STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. SOM-23-483

CHOCKSTONE GROUP, LLC, et al.

Plaintiffs-Appellees

v.

ROBERT A. MARTIN, et al.

Defendants-Appellants

On Appeal from Somerset County Superior Court
Docket No. RE-2020-004

BRIEF OF APPELLANTS ROBERT A. MARTIN AND CHARLOTTE M. FAWCETT

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Appellants Robert A. Martin and Charlotte M. Fawcett

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INTRODUCTION

Plaintiffs-Appellees Chockstone Group, LLC, David Theis, Sean Theis, Scott Theis, Kristina Hooper Kerry, and Greg Hooper (collectively, the "Childs Family") claim a prescriptive easement over Wildwood Lane as access to their small lakefront parcel on Great Moose Pond (the "Childs Camp") in St. Albans, Maine.[1] The Childs Family claim that they have acquired a prescriptive easement as to Wildwood Lane because they and their predecessors have used it to reach their camp continuously for at least twenty years under of claim of right adverse to Defendants-Appellants Robert A. Martin and Charlotte A. Fawcett (collectively, the "Martin Family") or their predecessors, with their knowledge and acquiescence.

The Superior Court erred in finding in favor of the Childs Family. There is no dispute that the Childs Family and their predecessors paid the Martin Family and their predecessors fees relating to Wildwood Lane for decades. Indeed, as the Superior Court found, the Childs Family made contributions when asked by the Martin Family. Despite these regular payments, the court concluded that the Childs Family had established both acquiescence and adversity because it held that, as a matter of Maine law, payments for maintenance are not inconsistent with acquiescence or adversity. Further, the court erroneously excluded evidence that the payments were made for use of Wildwood Lane rather than maintenance. The judgment of the Superior Court should be reversed.

[1] Chockstone Group, LLC is a limited liability company in which Jeffrey Childs is the sole member. A.123, ¶ 1.

STATEMENT OF FACTS

I. Factual Background

A. Wildwood Lane

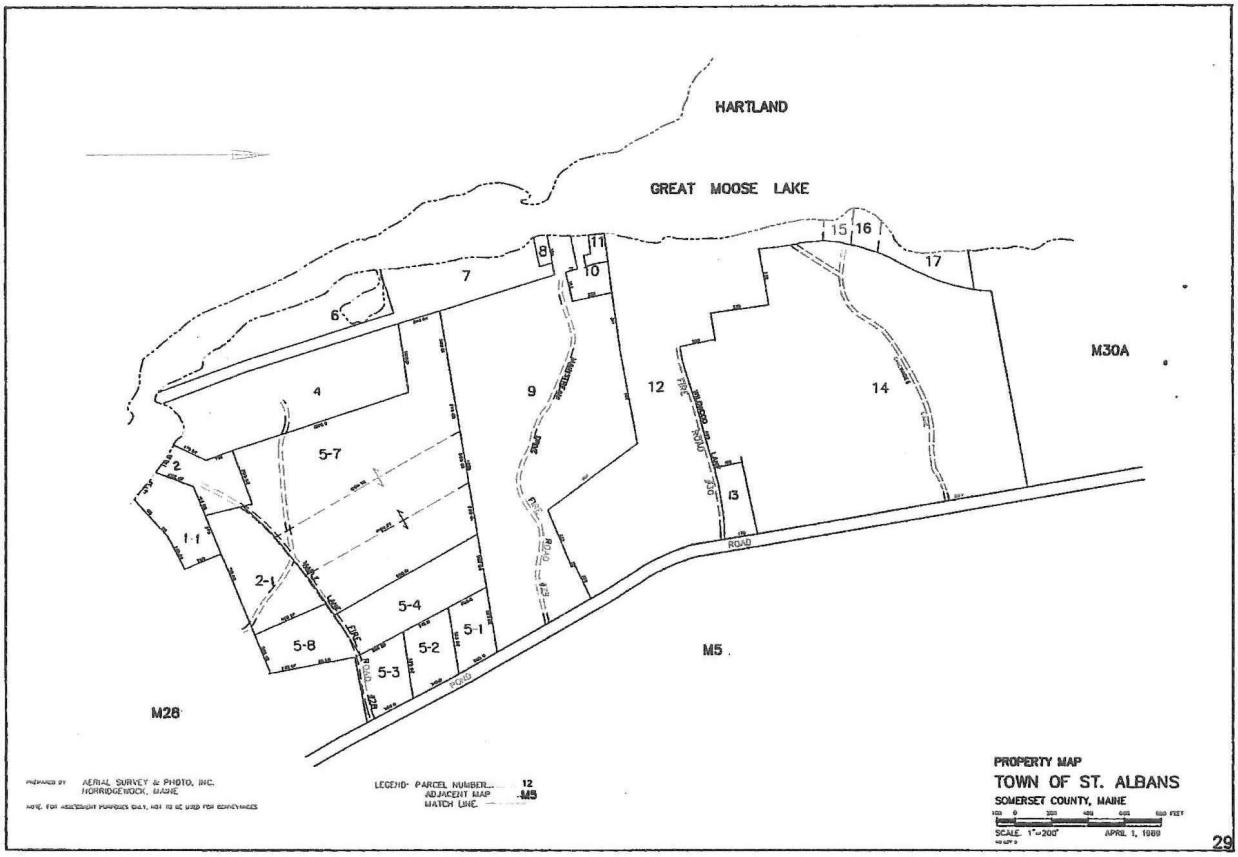
The Martin Family together own a parcel of land known as the "Wildwood Camps" in St. Albans, Maine, generally depicted as Lot 12 on the Town of St. Albans tax map M-29. A.123-24, ¶¶ 3, 5-6; *see* A.55 (Ex. 20). Clare Martin, the grandmother of the named defendants, acquired the first portion of Wildwood Camps by deed dated August 7, 1922. A.123-24, ¶ 6. Clyde Martin, the grandfather of the named defendants, purchased the remainder of the property by deed dated November 1, 1924. A.124, ¶ 6. Clyde Martin opened summer rental cottages on the property in 1927; eventually, Russell Martin, the father of the named defendants, and his wife took over operations of Wildwood Camps in 1951. A.124, ¶ 7; Tr. 142. Robert Martin and his sister, Charlotte Fawcett, took over operations from their father in 1978. Tr. 155. The Martin Family no longer operates summer cottages at Wildwood Camps. A.124, ¶ 8.

Historically, Wildwood Camps were accessed via Wildwood Lane (also known as Fire Road #30), which is depicted, in part, on Tax Map M-29. Tr. 138-39; A.124, ¶ 9. On the face of the earth, Wildwood Lane today extends from the end of the road as depicted on Tax Map M-29 over Parcel 12 (Wildwood Camps) and Parcel 10 (owned by Charlotte Fawcett) to the Childs Camp. A.124, ¶ 10; A.54 (Ex. 19); A.18, ¶ 19 n.3. The Martin Family owns the entire length of Wildwood Lane. A. 124, ¶¶ 11-14; A.72-

73 (Ex. 24). They wish to close and no longer maintain the road now that the summer camps are not in operation. Tr. at 205, 231-32.

The Childs Family together own the Childs Camp as tenants in common. A.123, ¶ 2. The Childs Camp is depicted generally on the Town of St. Albans tax map M-29, Lot 11. A.123, ¶ 3. Jennie Childs, the great-grandmother of the named plaintiffs in this case, acquired Childs Camp by deed dated March 8, 1906. A.123, ¶ 4. Over the years, and as discussed further below, the Childs Family and their predecessors have used Wildwood Lane to access the Childs Camp. Tr. 19-22.

The relevant properties and Wildwood Lane are shown on Tax Map 29:



A.55 (Ex. 20).

B. The Childs Family's Use of Wildwood Lane

Betty Jayne Childs Frosch ("BJ"), the mother of Kristina Kerry and Gregory Hooper, *see* Tr. 17, provided testimony regarding use of Wildwood Lane by the Childs Family and their predecessors. She first recalled travelling to the Childs Camp in 1946, using Wildwood Lane. Tr. 19-20, 22-23, 30. She would visit the Childs Camp about once a year as a child and continued to visit as an adult with her children. Tr. 26, 61. Various family members would also use the Childs Camp. Tr. 26-27, 61-62.

Other members of the extended Childs Family also testified as to their use of the Childs Camp and Wildwood Lane. Kristina Kerry, David Thies, and Jeffrey Childs testified that they would visit the Childs Camp during their childhoods. Tr. 67, 87-89, 114-15.[3] Kristina recalled using Wildwood Lane to access the Childs Camp, Tr. 67-68, as did David, Tr. 94, 97, and Jeffrey, Tr. 109.

The Childs Family and their predecessors paid the Martin Family and their predecessors fees relating to Wildwood Lane. When Russell Martin took over operation of the Wildwood Camps in 1951, he began charging a fee to the families who used Wildwood Lane. Tr. 141-43. From 1951 through 1978, Russell kept ledgers, which tracked fees he charged and collected from the families who used the road. Tr. 143-47, 207; A.74-100 (Ex. 26 excerpts), 101-22 (Ex. 27 excerpts); *see also* Ex. 18-5. The ledgers first reflected a collection of a road fee in 1951. A.74, 101. These fees were labeled

[2] BJ conveyed her interest in the Childs Camp to her children in 1997. Tr. 27, 69.
[3] Kristina and Jeffrey obtained their interests in the Childs Camp in 1997, *see* Tr. 69, 114, and David obtained his interest around 2008 or 2009, *see* Tr. 93.

variously as "private road entrance fees," A.74; "road fee charges," A.76; "fees charged for use of private road," A.101; "fees on road use," A.103, "fees on pvt. road use," A.104, "road fees," A.113, or similar terms. The fees varied over the years. *See, e.g.*, A.119-22 (Ex. 27). As Robert Martin testified, he continued collecting fees from Edwin ("Pete") Childs for "years" after Robert took over operation of Wildwood Camps in 1978. Tr. 195-96; *see* Tr. 155-57, 220, 229. After Pete stopped paying, the fee was not always paid. Tr. 196-97. Although Robert did not track fees in ledgers like his father, there are checkbook entries by his mother reflecting payments from the Childs Family in the mid-1980s. Tr. 207-08, 214, 219-20; A.53 (Ex. 18-6). Robert Martin testified that, when the fees were not paid, the Childs Family were denied the use of Wildwood Lane. Tr. 195, 197, 199, 207, 220.

There is no dispute regarding the fact of the Childs Family's payments to the Martin Family. The Childs Family acknowledged that they would make annual contributions relating to Wildwood Lane. Tr. 37, 77, 79, 81, 84-85, 92, 100. The parties, however, disputed the purpose of the fees. The Martin Family testified that the fees were for use of the road, consistent with the notations in the Russell Martin ledgers. Tr. 145-47, 154, 195, 229, 233.[4] The Childs Family claimed for the most part that they never had permission to use the road and that the fees were for maintenance, not access.

[4] It is also consistent with the fact that the amount of the fee varied annually based on the use of the road. A.119-22 (Ex. 27). The fee also did not fluctuate based on road repair costs. In the fall of 1954, the entire road washed out as a result of hurricanes, *see* A.105 (Ex. 27); Tr. 152-53. The road fees charged in 1955 did not increase over the fees assessed in 1954. A.104, 106 (Ex. 27); Tr. 153-54.

Tr. 39, 73, 79, 84, 98, 121; *but see* Tr. 70 ("Q. What were you paying for? A. I would say I was paying so I could get down the road because otherwise it was going to be blocked").

In 2006, the parties signed a "Road Maintenance Aggreement" [*sic*] (the "2006 Agreement"). A.52 (Ex. 9). Dated May 28, 2006, the Agreement provided that the Childs Family would pay $150 annually for ten years, and that Wildwoods Camps would "maintain a passable road and provide access to through [*sic*] any chain or gate" to Wildwood Lane during the term of the agreement. *Id.* The purpose of the 2006 Agreement, according to Jeffrey Childs, was to "access" Wildwood Lane through the road gate. Tr. 126-29.[5] The Childs Family made payments to the Martin Family under the Agreement. Tr. 72-73, 116-19, 129-30.

II. Procedural Background

The Childs Family filed the complaint initiating this action on March 12, 2020. A.3. The complaint contained counts for declaratory judgment, common law nuisance by obstruction of prescriptive easement, and common law trespass by unreasonable interference with prescriptive easement. A.33-35, ¶¶ 43-52. The Childs Family sought a declaration that the property on which the Childs Camp is located is benefitted by a prescriptive easement on and over Wildwood Lane. *Id.* The Childs Family also sought

[5] The record shows that the Martin Family controlled access to the road, including by use of a gate, *see* Tr. 117, 196, 246, as Charlotte Fawcett and Robert Martin's grandfather had done by installing a chain, Tr. 140, and as their father Russell Martin had also done by installing a second chain, Tr. 156. The Martin Family has always chained the road. Tr. 220-21, 242, 244, 246. At times the Martin Family has also used a car to block access to Wildwood Lane. Tr. 122, 199-200; A.50-51 (Exs. 7-8).

a permanent injunction against the Martin Family. *Id.* Charlotte Fawcett filed a counterclaim for declaratory judgment and trespass. A.44-49.

After a one-day bench trial on June 22, 2023, the Superior Court (Mullen, C.J.) entered a declaratory judgment in favor of the Childs Family. A.24, ¶ 64; A.26, ¶ 74(4). The court concluded that the Childs Family was entitled to a prescriptive easement over Wildwood Lane. First, the court found that the Childs Family and their predecessors had used Wildwood Lane since 1946. A.22, ¶ 51. Second, the court found that the Martin Family's predecessors knew of the use of the road by 1952, given the collection of fees relating to the road. A.22, ¶ 53. Third, the court found that the Martin Family and their predecessors had acquiesced to the use of the road by the Childs Family and their predecessors "for more than twenty years prior to 1997." A.23, ¶ 59.[6] The court's finding rested on the conclusion that the payments to the Martin Family by the Childs Family was "a contribution for maintenance, not for access to the Road." A.23, ¶ 58. The court reasoned that "[p]ayments made for maintenance do not preclude a finding of acquiescence." *Id.* Fourth, the court found that the Childs Family could avail themselves of "a presumption of a claim of right" because the payments were "for maintenance, not for a license to use the Road." A.23-24, ¶¶ 61-62. The court reasoned that "[p]ayment for maintenance is not necessarily inconsistent with a claim of right."

[6] The court found cessation of acquiescence beginning after BJ's children obtained their interests in 1997, and further concluded that the 2006 Agreement supported the conclusion that use of the road was permissive after execution of that agreement. A.23, ¶¶ 56, 59.

A.23-24, ¶ 62. The court also entered an injunction in favor of the Childs Family, A.25, ¶ 71, concluding it was necessary to prevent interference with the Childs Family's easement, A.24, ¶ 68; A.26, ¶ 74(5). The Martin Family filed a timely notice of appeal.

STATEMENT OF ISSUES

I. Whether the Superior Court erred as a matter of law by concluding that a landowner's assessment of fees for maintenance are consistent with a finding of acquiescence, which requires the landowner's passive assent or submission.

II. Whether the Superior Court erred as a matter of law by concluding that a user's willing payment of fees for maintenance are consistent with a finding of adversity, which requires that the use not be in recognition of or subordination to the title owner.

III. Whether the Superior Court erred as a matter of law by excluding a deposition transcript under the ancient documents hearsay exception under M.R. Evid. 803(16), on the basis that such transcripts can never qualify for the exception.

SUMMARY OF ARGUMENT

The Superior Court committed an error of law in concluding that the Childs Family had carried their burden to demonstrate both acquiescence and adversity, as required to establish a claim of prescriptive easement. At trial, both parties agreed that the Childs Family routinely paid the Martin Family fees in relation to Wildwood Lane. Nevertheless, crediting testimony from the Childs Family that the fees were for maintenance, the Superior Court reached the legal conclusion that maintenance fees

paid at the request of the landowner (here, the Martin Family) are not inconsistent with a finding of acquiescence and adversity. The Superior Court was wrong. A landowner's imposition of maintenance fees as a condition on the use of a road and payment of those fees by the user indicates both the landowner's grant of permission for use of the road as well as the user's recognition of the landowner's superior rights. Accordingly, even accepting the Superior Court's conclusion that the fees paid by the Childs Family to the Martin Family were for maintenance, the Childs' Family's claims must fail because they failed to demonstrate acquiescence and adversity.

Alternatively, even if maintenance payments could be consistent with findings of acquiescence and adversity, the Superior Court erred as a matter of law by excluding critical evidence regarding the nature of the fees paid by the Childs Family. The Superior Court excluded the deposition testimony of Russell Martin, reasoning that the ancient documents exception in M.R. Evid. 803(16) does not apply to deposition transcripts. Again, the Superior Court was wrong. A deposition transcript is a "document" within the meaning of Rule 803(16). Exclusion of the deposition prejudiced the Martin Family, as it contains direct evidence of the reason for the Martin Family's assessment of fees; as Russell Martin testified, the fees were assessed for the use of the road.

The Superior Court's errors require reversal of the judgment. Further, because maintenance payments are inconsistent with findings of acquiescence and adversity, judgment should enter in favor of the Martin Family—including with regard to Charlotte Fawcett's counterclaims.

ARGUMENT

I. Under the relevant standard of review, the Childs Family bears the burden to prove all the elements of a prescriptive easement.

Under Maine law, "[n]o person, class of person or the public shall acquire a right-of-way or other easement through, in, upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years." 14 M.R.S. § 812. To prevail in a claim for a prescriptive easement under this statute, a claimant must prove by a preponderance of the evidence: "(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; *see Lincoln v. Burbank*, 2016 ME 138, ¶ 27, 147 A.3d 1165. Each of these elements is essential. *Jacobs v. Boomer*, 267 A.2d 376, 378 (Me. 1970).

To establish the first element, continuous use for at least twenty years, the claimant must make two showings. The claimant must show that the use has been "without interruption." *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 22, 106 A.3d 1099 (quotation marks omitted). Further, the claimant must also show that the use constitutes "the kind and degree of occupancy (i.e., use and enjoyment) that an average owner would make of the property." *Id.* (quotation marks omitted).

To establish the second element, using property under claim of right adverse to the owner, the claimant "must be in possession as the owner, intending to claim the

land as her own, and may not be in recognition of or subordination to the record title owner." *Androkites*, 2010 ME 133, ¶ 16, 10 A.3d 677 (quotation marks and alterations omitted). Thus, adversity requires that the claimant show that the "claimant has used the property (1) in the absence of the owner's express or implied permission, and (2) as the owner would use it, disregarding the owner's claims entirely, using it as though he owns the property himself, (3) such that the use provided the owner with adequate notice that the owner's property rights are in jeopardy." *Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099 (alterations and quotation marks omitted); *see Lincoln*, 2016 ME 138, ¶ 27, 147 A.3d 1165. If, and only if, a claimant has satisfied the first (continuous use) and third (knowledge and acquiescence) elements of a prescriptive easement, then "a presumption arises that the use of the property was under a claim of right adverse to the owner." *Androkites*, 2010 ME 133, ¶ 17, 10 A.3d 677. But "the presumption will not arise if there is an explanation of the use that contradicts the rationale of the presumption." *Id.* In that instance, the claimant is left to prove the second element of the claim, without the benefit of any presumption. *See id.* ¶ 22.

Finally, to establish acquiescence, the claimant must show "consent by silence," *i.e.*, "passive assent or submission to the use." *Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099 (quotation marks omitted); *see Lincoln*, 2016 ME 138, ¶ 27, 147 A.3d 1165. "Knowledge and acquiescence may be established either by proof of actual knowledge and acquiescence, or by proof of a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed." *Almeder*, 2014 ME 139, ¶ 21, 106

A.3d 1099 (quotation marks omitted). "Acquiescence differs from adversity in that adversity regards the actions of the claimant, whereas acquiescence looks to the actions of the owner." *Id.* Acquiescence "requires [the owner's] passive assent to the claimant's use, as distinguished from the [owner's] granting of a license or permission given with the intention that the licensee's use may continue only as long as the owner continues to consent to it." *Taylor v. Nutter*, 687 A.2d 632, 635 (Me. 1996) (quotation marks omitted); *see Pace v. Carter*, 390 A.2d 505, 507 (Me. 1978). "Either a grant of permission or an express protestation will defeat a claim for a prescriptive easement." *Lincoln*, 2016 ME 138, ¶ 27, 147 A.3d 1165.

In reviewing the Superior Court's decision following trial, the Law Court reviews questions of law de novo and reviews factual finding for clear error. *Id.* ¶ 26.[7] In this case, the Superior Court made multiple legal errors by concluding that payment of maintenance fees is not inconsistent with the prescriptive easement elements of acquiescence and adversity. No deference is due the trial court's legal rulings. *Id.*

II. The Superior Court erred as a matter of law in determining that the Childs Family carried their burden to show acquiescence and adversity despite evidence of payments rendered to the Martin Family.

As the Martin Family argued below, the Childs Family is unable to demonstrate both acquiescence by the Martin Family and use adverse to the interests of the Martin Family. For decades, the Childs Family made payments to the Martin Family in

[7] As to factual findings, this court will vacate a trial court's conclusion if the evidence compels a contrary conclusion. *Androkites*, 2010 ME 133, ¶ 12, 10 A.3d 677. This appeal, however, involves legal challenges.

connection with their use of Wildwood Lane. These payments were reflected in the ledgers kept by Russell Martin and were ultimately memorialized in the 2006 Agreement. The Childs Family characterized these payments as having been made to help cover the costs of road maintenance of Wildwood Lane, but this characterization is not determinative of the issue presented. The key legal ramification of these payments is that, however denominated, the Childs Family's annual access to and use of Wildwood Lane was conditioned upon these payments. That is, the annual payments were a condition imposed by the Martin Family for a license to travel on Wildwood Lane, demonstrating both that the Martin Family had granted permission for the use and that the Childs Family recognized the Martin Family's ownership rights. The Martin Family's assessment of fees thus precludes both a finding of acquiescence and adversity.

A. The Superior Court erred in concluding that payments for maintenance are consistent with a finding of acquiescence.

The Superior Court erroneously concluded that, as a matter of law, "[p]ayments made for maintenance do not preclude a finding of acquiescence." A.23, ¶ 58. There is no dispute that the Childs Family's predecessors paid fees relating to Wildwood Lane, but the Superior Court accepted the Childs Family's argument that the payments were made to help cover the costs of road maintenance rather than for access to Wildwood Lane. *Id.* In so doing, the Superior Court created a dichotomy—fees for maintenance as opposed to fees for use—that simply does not exist in Maine law. *See Clement v. Shea*, 2004 WL 843182, at *3-4 (Me. Super. Ct. Feb. 12, 2004) (Hjelm, J.). Regardless of

whether a particular payment can be designated as a maintenance fee, the collection of any fee demonstrates the owner's active imposition of a condition on the use of a road and thus precludes a finding of acquiescence. *See Lincoln*, 2016 ME 138, ¶ 27, 147 A.3d 1165; *Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099; *Taylor*, 687 A.2d at 635.

1. The Superior Court concluded that a landowner's assessment of regular maintenance fees is not sufficient, as a legal matter, to establish permissive use.

Both parties put forward evidence regarding payments made by the Childs Family and their predecessors to the Martin Family and their predecessors relating to Wildwood Lane. The Martin Family put forward evidence that the Childs Family and their predecessors had been required to make regular payments relating to Wildwood Lane. Specifically, for the period from 1951 through 1978, Russell Martin would charge fees to everyone who used the road and would record the payments in his ledgers. Tr. 142-51; A.74-100 (Ex. 26), A. 101-22 (Ex. 27); *see also* Ex. 18-5. The Childs Family and their predecessors continued to pay the fee after Wildwoods Camps was transferred to Charlotte Fawcett and Robert Martin. Tr. 155-57, 207-08, 220, 229; A.53 (Ex. 18-6). The Childs Family acknowledged that they would make annual contributions relating to the road. Tr. 37, 77, 79, 85, 92, 100. Accordingly, there is no dispute over the court's finding that the Martin Family and their predecessors collected a fee related to the road. *See generally* A.22, ¶ 53.

At trial, however, the parties hotly contested the significance attributed by the court to those fees. *See* A.23, ¶¶ 57-58. As the testimony from Gregory Martin, Robert

Martin, and Charlotte Fawcett showed, the fees charged to the Childs Family were for use of the road. Tr. 145-47, 195, 229, 233. This is consistent with Russell Martin's ledgers. *See, e.g.*, A.74-100 (Ex. 26), A. 101-22 (Ex. 27); *see also* Ex. 18-5. The Childs Family, for their part, contested the reason for those payments; they claimed that they never had permission to use the road and that the fees were solely for maintenance rather than access. Tr. 39, 73, 84, 98, 121. Based on the testimony provided at trial, the trial court concluded that the contributions were for maintenance. A.23, ¶¶ 57-58.

Because it found that the fees were for maintenance, the trial court held that the Martin Family acquiesced to the Childs Family's use of Wildwood Lane. A.23, ¶ 59. The court's distinction between contributions for maintenance and contributions for access is unsupportable. Both preclude a finding of acquiescence.

2. The Superior Court's conclusion that maintenance fees do not indicate permissive use is contrary to Maine law.

There is no support in Maine law for the court's legal conclusion that "[p]ayments made for maintenance do not preclude a finding of acquiescence." A.23, ¶ 58. No case stands for that proposition. To the contrary, Maine precedent suggests that payment of maintenance fees vitiates any finding of acquiescence because it indicates active regulation of users by the landowner.

If a landowner (such as the Martin Family) actively imposes a condition precedent (a maintenance fee) that the claimants satisfy, then the landowner cannot be said to have granted "passive assent or submission" to the continuing use. *See Lincoln,*

2016 ME 138, ¶ 27, 147 A.3d 1165; *Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099; *Taylor*, 687 A.2d at 635. The collection of fees is inconsistent with passivity or submission; on the contrary, it necessarily demonstrates the landowner's active efforts to manage his or her property. It would not be apparent to a landowner who actively assesses fees to those who use his road that he would need to do anything more in order to protect his property interests.[8] Because the law generally establishes a low bar for landowners to register their non-acquiescence, *see Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099 (citing cases), the collection of maintenance fees should alone be enough to establish the owner's affirmative consent, *Clement*, 2004 WL 843182, at *4.

This conclusion is consistent with the only Maine case to have considered a similar issue. In *Clement v. Shea*, the Superior Court concluded that payment of maintenance fees is the equivalent of permission. *Id.* In that case, the claimants had used the road but paid maintenance fees to do so. *Id.* at *2 (even those owners who had not sought permission to use the road "made financial contributions toward its upkeep"). Justice Hjelm held that the assessment of maintenance fees precluded any finding of acquiescence. *Id.* at *4 (finding no acquiescence because the owner "permitted the nearby landowners to use that road if the road were maintained"). Justice Hjelm

[8] This is particularly true where, as here, the landowner also controls access to the road via use of a chain or gate. Tr. 117, 140, 156, 196, 220-21, 242, 244, 246; *see Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate LLC*, 2016 ME 114, ¶¶ 22, 25, 145 A.3d 1024 (trial court erred in concluding that erection of a fence was not evidence of nonacquiescence); *see also Great N. Paper Co. v. Eldredge*, 686 A.2d 1075, 1079 (Me. 1996) (suggesting that installation of a cable across a road would prevent a finding of acquiescence but finding that the prescriptive easement had been perfected before the cable was installed).

reasoned that the collection of maintenance fees disproved mere submission by the landowner: the landowner "permitted them to use the road so long as the road was maintained. Thus, the [landowner] did not merely submit or assent to the plaintiffs' use passively. Rather, all of the plaintiffs were permitted to use the road because [the landowner] remained satisfied that the conditions for that use were fulfilled." *Id.* This is logical—if, as in *Clement*, a landowner knows that his road is being used but is satisfied to allow such use because maintenance fees are being paid, then the landowner can be fairly said to have granted permission for continued use of the road in return for payment. It would be unfair to find acquiescence in the face of such active efforts by landowners to manage the use of their property.

A contrary rule, permitting a finding of acquiescence in the face of fee collections by the landowner, would give rise to substantial risk for landowners because it would run contrary to reasonable expectations and imposes too high a bar for protecting the interests of landowners. "'It is axiomatic that easements by prescription are not favored in law because they necessarily work losses or forfeitures of the rights of others.'" 14C Mass. Prac. § 14:89 n.1 (5th ed. Nov. 2023 update) (quoting *Zimmerman v. Newport*, 416 P.2d 622, 629 (Okla. 1966)); *see Lincoln v. Babyak*, 2018 WL 2247567, at *4 (Mass. Super. Ct. Apr. 5, 2018); 28A C.J.S. Easements § 23 (Mar. 2024 update). The Superior Court's legal distinction runs contrary to this axiom because landowners could reasonably conclude that assessment of fees to users of a road on their property is a grant of permission—after all, if a landowner collects a road maintenance fee, then it would

seem superfluous to also state that the landowner is allowing use of the road because the fee is paid. Thus, a rule that would require something more than assessment of a maintenance fee to show permission is likely to result in the loss of the exclusive use of property contrary to a landowner's reasonable expectations.

The conclusion that assessment of maintenance fees precludes a finding of acquiescence finds further support in the principle, well established in Maine law, that acquiescence, unlike adversity, "looks to the actions of the owner" rather than the claimant. *Almeder*, 2014 ME 139, ¶ 21, 106 A.3d 1099. Under this standard, the appropriate perspective for purposes of determining acquiescence is that of the landowner. Accordingly, one must view the assessment of fees from the landowner's perspective, not the claimant's. Although there may be many reasons for a claimant to pay someone else to maintain a road, there is only one reason for a landowner to assess maintenance fees: namely, as consideration for use of the road. Thus, assessment of maintenance fees by a landowner on users indicates permissive use.

B. The Superior Court erred in concluding that payments for maintenance are consistent with a finding of adversity.

For similar reasons, the Superior Court also erroneously concluded that the payment of road maintenance fees is "not necessarily inconsistent with a claim of right" necessary for adversity. A.24, ¶ 62. To be under claim of right, a use "may not be in recognition of or subordination to the record title owner." *Androkites*, 2010 ME 133, ¶ 16, 10 A.3d 677 (quotation marks omitted). The landowner must not have granted

"express or implied permission," and the user must "disregard[] the owner's claims entirely, using it as though he owns the property himself." *Almeder*, 2014 ME 139, ¶ 20, 106 A.3d 1099 (alterations and quotation marks omitted). The payment of maintenance fees is inconsistent with these requirements.

First, as explained above, the payment of maintenance fees to a landowner demonstrates the owner's permission. The trial court found that the Childs Family "made contributions for maintenance when asked." A.19, ¶ 27. If a landowner imposes a fee requirement upon the user, then the landowner has affirmatively granted permission for the use. Again, *Clement* provides useful guidance. In that case, the court declined to find adversity against the landowner because the evidence of maintenance payments showed that the users "used the road in the manner that [the landowner] authorized, namely, in exchange for bearing some form of responsibility to ensure the upkeep of the way." 2004 WL 843182, at *4. The same conclusion holds in this case.

This conclusion is also consistent with *Jacobs v. Boomer*. In that case, the defendant, Mr. Boomer, used the property of the plaintiff, Mr. Jacobs, to access Hoyt's Island. 267 A.2d at 377. Jacobs offered evidence of a rental agreement between the prior landowner, Mr. Bradley, and Boomer wherein Boomer agreed to pay $25 (later $35) per car that used the property. *Id.* at 378. Boomer offered testimony that the payments related to parking, not access to the landing via Jacobs' property. *Id.* at 379. Jacobs, however, offered testimony that he had told Boomer that he wished to maintain the pre-existing arrangements between Bradley and Boomer. *Id.* The trial judge found

that Boomer's use of the landing area "was not under claim of right adverse to [Jacobs], but was rather in subordination to [Jacobs'] rights" given "the existence of a continuous understanding or agreement that rent would be paid and was paid" throughout Boomer's use of the island and landing area. *Id.* In denying Boomer's appeal, the Law Court held that "[w]here in its origin a use is shown to be by license or permission of the owner of the servient tenement, such as where rent is paid for its use, the element of adverse user disappears and no prescriptive rights can arise therefrom." *Id.* at 380. Similar to *Jacobs*, where the Childs Family has paid a fee relating to the use of Wildwood Lane at the landowner's request, the Childs Family cannot demonstrate adversity.[9]

Second, the payment of maintenance fees shows that the user was acting in subordination to the landowner, and was not disregarding the landowner's rights. This is clearly illustrated here. Again, the trial court found that the Childs Family "made contributions for maintenance when asked." A.19, ¶ 27. As a matter of law, paying fees to a landowner at the landowner's request means that the user recognizes that the landowner has the right to demand payment. There is no logical alternative explanation. Here, if the Childs Family were truly disregarding the Martin Family's claims in a way that demonstrates that they were using the property as their own, then they would not have paid the Martin Family when the Martin Family requested it. A person with a right

[9] The Superior Court distinguished *Jacobs* on the basis that "[m]aintenance payments . . . imply a preexisting right to the property to be maintained, whereas a rental agreement creates that right." A.24, ¶ 63. But this conclusion does not hold. As further discussed herein, maintenance payments paid at the request of a landowner *indicates subservience to the landowner*—not a preexisting right to the property.

to use property does not pay another upon demand; payment upon demand only happens if the user recognizes the superior rights of another. For this reason, the court's rationale—that "one might pay a contractor or even a neighbor with needed equipment to maintain a driveway," A.24, ¶ 62—misses the point. Such payments are made *at the initiation of the payor*. Here, there is no dispute that the payments were made *at the initiation of the payee—i.e.*, the landowner. Thus, the Childs Family's payments to the Martin Family at the Martin Family's request controverts the notion that the Childs Family was acting in disregard to the Martin Family's claims.

In any event, even if payment of maintenance fees at the request of the landowner does not preclude adversity as a legal matter, payment of maintenance fees at least renders application of a presumption of adversity improper. Despite the payment of maintenance fees, the Superior Court applied a presumption of adversity. *See* A.23, ¶ 61. The court should not have applied the presumption for two reasons. First, as explained above, the Childs Family failed to demonstrate acquiescence, the third element necessary to establish a prescriptive easement. *See Androkites*, 2010 ME 133, ¶ 17, 10 A.3d 677. Having failed to make that showing, the presumption is inapplicable. *Id.* Second, for all the reasons set forth above, the payment of maintenance fees provides an explanation for the use of the road that contradicts the assumption of adversity that arises when there has been actual, open use for over twenty years—namely, that the owners of the road had granted permission to the users. *Id.* Once payment of fees became part of the record, the burden should have been on the Childs

Family to establish the nature of the payments because, as explained in *Clement*, contributions for maintenance suggest that the use of the road is not adverse. 2004 WL 843182, at *4. At the very least, therefore, the Childs Family should have been required to establish—without the benefit of a presumption—that they were disregarding the Martin Family's claims to the road, and that they paid for maintenance the way one might hire someone with the equipment necessary to plow their driveway in the winter.

C. The Superior Court's judgment cannot be sustained if payments for maintenance paid by the Childs Family to the Martin Family are inconsistent with acquiescence and adversity.

Because the payment of maintenance fees is, as a matter of law, inconsistent with a finding of acquiescence and adversity, the Superior Court's judgment cannot be supported and must be reversed. The Superior Court concluded that the only window for establishing acquiescence was the "twenty years prior to 1997," given that the evidence presented at trial established that there was no acquiescence by the Martin Family once BJ's children acquired their interests in 1997. A.23, ¶ 59. However, there is uncontroverted evidence that the Childs Family paid a fee to Russell Martin up through 1978 and for "years" thereafter. A.19, ¶¶ 24, 26; *see* Tr. 142-51, 155-57, 207-08, 220, 229 (referencing payments recorded in Russell Martin's ledgers, as well as subsequent payments, including in the 1980s); A.100 (Ex. 26) ("road fee" in 1978); A.53 (Ex. 18-6) (checkbook register). Given this timeline, the Childs Family cannot establish any twenty-year window of adverse use with the Martin Family's acquiescence. This is fatal to their claims, and requires entry of judgment in favor of the Martin Family.

III. The Superior Court erred as a matter of law by excluding the deposition transcript of Russell Martin, which would show that the Childs Family's use of Wildwood Lane was conditioned upon payment and a corresponding grant of license by the Martin Family.

Even if the Superior Court's distinction between fees for maintenance and fees for use could be supported as a matter of law, the Superior Court nevertheless erred by excluding the deposition transcript of Russell Martin. The Russell Martin transcript was admitted at trial *de bene*. A.20, ¶ 39; Tr. 166, 168, 170-74. In its written decision, the Superior Court concluded that the deposition was inadmissible. A.21, ¶ 45.

As discussed more fully below, the deposition transcript provides important context regarding the payment of fees by the Childs Family and their predecessors for use of Wildwood Lane. In his deposition, Russell Martin—who died before the start of this litigation—testified that the purpose of the fees charged to the Childs Family's predecessors for access to their camp via Wildwood Lane was for use, not maintenance. Although the deposition qualifies as an ancient document because it was given more than twenty years before trial, long before this litigation began, the Superior Court excluded the deposition because it was unaware of a case that had applied the ancient documents exception to testimony. A.21, ¶ 46. Exclusion of the testimony was not harmless, as it contradicts the Superior Court's finding regarding the purpose of the fees charged to the Childs Family.

This Court reviews a trial court's rulings on admissibility of evidence for abuse of discretion. *State v. Mills*, 2006 ME 134, ¶ 8, 910 A.2d 1053. A court abuses its

discretion "if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice." *Id.* (quotation marks omitted); *see State v. Hussein*, 2019 ME 74, ¶ 10, 208 A.3d 752 (a trial court "by definition abuses its discretion when it makes an error of law" (quotation marks omitted)). The decision to exclude the deposition transcript of Russell Martin was an error of law.

A. The Russell Martin transcript is admissible under Maine Rule of Evidence 803(16).

Pursuant to Maine Rule of Evidence 803(16), "[a] statement in a document that is at least 20 years old and whose authenticity is established" is not excluded by "the rule against hearsay, regardless of whether the declarant is available as a witness." M.R. Evid. 803(16). In this case, there is no debate over whether Russell Martin's deposition was sufficiently ancient; it was given in 2002, more than twenty years before the trial in this case. Tr. 170; *see* Ex. 23. Nor is there any debate over the deposition's authenticity; the parties stipulated to its authenticity. Tr. 202; A.21, ¶ 46. Thus, the only question in this case is whether the deposition is a "document" for purposes of the rule. It is.

The scope of the term "document" is broad and encompasses deposition transcripts. Maine courts have admitted a wide variety of documents under the ancient documents exception. *See Murch v. Nash*, 2004 ME 139, ¶ 16, 861 A.2d 645 (citing to Rule 803(16) for the proposition that a "commercial atlas is competent historical evidence of the presence of a right-of-way on the face of the earth"); *Landry v. Giguere*,

128 Me. 382, 147 A. 816, 817 (1929) (ancient deed); *Goodwin v. Jack*, 62 Me. 414, 416 (1872) (ancient books of record of proprietors of land); *Shepler v. Orne*, 2016 WL 4418863, at *3 (Me. Super. Ct. Apr. 8, 2016) (ancient letter and appraiser's report); *Welch v. State*, 2006 WL 381766, at *2 n.5 (Me. Super Ct. Jan. 19, 2006) (stating that a 1977 letter could have met the ancient document exception had it been properly authenticated by an affidavit). This is for good reason; treatises and other courts have noted the breadth of the ancient documents exception. *See Gregory v. Long*, 875 S.E.2d 298, 304 (W. Va. 2022) ("The term 'ancient document' generally encompasses written items such as wills, deeds, contracts, newspapers, publications, letters, office memoranda, ledger books, scientific reports, inscriptions, and the like." (quoting 29A Am. Jur. 2d *Evidence* § 1164 (2022))); 2 *McCormick on Evidence* § 323 at 595 (8th ed. 2020) (noting that the rule contains "no limitation as to the kind of document that qualified"); 4 *Federal Evidence* § 8:100 (4th ed. Aug. 2023 update) ("The term 'document' is not a word of art. The exception reaches written material of all kinds (letters, diaries, newspapers, receipts, maps, and so forth) . . . .").

For this reason, the few courts that have considered the issue[10] have applied the ancient document exception to old testimony. *See, e.g.*, *Mathin v. Kerry*, 782 F.3d 804, 812 (7th Cir. 2015) (declining to admit an affidavit under Fed. R. Evid. 803(16) because it could not be properly authenticated, not because it did not fall within the meaning of

[10] There is little case law regarding Rule 803 and the ancient documents exception generally. *See Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1375-76 (3d Cir. 1991).

the exception); *Osprey Ship Mgmt., Inc. v. Jackson Cnty. Port Auth.*, 2008 WL 282267, at *4 (S.D. Miss. Jan. 29, 2008) (admitting affidavit under Fed. R. Evid. 803(16)); *Lowell v. City of Boston*, 79 N.E.2d 713, 718-19 (Mass. 1948) (explaining that the petitioners, in support of their claim that certain land was held in trust by the City of Boston, relied upon a "written deposition" and considering its contents for the truth of the matter asserted).

Further, applying Rule 803(16) to depositions serves the purpose of the that rule. "Necessity . . . was the primary stimulus for this hearsay exception. After passage of a long period of time, witnesses are unlikely to be available or, if available, are unlikely to recall reliably the events at issue." 2 *McCormick on Evidence* § 323 at 594; *see Gregory*, 875 S.E.2d at 304 ("[T]he primary justification for the ancient document rule is one of necessity; if genuine documents are not to be excluded merely because the passage of time has clouded memories or allowed authenticating witnesses to disappear or die, an ancient document rule is necessary." (quoting Mitchell L. Posin, *Ancient Documents*, 50 Am. Jur. Proof of Facts 2d 321, § 1 (1988)); 4 *Federal Evidence* § 8:100 ("Need is the main justification for an ancient documents exception."). Necessity for the ancient documents exception is well illustrated by the deposition testimony in this case. Russell Martin, the deponent, is deceased and therefore can no longer testify, Tr. 169—even though he was the only person who could testify as to his purpose in charging fees to users of Wildwood Lane.

The Superior Court, however, never considered the primary justification for Rule 803(16); instead it only mentioned concerns regarding trustworthiness. It is true that a

secondary justification for the exception is trustworthiness—the passage of time between the creation of the document and the litigation in which it was introduced makes it "less likely that the declarant had a motive to falsify." 2 *McCormick on Evidence* § 323 at 594; *see Gregory*, 875 S.E.2d at 304 ("[A]s the length of time increases between the day the document was created and the date of trial, the possibility decreases that the document was prepared with litigation in mind."); 4 *Federal Evidence* § 8:100 (noting that ancient documents are more trustworthy because they "are not likely to have suffered from the forces generating the suit"); Field & Murray, *Maine Evidence* § 803.16 at 501 (6th ed. 2007) ("Under modern conditions, 20 years of existence is sufficient to assure presence of the factors making for reliability."). But, instead of accepting the categorical rule of trustworthiness set forth in Rule 803(16), the court engaged in a document-specific analysis of trustworthiness under Rule 803(16).

The Superior Court reasoned that Russell Martin's testimony was less trustworthy because it was given in "earlier litigation regarding a property dispute" and therefore may have created incentives to misreport some of the same facts at issue in this case. A.22, ¶ 47. That reasoning was flawed.

As an initial matter, a document-specific analysis of trustworthiness is not appropriate under Rule 803(16), which establishes a broad rule of admissibility. Rule 803(16) contains no requirement that the proffered document itself contains sufficient indicia of trustworthiness; rather, a document is admissible under the ancient documents exception if it is both authenticated and more than 20 years old.

M.R. Evid. 803(16). Because the Russell Martin deposition met these criteria, it should have been admitted. *See United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass. 1996) ("Once the ancient documents have been authenticated, they are presumed to be reliable, and if the non-moving party questions their reliability, he must bear the burden of impeachment." (quoting *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 805 F. Supp. 680, 711 n.34 (E.D. Wis. 1992) (alterations omitted))).[11]

Even if a document-specific analysis of reliability is a prerequisite to admission under Rule 803(16), the trial court still erred. Depositions generally are no less trustworthy than other documents admissible under Rule 803(16); indeed, because they are given under oath, they are more trustworthy than documents like newspaper articles. Nor is there any reason to find this specific deposition to be untrustworthy. The prior case involved a different issue, namely ownership of the land beneath Wildwood Lane, and did not involve the Childs Family's right to use Wildwood Lane for access to their camp. Tr. 177-80; A. 56-61 (Ex. 22). It did not put at issue the reason for the Childs Family's payments relating to Wildwood Lane. Accordingly, it did not give rise to a heightened risk that Russell Martin would misrepresent any facts relevant to this case.

Because the trial ignored the plain language of Rule 803(16) as well as the primary justification for that rule, the court erred by excluding the Russell Martin deposition.

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[11] The trustworthiness of a specific ancient document generally goes to the weight of the evidence, not admissibility. *See Escalante v. Clinton*, 386 F. App'x 493, 498-99 (5th Cir. 2010) (citing cases); *see generally State v. Gibb*, 2023 ME 4, ¶¶ 12-13, 288 A.3d 811. Although the Superior Court also could have engaged in a Rule 403 analysis, *see* Field & Murray, *Maine Evidence* § 803.16 at 501, it never mentioned that rule—nor did counsel for the Childs Family raise Rule 403 in its objection to the Russell Martin deposition.

B. Exclusion of the Russell Martin transcript was not harmless error.

Because the trial court erroneously excluded the Russell Martin deposition, this Court must determine whether the error was harmless. Generally, an error is not harmless if it affects the "substantial rights" of a party. *In re Scott S.*, 2001 ME 114, ¶ 24, 775 A.2d 1144 (quoting M.R. Civ. P. 61). For an error to be harmless, "the reviewing court must be convinced that it is highly probable that the error did not affect those substantial rights." *Id.* ¶ 25. "Prejudicial exclusion occurs if the evidence excluded was relevant and material to a crucial issue and it can with reason be said that such evidence, if admitted, would probably have affected the result." 3 Harvey, *Maine Civil Practice* § 61:1 at 288 (2023-2024 ed.); *see Morrill v. Morrill*, 1998 ME 133, ¶ 5, 712 A.2d 1039 (prejudicial error from exclusion of evidence "directly relevant" to an issue in the case).

The Superior Court's exclusion of the Russell Martin deposition was not harmless. It contains important testimony bearing directly on the issue presented here—namely, whether or not the Martin Family and their predecessors understood the Childs Family's use of Wildwood Lane to be contingent upon payment. One of the key pieces of evidence in the trial consisted of ledgers maintaining a record of fees collected for use of the road. Tr. 142-49; A. 74-100 (Ex. 26); A. 101-22 (Ex. 27). Russell Martin maintained these records:

> Q. … The first issue that I asked you to provide documents for was Robert's allegation that he has acquired title to the fire road by adverse possession?
>
> A. Yes.
>
> Q. Do you have any documents in support of that allegation?

A. No, the only thing is that I have kept a ledger here, a record of collecting fees for the use of the road, and I carried that on from my father who had done the same thing for 20-odd years before me.

Ex. 23 at 7. Russell Martin testified that the fees he charged "for the use of the road," *id.*, were a condition precedent for continued use of Wildwood Lane—including by the Childs Family's predecessors. Russell Martin testified as follows:

Q. … [W]ho were charged the fees in general terms?
A. The camps abutting our property.
Q. Okay.
A. There's five camps below me. … The camps below me had no deeds, no nothing. They just used the road, and I charged them according to their usage.
Q. Who were the camps south of you?
A. South of me was the Gertsen camp.
…
Q. Okay, and who else did you charge?
A. Jameson, Raymond Jameson.
…
Q. Okay.
A. Fred Baird.
…
A. And Childs camp and the Shorey camp.

Ex. 23 at 7-9. Russell Martin was clear as to the reason for the fees:

MR. BRINE: These people that lived south in their camps of Fire Road 30, did they pay their $2 and they drove down? They didn't have to park there because they could have gone to the railroad tracks to their own camp.
THE DEPONENT: Right.
MR. BRINE: They didn't have to park here.
THE DEPONENT: No, they didn't have to park there.
MR. BRINE: The $2 was simply so they could drive down to their camp.
THE DEPONENT: Right.

Ex. 23 at 54. As Russell Martin went on to explain, this fee was negotiated on an annual basis and was the basis for any permission to use the road:

> Q. Okay, and then you have the people south of you who do not have a deeded right-of-way like Pomeroy and Kimball did. They are – they basically have an oral – they have oral permission. They have permission to use the road, but they must pay a fee each year?
> A. Right.
> Q. And that fee was negotiated individually?
> A. Right.

Ex. 23 at 28. This evidence is important direct evidence for the reason why Russell Martin regularly assessed fees to various users of Wildwood Lane, including the Childs Family. Excluding the evidence of a deponent with direct knowledge of the reason for assessing fees to the Childs Family was highly prejudicial, as it bears directly on the reason for the fees assessed by the Martin Family and their predecessors—an issue that the Superior Court then resolved and found to be determinative in entering judgment against to the Martin Family.

IV. The Superior Court erred by entering judgment against Charlotte Fawcett on her counterclaims for declaratory judgment and trespass.

The Superior Court also erred in entering judgment against Charlotte Fawcett on her counterclaims for declaratory judgment and trespass. Because the Childs Family cannot establish a prescriptive easement over Wildwood Lane, Charlotte Fawcett is entitled to a declaration that the Childs Family have no right to use Wildwood Lane. 14 M.R.S. §§ 5953-5954. Similarly, because the Childs Family had no right to use Wildwood Lane, their admitted intrusions onto the Martin Family's property without their

permission constitute trespass. Tr. 99, 103-04; *Medeika v. Watts*, 2008 ME 163, ¶ 5, 957 A.2d 980 ("A person is liable for common law trespass 'irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or third person to do so.'"). Accordingly, judgment should enter in favor of Charlotte Fawcett.

CONCLUSION

The Martin Family consistently asserted its rights over the Childs Family's use of Wildwood Lane by assessing fees that the Childs Family regularly paid. The assessment and payment of fees precludes a finding of acquiescence and adversity. The Martin Family respectfully requests that the Court reverse the judgment in favor of the Childs Family and enter judgment in favor of the Martin Family, including as to the counterclaims asserted by Charlotte Fawcett.

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CERTIFICATE OF SERVICE

I, Joshua D. Dunlap, hereby certify that two copies of this Brief of Appellants Robert A. Martin and Charlotte M. Fawcett was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on March 26, 2024:

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