MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. BCD-25-259

MONTAGU REID HANKIN et al.

Plaintiffs/Appellees

v.

SARAH B. SEWALL, et al.

Defendants/Appellants

APPEAL FROM THE BUSINESS AND CONSUMER COURT

BRIEF OF APPELLANTS SARAH B. SEWALL and THOMAS P. CONROY

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises out of the cherished, coastal, summer community of Small Point in Phippsburg, Maine. (A. 52-53, 147-49.) Like so many similarly situated areas in Maine, the land relevant to this dispute has been passed on among family and close friends (who refer to themselves as "Small Pointers") over the course of four generations. Central to this appeal are questions surrounding the use of a private, dirt road—the Navy Road—which crosses lots owned by parties to this appeal.

The legal issues present are relatively straightforward and boil down to determining whether the trial court erred in granting prescriptive easements to use Navy Road. However, the factual context and procedural history of the case are anything *but* straightforward, due to the number of properties, the history of intergenerational conveyances, and the familial fondness for carrying on certain names. In short, it is easy to get lost in the facts of this matter and Defendants endeavor to simplify the background to the extent possible while providing this Court an overview of the parties, properties, and procedure involved.

The Parties

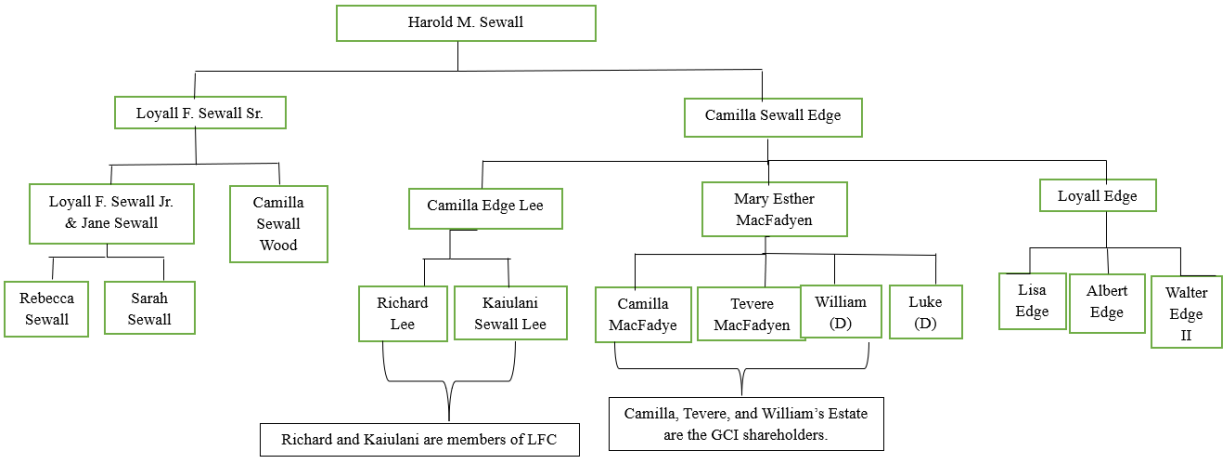
Each of the parties to this dispute own properties on Small Point, as depicted in the Tax Maps at pages 163 and 164 of the Appendix. Defendants Sarah Sewall ("Sewall") and Thomas Conroy ("Conroy" and together with Sewall, "Defendants" or "Sewall-Conroy") own Lot 23 (the "Sewall-Conroy Property"), (A. 55-56, 153,

164), which is adjacent to Lot 25, owned by Sewall's sister and brother-in-law, Defendants Rebecca Sewall and Shawn MacDonald, (A. 55, 153, 164).

Plaintiffs Montagu Reid Hankin and Bondie Hankin (collectively, "Plaintiffs" or the "Hankins") are the owners of Lot 7, which has one single-family residence. (A. 59, 152, 163.) Party-in-Interest Gun Club Inc. ("GCI") owns Lot 11, an undeveloped parcel, as well as Lot 5, a parcel with a few seasonal residences and other structures that comprise the "Gun Club compound." (A. 58-59, 152, 163; II Tr. 159.) GCI, in common with Party-in-Interest Lee Family Corporation ("LFC"), also owns an undeveloped parcel at the end of Small Point, Lot 6, which is subject to a conservation easement. (A. 56, 60, 152, 163.) In addition to Lots 6 and 11, there are two more undeveloped lots: Lot 9-2 and Lot 9-3, which are owned by Party-in-Interest Kaiulani Sewall Lee ("K.S. Lee") and Parties-in-Interest Albert S. Edge and Anne Judith Kassenaar ("Edge-Kassenaar") respectively. (A. 57-58, 152, 163.) Albert S. Edge, along with his siblings and fellow Parties-in-Interest, Walter E. Edge, II, and Lisa Edge Schraeter (together, the "Edge Siblings"), jointly own Lot 8 and the single-family residence thereon. (A. 59, 153, 163.) The Edge Siblings, Hankins, GCI, LFC, K.S. Lee, and Edge-Kassenaar are collectively referred to as "Claimants." Collectively, the Claimants' and Defendants' properties are referred to as the "Small Point Lots."

Sarah and Rebecca Sewall and the Claimants, with the exception of the

Hankins, are all great grandchildren of Harold M. Sewall, who owned the majority of the Small Point Lots over a century ago, and their chains of title can be traced back to his ownership. (A. 52, 188-282.) The following family tree is intended to aid this Court's understanding of the parties' familial relationships[1]:



Harold M. Sewall's property was transferred to his children Loyall F. Sewall, Sr. and Camilla Sewall Edge. (A. 191, 194, 196.) Upon Loyall F. Sewall, Sr.'s death, his property was transferred to his wife, Jane Sewall, and children, and eventually conveyed to Loyall F. Sewall, Jr.'s daughters, Sarah and Rebecca Sewall. (A. 204, 240, 253, 263.) Similarly, upon Camilla Sewall Edge's death, her property was divided up among her three children and eventually conveyed to her grandchildren, represented by LFC, GCI, and the Edge Siblings. (A. 56-60, 209-15, 218, 221-22.)

The Navy Road

[1] The family tree provided does not depict all members of each branch of the family but includes those who are either parties or mentioned in relevant testimony.

In 1960, the United States Navy constructed the dirt road to provide access to a "Rake Station" subsequently built at the end of Small Point, located on Lot 6. (A. 53.) The Navy negotiated with landowners, including Camilla Sewall Edge, to construct Navy Road across the properties on Small Point. (A. 53.) The easements granted to the Navy were non-exclusive and no express easements were exchanged among the landowners. (A. 55, 161.) Prior to its construction in 1960, the primary access to the Small Point Lots was via Gun Club Road, which runs parallel to Navy Road and continues to provide access along the easterly side of Small Point. (A. 52-55.) At the time, only Lot 5 contained a structure, which Camilla Sewall Edge accessed by Gun Club Road; the other lots remained undeveloped. (A. 58.)

For decades thereafter, seasonal use of Navy Road by Claimants, Defendants, and their elder relatives occurred without incident. (A. 55, 58-60.) As time passed, families grew, and land was conveyed to the next generation, some Small Pointers constructed seasonal residences on Lots accessible via the Navy Road, including a single-family residence on each of Lots 5, 7, 8, 23, and 25, (*see* A. 152-53) (specifying parcels *without* residences), and, in the 1970s, a driveway from Navy Road to a seasonal cottage on GCI's Lot 5 called the "Upper House," which had been constructed after Navy Road was built, (A. 55, 58-59).

The Sewalls, Lees, MacFadyens, and Edges grew up spending summers on Small Point, (A. 52), and they have fond memories of childhoods spent attending

summer school run by adults in the community and birthday parties for various family members, (A. 53). Into adulthood, they have attended weddings and celebrations and participated in community groups together, all on Small Point. (A. 52-53.) They have passed these traditions on to the next generations. (A. 52-53.)

Throughout these decades of seasonal use, Small Pointers have sought to limit use of Navy Road to residents and their guests. (A. 60.) For example, GCI installed a gate across Navy Road on its property, to limit public access to the end of Small Point (the "Point"). (A. 60.) Small Pointers continue to access the Point—and other undeveloped lots— by foot. (A. 60.) Non-Small Pointers discovered on Navy Road are asked to leave. (A. 60.)

Cooperative, seasonal use of residences on Navy Road continued until 2021,[2] when the Hankins approached Defendants and informed them they would be converting their seasonal home on Lot 7 to a year-round residence. (A. 60; *see infra* p. 33.) The Hankins further notified Sewall that they planned to expand the road and would begin work that winter. (V Tr. 230.) Sarah Sewall testified that that conversation marked "the first I knew of any intention to change the status quo[.]" (V Tr. 230.) As Sarah Sewall explained, while she had previously been aware that other landowners on Navy Road did not have an easement, she

[2] However, in 2018, when Edge-Kassenaar purchased Lot 9-3, a title attorney raised the issue of the lack of express easement over Navy Road, generating some discussion among the various owners about drafting reciprocal easements, but discussions fizzled out and nothing came of it. (A. 58.)

> didn't want to make a big deal out of it, because these were our cousins, and these were people who had been there for a while. And so we never worried about the status quo. But the thought that Reid [Hankin] was going to now make a permanent home there, to me, had all kinds of implications for where the road was going.

(V Tr. 231.) Upon receiving actual notice from Claimant Hankin that he intended to physically expand Navy Road as well as expand his use of Navy Road to year-round use, Sewall-Conroy successfully served and recorded 14 M.R.S. § 812 notices, "Notices to Prevent Acquisition of Rights of Way Easement by Custom, Use or Otherwise." (*See* Exs. 95-99.) Sewall-Conroy also installed a second gate across Navy Road, on a portion of the road that crossed their property and provided the Hankins with a key. (A. 61.)

Procedural History

Plaintiffs filed a verified complaint against Defendants in October 2022, subsequently amended on March 2, 2023 (the "Amended Complaint"), in which Plaintiffs sought, *inter alia*, a declaration establishing easement rights[3] over Navy Road and enjoining Defendants from interfering with such rights. (*See* A. 126-28.) A medley of answers, cross-claims, counter-claims, and cross-claim/counter-claims followed.[4] (*See generally* A. 10-19, 23-25.)

[3] Plaintiffs asserted easement rights on multiple theories, including express, prescriptive, by estoppel, and by necessity. (*See* A. 129-132.)

[4] This appeal, however, is solely concerned with Claimants' prescriptive easement claims.

The extensive pleadings in the case eventually culminated in a five-day bench trial held at the West Bath District Court in January 2025. At trial, Claimants asserted easement rights by prescription, estoppel, and quasi-easement. (A. 61-69.) The court issued a Decision (the "Decision") and a Final Judgment (the "Judgment") on March 17, 2025, recognizing prescriptive easements appurtenant to each of the Claimants' Lots and enjoining Defendants from installing a gate or interfering with Claimants' use of Navy Road; the court entered judgment for Defendants on all other Claimant requests for relief. (A. 39-70.) Although the applicable period of continuous use varied by Lot,[5] the court concluded that each Claimant proved continuous use, adversity, and acquiescence with respect to every Lot at issue.[6] (A. 63-68.) The court went on to conclude that each Lot—including the undeveloped Lots, which had largely only ever been accessed by foot—benefitted from a prescriptive easement for vehicular access for residential use, unrestricted by season. (A. 39-43, 63-68.)

Defendants filed a timely Motion for Further Findings of Fact and Conclusions of Law, pursuant to M.R. Civ. P. 52(b), and Motion to Alter or Amend Judgment, pursuant to M.R. Civ. P. 59(e) (the "Defendants' Motion"). (*See* Defs.'

[5] The court found that the Hankins (Lot 7) and Edge Siblings (Lot 8) had proven continuous use "for twenty years prior to 2021" for access to their parcels, (A. 63-64), and that Lots 9-2 and 9-3 met "the elements of a prescriptive easement as of 2002," (A. 66-67). Though the court was not explicit as to the prescriptive periods for Lots 5, 6, or 11, they presumably began in the 1970s. (*See generally* A. 55-66.)

[6] In doing so, the court analyzed the familial relationships between the parties to the proceeding, rather than relationships between the respective owners during the prescriptive period. *See infra* pp. 22-24.

Mot.) Defendants requested further findings of fact regarding: (1) the familial relationships between the predecessors-in-title during the prescriptive period of each of the Small Point Lots; (2) the friendly-neighbor relationship during the prescriptive period for each of the Small Point Lots; (3) Lot 11's status as legally distinct from Lot 5; and (4) the findings of continuous use for the undeveloped Lots 9-2, 9-3, and 11.[7] (Defs.' Mot. 2.) In an order dated May 19, 2025, (the "Order") the court explained that it "closely considered all the evidence regarding the undeveloped lots and the Small Point's history of family and neighbor relationships . . . [and] acknowledges that those issues presented the more difficult decisions that the court faced." (A. 50.)[8]

Defendants Sewall-Conroy timely appealed and Claimants timely cross-appealed. Now before this Court is Defendants' appeal pertaining to the court's recognition of prescriptive rights benefitting Lots 5, 6, 7, 8, 9-2, 9-3, and 11.

[7] Additionally, Defendants sought amendment to (1) conclude that Lots 6, 9-2, 9-3, and 11 were not benefitted by prescriptive easements or, alternatively, limit the scope of such easements to the recreational uses made during the prescriptive period, (Defs.' Mot. 17-23); and (2) conclude that Lots 5, 7, and 8 were not benefitted by prescriptive easements or, alternatively, limit the scope of such easements to access for one single-family residence per lot, (Defs.' Mot. 23-28).

[8] The court granted the Claimants' Motion to Amend Judgment ("Claimants' Motion") and entered an Amended Judgement on May 19, 2025 (the "Amended Judgment") addressing certain clerical errors and, *inter alia*, adding language to specify that the easement benefitting Lot 5 was "for year round residential use and any currently installed utilities" and the easement benefitting Lot 9-2 was similarly for year round use. (*See generally* A. 49-50, 139-43.)

ISSUES PRESENTED

I. Whether the trial court erred, as a matter of law, when it failed to apply the proper burden-shifting framework and held Claimants to a lesser burden of proof for the element of adversity that did not require a showing of actual notice.

II. Whether the trial court erred, as a matter of law, when it concluded that undeveloped Lots 9-2 and 9-3 are benefitted by prescriptive easements and further expanded the scope of such easements.

III. Whether the trial court erred, as a matter of law, when it treated Lots 5 and 11 as one, singular "GCI Parcel" despite Lots 5 and 11 being separate and distinct parcels.

SUMMARY OF THE ARGUMENT

Like many small, close-knit communities along Maine's coast, Small Point in Phippsburg, Maine is comprised of parcels of land that have been passed down from generation to generation and access among landowners has been assumed. This appeal centers on the use of Navy Road, a private, dirt road, and whether the trial court erred in granting prescriptive easement rights for its use.

In granting those rights, the trial court erred as a matter of law on several fronts pertaining to the adversity and continuous use requirements of establishing prescriptive rights. With respect to adversity, the court misapplied the burden-shifting framework this Court laid out in *Androkites* and *Hamlin*, whereby the presumption of adversity does not arise if there is an explanation of the use that contradicts the rationale of the presumption. In this case, the existence of both

familial and neighborly relationships of the dominant and servient landowners during the prescriptive periods preclude application of the presumption of adversity. The court then further erred in concluding that the Defendants failed to rebut the presumption of adversity rather than requiring that Claimants prove adversity and actual notice to the true owner, as *Androkites* dictates. Because of these errors, the court's granting of prescriptive rights for all Claimants' lots should be reversed.

Even assuming, *arguendo*, the trial court correctly analyzed the adversity element and properly applied the burden-shifting framework, Claimants failed to establish continuous use with respect to certain vacant lots, and the court's explicit findings of continuous use of Navy Road to access those lots are unsupported by competent evidence in the record. Moreover, the court's analysis of continuous use with respect to two contiguous lots in common ownership defies this Court's mandate that prescriptive rights be determined on a lot-by-lot basis. Again, these errors require reversal.

As the trial court observed at the end of trial, "[t]he coast of Maine is changing fast and dramatically," and disputes surrounding easements and land rights continue to arise. (*See* V Tr. 184-86.) This timely case presents the opportunity for this Court to formally adopt the friendly-neighbor exception to the presumption of adversity. In *Riffle v. Smith*, this Court was unable to reach the issue of the legal effect of a friendly-neighbor relationship on the applicability of the presumption but left the

door open, seemingly inviting a case with the proper factual basis for adopting the friendly-neighbor exception. This is that case. With the increase in properties changing hands in Maine in recent years, small communities throughout the state—and trial courts—continue to face questions of rights of access. As a matter of policy, recognition of a friendly-neighbor exception promotes neighborly relationships by allowing use without the risk of creating permanent burdens on servient properties. The friendly-neighbor exception aligns with the long-held value of neighborly courtesy within Maine's communities.

For these reasons, and those set forth *infra*, Defendants respectfully request that this Court grant their appeal and reverse the court's granting of prescriptive easement rights benefitting Claimants' Lots.

ARGUMENT

A. Standard of Review

This Court "review[s] the trial court's factual findings as to the elements of a prescriptive easement for clear error and will affirm those findings if supported by competent record evidence, even if evidence could support alternative factual findings." *Androkites v. White*, 2010 ME 133, ¶ 12, 10 A.3d 677. This Court then reviews "conclusions of law based on those findings de novo." *Hamlin v. Niedner*, 2008 ME 130, ¶ 7, 955 A.2d 251.

When a party files a motion for further findings of fact pursuant to Maine Rule

of Civil Procedure 52(b), this Court "review[s] the original findings and any additional findings made in response to the motion for findings to determine if they are sufficient, as a matter of law, to support the result." *Bayberry Cove Childrens' Land Tr. v. Town of Steuben*, 2013 ME 35, ¶ 5, 65 A.3d 1188 (quotation marks omitted). Further, "[w]here, as here, a party's motion for further findings has been denied, [this Court will] not infer findings from the evidence in the record. Rather, [the Court] confine[s its] review to the trial court's explicit findings and determine[s] whether those findings are supported by the record." *H & B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 10, 246 A.3d 1176 (citations omitted). Additionally, "the trial court's judgment must be 'supported by express factual findings that are based on record evidence, are sufficient to support the result, and are sufficient to inform the parties and any reviewing court of the basis for the decision.'" *Id*. (quoting *Mooar v. Greenleaf*, 2018 ME 23, ¶ 7, 179 A.3d 307).

B. The trial court erred, as a matter of law, when it failed to apply the proper burden-shifting framework and held Claimants to a lesser burden of proof for the element of adversity that did not require a showing of actual notice.

Because the trial court erred, as a matter of law, when it failed to apply the proper burden-shifting framework and held Claimants to a lesser burden of proof on the element of adversity, this Court should vacate the judgment establishing prescriptive rights benefitting Lots 5, 6, 8, 9-2, 9-3, and 11.

"The party claiming a prescriptive easement has the burden at trial of proving

by a preponderance of the evidence each of the following elements: (1) continuous use for at least twenty years; (2) under a claim of right adverse to the owner; (3) with the owner's knowledge and acquiescence, or with a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." *Androkites v. White*, 2010 ME 133, ¶ 14, 10 A.3d 677.

Generally, "when the first and third elements of a private prescriptive easement are established . . . a presumption arises that the use of the property was under a claim of right adverse to the owner." *Id*. ¶ 17. However,

> [When] the dominant and servient estates were owned within the same family during the period in which the prescriptive right of access is alleged to have accrued, application of such a presumption that shifts the burden of proof is inappropriate. Absent evidence to the contrary, the law will infer that comings and goings of family members, across property owned within the family, are by accommodation or permission and do not have the requisite adversity to support imposition of a prescriptive easement by one family member upon another.

Id. ¶ 18. Accordingly, "the prescriptive easement claimant may not rely upon a presumption of use under a claim of right adverse to the owner when the other elements of a prescriptive claim are proved; and the prescriptive user instead bears the burden of proving . . . that she used the land under a claim of right in a manner adverse to the owner, which requires *proof of adversity and actual notice* to the true owner." *Id*. ¶ 22 (emphasis added).

When a familial relationship exists between the property owners during the prescriptive period, the burden of proving the adversity element is greater: "[T]here

must be *clear proof* of hostility and actual notice to the true owner to satisfy the hostility requirement." *See id*. ¶¶ 20-23 (emphasis added). This Court "review[s] the court's application of the burden of proof de novo." *Maine Eye Care Assocs. P.A. v. Gorman*, 2006 ME 15, ¶ 15, 890 A.2d 707.

1. *The trial court's decision to abandon the proper burden-shifting framework, established by this Court in* Androkites *and* Hamlin*, constitutes legal error.*

The trial court did not apply the framework laid out in *Androkites*, constituting legal error. Rather than recognizing that the dominant and servient estates were owned by the same family during the respective prescriptive periods and declining to apply the presumption of adversity, as *Androkites* requires, the trial court summarily concluded for each lot that the relationships of the *parties* were insufficiently close and the Defendants "did not meet their burden to rebut the presumption" of adversity, and so applied the presumption of adversity. (*See* A. 63-67.) These conclusions are plagued by three major errors.

i. <u>The trial court erred by creating a new requirement that Defendants demonstrate a sufficiently close familial relationship among dominant and servient estate owners.</u>

First, the court erred by exceeding the bounds of this Court's established burden-shifting framework and creating a new requirement that the Defendants must demonstrate that the familial relationship is a sufficiently close relationship before determining that the presumption of adversity will not arise. (*See* A. 64.) This is in direct contravention of this Court's decision in *Androkites* and *Hamlin*, neither of

which require nor analyze closeness among family members to prevent the presumption of adversity from arising. *See Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677; *Hamlin*, 2008 ME 130, ¶ 13, 955 A.2d 151. Instead, the inquiry under *Androkites* and *Hamlin* is whether ownership of the dominant and servient estates was "within the same family during the period in which the prescriptive right of access is alleged to have accrued." *See Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677. If the answer is "yes," absent evidence to the contrary, the law infers the usage was permissive, the presumption of adversity does not arise, and the burden does not shift. *See id*. This aligns with the principle that, among family members, "'the landowner is reasonably entitled to regard the use as permissive unless specifically informed of the contrary fact.'" *Id*. (quoting 4 Richard R. Powell, *Powell on Real Property* § 34.10[2][c] (2005)).

By placing this extra requirement on the Defendants to prove sufficient closeness, the trial court decision contravenes not only the rationale for burden-shifting in familial relationship cases, *see id.*¶¶ 18-19 (placing the burden of proof on the family member asserting adversity is consistent with considerations of fairness), it also contravenes "'every presumption that the occupancy is in subordination to the true title,'" *Hamlin*, 2008 ME 130, ¶ 11, 955 A.2d 251 (quoting

Striefel v. Charles-Keyt-Leaman P'ship, 1999 ME 111, 733 A.2d 984).[9]

ii. The trial court erred in considering the familial relationships of the current owners rather than the owners during the prescriptive periods.

Second, the court wrongly considered the familial relationships of the *current* owners (and parties to this case), rather than the owners during the relevant prescriptive period(s). *See Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677. The relevant inquiry is whether ownership of the dominant and servient estates was within a family during the prescriptive period, not whether the current parties are

[9] Notwithstanding the trial court's legal error in doing so, Defendants understand the court's inclination to explore a limitation to application of the familial permission exception, but such a limitation would be more appropriate in situations where a family tree has spread so far that its members no longer realize they are family. In those cases, trial courts may need to decide whether the familial permission inference is applicable. This, however, is not that case.

Even if this Court were inclined to accept the trial court's imposition of a burden on Defendants to prove that the familial relationships were sufficiently close, the record demonstrates that the Defendants met that burden. These family members, particularly those during the prescriptive periods, were well-acquainted with one another. They were sisters-in-law, aunts and uncles, nieces and nephews, first cousins, and so on. More specifically, Sarah Sewall's grandmother, Jane Sewall who owned the Sewall-Conroy property from 1959 to 1992, was an integral member of the larger Sewall Family and of Small Point generally. (IV Tr. 212; V Tr. 22.) Jane Sewall, known as "Aunt Janey," (IV Tr. 208), was the widowed sister-in-law of Camilla Sewall Edge, the matriarch of the Lee and MacFadyen families, (I Tr. 252). Jane Sewall and Camilla Sewall Edge regularly spent time together and Camilla Sewall Edge's descendants continued to engage with Jane following Camilla Sewall Edge's passing in 1972, (I Tr. 250; II Tr. 117, 186-87; IV Tr. 208-209; V Tr. 94-96).

These intrafamily activities continued with the next generation, which includes Sarah Sewall and many of the Claimants. Not only did these family members convene for major events, such as weddings, birthdays, new life, and even deaths, but the intrafamilial relationships occurred in day-to-day life. (IV Tr. 214-219; V Tr. 60-61, 75-76, 80, 92-96.) When Sarah Sewall gave birth to triplets in the 1990s, Camilla Sewall Lee hired a nanny for Sarah to help with the babies. (IV Tr. 219.) The record in this case is riddled with testimonial examples of just how connected the family members were and just how integral those relationships were to the permitted use of Navy Road prior to 2021. The evidence in the record is insufficient to support any finding to the contrary. *See Sargent v. Braun*, 2006 ME 96, ¶ 5, 902 A.2d 839 (stating that the Court must review the sufficiency of the findings and whether they are supported by evidence in the record).

family. *See Hamlin*, 2008 ME 130, ¶ 14, 955 A.2d 251. In both *Androkites* and *Hamlin*, the parties indisputably were not family, but that fact did not prevent application of the familial permission exception because the servient and dominant owners *during the prescriptive period* were. *Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677; *Hamlin*, 2008 ME 130, ¶ 14, 955 A.3d 251.

The record clearly demonstrates that ownership of the dominant and servient estates at issue here was held within the same family during the prescriptive periods.[10] When asked the basis for her belief that she and other Small Point Lot owners have rights to use Navy Road, Kaiulani Sewall Lee testified,

> We've used it our whole lives and before us, our mothers, our aunts, and before that, our grandmother, and prior to that, some of it by our great grandfather. You know, it goes back generations, and no one's ever questioned it or said anything different[.]

(II Tr. 125.) The court erred in failing to recognize the family relationships that existed during the prescriptive periods and in failing to correctly apply the familial permission exception.

iii. <u>The trial court erred in applying the wrong standard for notice to Defendants.</u>

[10] On the servient estate owners' side, from 1959 to 1999, Jane S. Sewall (and later her estate), Loyall F. Sewall, Jr., and Camilla Sewall Wood (Sarah Sewall's grandmother, father, and aunt, respectively) were the owners of the Sewall-Conroy Property. (Exs. 46, 77-78.) On the dominant estate owners' side, through the 1970s and mid-1980s, Lots 5, 6, 9-2, 9-3, and 11 were owned by Camilla Edge Lee and Mary Esther MacFadyen, (Ex. 48), nieces of Jane Sewall and first cousins of Loyall F. Sewall, Jr. and Camilla Sewall Wood. Subsequently, they were owned by GCI and LFC, (Exs. 50-51), whose members were the great-nieces and nephews of Jane Sewall and first cousins once removed of Loyall F. Sewall, Jr. and Camilla Sewall Wood.

Lastly, the court explained that "[e]ven if the burden shifted, the court finds that [Claimants] met their burden to prove adversity." (A. 64.) The court reasoned that the Claimants' use was "in a manner such that the owners of the servient estate *should be aware* that their rights are at stake." (A. 64.) (emphasis added). But the standard articulated by this Court in *Androkites* and *Hamlin* is much higher than this, requiring that Claimants prove "by a preponderance of the evidence, that [they] used the land under a claim of right in a manner adverse to the owner, which requires proof of adversity and *actual notice* to the true owner." *Androkites*, 2010 ME 133, ¶ 22, 10 A.3d 677 (emphasis added). The trial court made no finding regarding actual notice and nothing in the trial record supports a finding that actual notice was given by the owners of Lots 5, 6, 8, 9-2, 9-3, or 11.[11]

2. *The trial court erred in applying the presumption of adversity or finding adversity where the friendly-neighbor relationships among owners implies permissive use.*

Regardless of whether the familial permission exception applies in this case, the friendly-neighbor relationships among the owners during the prescriptive period also imply permissive use and preclude an application of the presumption of

[11] For those lots for which the court found Claimants provided proof of adversity, the court's factual basis for such findings is unclear. (*See, e.g.,* A. 65) (stating only that GCI "met their burden to show that the use was adverse" with respect to Lots 5 and 11); (A. 66) (concluding that "the Point Parcel owners met their burden to show that the use was adverse even if the presumption was shifted" with respect to Lot 6).

adversity or a finding of adversity. While adversity may be presumed when continuous use and the true owner's knowledge and acquiescence of that use have been established, this presumption does not arise, and the prescriptive user must instead affirmatively prove adversity, "if there is an explanation of the use that contradicts the rationale of the presumption." *Androkites v. White*, 2010 ME 133, ¶ 17, 10 A.3d 677.

As noted above, this Court has recognized that "the law will infer that comings and goings of family members, across property owned within the family, are by accommodation or permission and do not have the requisite adversity to support imposition of a prescriptive easement by one family member upon another." *Id*. ¶ 18. Similarly, in public prescriptive easement claims, public recreational uses of land are presumed permissive, defeating the presumption of adversity for such claims. *See Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137, ¶ 24, 804 A.2d 364. The realm of possible explanations contradicting the rationale of the presumption of adversity is not limited to these two explanations and this Court has not yet had an opportunity to address the question of whether a friendly-neighbor relationship among dominant and servient owners may also provide an explanation of use.

In *Riffle v. Smith*, the appellants advocated for this Court to "adopt a 'friendly-neighbor' exception to the presumption of adversity" in prescriptive easement claims. *Riffle v. Smith*, 2014 ME 21, ¶ 1, 86 A.3d 1165. However, because the trial

court did not find that a friendly-neighbor relationship had existed during the prescriptive period and the appellants did not request further findings of fact, this Court was unable to reach the question of whether a friendly-neighbor relationship may explain use, preventing the presumption of adversity from arising and leaving the burden of proof of adversity squarely with the plaintiff. *Id*. ¶ 9 & n.3. But this Court left the door open, and this case presents the proper factual basis for adopting the friendly-neighbor exception.

i. The friendly-neighbor exception is simply good policy for Maine. It encourages neighborly accommodation without risk of permanently burdening the servient estate.

As a matter of policy, adoption of a friendly-neighbor exception to the presumption of adversity promotes neighborly relationships by allowing use without the risk of permanently burdening the servient property. Recognition of the friendly-neighbor accommodation

> encourages voluntary acts of courtesy among neighbors by making clear that such courtesies will not result in a forfeiture of property rights. The rationale is that if permissive use were allowed to ripen into a prescriptive right, neighbors would be far less willing to permit one another to use their lands to begin with.

56 A.L.R.7th Art. 8 § 3 (originally published in 2020) (citation modified).

In an effort to encourage neighborly courtesy, many jurisdictions across the country have recognized a "friendly-neighbor" exception, often termed a "neighborly accommodation," to the presumption of adversity. *See, e.g., McNeill v.*

Shutts, 258 A.D.2d 695, 696, 685 N.Y.S.2d 318, 319 (1999) (noting that the presumption of adversity does not apply where the relationship of the servient and dominant estate owners "was one of cooperation and neighborly accommodation"); *see also*, *Gamboa v. Clark*, 183 Wash. 2d 38, 44, 348 P.3d 1214, 1217 (2015) (recognizing that a presumption of permissive use "applies to enclosed or developed land cases in which it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence"); *Butterfly Realty v. James Romanella & Sons, Inc.*, 93 A.3d 1022, 1032 (R.I. 2014) (recognizing that permission may be inferred from a neighborly accommodation); *O'Dell v. Stegall*, 226 W. Va. 590, 613, 703 S.E.2d 561, 584 & n.24 (2010) (recognizing that "[p]ermission may be inferred 'from the neighborly relation of the parties,'") (quoting 4 Richard R. Powell, *Powell on Real Estate,* § 34.10[2][a]) (collecting cases); *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 136 (Del. Ch. 2006) (noting the existence of "well established law supporting the proposition that neighborly or friendly use of land, whether a roadway, open land, or otherwise, does not establish an adverse use. Simply put, taking neighborly acquiescence for the kind of laxity required for the establishment of a prescriptive easement is not a rule in accordance with the law of this state"); *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 407 (Ind. 2005) (finding no prescriptive easement where there existed "implied permission grounded in the cordial relationship" between two separate families with evidence of shared holidays

and celebrations); *Greenwalt Fam. Tr. v. Kehler*, 885 P.2d 421, 425 (Mont. 1994) ("[A] prescriptive easement does not arise from neighborly accommodation"); *Burnham v. Kwentus*, 174 So. 3d 286, 293 (Miss. Ct. App. 2015) (finding that use of a roadway was permissive where the servient estate owner testified that they had allowed the dominant estate owner to use the road "not because they believed [he] had a right to use the road, but because they wanted to be kind neighbors"); *Blank v. Scaturchio*, No. CV-20-6101816-S, 2024 WL 2720264, at *4 (Conn. Super. Ct. May 24, 2024) (finding "that the plaintiffs' use of the disputed area was a permissive accommodation between close neighbors, rather than a use of the disputed area exercised under a claim of right sufficient to establish a prescriptive easement").

Courts in Washington have established a framework for neighborly accommodation similar to the framework this Court has established for the familial permission exception described above. In Washington, the Supreme Court has recognized a "presumption of permissive use whenever there is a reasonable inference of neighborly accommodation." *Gamboa v. Clark*, 183 Wash. 2d 38, 47, 348 P.3d 1214, 1219 (2015). "What constitutes a reasonable inference of neighborly sufferance or acquiescence is a fairly low bar," applying in situations "where persons traveled the private road of a neighbor in conjunction with such neighbor and other persons, nothing further appearing[.]" *Id*. at 1221 (citing *Roediger v. Cullen*, 26 Wash. 2d 690, 711, 175 P.2d 669, 681 (1946). The court justifies the low bar by

explaining that

> [a]pplying a presumption of permissive use incentivizes landowners to allow neighbors to use their roads for the neighbors' convenience. We do not want to require a landowner to adopt a dog-in-the-manger attitude in order to protect his title to his property. Not applying a presumption of permissive use in these circumstances punishes a courteous neighbor by taking away his or her property right.

Id. at 1219. Only when the use becomes clearly adverse does the law require an owner to take action. *Id*.

Declining to recognize a friendly-neighbor exception discourages the type of neighborly courtesy that has defined small Maine communities for generations. And with the increase in properties changing hands in recent years, small communities, like Small Point, all over the State are now facing questions of rights of access. Recognition of a friendly-neighbor exception allows property owners to continue to accommodate old neighbors and new neighbors without the risk of potentially permanently burdening their property, so long as they have not received actual notice of adversity. Simply stated, the friendly-neighbor exception aligns with the long-held value of neighborly courtesy within Maine's communities.

ii. <u>This Court already has a workable framework for a friendly-neighbor exception.</u>

Should this Court adopt a similar neighborly accommodation or friendly-neighbor exception, this Court could simply apply the framework already established in the familial context. Upon a finding that a friendly-neighbor

relationship existed among owners during the prescriptive period, the law would infer permissive use and the presumption of adversity would not arise. The burden of proving adversity would remain with the prescriptive user to prove that they used the land under a claim of right in a manner adverse to the owner, requiring proof of adversity and actual notice to the true owner.

iii. This case presents this Court with an opportunity to adopt a friendly-neighbor exception to the application of the presumption of adversity.

Recognizing the neighborly goodwill that has existed in Maine coastal communities, like Small Point, for generations and the availability of an applicable framework, this matter presents this Court with an opportunity to adopt a friendly-neighbor, or neighborly accommodation, exception to the presumption of adversity. And, unlike in *Riffle*, there is clear factual support here for a finding of the types of friendly-neighbor relationships that justify recognizing the exception.

There is sufficient evidence in the record to support a finding of friendly-neighbor relationships here.[12] The Small Point community was a small, tight-knit community, complete with community organizations, like the Small Point Association, run by members of the community as volunteers with each member taking a turn at some point. (II Tr. 51, 55-57.) The community on Navy Road specifically was a subset of the larger Small Point community. (IV Tr. 206.) The

[12] The evidence provided above, *supra* p. 23 & n.9, establishing the family relationships among dominant and servient estate owners equally demonstrates friendly-neighbor relationships among them. As such, Defendants incorporate by reference here the evidence provided above.

families along Navy Road spent time together, attending summer school, birthday parties, weddings, and cocktail parties. (IV Tr. 206, 209-16.) Families often stayed as guests or renters at one another's houses. (I Tr. 160; II Tr. 223; IV Tr. 225, 227.) The children grew up with the notion that Small Point was shared land and passed freely among the various properties. (IV Tr. 216.) Rebecca Sewall testified that she understood there were questions around the Claimants' rights to use Navy Road, but that "because they were family, because we were all part of a community, I certainly wasn't going to object[.]" (V Tr. 114.)

In addition to accommodating each other's use, this small community of homeowners made efforts to limit use by those outside their community. Homeowners placed a gate at the top of the road to discourage outsiders from using the Road. (I Tr. 240-43; II Tr. 5-6.) Richard Lee testified that he personally took efforts to limit outsiders' access, asking questions to determine outsiders' purpose for use of the Road and calling the sheriff to have outsiders "taken away." (I Tr. 242-43, 275-77.) He also placed boulders in gaps along the road where outsiders parked to try to prevent parking on the road. (II Tr. 54.) When asked why he took this action, Richard Lee responded that "these were people without permission," identifiable by the lack of a "Small Point" sticker on their car. (II Tr. 55.) These stickers were issued by the Small Point Association and Richard Lee testified that he would issue parking tickets to cars found lacking a sticker. (II Tr. 55.) He further testified that the Small

Point Association hired security people for ticketing and "managing the traffic from the outside during the off season" when homeowners were less present. (II Tr. 57.) K.S. Lee and Tevere MacFadyen testified that among owners along Navy Road there was a consensus that "they wanted to have less traffic on that road by people who didn't own land." (II Tr. 111-12, 232-34.) Small Pointers made great efforts to exclude outsider use of Navy Road while simultaneously freely allowing use among neighbors.

3. *Applying the proper framework for either the familial permission or friendly-neighbor exceptions, proving* actual notice *is a prerequisite for establishing the element of adversity, and Claimants' failure to do so precludes prescriptive easement rights as a matter of law.*

These facts, just like those establishing familial relationships, clearly demonstrate friendly-neighbor relationships among owners along Navy Road, creating an inference of permissive use and rendering inappropriate the application of the presumption of adversity. The evidence in this case is insufficient to support any finding other than that the comings and goings of owners along Navy Road were by familial and/ or neighborly accommodation and with the implied permission of the owners of the Sewall-Conroy Property through the years.

Applying the framework described above, *supra* pp. 20-25, the burden of proof remains with the Claimants to prove adversity and actual notice. The record, however, establishes that actual notice did not come until 2021 when Claimant Reid Hankin approached Sewall-Conroy and informed them that he would be winterizing

his home on Lot 7 and moving there year-round. *See supra* pp. 12-13; (IV Tr. 230.)[13]

Because Claimants' use of Navy Road can be explained by familial relationships and/or neighborly accommodation, and because there is no evidence in the record of actual notice for any of Claimants' Lots,[14] Claimants did not satisfy their burden of proving adverse use for the requisite twenty years. This Court, then, must vacate the judgment granting prescriptive rights benefitting Claimants' Lots.

C. The trial court erred, as a matter of law, when it concluded that undeveloped Lots 9-2 and 9-3 are benefitted by prescriptive easements and further expanded the scope of such easements.

This Court should vacate the Judgment establishing prescriptive rights benefitting Lots 9-2 and 9-3 for two reasons: (1) the evidence is insufficient to support the trial court's explicit findings regarding continuous use of Navy Road to access those lots;[15] and (2) the court erred in concluding that a future change in use

[13] An incident raising the question of lack of access also arose in 2018 when Edge-Kassenaar sought to purchase Lot 9-3. (III Tr. 49.) Landowners along Navy Road met to discuss the issue and looked into exchanging reciprocal easements. (II Tr. 234-35.) Tevere MacFadyen testified that he had written in an email to fellow landowners along Navy Road that "[w]e are obviously beholden to all the rest of you who allow us to cross your property en route to your own," and he testified that he had believed they could easily resolve the issue of a lack of written easements "as friends and neighbors." (II Tr. 234-35.) Discussion eventually fizzled when the seller reduced the price to account for the access issues and everyone moved on. (II Tr. 104; III Tr. 49-50.) To the extent this could be construed as actual notice, it occurred in 2018 and the requisite twenty-year period cannot be satisfied thereafter.

[14] Excepting Lot 7 for which actual notice was not given until 2021. *See supra* pp. 12-13.

[15] Defendants filed a Motion for Further Findings of Fact and Conclusions of Law, pursuant to M.R. Civ. P. 52(b), and requested additional facts related to use of Navy Road to access Lots 9-2 and 9-3. (Defs.' Mot. 10-14.) The trial court denied the Motion. (A. 50.) Therefore, this Court must determine whether the trial court's findings are supported by the record. *See H&B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 10, 246 A.3d 1176.

of Lots 9-2 and 9-3 would be within the scope of the prescriptive easements, when that issue was not before the court and required the court to consider hypothetical facts unsupported by evidence.

1. *The record is insufficient to support the trial court's findings of continuous use to access undeveloped Lots 9-2 and 9-3.*

"The elements necessary for establishing the existence of a prescriptive easement are 'continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.'" *Great N. Paper Co. v. Eldredge*, 686 A.2d 1075, 1077 (Me. 1996) (quoting *Jost v. Resta*, 536 A.2d 1113, 1114 (Me.1988)). Continuous use must be determined on a lot-by-lot basis because use by one lot owner to access his or her lot is insufficient to put servient estate owners on notice that other lot owners are also claiming rights. *See Flaherty v. Muther*, 2011 ME 32, ¶ 84, 17 A.3d 640; *Gutcheon v. Becton*, 585 A.2d 818, 822 (Me. 1991) ("In each case, the court properly found a continuity of use for the prescribed period of time and declared the creation of distinct easements appurtenant to each of the plaintiffs' lots.").

Although the Law Court has recognized that "continuous use" does not require constant use, it does require something more than sporadic use. *See Fitanides v. Holman*, 310 A.2d 65, 68 (Me. 1973) (affirming trial court's determination that "evidence of only sporadic use of the right of way . . . for such purposes as wood

cutting, picnicking, reading, some moving of cattle and occasional berrying . . . did not constitute continuous use").

Here, with respect to Lots 9-2 and 9-3, the trial court explicitly found that "[f]rom 1971 to 2002, members of the Lee family accessed [Lots 9-2 and 9-3] over Navy Road and to inspect the property and make occasional visits to walk or forage." (A. 57.) The court then concluded that "the use by [LFC] was enough to meet the elements of a prescriptive easement as of 2002." (A. 66.) LFC did not, however, own Lots 9-2 and 9-3 for the entirety of the prescriptive period.[16]

This Court has emphasized that the requisite adverse use must be that of the owner of the dominant estate during the prescriptive period. *See*, *e.g.*, *Flaherty v. Muther*, 2011 ME 32, ¶ 79, 17 A.3d 640 (noting that "[t]he court properly focused on evidence of use . . . by persons who were . . . owners at the time of the use."); *see also Kornbluth v. Kalur*, 577 A.2d 1194, 1195-96 (Me. 1990) (vacating judgment establishing a prescriptive easement where the evidence of use presented was that of visitors to the dominant property and not of the owners themselves). While "[s]uccessive periods of use may be added or 'tacked' together in order to satisfy the prescriptive period when privity exists between the users," a successor in interest may not establish a prescriptive easement by means of tacking where their

[16] During the prescriptive period identified by the court, Lots 9-2 and 9-3 were owned as follows: (1) from 1972 to 1978, by Camilla Edge Lee and Mary Esther Edge MacFadyen (Ex. 48); (2) from 1978 to 1987, by Camilla Edge Lee (Ex. 65); and (3) from 1987 to 2002, by LFC (Ex. 66).

predecessors' use did not establish a prescriptive easement. *Glidden v. Belden*, 684 A.2d 1306, 1317-18 (Me. 1996).

The trial court's recognition of prescriptive rights benefitting Lots 9-2 and 9-3 is fatally flawed because there is insufficient evidence of (1) Camilla Edge Lee and Mary Esther MacFayden's use of Navy Road to access those Lots during their ownership from 1972 to 1978; (2) Camilla Edge Lee's use during her ownership from 1978 to 1987, and (3) LFC's use during its ownership from 1987 to 2002.

i. <u>There is insufficient evidence of Camilla Edge Lee or Mary Esther MacFadyen's use of Navy Road to access Lots 9-2 and 9-3 during the period of their ownership from 1972 to 1978 or of Camilla Edge Lee's use from 1978 to 1987.</u>

From 1972 to 1978, Camilla Edge Lee and Mary Esther MacFadyen jointly owned Lots 9-2 and 9-3. (Ex. 48.) In 1978, Mary Esther MacFadyen conveyed her interest in the Lots to Camilla Edge Lee, leaving her the sole owner. (Ex. 65.) Therefore, the trial court's findings of continuous use of Navy Road to access Lots 9-2 and 9-3 for the prescriptive period of 1971 to 2002 must be supported by evidence of Camilla Edge Lee and Mary Esther MacFadyen's use.

To begin, there is no evidence at all in the record of Mary Esther MacFadyen's use of Navy Road to access Lots 9-2 or 9-3. And while there is some evidence of Camilla Edge Lee's use of Navy Road to access Lots 9-2 and 9-3, such evidence is insufficient to support a finding of continuous use. Richard Lee provided the sole testimony regarding his mother Camilla Edge Lee's use from 1972 to 1987:

Q: During that time period, would you, your mom, and your siblings use Navy Road to access your mom's property on Small Point?
A: Yes, we did.
Q: What was that use[?] . . .
A: Well, it was mainly recreational, but year-round we skied the Navy Road, we drove it, we plowed it if we needed to get something in and out of the Gun Club Upper House. We used it for various reasons.

(I Tr. 223.) This singular testimony is wholly insufficient to establish continuous use of Navy Road to access Lots 9-2 and 9-3 during Camilla Edge Lee's ownership period because (1) use of the pronoun "we" renders it impossible to decipher whether Richard Lee was describing his mother's use; and (2) Camilla Edge Lee held an ownership interest in Lot 6 at the time, (Ex. 48), and use of the term "your mom's property" leaves ambiguity as to which lot(s) were being accessed. *Cf. Clement v. Shea,* No. CIV.A. RE-00-21, 2004 WL 843182, at *3 (Me. Super. Feb. 12, 2004) ("Because the claimants bear the burden of proving that the owners of their lots used the road other than in a permissive manner throughout the prescriptive period, any uncertainty about the dates when the predecessors performed that work operates against their claim here.").

Even assuming, *arguendo*, this testimony could be understood to describe Camilla Edge Lee's use of Navy Road to access Lots 9-2 and 9-3, it is insufficient, as a matter of law, to support a finding of continuous use. In *Kornbluth*, this Court examined the record and concluded that "one vague reference to use by 'owners . . . of the cottage' is not competent evidence to support a finding of adverse use by the

[claimants'] predecessors in title." 577 A.2d 1194, 1195-96 (Me. 1990). Richard Lee's one vague reference to his mother's use of Navy Road is similarly not competent evidence to establish adverse use during the prescriptive period.

ii. There is insufficient evidence of LFC's use of Navy Road to access Lots 9-2 and 9-3 during the period of its ownership from 1987 to 2002.

The evidence of LFC's use during its period of ownership from 1987 to 2002 is similarly insufficient to support a finding of continuous use. K.S. Lee and Richard Lee were the sole witnesses who provided testimony with respect to use of Navy Road to access Lots 9-2 and 9-3 during the period of 1987 to 2002. K.S. Lee testified that she cross-country skied, snowshoed, and ice skated but also testified that there was rarely snow. (II Tr. 114-15, 132-33.) She testified that she "wandered the lot" with children and grandchildren and picnicked near the pond, but her testimony is unclear as to the time frame and frequency of these activities.[17] (II Tr. 128.)

Richard Henry Lee testified to having engaged in more activities in the area, but his testimony was unclear, at best, as to where his activities occurred. *See, e.g.*, (I Tr. 225) (testifying to going "out to Small Point" generally via Navy Road); (I Tr. 226) (testifying to harvesting wood but stating he was unsure where the harvesting occurred). Similarly, Richard Lee testified to occasionally partaking in some recreational activities on the property between 1972 and 1987 and testified that these

[17] Notably, none of these uses require vehicular access to the lots via Navy Road. Instead, these are the sorts of activities for which one may cross the road from one property to another on foot.

uses continued through 2002. *See* (I Tr. 223-24; II Tr. 66) (hunting); (I Tr. 229-30) (canoeing and floating on the pond); (II Tr. 67) (ice skating "a couple times each decade"); (II Tr. 67) (cross-country skiing the length of Navy Road); (I Tr. 256) (stating that all uses continued). Lastly, Richard Lee testified to using Navy Road to access Lots 9-2 and 9-3 for work performed in the 1990s in connection with a subdivision of the property. (I Tr. 257-62.) K.S. Lee and Richard Lee's testimony of their own use is vague regarding whether their use of Navy Road was to access Lots 9-2 and 9-3 or LFC's other lot, Lot 6. Furthermore, even assuming, *arguendo*, that the uses to which they testified occurred for the purpose of reaching Lots 9-2 and 9-3 during the prescriptive period, such sporadic use of Navy Road is insufficient to constitute continuous use—especially to the extent such use may have necessitated vehicular access over the Navy Road. *See Fitanides*, 310 A.2d at 68.

The testimony of K.S. Lee and Richard Lee provided herein constitutes the *entirety* of evidence offered by Claimants of use of Navy Road to access Lots 9-2 and 9-3 during the prescriptive period identified by the trial court of 1971 to 2002. Claimants offered no evidence of Mary Esther MacFadyen's use and offered one vague reference to Camilla Edge Lee's use during her period of ownership. As such, even if this Court were inclined to hold that LFC's use was sufficient to constitute continuous use during its ownership from 1987 to 2002, such use occurred for a period of just fifteen years, at most, five years short of the requisite twenty-year

period. The trial court erred in recognizing prescriptive rights for the benefit of Lots 9-2 and 9-3 on this basis and, therefore, this Court should vacate the judgment as it relates to those rights.

2. The trial court erred in declaring that a change in use of Lots 9-2 and 9-3 from undeveloped to residential would not overburden the Sewall-Conroy Property when that issue was not properly before the court.

Even if this Court were inclined to uphold the lower court's recognition of prescriptive rights benefitting Lots 9-2 and 9-3, the trial court erred in declaring that a change in use of Lots 9-2 and 9-3 from undeveloped to residential lots would not result in an overburdening of the Sewall-Conroy Property because the evidence presented at trial did not place this issue before the court.

"A right of way gained by prescriptive use is not unlimited." *Benner v. Sherman*, 371 A.2d 420, 422 (Me. 1977). Rather, "an easement acquired by prescription is limited by the character of the prescriptive use." *Bray v. Grindle*, 2002 ME 130, ¶ 14, 802 A.2d 1004 (quoting *MacKenna v. Inhabitants of the Town of Searsmont,* 349 A.2d 760, 762 (Me.1976)); *see also* Benner, 371 A.2d at 422 (stating "an easement arising by prescription, unlike an easement by grant is fixed by the use through which it was created") (citation modified); Restatement of Property § 477 (1944) ("The extent of an easement created by prescription is fixed by the use through which it was created.").

While the character of use during the prescriptive period generally limits the

scope of rights acquired, this Court has recognized that some flexibility of use may be accommodated within those limits. *See Bray*, 2002 ME 130, ¶ 15, 802 A.2d 1004 (quoting Restatement of Property § 478 cmt. a (1944)).

> In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement.

Id. (quotation marks omitted). Additionally, a court may also consider whether "'the needs which result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs increases the burden on the servient tenement.'" *Id*. ¶ 16 (quoting Restatement § 479) "The general principle underlying these factors is that 'a use made under a prescriptive easement must be consistent with the general pattern formed by the use by which the easement was created.'" *Id*. (quoting Restatement § 478 cmt. a).

This Court in *Bray* cautioned courts against making declarations that require a determination of facts not currently existing. *See Bray v. Grindle*, 2002 ME 130, ¶¶ 18-20, 802 A.2d 1004. In *Bray*, this Court modified the trial court's judgment declaring that a prescriptive easement was "*limited* to intermittent logging and berrying" because such a limitation required "an implicit finding that no additional uses would be permissible." *Id*. ¶¶ 18-19. This Court held that there was insufficient evidence in the record to support a judgment declaring whether future uses would

be permissible where the evidence presented at trial "focused on the use of the road during the prescriptive period . . . rather than on the future use proposed by [the dominant estate owner] and the effect of such use on [the servient estate owner]." *Id*. ¶ 18. As such, this Court instructed that "[b]ased on its finding of the use during the prescriptive period, the trial court correctly declared that [the dominant estate owner] has an easement across [the servient] land for intermittent logging and berrying" and "[o]n this record, . . . the court should have declined to go beyond that basic declaration." *Id*. ¶ 19.

Here, with respect to Lots 9-2 and 9-3, the court found "that the normal evolution of each of these two lots would include one single family residence without burdening the Defendants' estates under normal circumstances." (A. 67-68.) But the record does not support this finding because, as in *Bray*, the evidence presented at trial was of past use of Navy Road, not future use. The owners of Lots 9-2 and 9-3 testified that they have no immediate residential plans for those lots. (II Tr. 109; III Tr. 37.) On this record, to the extent Lots 9-2 and 9-3 are benefitted by a prescriptive easement, the trial court should have declared such easement "[b]ased on its finding of the use during the prescriptive period" and "should have declined to go beyond that basic declaration." *See Bray*, 2002 ME 130, ¶19, 802 A.2d 1004.

In the event this Court holds that trial court properly recognized prescriptive easement rights benefitting Lots 9-2 and 9-3, the Court should vacate the portion of

judgment expanding the scope of rights and declaring that construction of a single-family residence would not overburden the prescriptive easement.[18]

D. Lots 5 and 11 are separate and distinct parcels, and the trial court erred, as a matter of law, when it treated the Lots as one, singular "GCI Parcel."

Lastly, the court's analysis with respect to GCI Lots 5 and 11 is legally flawed because, even if the prescriptive periods for these Lots were discernable from the Decision, the court failed to treat the two Lots as legally distinct.

Citing *Flaherty*, 2011 ME 32, ¶ 84, 17 A.3d 640, the trial court correctly recognized that "[u]se by the owner of one lot does not necessarily put the owners of the servient estate [on notice] that all lots are claiming a right to use the easement." (A. 63.) Accordingly, the trial court opined that it "considered the use of each parcel where the owners were claiming an easement." (A. 63.) Notwithstanding its recitation of the proper analytical framework, the court erred when it analyzed Lot 5 and Lot 11 jointly— treating the two distinct parcels as a singular "GCI Parcel."[19]

[18] For these same reasons, the court erred by expanding the scope of easement rights benefitting Lots 9-2 and 9-3 to include vehicular use. To the extent Claimants' testimony at trial provided any evidence of continuous use of Navy Road for access to Lots 9-2 and 9-3, such testimony centered on pedestrian use, not vehicular. The trial court should have declined to go beyond a basic declaration of pedestrian rights, to the extent such rights were established.

[19] In contrast to the discussion in the Decision, the Judgment sets forth the easement rights appurtenant to Lot 5 and Lot 11 separately. (*See* A. 42.) Although the court did not explicitly address its unified treatment of the two parcels in either the Decision or the Judgment, the trial transcript indicates that the court analyzed the two lots as "once (*sic*) parcel owned in unified ownership." (V Tr. 164.) As this section explains, such treatment defies well-established common law and constitutes legal error.

Although these Lots have common ownership, they are legally distinct: The Lots were previously conveyed as separate parcels, are taxed separately, and have been used for inconsistent purposes and to varying degrees. (*See* A. 163-64, 209-17; II Tr. 158-59, 200-01, 228-30.) Thus, the law requires that the parcels be analyzed separately. *See Gutcheon v. Becton*, 585 A.2d 818, 822 (Me. 1991) (endorsing the court's analysis of prior usage and tacking during prescriptive periods with respect to "distinct easements appurtenant to each of the plaintiffs' lots"). In *Gutcheon*, the initial dominant owners acquired contiguous lots from 1932 to 1961. *Id*. at 820-21. This Court affirmed the lower court's lot-by-lot analysis, finding that prescriptive rights were established at varying points from 1952 to 1981, commensurate with the respective periods of use for each lot, despite the dominant properties being held in common ownership. *Id*. at 821-22.

Prescriptive easements are easements appurtenant and therefore must be considered in the context of the specific lots at issue.[20] *See generally id*. Just because additional land could also benefit from an easement appurtenant to a separate parcel in common ownership does *not* automatically enlarge the dominant estate owner's

[20] To the extent the court's decision can be interpreted as extending the contested Lot 5 prescriptive easement to further benefit Lot 11, by virtue of the Lots' common GCI ownership, it is essentially treating the easement as benefitting GCI itself, rather than the land. *See Wentworth v. Sebra*, 2003 ME 97, ¶ 13, 829 A.2d 520 (distinguishing between easements appurtenant and easements in gross); *Clement v. Shea*, No. CIV.A. RE-00-21, 2004 WL 843182, at 2-4 (Me. Super. Feb. 12, 2004) (Hjelm, J.) (declining to grant prescriptive easement rights and rejecting argument for easement in gross, when purpose of claimed easements was to access specific lots). There has never been—nor could there be—any suggestion that GCI is entitled to such an easement.

easement rights. Rather, "under the common law generally recognized by most states an easement holder may use an appurtenant easement only for the benefit of the appurtenant parcel. The easement holder may not use the appurtenant easement indiscriminately to serve non-appurtenant parcels." Knud E. Hermansen & Donald R. Richards, *Maine Roads & Easements*, 48 Me. L. Rev. 197, 220–21 (1996) (footnote omitted).

Uniting Lot 5 and Lot 11 as a singular GCI Parcel thwarts proper analysis of whether there exist "distinct easements appurtenant to each of the plaintiffs' lots." *See Gutcheon*, 585 A.2d at 822. Separately analyzing the lots is consistent with this Court's recognition that, "[w]hen the circumstances surrounding the creation of an easement are prescriptive in nature, the adverse use that leads to creation of the servitude provides the basis for determining its terms." *Flaherty*, 2011 ME 32, ¶ 83 (quotation marks omitted).

Even assuming, *arguendo*, that a prescriptive easement is deemed to benefit Lot 5, the terms of the easement are constricted to the adverse use underlying its creation, *see id.*— use exclusive to Lot 5.[21] Extending the benefit to Lot 11—despite

[21] As set forth in the Statement of Fact, the trial court relied on evidence of use—specifically, residential use of the structures on Lot 5, contractor access, recreation, foraging, inspection, and campsite access—pertaining exclusively to Lot 5 when it concluded Lot 11 also benefits from prescriptive easement rights. The record is wholly devoid of any evidence that supports finding residential use, campsite use, inspection or contractor use on Lot 11. While it is possible that trial testimony could be interpreted as indicating recreation and foraging occurred on Lot 11, it is ambiguous, at best, as to whether it occurred on Lot 11 and, if so, to what extent. Rather, the Claimants' testimony focused on the use of other Small Point parcels.

entirely distinct circumstances and a total lack of evidence to support it—defies the general rule that the dominant estate cannot extend its use of an easement appurtenant to one of its lots to be used to benefit its other land. *See, e.g., Brown v. Voss*, 715 P.2d 514, 517 (Wa. 1986); *Maine Roads & Easements*, 48 Me. L. Rev. at 220–21 ("Any use of the appurtenant easement to enjoy another parcel, even by the owner of the appurtenant property (dominant estate) attempting to reach another adjacent (but non-appurtenant) parcel, is a trespass on the servient estate."). Accordingly, this Court should vacate the grant of prescriptive easement rights with respect to Lot 11.

CONCLUSION

For the reasons set forth in this brief, Sarah B. Sewall and Thomas P. Conroy respectfully request that this Court grant their appeal and vacate the court's order granting prescriptive rights for the benefit of Lots 5, 6, 7, 8, 9-2, 9-3, and 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel for Defendants Sarah B. Sewall and Thomas B. Conroy hereby certify that they have complied with Maine Rule of Appellate Procedure 7(c), as modified by this Court's Order on Motions Regarding Appendix, dated September 2, 2025, by (1) electronically filing one emailed copy of this brief to the Clerk of the Law Court; and (2) serving one emailed copy to each party who are either separately represented or who is unrepresented and has opted into electronic service.

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CERTIFICATE OF CONFORMANCE

Undersigned counsel for Sarah B. Sewall and Thomas P. Conroy hereby certifies that this brief conforms with this Court's July 11, 2025 Briefing Schedule.

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