

STATE OF MAINE
YORK, ss.

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

ROBERT F. ALMEDER and)	
VIRGINIA S. ALMEDER, et al.,)	
)	
Plaintiffs)	DEFENDANT TOWN OF
)	KENNEBUNKPORT'S MOTION
v.)	<i>IN LIMINE</i> TO EXCLUDE EVIDENCE
)	REGARDING FUTURE USE OF
TOWN OF KENNEBUNKPORT, et al.,)	GOOSE ROCKS BEACH
)	
Defendants)	

Pursuant to Maine Rule of Civil Procedure 7(b) and the Court's Pretrial Orders, Defendant Town of Kennebunkport hereby moves *in limine* to exclude any documentary and testimonial evidence offered by the Plaintiffs regarding their present intent to permit members of the public, TMF Defendants or others to continue using Goose Rocks Beach (the "Beach") in the future. Whether or not any particular Plaintiff claims that he/she intends to permit such a use in the future is in no way probative of the issues presently before the Court, namely whether the public or TMF Defendants have acquired a legal right in Goose Rocks Beach by virtue of their longstanding use of the Beach.

BACKGROUND

Goose Rocks Beach is a recreational destination comprising two miles of sandy beach in Kennebunkport, Maine. As the Court is aware, this lawsuit attempts to resolve legal title to the stretch of sand beach between low water mark of the Atlantic Ocean and the sea wall, which is partially man-made and partially a natural formation of sand and vegetation. Presently before the Court during the first phase of trial are public use rights either by prescriptive easement or custom, or private prescriptive rights, pertaining to the entire two miles of beachfront property

beginning at the Batson River and stretching to the Little River.

The Plaintiffs' List of Trial Witnesses, submitted to this Court on July 19, 2012, indicates that the Plaintiffs intend to call certain plaintiffs and parties-in-interest to testify relating to the "use related claims" of the defendants Town of Kennebunkport, the TMF Defendants, and on the State's public trust defense. Specifically, the Plaintiffs have named the following witnesses: Robert Almeder, Charles Archer, Christopher Asplundh, Sr., Christopher Asplundh, Jr., Mark Celi, John Coughlin, Parker Dwelley, William Forrest, John Gallant, Jule Gerrish, Eugene Gray, Peter Gray, Edwina Hastings, Leslie Josselyn-Rose, Nancie Julian, Deborah Kinney, Donna Lencki, Susan Lewis, Terrence O'Connor, Kristen Raines, Barbara Recurrel, Linda Rice, Michael Sandifer, Robert Scribner, Claire Scribner, Matthew Sotir, Cornelius Vandervoorn, Lawrence Vandervoorn, Steven Wilson, and Beth Zagoren. At their depositions, many of these witnesses have testified that they do not object to reasonable recreational use of the Beach by the public, TMF Defendants and others, and they insist that they would continue to allow reasonable recreational use of the Beach in the future even if they were to prevail in this case.

ARGUMENT

"Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M.R.Evid.401. Evidence that is not relevant is inadmissible. M.R.Evid.402.

Presently before this Court during this first phase of trial are three narrow legal issues: whether the general public has acquired a right to use the Beach by either prescriptive easement or the doctrine of custom, and whether TMF Defendants have acquired private prescriptive rights to the Beach. In Maine, a prescriptive easement is created when there is continuous use for at

least twenty years under a claim of right adverse to the owner, and with his knowledge and acquiescence, or by a use that is open, notorious, visible, and uninterrupted, such that acquiescence can be presumed. *E.g.*, *Jost v. Resta*, 536 A.2d 1113, 1114 (Me. 1988). A claim of custom is premised typically on seven criteria, including several factors that look to the use of land in the past: the custom must be ancient and in place as long as anyone can remember, the use must have been exercised without interruption, the use must be peaceable and free from dispute, and the use must be reasonable. *E.g.*, *Bell v. Town of Wells*, 1987 Me. Super. LEXIS 256 ** 37-38 (Sept. 14, 1987)(citing *State ex. rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969)). Both of these legal issues require this Court to evaluate factual issues of what occurred in the *past*: specifically, how and when the Beach was used, who used it, what beachfront owners knew of that use, whether the use was in dispute, and whether the use was reasonable. Although these legal theories are distinguishable, they rely on similar facts, namely the historic use of the Beach, and the past knowledge or acquiescence by Plaintiffs and their predecessors in title to the historic use of the Beach.

Whether or not any particular plaintiffs or other beachfront owners intend, in the future, to permit members of the public to use or continue using that portion of Goose Rocks Beach that abuts their property is irrelevant to the Court's analysis of the use of the Beach in the past. Similarly irrelevant is evidence regarding whether any specific beachfront owner objects to any particular type of activity on the Beach at any point in the future. As such, this Court should exclude any testimony or any other documentary evidence offered by the Plaintiffs or other beachfront owners regarding their intent to permit use of the Beach by the public, TMF Defendants and others in the future.¹

¹ In the case of *Bell v. Town of Wells*, both the Law Court and the Superior Court noted the following: "The only open and continuous public use . . . proved to exist in this case for the 20 years preceding this

Furthermore, such evidence is additionally irrelevant because beachfront owners can only testify concerning their own intent regarding the future use of the Beach, and obviously no one can competently testify as to the intent of their heirs, assigns and successors-in-title with respect to the future use of the Beach. As such, any testimony regarding the future intent of plaintiffs and other beachfront owners concerning the use of the Beach will not help guide the Court's understanding of whether the Town, the public or TMF Defendants have acquired prescriptive rights, or rights by custom, in Goose Rocks Beach.

CONCLUSION

Accordingly, Plaintiffs should be precluded from offering evidence about their intent to allow use of the Beach in the future, as well as regarding any particular type of recreational activity, as it is irrelevant and not probative of the past use of Goose Rocks Beach.

Dated: August 9, 2012



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lawsuit . . . was the public's . . . consistent habit of strolling up and down the length of Moody Beach. All of the plaintiffs testified that they were perfectly willing to permit this, never complained about it and would continue to permit this activity in the future." *Bell v. Town of Wells*, 557 A.2d 168, 170 (quoting *Bell v. Town of Wells*, 1987 Me. Super. LEXIS 256 (Sept. 14, 1987)). Notwithstanding the claims of the plaintiffs in *Bell*, public use of Moody Beach is now virtually non-existent, which further demonstrates that plaintiffs' claims concerning their future intent in that case were not even probative of the future use of Moody Beach regardless of whether evidence of future was relevant in the first place.

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Defendants)

ORDER

And now, upon review of the Motion *in Limine* of Defendant Town of Kennebunkport, such Motion is GRANTED. Plaintiffs are hereby precluded from offering evidence or testimony about their intent to allow public or private use of Goose Rocks Beach in the future, including but not limited to evidence or testimony regarding particular types of recreational activity.

Dated:

Justice, Superior Court