming, Eaton and Gallant.) Plaintiffs such as Scribner have lifelong experience with GRB as a community where recreating on the beach was enjoyed by all, beachfront, back lot and general public without discrimination.

In an attempt to negate the obvious fact that beachfront owners have had knowledge and have acquiesced to use of the beach by non-beachfront owners, the Plaintiffs raise the gratuitous remarks in the Town's Comprehensive Plans referencing GRB. The Plaintiffs argue that the various Kennebunkport Comprehensive Plans led them into a secure complacency that there was not a claim for a prescriptive easement. First, the testimony from the Defendants and most of the Plaintiffs support the fact that there was a prescriptive easement long before there was a comprehensive plan referring to GRB. Second, a comprehensive plan is a road map for future development and is not a law or ordinance and has no legal implications. A statement such as

"the beach is never crowded" is a factual observation. On the other hand, a statement that "the beach is privately owned" is a legal conclusion beyond the scope of a comprehensive plan.


Third, a statement in a comprehensive plan referring to beach ownership says nothing about a prescriptive easement. Fourth, taking into account the pleadings and the totality of the testimony from Plaintiffs, Defendants, Town officials, other GRB property owners and other non-party witnesses such as Ralph Smith, the use of the beach was so open and notorious over many decades that knowledge must be presumed.

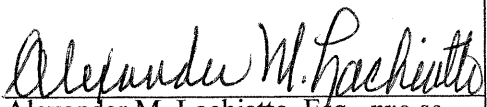
Fifth, while the Plaintiffs point to the comprehensive plans as a crutch, there was not one word of testimony that any of the Plaintiffs, whether residents or non-residents of Kennebunkport, actually read the plans; voted for or against the plans; or had knowledge of the plans prior to the onset of this litigation.

GRB is a mecca of sorts for beach lovers. It is not Coney Island or Old Orchard Beach or a Miami Beach or Malibu. GRB is a family beach. It stretches credulity to the breaking point to argue that the hundreds upon hundreds of visitors from Canada, especially from Quebec, visitors from the northeast and other parts of the United States, whether day visitors or renters over the past many decades had "tacit consent" to use the beach at Goose Rocks. And "tacit consent" is silent acquiescence, unspoken or saying nothing. No one asked for permission, no one gave permission. The beach was and is just a beach that everyone could enjoy. There was no hierarchy of use or caste system discriminating in favor of some and against others. It was and is just a beach. But for those who lived and live at GRB; those who owned and those who own property at GRB; those who visited and those who visit GRB, it was and is our beach. Now there are those who want to make GRB their exclusive beach.

The irony is that for those who want a private beach, it means a narrow width of beach running to the mean low tide. They will have no rights to the beach to the right or left of their narrow strip of beach. That means that they will have no right to even walk past the boundaries of their property. Each beachfront owner will have his or her little island, isolated in a community of islands on the beach. The absurdity of this position was forecast by justice, now Chief Justice Saufley in her concurring opinion in *Eaton, supra*.

Dated this September 20, 2012

  
Richard J. Driver, Esq. *pro se*  
6 Marshview Circle  
Kennebunkport, ME 04046  
(207) 967-3580

  
Alexander M. Lachiatto, Esq. *pro se*  
12 Bel Air Avenue  
Kennebunkport, ME 04046  
(207) 967-5697