STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Docket No. BCD-24-539

RICHARD G. TAPPEN, SHEILA M. TAPPEN, and TAPCO, LLC

Appellants

v.

CLARK T. HILL, MEREDITH A. INOSENCIO, RICHARD S. HILL, DIANNA S. KILGALLEN, BRIAN KILGALLEN, and HILL FAMILY COTTAGE CORP.

Appellees

On Appeal from the Business and Consumer Court

BRIEF OF APPELLANTS

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INTRODUCTION

This case arises from a dispute between neighbors in the Popham Beach Estates subdivision in Phippsburg Maine over the use of the beach in front of Plaintiffs' summer cottage. Between 1994 and 2021 Defendants acquired and improved several "back lots" in the subdivision and created five rental units. Defendants' renters are instructed to access the beach by using a path that crosses private property owned by an individual who is not a party to this case. That path deposits the renters on the beach right next to Plaintiffs' cottage. When the renters reach the beach, they often set up camp in front of Plaintiffs' cottage.

When Plaintiffs asked Defendants to discontinue this pattern of activity, Defendants argued that they and their renters had acquired rights to use the beach by the doctrines of prescriptive easement, and easement by subdivision and sale. Plaintiffs brought this action to clarify their property rights. The trial court ruled that "[t]he prescriptive rights claims of the 'back lot' owners fail." The trial court also ruled that the back lot owners had acquired certain implied easement rights by subdivision and sale. Plaintiffs are appealing the portion of the trial court's ruling that granted Defendants an easement by subdivision and sale to use the beach.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs and Defendants own property in Phippsburg Maine which is depicted on a subdivision plan entitled "Plan Showing Property of Popham Beach Real Estate & Hotel Company at Popham Beach, Maine, 1893" and recorded in the Sagadahoc County Registry of Deeds (the "Registry") at Plan Book 1, Page 9 (the "1893 Plan"). A. 75 ¶ 1. Plaintiffs' and Defendants' property in Phippsburg also is depicted on a subdivision plan entitled "Plan Showing Property, Popham Beach Estates, Inc. Popham Beach, Maine, 1922" and recorded in the Registry at Plan Book 2, Page 53 (the "1922 Plan"). A. 76 ¶ 2.

All of the deeds in the Plaintiffs' and Defendants' chains of title describe the property being conveyed only by reference to a lot number on the 1893 Plan. A. 85, 86; Trial Tr. Vol 1, 47:15 – 47:20; Trial Exs. 9, 10, 11, 12, 13, 14, 15,16, 17, 18. One or more of the Plaintiffs own Lot 205 by deed and Lot 206 by adverse possession. Trial Tr. Vol. 1, 42:17 – 43:14. Lots 205 and 206 are depicted on the 1893 Plan as being bounded on their south side by a feature labeled "Sea Wall Beach" on that plan. A. 81; Trial Tr. Vol. 1, 25:1- 25:21, 47:14 – 48:11. One or more of the Defendants own Lots 74, 75, 76, 77, 177, 179, 180, 181, 182, 185, 200, 202, 203. A.76-77; Trial Exs. 9, 10, 11, 12, 13, 14, 15,16, 17, 18. None of the

numbered lots owned by Defendants are bounded by Sea Wall Beach.[1] *See* A. 81, 82. None of the deeds at issue contain any language granting lot owners any easement rights to Sea Wall Beach or reserving any rights in Sea Wall Beach for use by lot owners in the Popham Beach Estates subdivision. Trial Tr. Vol. 1, 54:20-55:21; *see also* Trial Exs. 9, 10, 11, 12, 13, 14, 15,16, 17, 18. In fact, Sea Wall Beach is not mentioned at all in any of the relevant deeds. *See Id.*

Between 1994 and 2021 each of the Defendants other than Defendant Hill Family Cottage Corporation (the "Individual Defendants") acquired and improved one or more numbered lots in the subdivision.[2] A. 77, ¶¶ 11-14; A. 79, ¶¶ 23-33; Trial Exs. 9, 10, 11, 12, 13, 14, 15. None of those lots are beachfront lots. *See* A.81, 82. The Individual Defendants operate a short-term rental business from the five houses on those lots. Trial Tr. Vol. 1, 210:23 - 211:24; Ex. 26. The Individual Defendants' renters are instructed to access the beach by walking across Lot 204 which is owned by Carol Reece who is not a party to this action. A. 79, ¶ 22; A. 88; Trial Tr. Vol. 1, 196:3 – 196:11. The path across Lot 207 terminates at Sea Wall Beach near the boundary between Lots 206 and 207. A. 88. When the renters reach

[1] Lot 77 which is owned by Defendant Hill Family Cottage Corporation was extended to the high water line in 1949 when Harriet Hill purchased the property between the southern boundary of lot 77 and the high water line from the successor-in-title to the developer. A. 76, ¶ 7, 89; Trial Tr. Vol. 1, 52:22 – 53:19.

[2] Defendant Hill Family Cottage Corporation ("HFCC") owns a cottage located on Lot 76 that has been in existence since the 1940s. Trial Tr. Vol. 2, 35:1 – 35:6; Trial Exs. 16, 17, 18. The Individual Defendants own the five rental properties. Trial Exs. 9, 10, 11, 12, 13, 14, 15.

the beach, they often turn right and set up their blankets, chairs, umbrellas, and other recreational equipment in front of Plaintiffs' cottage on Lot 205. Trial Tr. Vol. 1, 197:14 – 200:3; Trial Exs. 24, 25.

In 2021, Plaintiffs obtained a release deed from Mary Stimson McNamara, the successor-in-title to the original developer for, *inter alia*, any land owned by Ms. McNamara located between the southern boundary of Lots 205 and 206 and the low tide line of the Atlantic Ocean. A. 76, ¶ 3; A. 83. By letter dated April 14, 2021, Plaintiffs asked the Individual Defendants to stop their renters from trespassing on Plaintiffs' property. A. 31. In response, by letter dated February 4, 2022, the Individual Defendants argued that they and their renters had acquired rights to use Sea Wall Beach by the doctrines of prescriptive easement, and easement by subdivision and sale. A. 44-45. This litigation followed.

The single-count Complaint in this action asked the trial court to declare that none of the Defendants has the right to use, cross over, or encroach upon the property owned by the Plaintiffs. A. 24-45. The Defendants filed two separate pleadings entitled "Answer and Counterclaims." A. 46, 62. One pleading was filed by the Hill Family Cottage Corporation ("HFCC") and the other by the Individual Defendants. *Id.* Both pleadings included an affirmative defense and a counterclaim based upon the theory of "easement by subdivision and sale" – i.e. "[t]he recording of the Popham Beach estates Plan and subsequent conveyance of parcels within the

subdivision containing deed references to said plan creates an implied easement by subdivision and sale over [Sea Wall Beach]." A. 56, 70-71. In the trial court's Judgment, the court identified seven issues for decision. A. 9-10. This appeal addresses issues five and six which are related to the easement by subdivision and sale counterclaim. Issues five and six as identified and decided by the trial court are:

> 5. Whether any of the Defendants enjoy an implied easement by subdivision and sale over any portion of the property that Plaintiffs purchased from Mary McNamara between the low tide line and the southerly boundary of Lots 204, 205, 206, 207 and 208.
>
> 6. If any of the Defendants enjoy an implied easement over any portion of the property, then what is the location of the boundary between Lot 205 and the boundary of Seawall beach (sic) as depicted on the plan.

A. 10

STATEMENT OF ISSUES PRESENTED

1. Did the trial court err when it determined that the 1893 Plan contained sufficient evidence to prove Defendants' counterclaim that the developer of the Popham Beach estates subdivision intended to permit unfettered recreational use of Sea Wall Beach by all lot owners in the subdivision.
2. Did the trial court err when it rejected Defendants' counterclaim that the developer of Popham Beach Estates intended for Sea Wall Beach to include additional land above the high tide line but then declined to rule as a matter of law that the upland boundary of Sea Wall Beach is the high tide line.

SUMMARY OF ARGUMENT

The trial court ruled based upon the four corners of the 1893 Plan that the developer of the Popham Beach Estates subdivision intended to dedicate the area labeled as Sea Wall Beach on the 1893 Plan for unfettered recreational use by the owners of the lots in the subdivision. A. 19. That ruling was erroneous because it was based solely upon the trial courts' conclusion that "the court cannot infer [from the 1893 Plan] that the Developer's plan was to limit residents' use to 'fishing fowling and navigating' below the high tide line". *See Id*.

Because the existence of an implied easement to use Sea Wall Beach for recreational purposes was asserted by Defendants as an affirmative defense and also as a counterclaim, the Defendants carried the burden of proof, and the trial court was obligated to rule against the Defendants if they failed to provide affirmative proof of the elements of that claim – i.e. affirmative proof that the developer intended to create a recreational easement for use by the lot owners. Because the trial court found that it was unclear from the 1893 Plan whether the developer intended to permit access to Sea Wall Beach for any purposes other than "fishing, fowling and navigating" as permitted by the common law, the trial court should have ruled against the Defendants on the counterclaim and held that there was no implied easement for use of Sea Wall Beach for any purposes other than fishing, fowling, and navigating.

Similarly, the Defendants argued as part of their implied easement counterclaim that the area labeled Sea Wall Beach on the 1893 Plan extends to the north past the high tide line and includes some of the sand dunes on Lots 204 through 208. A. 19-21. The trial court found that, based upon the evidence in the record, it could not adopt Defendants' theory regarding the location of the upland boundary of Sea Wall Beach "without resorting to speculation." A. 20-21. Based upon that finding, the trial court should have ruled that the upland boundary of Sea Wall Beach is the high tide line which would be consistent with the accepted legal definition of "beach" in the State of Maine as the area between the low tide and high tide lines. The trial court erred by, instead, ruling that it could not determine the location of the upland boundary of Sea Wall Beach because neither party offered sufficient evidence to prove the precise location of that boundary. *See* A. 20-21. This was an error of law because the burden was on the Defendants to prove that the upland boundary of Sea Wall Beach as depicted on the 1893 Plan is located somewhere other than the high tide line where the legal definition of a "beach" under Maine law would place it.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED IN FAVOR OF THE DEFENDANTS ON THEIR CLAIM FOR AN IMPLIED EASEMENT WHITHOUT ANY AFFIRMATIVE PROOF IN THE RECORD OF THE INTENT OF THE DEVELOPER TO CREATE A RECREATIONAL EASEMENT

There is no mention of Sea Wall Beach or a recreational easement in any of the relevant deeds. *See* Trial Exs. 9, 10, 11, 12, 13, 14, 15,16, 17, 18. As the trial court correctly observed, when a deed refers to a plan, that plan is incorporated by reference into the deed. *See Sleeper v. Loring*, 2013 ME 112, ¶13, 83 A.2d 769, 774. As the trial court also correctly observed, in the instant case the only evidence of the developer's intent is "the plan itself." A. 19. Maine law recognizes a presumption that the depiction of roads on a subdivision plan indicates the developer's intent that any lot owners whose deed describes the property by reference to the plan has a right to use the roads depicted thereon. *See Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274, 278 (Me. 1968). This Court has decided several cases in which it was argued that an implied easement for the use of something other than a road had been created by "subdivision and sale" but the Court has consistently rejected that argument. *See e.g. Harris v. South Portland*, 118 Me. 356, 358, 108 A. 326, 327 (1919); *Arnold v. Boulay*, 146 Me. 116, 120, 83 A.2d 574, 576-77 (1951)

In *Arnold*, 146 Me. at 117-22, this Court held that an area depicted on a subdivision plan as a road could be used for purposes other than travel. However,

the land at issue in *Arnold* was clearly labeled "Lake Shore Road" on the subdivision plan. *Arnold*, 146 Me. at 117-18. Although the dicta in *Arnold*, which was relied upon by the Plaintiffs and the trial court, indicates that easement rights implied by a subdivision plan could include "streets, parks, squares or … other modes of general nature," the ruling in *Arnold* was limited to the use of an area depicted on the subdivision plan as a street. *Arnold,* 146 Me. at 121. The trial court's Judgment in this case stretches this Court's dicta in *Arnold* to the breaking point by ruling that a developer expresses a "clear intent" to create recreational easement rights in a beach merely by labeling the area as a beach on a subdivision plan and providing subdivision roads to access that beach. Even if this Court was inclined to expand the scope of easements that may be implied from subdivision plans beyond just subdivision roads, the factual record in this case does not support such an expansion.

Courts in other jurisdictions have held that certain easement rights can be created by "subdivision and sale" but only if the subdivision plan clearly and unambiguously indicates the intent of the developer to create public spaces for use by lot owners. In *Lenning v. Ocean City Ass'n*, 41 N.J. Eq. 606, 7 A. 491, 493 (1886), the court relied upon numerous pieces of evidence to ascertain the intent of the developer including the plan of the development which included references to an "auditorium," areas to be "kept open," and a "camp ground reserved for religious services and tenting purposes." Similarly, in *Bacon v. Onset Bay Grove Ass'n*, 241

Mass. 417, 136 N.E. 813, 815 (1922), the plan at issue contained references to "a camp ground, many ways, parks, groves, squares, and reserved spaces." Based upon that evidence, the court held that the developer intended to reserve the two areas labeled "Pavilion Park" and "Union Square" for common use by the lot owners in the development.

It makes sense that a developer can indicate his or her intent to create easement rights by expressly labeling certain areas within a subdivision to be "kept open" or designating certain areas as a "park" or a "square" and the use of such a label may be all that is necessary to demonstrate the developer's intent to set those areas aside for common use because parks and squares are understood to be "public" spaces. However, none of the land at issue in this case is labeled on either the 1893 Plan or the 1922 Plan as open space or as a "park" or "square." *See* A. 81, 82. The trial court relied solely upon the label Sea Wall Beach and the fact that the developer created roads leading to Sea Wall Beach to reach the "conclusion" that "[t]he court cannot infer that that the Developer's Plan was to limit the residents' use to 'fishing, fowling and navigating' below the high tide line."[3] A. 19.

Significantly, the trial court did not find that the 1893 Plan contained evidence sufficient to prove that the developer intended to create a recreational easement; it

[3] Maine law historically provides that the public has a right to engage in fishing, fowling, and navigation (and perhaps certain "other recreational uses [that] have developed and received public acceptance") in the "intertidal zone" between high water and low water regardless of who owns the land. *See McGarvey v. Whittredge*, 2011 ME 97, P 23-58, 28 A.2d 620, .627-636.

merely found that the evidence did not prove a lack of such an intent. A. 19. The trial court's finding of an implied easement was based solely upon the lack of evidence to negate that implication. That approach stands the burden of proof on its head. Defendants asserted an affirmative defense and a counterclaim based upon their claim that they were the beneficiaries of a recreational easement evidenced by the 1893 Plan. A. 51, 55-56, 66, 70-71. It is clear from the 1893 Plan that the developer intended to provide access to Sea Wall Beach. *See* A. 81. What is not clear is whether the developer intended to provide the lot owners with any recreational use rights beyond the scope of the fishing, fowling, and navigating rights afforded by the common law. Accordingly, the trial court erred by granting such rights to the Defendants.

Moreover, a comparison of the 1893 Plan and the 1922 Plan demonstrates that the developer did not intend to attach any particular significance to the label Sea Wall Beach other than to identify a physical feature on the ground. There are numerous other features on the 1893 Plan that one could argue appear to be designated as "public" spaces. such as "Bath House" "Rockledge Hotel" "Sand Dunes" "Woods" "Pine Grove" and "Silver Lake." A. 81. Although these features were labeled on the 1893 Plan, many of those labels do not appear on the 1922 Plan. A. 82. The "Woods" and the "Pine Grove" were "converted" into numbered lots on the 1922 Plan as was the unlabeled wooded area depicted on the 1893 Plan to the

northeast of "Silver Lake" and the area labeled "Rockledge Hotel." A. 81, 82. The labels on the "Sand Dunes" and "Bath House" were simply removed. A. 81, 82.

These changes which appear on the 1922 Plan must have occurred after some of the lots depicted on the 1893 Plan had been sold with reference to that plan, because several lots are marked "sold" on the recorded 1922 Plan. A. 82. Thus, it is clear that the developer did not intend to reserve the "Woods," the "Pine Grove", or the "Rockledge Hotel" for use by all lot owners and was not prohibited from "converting" those areas into numbered lots and selling those newly created lots even after selling lots based upon the 1893 Plan that depicted and labeled them as undeveloped, wooded areas. *See* Trial Tr. Vol. 1, 56:16 – 58:9.

Moreover, the record indicates that, when Defendants were asked by Mary McNamara in 2015 to stop providing their renters with access to "Silver Lake" they complied with that request. Trial Tr. Vol 1, 215:4 – 216:20; Trial Tr. Vol. 2, 5:24 – 6:22; Trial Ex. 32. The trial court erroneously assumed that because the intertidal zone is labeled as Sea Wall Beach, the developer intended it to be preserved as a recreational area to be used by all lot owners, but that assumption is inconsistent with the treatment by the developer of the "Woods" the "Pine Grove," and the "Rockledge Hotel" and with the understanding of Ms. McNamara and the Defendants in 2015 with regard to "Silver Lake."

The trial court tacitly conceded in the Judgment that the mere fact that a particular location is labeled Sea Wall Beach on the 1893 Plan is insufficient to support a finding that the developer intended to create an easement for recreational use of the beach by the lot owners in the subdivision beyond the uses permitted by the common law, and the trial court erred when it ruled that the fact that it could not "infer" from the 1893 Plan that the developer intended to limit the use of the beach to the legally permitted uses of fishing, fowling, and navigating was sufficient to support the creation of a broader recreational easement. *See* A. 19. Defendants had the burden to prove the intent of the developer and, when they were unable to do so by affirmative evidence in the record, the trial court should have denied their counterclaim for easement by subdivision and sale. *See Luce Company v. Hoefler*, 464 A.2d 213, 215 (Me. 1984) ("The party who bears the burden of proving the factual basis for a claim or affirmative defense will suffer an adverse judgment if the factfinder is merely not persuaded by that party's evidence.")

II. THE TRIAL COURT ERRED WHEN IT REJECTED DEFENDANTS' ARGUMENT REGARDING THE LOCATION OF THE UPLAND BOUNDARY OF SEA WALL BEACH BUT REFUSED TO RULE THAT, AS A MATTER OF LAW, SEA WALL BEACH CONSISTS OF THE AREA BETWEEN THE LOW TIDE LINE AND THE HIGH TIDE LINE

As part of Defendants' counterclaim, they argued that the area on the 1893 Plan labeled Sea Wall Beach includes not just the intertidal zone but also a portion of the "dry sand" above the high tide line. A. 19-21, 55-56, 70-71. As a matter of

law, this Court should limit the geographic scope of Defendants' use of Sea Wall Beach (regardless of whether that use is limited to fishing, fowling, and navigating or is expanded to include additional recreational activities) to the intertidal zone between the low tide line and the high tide line because the trial court ruled that the Defendants failed to prove an alternative location of the upland boundary of Sea Wall Beach. Having determined that Defendants failed to meet their burden of proof, the trial court erred when it declined to adopt Plaintiffs' position that, in the absence of proof to the contrary, the feature labeled Sea Wall Beach on the 1893 Plan as a matter of law extends from the low tide line to the high tide line. *See* A. 19-22.[4]

In *Almeder v. Town of Kennebunkport*, 2019 ME 151 ¶ 8, 217 A.3d 1111, 1116, this Court defined the term "beach" as "the sand lying between the lines of the high water and low water over which the tide ebbs and flows." In *Almeader*, the Court noted that it first adopted this definition in *Hodge v. Boothby*, 48 Me. 68, 71 (1861). Id. In *Hodge*, 48 Me. at 71, the Court cited to *Doane v. Willcutt*, 71 Mass.

[4] In the Complaint, Plaintiffs sought to prohibit Defendants from using all of the land Plaintiffs had acquired from Ms. McNamara through the release deed dated March 16, 2021 (A. 83). A. 25 ¶¶ 2, 29-30, 83-84. At trial, Plaintiffs' expert witness testified that the release deed did not convey ownership of any land above the high water line in front of Lots 204-207 because Ms. McNamara did not own that land. Trial Tr. Vol. 1, 43:21 – 45:24. Plaintiffs' expert testified that Lots 204-207 extended to the high water line, and that only Sea Wall Beach (which consists of the area between the high water line and the low water line) was owned by Ms. McNamara at the time she executed and delivered the release deed. *Id.*; Trial Tr. Vol. 1, 45:25 – 48:11. Plaintiffs adopted this analysis in their closing argument and urged the trial court to limit the geographic scope of any implied easement to use Sea Wall Beach to the intertidal zone between high water and low water. Trial Tr. Vol. 2, 158:17 – 160:17, 166:2 – 168:9.

328 (1855) for the proposition that "the fixed and definite meaning of the word 'beach' when used in reference to places anywhere in the vicinity of the sea" is "that part of the land lying between the lines of high water and low water over which the tide ebbs and flows." In *Doane*, the Supreme Judicial Court of Massachusetts stated that, when interpreting the "natural force and effect" of language used in a deed, "[t]he term 'beach' we consider, when used in reference to places anywhere in the vicinity of the sea, or arms of the sea, as having a fixed, definite meaning, comprising the territory lying between the lines of high water and low water, over which the tide ebbs and flows." 71 Mass. at 335. Thus, the term "beach" has had a clear legal definition since at least 1855.

In the instant case, Defendants argued to the trial court that the developer of Popham Beach Estates intended the reference in the 1893 Plan to Sea Wall Beach to apply to an area different, and larger, that the common law definition of beach. The trial court found that there was inadequate evidence in the record to support that argument, and that it could not adopt that argument "without speculation." A. 20. But, instead of accepting Plaintiffs' argument that, in the absence of evidence of contrary intent by the developer, Sea Wall Beach as labeled by the developer on the 1893 Plan should be treated as a beach as defined by Maine law and, thus, bounded by the low tide line and the high tide line, the trial court concluded that it also could not adopt that argument "without speculation" and, consequently, declined to

determine the location of the upland boundary of Sea Wall Beach. A. 21-22. That was a clear error of law.

Defendants had the burden to prove that the developer intended to define Sea Wall Beach in a way that deviated from the commonly accepted legal definition of a beach. Defendants failed to meet that burden. Accordingly, the trial court should have adopted the Plaintiffs' position that the upland boundary of Sea Wall Beach is the same as the upland boundary of every other beach in the State of Maine – the high tide line. *See Luce*, 464 A.2d at 215.

CONCLUSION

For the reasons set forth above, the Court should reverse the trial court's ruling that Defendants have an easement by subdivision and sale to use Sea Wall Beach for recreational purposes and rule that Defendants' use of Sea Wall Beach is limited to fishing, fowling, and navigating. The Court also should limit the geographic scope of Sea Wall Beach to the intertidal zone.

Dated in Portland, Maine this ___ day of March 2025.

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CERTIFICATE OF SERVICE

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