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 APPELLEES CHOCKSTONE GROUP, LLC, GREGORY CHILDS HOOPER, DAVID THIES, SEAN THIES, SCOTT THIES, AND KRISTINA HOOPER KERRY

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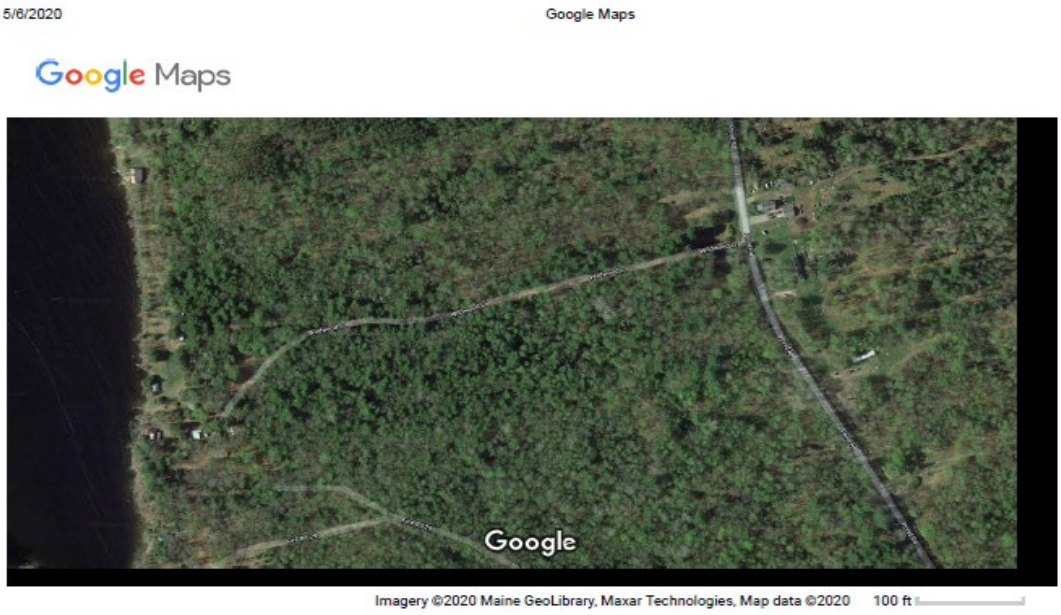
STATEMENT OF FACTS

A. Factual Background

The Plaintiffs are each members of the Childs family. A.123, ¶ 1; see Ex. 25. The Childs family has been accessing their camp on the shore of Great Moose Pond in St. Albans, Maine ("the Childs Camp") since the turn of the previous century over the road from Pond Road, St. Albans, to Wildwood Lane, to their camp. A.123, ¶ 4; Tr. 62. The route, use, and access never varied. Tr. 20-22; 25; 90-91, 109. Wildwood Lane, formerly known as Fire Road 30, is shown, in part, on the town tax map. A.55 (Ex. 20). From the end of the dashed line on the tax map labeled Wildwood Lane and Fire Road 30, it turns and continues down to the Childs Camp which is the postage stamp sized lot 11 shown on the tax map. Tr. 20-22; 68; see A.124, ¶ 9 (Wildwood Land and Fire Road #30 are the same). This road is shown in Trial Exhibit 19. A.54:



It is also depicted in the photographs showing the broken-down vehicle blocking the roadway to the Childs Camp. A.51; see also Tr. 122. That road is the sole means of access to the Camp. Tr. 30, 78-80.

Trial Exhibit 25 is an illustrative aid naming the current owners of the Childs Camp. As all parties stipulated, the Childs Camp came into the family in 1906. A.123, ¶ 4. The family has used it continuously since then. Jeff Childs owns his one-third interest through his limited liability company, Chockstone Group, LLC. He is the sole owner of that LLC. Tr. 107-109.

Jeff's aunt, Barbara Jean (B.J.) Hooper Frosch, is a grandchild of that original owner, Jennie Childs. Ex. 25. She owned a one-third interest in the Camp until she gave her interest in the Childs Camp to her children. Kristina Hooper Kerry[1], one of those children, testified at trial about the continuous, long-term use of the road to access the camp.[2]

David Thies is Jeff Childs's and Kristina Kerry's first cousin, and a child of Connie and Dennis Thies. (Connie is B.J. Frosch's sister). Ex. 25; Tr. 88. He testified about his and his family's continuous non-permissive use of the access road at all

[1] Kristina was also identified in the deeds as Kristina J. Hooper Pogwaite.

[2] Kristina's siblings, Julia Fusari and Ned Hooper, had been owners by virtue of their mother's, B.J. Frosch's, deed to them, but they released their interest to their siblings, Kristina Kerry and Greg Hooper. As a result, by assented Motion to Dismiss filed at the outset of the trial, Julia Fusari and Ned Hooper were dismissed with prejudice as to all claims and counterclaims.

times from his earliest memory (he was born in 1965) to the present. He acquired his interest, with two of his three siblings, by deed from his parents. Tr. 93.

Thus, the Childs Camp is owned 1/3 by Jeff Childs, through his LLC; 1/3 by the Thies brothers; and 1/3 by Kristina Kerry and her brother, Greg.

The Defendants Robert Martin and Charlotte Fawcett are siblings. They have two brothers, Gregory and Lowell, each of whom testified as defense witnesses.

The Martin family's first connection with the land burdened by the access road is the deed into their grandmother Clare in August 1922. A.123-124, ¶ 6. She acquired a portion of what would become Wildwood Camps through that deed. In 1924, her husband, Clyde, acquired more land. A.123-124, ¶ 6. Clyde Martin opened Wildwood Camps in 1927. A.123-124, ¶ 6. This business consisted of a handful of camps built by the Martin family and rented to summer tourists by the week. A.124, ¶ 7; see also Tr. 135-137.

The Defendants' father, Russell Martin, did not acquire any of the land in the area burdened by the access road until 1951. He took over the operation of the camps at that time. A.124, ¶ 7. The deeds described in paragraph 6 of the Stipulations did not describe or convey the fee underlying the entire length of Wildwood Lane, as the access road is called. A.124, ¶¶ 9, 11.

Robert Martin and Charlotte Fawcett assisted their parents in the operation of Wildwood Camps, but they never handled the funds or managed the business. Tr. 181-183, 194, 218, 229.

Robert Martin and Charlotte Fawcett acquired the Wildwoods Camp property in 1978 and took over operating the business. Tr. 155. By deed dated January 20, 1982, Defendants acquired additional land for the Wildwood Camps. A.124, ¶ 12 and Exhibit A thereto. That deed did not convey all the earth underlying Wildwood Lane. A.124, Exhibit A (conveying land on "*to the southerly side* of the right-of-way as now used to the Pond Road").

Even after becoming the owner of Wildwood Camps, Charlotte Fawcett had no role to play concerning the road. Tr. 229, 232.

Recognizing that they did not own the land under all of Wildwood Lane, the Defendants commenced an action for declaratory judgment seeking a declaration that they acquired the land under Wildwood Lane by adverse possession. Ex. 22.[3] That lawsuit was not commenced until 2000. See Ex. 22. By deed dated May 17, 2006 from the Schulz family, the Defendants in that action, Robert Martin became the record owner of the full length of the land over which Wildwood Lane traveled. Ex. 24. The deed recited that its purpose was to convey to Robert Martin all the land

[3] The Trial Exhibit List mistakenly identified this Complaint as *Martin v. Shorey.* In fact, as seen from the Exhibit the matter name is *Martin v. Schulz.*

underlying Wildwood Lane a.k.a. Fire Road #30. Ex. 24. It is as a consequence of this deed, that the Defendants finally acquired the land under the entirety of the Wildwood Lane, the road the Childs family had used for 100 years by the time of the date of that deed. The gate at the Pond Road head of the lane was installed shortly after that deed. Tr. 117.[4] Prior to the locked gate being erected, there had been a cable or chain placed at the entrance at the end of each summer season. Tr. 117. This did not serve as an impediment to the use of the road by the Childs family. Tr. 117; see also Tr. 244.

Over the years, the Martin family did maintenance on the road. Tr. 116, 128, 152, 186. Robert Martin also had violent confrontations with others who used the road at times. Tr. 72, 99, 180-181, 212. His father had once hit a person over the head with a shovel. Tr. 159-160. Kristina Kerry was frightened of the Martins. Tr. 72. Jeff Childs approached Robert Martin in 2006 for a clear road maintenance agreement in recognition of the fact that Robert had the equipment to maintain the road and to avoid the physical violence that the Schulz family had endured. Tr. 118, 128.

[4] When Robert Martin was asked to explain the reasons he sued the Schulzes for a decree of adverse possession of the earth underlying the road, he simply insisted, notwithstanding the clarity of the name of the lawsuit, that he did not sue the Schulzes. Tr. 209, see also Ex. 22 (Amended Complaint, Robert Martin and Charlotte Fawcett v. Charles J. Schulz). This insistence on facts that were clearly refuted was typical of his testimony and surely aided the Trial Court in concluding that the Appellants' evidence was not credible. A.23, ¶ 57.

The consistent evidence was that to the extent the Childs family paid the Martin family it was in recognition of the maintenance required for the road to be passable. Tr. 36, 71, 104, 116, 118-120, 128. The Martins acknowledged that they maintained the road and Robert Martin insisted that he wanted to block the Childs family's access over the road because he was tired of the obligation to maintain. Tr. 198, 205. Charlotte Fawcett echoed this view, noting that the recent interference with the Childs family's use arose from a desire to stop maintaining the road. Tr. 232. There was no evidence offered that the Childs family compelled or expected any particular amount of maintenance of the road. Indeed, they did some maintenance themselves as needed. Tr. 37-38, 92.

The Martins claimed that any money they or their father received was for use of the road. Robert Martin acknowledged that for the period from 1978 to 2005 he had produced only two pages from check registers to represent claimed payments from the Childs/Thies family. Tr. 219-220; Ex. 18-6. The Exhibit has one entry for Pete Childs ($45) and one entry in a different year for Thies ($90). Ex 18. Robert Martin insisted that if a payment had not been received, then the Childs family was not permitted to use the road. Yet, the evidence was clear that the Childs family

always used the road. Tr. 19-28 (B.J. Frosch, every year from 1946); 68, 80 (Kristina Kerry only missed three summers since 1997).[5]

B. Procedural History

With the increasingly hostile interactions and the introduction of the junk car as a barricade to the road, the Childs family filed their complaint in March, 2020. They sought a declaratory judgment that the long-term non-permissive use of the road had ripened to a prescriptive easement. A.28-34. They also sought a permanent injunction against Robert Martin and Charlotte Fawcett and all those acting in concert with them from interfering with that prescriptive easement.[6] Charlotte Fawcett asserted a counterclaim seeking a declaration that the road does not serve as an easement and sought trespass damages.

The Superior Court held a one-day bench trial on June 22, 2023. After hearing from 8 witnesses and having ample opportunity to evaluate the credibility of the witnesses, the exhibits, and the stipulated facts, the Superior Court (Mullen, C.J.) found and held that the Childs had demonstrated by a preponderance of the evidence that they had a prescriptive easement of access and egress from Pond Road over Wildwood Lane, along the dirt road to the Childs Camp. A.24, ¶ 64. The Court also

[5] Robert Martin explained the absence of business records to prove the existence of use fees for 1978 to 2005 by explaining that he only retains business records for seven years and then routinely discards them. Tr. 220. The check register produced concerns two years, 1984 and 1988, more than 30 years old at the time of their production.

[6] The Complaint also asserted a claim for Trespass and Nuisance. Those claims were duplicative of the claims asserted in Count I for declaratory judgment and injunction.

found that the Childs family had demonstrated that if a permanent injunction were not granted, Defendants are likely to block the road or otherwise interfere with the easement and granted the requested injunction. A.24-25, ¶¶ 68, 71. The Court held that the Counterclaim failed. A.25, ¶ 73.

Robert Martin and Charlotte Fawcett timely appealed.

STATEMENT OF ISSUES

I. Whether the Court erred in ruling consistently with Rule 804(b)(1)(B) of the Maine Rules of Evidence that deposition of Russell Martin taken in litigation in which the Childs family were not parties and were not in privity with any of the parties was inadmissible.

II. Whether in evaluating the credibility of the witnesses, the exhibits, and the stipulated facts the Court erred in finding that the Childs family had shown by a preponderance of the evidence that they had an easement by prescription over the road to their camp which they had used for the summers continuously and without permission for longer than 20 years.

III. Whether there is a rule of law in Maine that an occasional payment defeats a finding of acquiescence.

ARGUMENT

I. Under the relevant standard of review, the Court did not err when it excluded consideration of the deposition of Russell Martin consistently with the prohibition against the admission of hearsay evidence unless the party against which it is offered had had an opportunity to cross-examine the deponent.

Whether a Trial Court erred in its rulings on the admissibility of evidence is reviewed for abuse of discretion. *State v. Mills,* 2006 ME 134, ¶ 8, 910 A.2d 1053. The Superior Court did not abuse its discretion when it ruled that the deposition of Russell Martin dated September 5, 2002, was inadmissible under Rule 804 of the Maine Rules of Evidence. The Court specifically concluded that the deposition was inadmissible under Rule 804 of the Maine Rules of Evidence. A.21, ¶ 45. The offered testimony via the deposition transcript "cannot be admitted under Rule 804 because Plaintiffs, against whom it is offered, did not have an opportunity to develop the testimony. Neither they nor their predecessors were parties to the prior litigation in the context of which the deposition was taken." *Id.*

Appellants concede that "context regarding the payment of fees by the Childs Family" was important to the Court's conclusion weighing all the admissible evidence that that Plaintiffs had a prescriptive easement over the road. *See* Appellants' Brief, p. 23. Yet, they argue that the deposition, under which the Plaintiffs had no opportunity to develop and explore the context of Russell Martin's statements should nonetheless be admitted. The Rules of Evidence say otherwise.

An opportunity to cross-examine and develop the testimony is a central prerequisite to the admissibility of prior sworn testimony when the declarant is unavailable. The Superior Court committed no error in excluding the deposition under Rule 804.

The Appellants do not identify any law to controvert this conclusion. They do not even cite Rule 804. Rather, they rely solely on the ancient records exception to the hearsay rule. Appellants' Brief, pp. 25-28. They, however, cite to no cases wherein the "ancient records" exception, Me.R.Evid. 803(16) supplants the fundamental prohibition against the admission of a deposition taken in independent, separate litigation. *See Murch v. Nash,* 2004 ME 139, ¶ 16, 861 A.2d 645 (atlas, not deposition); *Landry v. Giguere,* 128 Me. 382, 147 A. 816, 817 (1929) (ancient deed, not deposition); *Goodwin v. Jack*, 62 Me. 414, 416 (1872) (records of proprietors of land); *Shepler v. Orne,* 2016 WL 4418863, at *3 (Me. Super. Ct. Apr. 8, 2016) (letter and appraiser's report, not deposition); *Welch v. State,* 2006 WL 381766, at *2 n.5 (Me. Super Ct. Jan. 19, 2006) (letter *if* it had been authenticated, but it was not). Indeed, even the treatises relied on by Appellants never go so far as to equate sworn deposition testimony in a previous court proceeding such as a deposition to an ancient document. See Appellants' Brief, p. 25. Appellants suggest that *Mathin v. Kerry*, 782 F.3d 804, 812 (7th Cir. 2015) provides a basis for admitting ancient sworn testimony under certain circumstances. Appellants' Brief, p. 25. Yet, that case too does not consider deposition testimony; rather it addresses affidavits.

The Rules of Evidence are clear that each of their elements must be satisfied to render testimony admissible. The "hearsay within hearsay" must be evaluated. See Me.R.Evid. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if *each part* of the combined statements conforms with an exception to the rule"). *see also Handrahan v. Malenko*, 2011 ME 15, ¶17 n.3, 12 A.3d 79, 82 n.3 (noting that admissibility of a document under one exception does not render it admissible if other impediments to admission exist). None of the cases cited by Appellants address the argument advanced by them that would have this court ignore the prerequisite for admission of the prior sworn testimony merely due to date the testimony was given. In light of the mandate in Rule 805 that each element of the hearsay rules must be satisfied, the Appellants request that this Court ignore Rule 804 must be rejected.

Here, the Rules of Evidence are clear that prior sworn testimony may be admitted only if it "is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Me. R. Evid. 804(b)(1)(B). The analysis of whether this prior sworn testimony is admissible is dependent not on the age of the document but on the nature of the hearsay evidence in the document sought to be introduced. Because the Childs family were not parties or in privity to the parties in

the previous litigation, they did not have an opportunity to develop or explore the testimony of Russell Martin.

As the record reflects the testimony of Russell Martin, Robert Martin and Charlotte Fawcett's father, arose in a wholly separate lawsuit brought by Robert Martin against a wholly different family, the Schulz family. *See* Ex. 22. Noone argues that that litigation involved the Childs family or their interest. The other litigation asserted Robert Martin's claim to title to the earth underlying a portion of Wildwood Lane on the basis of adverse possession. *Id*. That Russell Martin may have been asked a question which tangentially touched on the Childs family's long-term use of that road highlights the basis for the prohibition of the introduction of the testimony. The Childs family had no right to ask any questions about that and, therefore, were deprived of the chance to explore the assertions made.

The prohibition against admission embraces the fundamental principle that if a party is to be confronted with evidence essential to their claim, he must first be permitted a chance to ask questions about that evidence. *See Banks v. Leary*, 2019 ME 89, ¶ 13, 209 A.3d 109, 114 (the opportunity to cross-examine adverse witness is required in every setting where important decisions turn on questions of fact), *citing Jusseaume v. Ducatt*, 2011 ME 43, ¶ 13, 15 A,3d 714. Appellants seek a declaration of error where the Superior Court honored and preserved that protection enshrined in Rule 804(b)(1)(B). There was no error.

It is not enough to suggest, as Appellants do, that Russell Martin is likely to have been trustworthy. *See* Appellants' Brief, pp. 27-28. The rule excluding the prior testimony is dependent on the party against whom the prior testimony is offered having had a meaningful chance to explore his trustworthiness. *See* Adviser's Note, Me.R.Evid 804(b)(1)(at the heart of the reason for the exception is the fairness arising from the opportunity to examine); *see Ellsworth v. Waltham*, 125 Me. 214, 215, 132 A. 423, 424 (1926) (noting that fundamental nature of the prohibition to admissibility is the inability of the party to develop and examine the testimony if that party was not in the first action). One cannot evaluate the credibility or circumstances giving rise to the testimony without first examining it. The Childs were never able to ask what Russell Martin meant by fees; how frequently he claims to have collected them; the purpose for any payments claimed; how he determined any amount; and what he provided in exchange.

As the Appellants acknowledge, the Court concluded that the document did not meet the requirements of trustworthiness. A.21-22, ¶¶ 46, 48. The requirement of an opportunity to cross-examine is the precursor for determining trustworthiness. In the absence of that opportunity, the rule does not allow a Court to admit the prior sworn testimony. Only if the Childs family had had the opportunity to explore each of those important matters at that deposition could the testimony meet the standard

for admissibility. They had no such opportunity and, therefore, the Court committed no error in excluding the testimony as mandated by Rule 804(b)(1)(B).

Finally, the Appellants acknowledge that any error in the exclusion of the evidence must be demonstrated to have caused the Appellants harm. Appellant's Brief, pp. 29-31. Given that the Ledgers which Appellants asserted represented evidence of payments by the Childs family were admitted in evidence, there was no harm in excluding the conclusory, unexamined testimony about those payments. *See* A.74-122.[7]

II. Under the relevant standard of review, the Childs family carried their burden of proof on their claim for a prescriptive easement over the Wildwood Lane and the road down to that camp for access to and from their camp.

The Superior Court held based on the facts, the credibility of the witnesses, and the documents in evidence that the Plaintiffs had proven that they had acquired a prescriptive easement. Specifically, it held that the credible evidence showed that the use of the road was non-permissive and with the acquiescence of the Appellants.

[7] The Ledgers which were entered into evidence were produced on the eve of trial although they had been sought in discovery three years earlier. They represented duplicate sets of the same data. Therefore, although they consist of multiple pages, they only represent a claim of payment for limited years, namely 1951, 1952,1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1965, 1966, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, and 1978. Only three of these pages refer in any way to the Childs, that for 1960,1961, and 1962. A.119-121. Similarly, the two pieces of financial data that were introduced through Robert Martin are the only business records of the period from 1978 to 2005 and they show only two payments in that 27-year period. Ex. 18-6.

A.23, ¶¶ 54-59. "The Court [credited] Plaintiffs' witnesses' testimony that the money they and their predecessors historically paid to the Martin family was a contribution for the maintenance, not for access to the Road. Payments made for maintenance do not preclude a finding of acquiescence." A.23, ¶ 58. "Although Defendants showed cessation of acquiescence beginning sometime after BJ's children acquired their interests in 1997, Plaintiffs established acquiescence for more than twenty years prior to 1997." A.23, ¶ 59.

The standard of review for such conclusions is clear error. *Androkites v. White,* 2010 ME 133, ¶ 12, 10 A. 3d 677. ("we review 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."). The Law Court may vacate a trial court's conclusion only if the evidence compelled a contrary conclusion. *Jordan v. Shea,* 2002 ME 36, ¶ 791 A.2d 116, 122.

The de novo standard of review which applies to questions of law and legal conclusions does not apply to this Court's review of the Superior Court's decision in this matter. *See Mill Pond Condo. Ass'n v. Manalio*, 2006 NE 135, ¶6, 910 A.2d 392, 395; *Murch v. Nash,* 2004 ME 139, ¶ 10, 861 A.2d 645, 649. The decision was

not dependent on the interpretation of any deeds, contracts, or the like. The Appellants' effort to find a rule of law that a de novo review of whether a payment, as a matter of law, compels a finding of permissive use fails. *See* Appellants' Brief, p.12. In fact, the cases cited by Appellants reinforce that that standard of review compels the Law Court to review factual findings for clear error. *See Lincoln v. Burbank,* 2016 ME 138, ¶ 26, 147 A.3d 1165, 1172; *Jacobs v. Boomer,* 267 A.2d 376, 379 (Me. 1970) (applying clearly erroneous standard in prescriptive easement matter).

A prescriptive easement is created by a 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. *Lincoln v. Burbank,* 2016 ME. 138, ¶ 27, 147 A.2d 1165; *Blackmer v. Williams*, 437 A. 2d 858 (Me. 1981); *see Pace v. Carter*, 390 A.2d 505, 507 (Me. 1978); *Fitanides v. Holman*, 310 A.2d 65, 68 (Me. 1973).

Here, the central question the Superior Court had to weigh as a matter of fact was, based on the evidence, did the Childs Family pay a periodic, occasional "fee" to the Martin family in exchange for permission to use the road to the Childs family camp *or* were the periodic, occasional funds paid in exchange for maintenance of the road and it recognition that the Childs family had a right to use the road arising

from their long term use? This is a factual conclusion which must be evaluated by this court for clear error.

The Superior Court found as a matter of fact that the periodic payments sometimes made by the Childs family were for the maintenance of the road and for assuring that the gate installed at the head of the road in approximately 2006 would remain accessible. A.23-24, ¶¶ 56, 57, 63. The Superior Court weighed the credibility of the witnesses and expressly found the Defendants' testimony not credible on the issue of the purpose of the periodic fees. A.23, at ¶ 57. Rather, the Court noted for example that the Maintenance Agreement, A.52 (Ex. 9), was express in identifying the purpose of the payment was to assure that Martin agreed to maintain a passable road and provide access through any chain or gate. A.23, ¶ 56.

In making these findings, the Trial Court heard conflicting testimony. The claim of the receipt of constant payments from the Childs family to the Martin family was not established by any clear evidence. There was no dispute that the Childs family paid some funds pursuant to the Road Maintenance Agreement from 2006 to 2016. Ex. 9. As the Trial Court found, by that time, and, indeed, since 1997, acquiescence had been present for at least 20 years. A.23, ¶ 59. Further, Exhibit 18-6 showed two payments in the time period from 1984 to 1988. Ex. 18-6, Tr. 219-220. Finally, the ledger books marked for the years 1951 to 1978 only refer to the Childs family three times. A.74-122.

No evidence of payment otherwise was presented, Charlotte Fawcett, noted that she did not charge fees and "really [did not] know who they paid it to." Tr. 229. Gregory Martin similarly conceded that he did not keep any ledger books; did not collect fees; and had no role in the management of the camps from 1978 to 2001. Tr. 181-183. As noted above, while Robert Martin testified that no use was permitted unless there was payment, the evidence was clear that the Childs family used the road continuously.

In the face of that testimony and evidence, the weight and significance to be afforded to the payments is properly a matter of factual evaluation, reviewed for clear abuse.

In concluding that the periodic payments evidenced knowledge of the use and acquiescence, the Superior Court was entitled to evaluate the lack of credibility of Robert Martin concerning the agreement. Thus, the Court heard Robert Martin excuse away his signature on the Maintenance Agreement because he "was going through a contentious divorce at the time, and finding solace in the bottom of a bottle." Tr. 198: 2-5. The Trial Judge himself examined Robert Martin about the agreement, noting that it is called on its face a Maintenance Agreement, and asked Robert Martin's position on that clear language. Tr. 221:17 to 222:8. Robert Martin tried a different tack then, to deflect the clear language of the agreement. He suggested he "messed up" when he signed it and, in any event, his sister Charlotte

Fawcett was "the head honcho." *Id.* The Court also could take note of Robert Martin's earlier testimony that he himself had typed the very agreement he now asserted he knew nothing about because of his use of alcohol. *Id.* at 222:20 to 224:20. Robert Martin similarly attempted to divorce himself from the facts by asserting that he had never brought a lawsuit against the Schulzes, seeking title to the land under Wildwood Lane on the basis of adverse possession. Tr. 208:23 to 209:23.

Charlotte Fawcett, characterized as the "head honcho" by her brother Robert Martin, further could shed no direct information on the claim of the purpose of the fees. She testified that she did not charge fees. Tr. p. 229. She testified that she really did not know who paid what to whom. *Id.* She noted that her current objection to the Childs family's use is because "we have no reason to want to maintain the road or keep the road up." Tr. p. 232. Again, she had nothing to do with the road; Bob was in charge of the road. *Id.*

By contrast the Plaintiffs' testimony was clear. They had been using the road since 1906. Indeed, by the time Wildwood Camps had been opened, the Childs Family had driven to their camp along the Road every summer for 50 years. BJ Frosch, the senior member of the Childs family who testified, that she did not pay a fee. Tr. 27:13-15. She did not pay Charlotte Fawcett or Greg Martin. Tr. 28:9-14. She had reviewed the substantial guest books kept in the Childs camp and they had

no reference to any fees paid to anyone or to permission to use the Road. Tr. 30:22 to 31:6. She had never paid the Martins' mother, Marguerite. Tr. 32:16-22. There had been an altercation regarding the use of the road and that did not stop her family's use of the road. Tr. 36:24-37.

In the face of these equivocations, the Superior Court's finding that "there was no competent evidence …that Defendants or their predecessors either granted express permission or attempted to deny access to the Road during the May-September season prior to 2006. Nor was there evidence that Plaintiffs or their predecessors were told that they could not use the Road unless they paid a fee until shortly before commencement of this this litigation. The Court does not credit Defendants' account of the purposes of the fees prior to execution of the Maintenance Agreement." A.23, at ¶ 57.

Again, the evaluation of the credibility of the evidence was at the heart of the Trial Court's findings when it concluded that "the Court credits Plaintiffs' witnesses testimony that the money they and their predecessors historically paid to the Martin family was a contribution for maintenance, not for access to the Road." A.23, ¶ 58. The Court found based on the evidence that the "money paid by Plaintiffs and their predecessors to Defendants and their predecessors before 2006 was for maintenance, not for a license to use the Road." A.23-24, ¶62. In making this factual finding the Court had before it the testimony of Greg Martin, who spoke of the substantial

washout of the road as a consequence of a hurricane in 1954, necessitating the rebuilding of the road and the need to gather sums for that purpose. Tr. 152-153. The Court also heard Greg Martin's testimony that he did not keep the ledger books of the Wildwoods Camps business (Tr. p. 181); that he did not collect any fees or financial records (Tr. 182)(he began to "manage" the camps in 1963 -1966, but that management when he was about 15 years old did not include collecting any fees or keeping financial records); that he had no role in the management of the Wildwood Camps from 1978 to 2001 (Tr. 183); and he had no role in operation of the camps from 2001 to 2016 other than the role he played in assisting with the prior litigation against the Schulzes, Tr. 183.

At trial, the Defendants had specifically argued that the Maine Law Court decision of *Jacobs v. Boomer,* compelled a conclusion as a matter of law that contributions for maintenance of a road constitute permissive use, thereby precluding a finding of a prescriptive easement. *See* A.24, ¶ 63. They make the same argument to this Court. Appellants' Brief, p. 20, citing 267 A.2d at 377-380. Yet, the Trial Court found that the facts of *Jacobs* were wholly distinguishable. See A.24, ¶ 63. In the *Jacobs* matter the Trial Court found that the "rent" was expressly paid for the right of use. 267 A.2d at 378. It was clear that "the origin of a use [in the *Jacobs* matter] was coincident with the license or permission. *Id.* at 380. By contrast,

the Trial Justice in the within matter found that maintenance payments were made as a consequence of a preexisting right of use. A.24, ¶ 63.

In any event, it is clear that the findings of the Court in *Jacobs v. Boomer* was not dependent on a rule of law that payment equals permission, as argued by the Appellants. *See* Appellants' Brief, p. 20. Rather, the Law Court upheld the findings of the Trial Court because its conclusions were not clearly erroneous. *Id.* As the Law Court noted, "the Presiding Justice had the duty to decide from all the attending circumstances, the testimony of the witnesses which as heretofore mentioned as inconsistent and contradictory in certain particulars, and the conduct of the parties throughout the years, whether the rental agreement admittedly existing between the Defendant and the Plaintiffs and their predecessors in title destroyed any claim of adverse use." *Id.* In affirming that factual conclusion, the Law Court specifically confirmed that "the Justice below was also in the advantageous position of having seen and heard the witnesses in interpreting the whole evidence to solve the issue, whether the Defendant's use was adverse. His observations of the witnesses their poise or anxiety, the overstatement or underestimation of their position, may have influenced him in siding with the Plaintiffs' version." *Id.*

The same is true here. The Trial Justice listened to the Defendants and the Plaintiffs. He asked many questions himself. The Court found expressly that "The Court credits Plaintiffs' witnesses' testimony that the money they and their

predecessors historically paid to the Martin family was a contribution to maintenance, not for access to the Road. Payments made for maintenance do not preclude a finding of acquiescence." A.23, ¶ 58. This finding of fact is not clearly erroneous and cannot be overturned.

The Superior Court decision in *Clement v. Shea* relied on by the Appellants similarly does not stand for the proposition that payment as a matter of law defeats a claim of prescriptive easement. 2004 WL 843182 (Me. Super. Ct. be. 12, 2004). In fact, again, the holding is dependent on the factual findings to which any reviewing court must give deference. *Id.* at *4. There, the trial court found that the very road over which a prescriptive easement was claimed was constructed only as a consequence of express permission from the owner and then use was expressly limited to the commitment and agreement of the users with the owner as to the manner and nature of use and maintenance. *Id,* *1-4. It was not the fact of payment which compelled the trial court to find no prescriptive easement. It was the totality of the circumstances and relationships under which the road was built. *Id.*

By contrast, in the within matter, the Court found specifically that acquiescence had been established for more than 20 years prior to 1997. A.23, ¶59. In fact, the Court found that the Plaintiffs had carried their burden of proof as to all the elements of a prescriptive easement. They had established continuous use from at least 1946. A.22, ¶ 51. The Defendants' knowledge of the use was also

confirmed. A.22-23, ¶¶ 53, 61. While the Court found that acquiescence was "more fervently disputed," the Trial Court found that the credible evidence established acquiescence. A.23, ¶¶ 54-57. ("there was no competent evidence, however, that Defendants or their predecessors either granted express permission or attempted to deny access to the Road during the May-September season prior to 2006. Nor was there evidence that Plaintiffs or their predecessors were told that they could not use the Road unless they paid a fee until shortly before commencement of this litigation. The Court does not credit Defendants' account of the purpose of the fees prior to execution of the Maintenance Agreement."). The Defendants' version of the story was simply not believable. In theses circumstances, the Court's findings of fact are not to be disturbed as there is no clear error.[8]

The Court had no evidence through the Defendants to contradict the Plaintiffs' evidence about the continuous use of the road, the purpose any payments made, and the interference with the road warranting the action for declaratory judgment and the permanent injunction.

[8] The Defendants filed no motion for additional or amended findings of fact. Therefore, the Law Court is justified in concluding that the Trial Court found for the Plaintiffs upon all issues of fact necessarily involved in its ultimate decision which was favorable to them. *See Jacobs v. Boomer*, 267 A.2d at 379, citing *Harriman v. Spaulding,* 156 Me. 440, 165 A.2d 47 (Me. 1960).

III. **The conclusion by the Trial Court that acquiescence had occurred for more than twenty years is not a question of law subject to a de novo standard of review**.

The Appellants argue that the standard of review should be a de novo standard on the question of whether payment of a fee towards maintaining the road as a matter of law compels a lack of acquiescence. Appellants' Brief, pp. 15-18. Yet, as noted above the *Clement* matter relied on by Appellants to support this theory makes no such holding. 2004 WL 843182, *4. Rather, the conclusion is premised on the totality of the facts. There is no principle which holds as a matter of law that periodic payment defeats a prescriptive easement.

Appellants argue that there is no "alternative explanation" to the claim that money paid must be for permission. Appellants' Brief, p. 20. There is. As Jeff Childs explained, Robert Martin had a tractor. Tr. 116. It made sense that the road that had been used since 1906 be able to be driven over. The Childs family sometimes provided money to compensate for the work done. It was a recognition of a service provided to them. Although the Appellants suggest that it is reflective of a 'subordination" of the Childs family to the Martin family, there is no record cite to any testimony or writing by the Martin witnesses or the Childs witnesses that supports or even intimates this claim of "subordination." Rather, the acquiescence

was supported by the undisputed testimony of Charlotte Fawcett that she observed people coming and going to the Childs Camp over the years. Tr. 236.

The Court credited the undisputed facts of continuous, known, and acquiesced use. No case or law exists to mandate that a prescriptive easement can never be found if a periodic contribution to the maintenance of the road is used. As noted above, those cases relied on by Appellants are determined by the facts – not the law. In the case of *Jacobs v. Boomer*, the Law Court deferred to the trial court's findings. 267 A.2d at 380. The decision of the Superior Court in this matter similarly is not clearly erroneous and must not be disturbed.

CONCLUSION

The Trial Court's findings that the Childs family had obtained a prescriptive easement for access and egress to their Camp was amply supported by credible evidence and is not clearly erroneous. The Judgment declaring the existence of the prescriptive easement for the benefit of the Childs' camp arising from the continuous use for at least twenty years; under a claim of right adverse to the owner; with the owner's knowledge and acquiescence and the permanent injunction prohibiting interference with the use of that easement should be sustained. Further, the Court's evidentiary ruling prohibiting the introduction of inadmissible hearsay was not an abuse of discretion. The judgment should be sustained in full.

Dated: May 10, 2024.

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CERTIFICATE OF SERVICE

I, Judy A. S. Metcalf, hereby certify that two copies of the Brief of Appellees, Chockstone Group, LLC, Gregory Childs Hooper, Kristina Kerry, Scott D. Thies, Sean M. Thies, and David A. Thies was served upon counsel for the Appellants at the address set forth below by email and first class mail, postage-prepaid on May 10, 2024:

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