# State of New Hampshire
# Supreme Court

NO. 2012-0771

2013 TERM

JUNE SESSION

**Granite Acres Property Owners Association, &a.**

**v.**

**Gail & John Montgomery**

RULE 7 APPEAL OF FINAL DECISION OF THE
GRAFTON COUNTY SUPERIOR COURT

REPLY BRIEF BY GAIL & JOHN MONTGOMERY

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ARGUMENT

The Montgomerys are not trying to get their neighbors off the road. They seek only to prevent maintenance that causes damage to their abutting property and by extension the pond. The Montgomerys are not luddites insisting on some former technology. They don't care what truck is used, only that it doesn't scar trees and move earth on their land in proximity of the road.

### I. Plaintiff Conflates Differing Groups

The appellees' brief assiduously conflates the plaintiffs. It collectively calls them "plaintiffs," *GAPOA Brf*. at 2-3, even though they have differing rights and obligations for their express claims and differing histories for their prescriptive claims. Their brief goes so far as to deprecate the idea that individual identity matters. *GAPOA Brf*. at 19.

But the differences between plaintiffs is crucial. Whether individual parties have an express easement must be analyzed deed-by-deed. *Soukup v. Brooks*, 159 N.H. 9, 14 (2009) ("An easement may be created … by a written conveyance…."). Whether individual parties have a prescriptive easement must be analyzed intruder-by-intruder. *Town of Warren v. Shortt*, 139 N.H. 240, 244 (1994) ("[A]n individual may establish an independent claim of right, adverse to the owner, even if another individual is using the way permissively.").

Just because someone in the neighborhood may have a deeded right or might have acted adversely does not give other neighbors those same rights. This is not a class-action, as the material facts are not "common to the class" and thus there is no "typical" claim such that one neighbor can stand in for another. *See Cantwell v. J & R Properties Unlimited, Inc*., 155 N.H. 508, 510 (2007) (listing conditions necessary for class action).

In failing to distinguish among themselves, the plaintiffs have chosen a few – those with the most advantageous deeds (for express easements) and those with the longest memories (for prescriptive easements) – and contrived a collective neighborhood right.

## II. Plaintiffs' Claim to an Express Maintenance Easement Fails

### A. Conflation of Plaintiffs' Deeds

The plaintiffs claim they have express rights to maintain Sands O' Time Road. There clearly are some plaintiffs who do – those that have it in their deeds – limited by the "shall agree" provision of their deeds. Others do not.

As explained in the Montgomerys' opening brief, the deeds of those early owners in Hanover (and a few in Canaan) give them a right-of-way, as well as mutual authority with the grantor to be involved in "repair[s] and maintenance … as they for their interests and convenience shall determine and among themselves shall agree," and are loosely organized as the "Sands O' Time Association."

Then there are those later owners in Granite Acres whose deeds give them only "a right of way … over the road," but no rights regarding maintenance, and are formally represented by the GAPOA. *Opening Brf.* at 6-7.

As to this first group (of which the Montgomerys are nominally a member), the plaintiffs' brief is silent. It offers no explanation for how their rights to agree are eclipsed by some supposedly greater rights owned by Granite Acres, even though the Granite Acres deed expressly provides less.

As to the second group, the plaintiffs' brief is a bootstrap attempt. It claims that, despite an absence of maintenance in their deeds, because the Hanover (and some Canaan) deeds have an explicit right to maintain, so must the Granite Acres, merely by proximity.

### B. Not a Pass-And-Repass Easement

The plaintiffs' brief asserts the general rule that the right to use a pass-and-repass easement carries with it the right to maintain the easement. *GAPOA Brf.* at 13, 16-17. Their brief does not address, however, that the general rule does not apply when the grantor expressed a more limited

intent. *Arcidi v. Town of Rye*, 150 N.H. 694 (2004).

As noted in the Montgomerys' opening brief, Pauline Barney did not create a general pass-and-repass easement, but limited it in three ways. First, she made the right-of-way 20 feet wide, meaning that whatever rights any of the plaintiffs have, they cannot be conducted outside of that. Second, she previously granted to others the right to "agree," meaning that whatever rights any of the plaintiffs have, they cannot be conducted without agreement of prior easement-holders. Third, the circumstances of Pauline Barney's conveyances made maintenance an issue – in her first phase she controlled it, in her second phase she delegated it to others, and in her third phase she neglected it altogether – meaning that whatever rights any of the plaintiffs have, they must be construed in accord with that unique set of circumstances.

The plaintiffs' brief does not address these matters, and thus appears to concede them.

### C. Authority to Assess Does Not Alter Deed

The plaintiffs argue that because the Granite Acres deeds allow the GAPOA to make assessments for maintenance of roads, it also has authority to maintain specifically Sands O' Time Road. *GAPOA Brf*. at 13, 20. They do not distinguish however, between Sands O' Time Road and the roads internal to the development, do not say how authority to assess can be construed so broadly as to change the underlying deed, nor explain how authority to assess generally applies to Sands O' Time Road specifically. The authority to assess is merely *how* a group pays, not what it pays for, and the argument must fail.

### D. Eisenberg Deed Does Not Affect Plaintiffs' Substantive Rights

The plaintiffs appear to advance a creative argument that the deed to the road itself, from Pauline Barney to Eisenberg, gives the Granite Acres owners maintenance rights because in that deed Pauline Barney reserved to herself a right of way over the road.

As noted in the Montgomerys' opening brief, Pauline Barney conveyed the road to Eisenberg in 1968, at which time she had moved to one of the cottages in Canaan and others already had maintenance rights in their deeds. Thus the deed says:

> *Reserving* to Pauline Barney … *a right of way* from … Tunis Road to the property owned by her located in Canaan, over the road known as Sands O' Time private road, and *subject to the rights of others* deriving title from her to use said private road, said road to be maintained by the various cottage owners entitled to use said road *as they shall agree*.

DEED, BARNEY→EISENBERG (1968), Exh. L, *Appx.* at 212. The deed ensures her own access, and alerts Eisenberg of her many previous grants which included the right to agree regarding maintenance. It says nothing implicit or explicit about maintenance rights for future grantees.

The plaintiffs' argument also ignores the fact that whatever rights Pauline Barney reserved were ultimately conveyed to the Montgomerys when they acquired the road from Eisenberg.

The existence of the Barney→Eisenberg deed is not relevant to a claim of express easement.

### E. Unreasonable Maintenance

The plaintiffs claim they have maintained reasonably, and that overcomes any other problems. *GAPOA Brf.* at 22-24. First, their maintenance has not been reasonable. They have not gained the Montgomerys' agreement as required by deed, they have not avoided damage to abutting property, and they have not taken into account environmental issues regarding runoff into the pond.

Second, the rule of reason addresses the conduct of dominant and servient owners when their respective rights have been already established but their scope is in dispute. It does not address the creation of easement rights, and thus cannot serve as a basis for maintenance rights that do not otherwise exist by deed or prescription. The case cited by the plaintiffs, *Sakansky v. Wein*, 86 N.H. 337 (1933), is explicit on this point:

> The rule of reason is a rule of interpretation. Its office is either to give a meaning to words which the parties or their ancestors in title have actually used …, or else to give a detailed definition to rights created by general words either actually used, or whose existence is implied by law. This rule of reason does not prevent the parties from making any contract regarding their respective rights which they may wish, regardless of the reasonableness of their wishes on the subject. The rule merely refuses to give unreasonable rights, or to impose unreasonable burdens, when the parties, either actually or by legal implication, have spoken generally.

*Sakansky v. Wein*, 86 N.H. at 339 (quotations and citations omitted).

There can be no suggestion here that the parties have merely "spoken generally." Specified are the width of the easement, the maintenance rights of the parties, and the agreement rights of the parties.

The width of the easement, addressed both in the Montgomerys' opening brief and *infra*, is clearly 20 feet. Who has rights to maintenance, addressed both in the Montgomerys' opening brief and *supra*, is in the deeds.

As to agreement rights, neither the Montgomerys' deed, nor the other Hanover (and some Canaan) owners who have rights to agree, specify that they must *reasonably* agree. Rather, the Hanover deeds say owners may agree in their "interests and convenience." One's "interests and convenience" is explicitly subjective, and one may therefore unreasonably withhold agreement as long as one has a good-faith belief that one's interests and convenience is not served by agreeing. *See, McNeal v. Lebel*, 157 N.H. 458, 465 (2008) (in satisfaction contract, buyer's subjective dissatisfaction need only be in good faith).

Accordingly, the reasonable use doctrine does not support the plaintiffs' claims here.

## III. Plaintiffs' Claim to a Prescriptive Easement Fails

As noted *supra*, the plaintiffs' brief does not distinguish among individual owners nor among their varying periods of use that might establish prescription. As noted in the Montgomerys' opening brief, there is no testifying witness who could claim 20 years adverse use. Of all those who might, only a few offered evidence. Granite Acres did not even exist until 1974, thus eliminating those owners from any possible prescription. Simply restating admittedly ancient use by some people and a '57 Chevy does not establish a prescriptive easement for all plaintiffs.

As also noted in the Montgomerys' opening brief, not only do the Hanover (and some Canaan) deeds give permission to maintain through their agreement requirement, but Pauline Barney also gave explicit permission to maintain, and that permission was not revoked until the Montgomerys unequivocally did in the early 1990s. "[A] permissive use no matter how long or how often exercised cannot ripen into an easement by prescription." *Town of Warren v. Shortt*, 139 N.H. 240, 244 (1994).

The plaintiffs' brief acknowledges Pauline Barney's blessing of maintenance activities. *GAPOA Brf*. at 15. But it is otherwise silent on the permissive nature of the plaintiffs' maintenance from sometime before 1958 to the early 1990s. Having made no argument about a necessary element of prescription, it appears conceded, and the plaintiffs therefore cannot establish a prescriptive easement.

It must be again pointed out that the Montgomerys have never expressed any concern with the traditional maintenance of the road before it got overly mechanized, went beyond the boundaries of the deeded easement, and routinely damaged their abutting property. Because no adverse 20-year period from that has run, no prescriptive right to such maintenance is possible.

## IV. Unsubstantiated Conspiracy Theory

The plaintiffs do not confront the fact that the neighborhood has changed character, and that the easement has grown beyond both its carrying capacity and original intent. Rather they argue, for no discernible legal reason, that the Montgomerys actions have been motivated by a campaign to get the road relocated. There is no basis in the facts to allege such an agenda. The Montgomerys' relocation proposal was a good-faith effort to avoid the litigation in which the parties are now unfortunately engaged. The proposal was in the spirit of the Hanover (and some Canaan) deeds, which anticipate the possibility of relocation: "Granting also the privilege of access … over the Private Road now existing or over a similar right of way should it become advisable to alter the present route." DEED, BARNEY→SOMES (1959), Exh. 3, *Appx.* at 63.

The plaintiffs also mischaracterize the Montgomerys' offer as worth just $2,000. The entire proposal, however, included the Montgomerys donating the land, tree removal, and engineering, permitting and legal costs. The Montgomerys pledged cooperation to facilitate municipal adoption of the road, and *also* $2,000 toward construction. Even if the ultimate cost of the road is $100,000 or $200,000 as some hearsay suggests, *Trn.* at 87, that amount is reasonable to spread among 50 or 100 lots to ensure the sustainability of the neighborhood, especially when the plaintiffs so vociferously declined municipal control.

## V. Right-of-Way is 20 Feet Wide and Other Undisputed Facts

The plaintiffs both appear to dispute but also concede the width of the right-of-way. *Compare GA Brf.* at 13 (deeds "did not contain a stated width") *with e.g., Trn.* at 78 (plaintiff Garipay reading letter written by association to Hanover Planning Board: "Each property owner has a deeded 20 foot right-of-way in Hanover"). They also appear to contest the width of the travel way. *Compare GA Brf.* at 14.

Neither the width of the right-of-way nor the width of the travel way can be seriously disputed, however. As noted in the Montgomerys' opening brief, the deeds abutting the road measure their lots as "ten feet from the center of said roadway." *See e.g.*, DEED, CROWTHER→ MONTGOMERY (1990), Exh. G, *Appx.* at 199. The deed to the road itself is even more explicit, describing "A (20-foot wide) strip of land." DEED, EISENBERG →MONTGOMERY (2001), Exh. I, *Appx.* at 205 (parenthesis in original). The plaintiffs' expert referred to the "20-foot right of way." *Trn*. at 294.

Likewise, the plaintiffs' expert conceded the travel way is 12 feet wide. *Trn.* at 303. The Montgomerys' road engineer said it measured between 10 and 15 feet. *Trn.* at 6. Whatever its precise width, several plaintiffs, including an elderly one, said they understood it has always been a one-lane road. *Trn*. at 188, 266-67. The photos show large trees hard up against the edge of the traveled way, and the plaintiffs' expert referred to them as "right next to the traveled way," indicating that whatever its width, the travel way has not changed in at least as long as it took those big trees to grow from saplings. PHOTOS, Exh. T, *Appx.* at 295, PHOTOS, Exh. U, *Appx.* at 303-312; *Trn*. at 295-96.

It also cannot be seriously disputed that the plaintiffs' stepped-up maintenance activities beginning in the mid-1990s have impinged on the Montgomerys property and caused some damage.

While the court understood the road was inadequate, it is not disputed that its solution was to widen the right-of-way from 20 feet to 30 feet or more, for the benefit of the neighborhood, at the expense of the owner.

## CONCLUSION

As noted, the Montgomerys do not seek to eliminate their neighbors' use of the road. Rather they want to stop maintenance activities that damage their abutting property and the pond. They do not insist on dated machinery, but are concerned only that their property rights be respected.

The plaintiffs have failed to establish either an express or a prescriptive easement. The court below ruled in error, and this Court should reverse.

Respectfully submitted,

Gail & John Montgomery
By their Attorney,

**Law Office of Joshua L. Gordon**

Dated: April 22, 2013

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

## CERTIFICATION

I hereby certify that on April 22, 2013, copies of the foregoing will be forwarded to Barry C. Schuster, Esq.

Dated: April 22, 2013

Joshua L. Gordon, Esq.