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

REPLY BRIEF OF APPELLANTS

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I. THE BURDEN OF PROOF FALLS SQUARELY UPON THE HILLS

The Hills have mischaracterized the procedural posture of this case and conflated the burden of proof applicable to the Tappens' claims with the burden of proof applicable to the Hills' affirmative defenses and counterclaims. The Tappens commenced this litigation seeking to exclude the Hills and their short-term rental customers from the land the Tappens own in the Popham Beach estates subdivision. A. 24-45. That land includes Lots 205 and 206 in the subdivision as well as additional land obtained by release deed from Mary Stimson McNamara in 2021. A. 10, 25, 83, 85. The Hills did not directly challenge the Tappens' claim of ownership. Instead, the Hills asserted affirmative defenses and counterclaims seeking to obtain a recreational easement over Sea Wall Beach and all other land in the subdivision that was not part of a numbered building lot based upon the legal theories of prescriptive easement and easement by subdivision and sale. A. 46-74.

This Court stated in *Markley v. Semle*, 1998 ME 145, ¶5, 713 A.2d 945, 947 (quoting *Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980)), that "[t]he party who asserts that affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion." In the case at bar, it is the Hills who claim that there is a recreational easement created by prescription or by "subdivision and sale" that entitles them to use Sea Wall Beach.

Thus, the burden fell upon the Hills to prove at trial the existence and scope of their claimed easement.

The trial court ruled that the Hills have an implied easement by subdivision and sale to use Sea Wall Beach for recreational purposes but denied their claim to an easement by subdivision and sale over any other property in the subdivision. A. 17-19. The trial court's ruling that the developer of the subdivision intended to create a recreational easement on Sea Wall Beach was not supported by the record evidence and should be reversed by this Court.

The trial court also ruled that neither the Tappens nor the Hills presented sufficient evidence at trial to demonstrate the location on the face of the earth of the boundary line between Sea Wall Beach and the numbered subdivision lots at issue and declined to decide that issue. A. 19-22. However, because the geographic scope of the Hills' easement is limited to Sea Wall Beach, because the word "beach" refers as a matter of law to the intertidal zone, and because the Hills have failed to prove that the term Sea Wall Beach was intended by the developer of the subdivision to refer to anything other than a "beach" as defined by Maine law, it was not necessary for the trial court to rely upon record evidence to determine the location on the face of the earth of the boundary line between Sea Wall Beach and the numbered lots in order to rule that the Hills' recreational easement, if such

an easement exists at all, is limited to the intertidal zone, and the trial court erred by failing to do so.

II. RULE 52 DOES NOT PRECLUDE THE TAPPENS' APPEAL OF THE TRIAL COURT'S RULING THAT THE DEVELOPER OF THE SUBDIVISION INTENDED TO CREATE A RECREATIONAL EASEMENT

The Hills erroneously claim that the Tappens have waived their right to appeal because they did not file a Rule 52 motion asking the trial court to make additional findings of fact. Red Brief at 15-18. None of the cases cited by the Hills support that claim. Those cases merely stand for the proposition that, in the absence of a Rule 52 motion, the Law Court will presume that the trial court found sufficient facts to support its legal conclusions "if those findings are supported by competent evidence in the record." *See In re Christian D.*, 2025 ME 16, ¶ 7, 331 A.3d 409. The basis of the Tappens' appeal of trial court's ruling that the developer of the subdivision intended to create a recreational easement on Sea Wall Beach is that the record evidence is not sufficient to support that ruling. *See* Blue Brief at 12-17. There was no need for the Tappens to file a Rule 52 motion in this case because: 1) the trial court's ruling was a legal conclusion not a factual finding as argued by the Hills; and 2) the trial court expressly identified the factual basis for its ruling in the Judgment. *See* A. 19.

It is well settled law that the interpretation of unambiguous deed language (including language on a plan that is incorporated by reference into a deed) is a

matter of law. *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, ¶ 26, 290 A.3d 79, 89. When the language of a deed (or a plan) is unambiguous, the court should focus on the four corners of the document and should not speculate about the grantor's actual or probable objectives. *Sleeper v. Loring*, 2013 ME 112, ¶ 16, 83 A.3d 769. The trial court clearly stated in the Judgment that its legal conclusion regarding the intent of the developer was based upon "review of the plan itself." A. 19. There is no other evidence in the record that indicates the intent of the developer. Thus, the trial court's interpretation of the plan is ripe for review by this Court as a matter of law.

The Hills erroneously argue that by failing to file a Rule 52 motion the Tappens failed to raise the issue of the intent of the developer at trial and, thus, are precluded from appealing the trial court's decision on that issue. Red Brief at 16-17. None of the cases cited by the Hills in support of this argument involved a failure to file a Rule 52 motion. In every one of those cases an appeal was filed on an issue that had not been tried in the court below.

In the instant case, the issue of the developer's intent to create a recreational easement was raised at trial as demonstrated by the trial court's consideration and rejection of the opinion of the Tappens' expert witness that the words Sea Wall Beach on the Plans are nothing more than the labeling of a physical feature on the face of the earth. *See* Trial Tr., Day 1, 56:16-58:9. The trial court also expressly

listed in the Judgment the issue of the creation of an "implied easement by subdivision and sale" over the land "between the low tide line and the southerly boundary of Lots 204, 205, 206, 207, and 208" as one of the issues it was charged with deciding. App. 10. The record evidence irrefutably demonstrates that the developer's intent to create a recreational easement was a central issue at trial. Accordingly, the Tappens' appeal of the trial court's ruling that the developer intended to create a recreational easement is properly before this Court.

III. THE RECORD EVIDENCE IS INFUFFICIENT TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE DEVELOPER INTENDED TO CREATE A RECREATIONAL EASEMENT

The trial court concluded that the depiction on the 1893 and 1922 Plans of certain roads leading to the beach indicated the developer's intent to provide beach access. A. 19. This is a legal interpretation of the deed language (including the plans referenced in the deeds) that falls within the purview of the trial court. However, the trial court erred as a matter of law when it declared that the developer also must have intended to create a ***recreational*** easement over the beach based upon its factual finding that it could not infer "that the Developer's Plan was to limit the residents' use to 'fishing, fowling and navigating' below the high tide line." Regardless of whether that factual finding by the trial court was based solely upon the deeds and the Plans or upon some other record evidence as well, it is insufficient as a matter of law to form the basis of the trial court's ruling

that the developer intended to create an easement for recreational use of the beach. There is no factual basis for that legal conclusion anywhere in the record.

The mere fact that the trial court could find no factual basis to support the conclusion that the developer intended to limit the use of the beach to the historical uses of fishing, fowling, and navigating is not sufficient to support the trial court's conclusion that the developer intended to create a recreational easement. There must be some evidence in the record that affirmatively supports that conclusion, not just a lack of evidence to support a contrary conclusion. *See In re Christian D.*, 2025 ME 16, ¶ 7, 331 A.3d 409 (holding that the appellate court will infer that the trial court found sufficient facts to support its legal conclusions but only if those findings "are supported by competent evidence in the record").

The Hills argue that a group of historical photos in the record provides additional evidence of the developer's intent and supports the trial court's legal conclusion, but that is not correct. *See* Red Br. At 8. Every one of those photographs is dated years after the original subdivision plan was created in 1893. A. 92-97. The earliest photo is from 1907 and it depicts an Excursion Steamer, not someone using the beach. A. 92. Similarly, the portions of the Trial Transcript cited by the Hills in support of their argument all relate to use of the beach by the Hill family many years after the creation of the subdivision. *See* Red Br. at 8. The Hills rely upon testimony from Mr. Tappen who was born in 1950, from Mr.

Richard Hill who was born in 1944, from Dianna Kilgallen (nee Hill) who was born in 1983, and Meredith Inosencio (nee Hill) who was born in 1980. *See* Red Brief at 8 and Trial Transcript citations therein. Thus, there is no evidence whatsoever in the record regarding the use of Sea Wall Beach at or near the time the subdivision was created.

Moreover, it is clear from the photographs in the record that the use of the subdivision property was very different in the late 1800s and early 1900s from the use today. *See* A. 90, 92. There was a hotel on the property and an excursion steamer docked on the river. Any "public" use of the beach for recreational purposes was most likely by hotel guests or by people who paid to use the "bath house" depicted on the 1893 Plan. Indeed, the 1893 Plan is titled "Plan Showing Property of Popham Beach Real Estate & Hotel Company at Popham Beach Maine."

It was not until the subdivision plan was redrawn in 1922 that the words "Popham Beach Estates, Inc." first appeared. The Hills argue that this appellation indicates an intent to "make beach access a defining feature of the subdivision." Red Br. 19. It is significant, however, that the 1893 and 1922 Plans contain labels for certain physical features including "Sea Wall Beach" and "Riverside Beach" but no make mention whatsoever of "Popham Beach" other than in the title block. Thus, the plain language of the Plans indicate that "Popham Beach, Maine" was

intended to refer to a general "neighborhood" while "Sea Wall Beach" and "Riverside Beach" were intended to refer to particular physical features on the face of the earth.

Finally, the Hills argue that the Tappens have wrongly urged this Court to adopt a rule that "easements implied from features on a subdivision plan can only apply to roads." Red Brief at 21-24. That is not at all what the Tappens have argued. It is the Tappens' position that roads are the only features that are entitled to a presumption of dedication to public use merely by being identified on a subdivision plan. Blue Brief at 12-17. Other public uses may be created by features depicted on a subdivision plan but only if the plan clearly indicates the developer's intent to do so. For example, a notation that an area is to be "kept open" or used as a "park" or a "square" can indicate the developer's intent to create a public space. *See* Blue Brief at 13-14. However, the mere fact that physical features such as beaches, sand dunes, woods, and lakes are labeled on a plan is insufficient as a matter of law to demonstrate an intent by a developer to create a public easement. *See* Blue Brief at 14-16. If that was not the case, the Maine courts would soon be flooded with litigation by subdivision lot owners seeking to establish implied easement rights to use every beach, grove, field, woods, and lake depicted on a subdivision plan.

In short, there is no evidence anywhere in the record to support the trial court's legal conclusion that the developer of the subdivision intended to grant a right to each lot owner to make unlimited recreational use of the area labeled on the Plans as Sea Wall Beach. Accordingly, the trial court erred when it interpreted the Plans to indicate that the developer intended to create a recreational easement for the use of Sea Wall Beach by purchasers of lots in the subdivision, and that ruling should be reversed by this Court.

IV. THE HILLS FAILED TO PROVE THAT THE TERM "BEACH" WAS INTENDED BY THE DEVELOPER OF THE SUBDIVISION TO MEAN ANYTHING OTHER THAN THE INTERTIDAL ZONE

It is well settled law that, when interpreting a deed, the court must give unambiguous words their plain meaning. *Sleeper v. Loring*, 2013 ME 112, ¶ 16, 83 A.3d 774-775. The word "beach" has had a specific legal definition in the State of Maine since at least 1861. *Hodge v. Boothby*, 48 Me. 68, 71 (1861) ("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 high and low water over which the tide ebbs and flows.") The testimony offered by the Tappens' expert witness regarding the location of the boundary between Sea Wall Beach and the subdivision lot owned by TAPCO was consistent with this legal precedent. Trial Transcript, Day 1, 43:21-48:1. The Hills did not offer any facts to demonstrate that the developer of the subdivision intended the words Sea Wall

Beach on the Plans to refer to any geographic feature other than a "beach" as defined by Maine law.

The Hills argue that in *Almeader v. Town of Kennebunkport*, 2019 ME 151 ¶ 8, n.1, 217 A.3d 1111, 1116, this Court held that the term "beach" can under some circumstances be used to refer to areas other than the intertidal zone. Red Br. at 29. However, in the instant case there is no evidence in the record to indicate that the developer intended the words Sea Wall Beach on the Plans to refer to anything other than a "beach" as defined by Maine law. In the absence of any such evidence, the trial court was compelled to find that the upland boundary of Sea Wall Beach is the high water mark, just like every other "beach" in the State of Maine.

The Tappens did not have the burden to prove that to be true. It is the default meaning of the word "beach" as a matter of legal precedent. In order to overcome that legal precedent, the Hills had the burden to prove that the developer of the subdivision intended for the particular beach depicted on the Plans as Sea Wall Beach to encompass some area other than the intertidal zone. There is no such evidence in the record. Accordingly, the trial court erred when it failed to rule as a matter of law that upland boundary of Sea Wall Beach as depicted on the Plans is the high tide line.

The Hills also argue that the record evidence is not clear regarding the boundaries of the subdivision lots upland of Sea Wall Beach and that this lack of clarity means that the Tappens cannot prove their ownership of the land at issue. Red Brief at 29-30. That argument is a classic red herring. It is the Hills who asserted the existence of a recreational easement, and it is their burden to prove the scope and location of that easement. The location of the boundaries of the subdivision lots is irrelevant.

With regard to the two subdivision lots at issue in this case – Lots 205 and 206 - the Tappens obtained a release deed from Ms. Stimson McNamara in 2021 that grants them, *inter alia*, fee ownership of all land between the lot lines as depicted on the Plans and the low water line of Sea Wall Beach. A. 83-84. Thus, with regard to the two lots at issue here, it is undisputed that the Tappens own all of the land between Hunnewell Avenue and the low water line based upon the deeds to their numbered lots and the release deed they obtained from Mary Stimson McNamara, and that is true regardless of where on the face of the earth the boundaries of Lots 205 and 206 are located. *See* A. 83-84. The only question before the trial court was to what extent a recreational easement exists that permits the Hills to use any part of that land. The trial court erred as a matter of law when it ruled that the developer of the subdivision intended to create a recreational easement for uses other than fishing, fowling, and navigation and when it failed to

rule that any use of Sea Wall Beach by the Hills or any other owners of lots in the subdivision for any purpose is limited to the intertidal zone. Accordingly, this Court should reverse those rulings.

Dated in Portland, Maine this 17th day of June 2025.

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