

State of New Hampshire  
Supreme Court

NO. 2014-0516

2015 TERM

MARCH SESSION

EVELYN & KENNETH DOERR

v.

DAWN & PHILIP TUOMALA

RULE 7 APPEAL OF FINAL DECISION OF THE  
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

REPLY BRIEF

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

ARGUMENT..... 1

    I.    Court Discarded Most of the Value of the Easement the Doerrs Purchased. . 1

    II.   Court Should Enforce Unambiguous Deed Provision..... 3

    III.  Restrictions Imposed Are Not Supported by Evidence in the Record. .... 4

        A.    Non-Contiguous Location..... 4

        B.    Recreational Use..... 4

        C.    Narrow Roads..... 4

        D.    Periodic Flooding..... 5

        E.    Dark Roads..... 5

        F.    Past Use. .... 5

        G.    Maintenance Burden..... 6

        H.    Danger of Breakdown..... 6

    IV.  The Court Could Have Imposed Proportionate Restrictions. .... 7

CONCLUSION..... 7

CERTIFICATION..... 8

## TABLE OF AUTHORITIES

|  |      |
|--|------|
| <i>Abbott v. Butler</i> ,<br>59 N.H. 317 (1879).....   | 3    |
| <i>Delaney v. Gurrieri</i> ,<br>122 N.H. 819, 822 (1982).....  | 3    |
| <i>Ettinger v. Pomeroy Limited Partnership</i> ,<br>Slip op. 13-0354, __ N.H. __ (decided July 2, 2014)..... | 3    |
| <i>Heartz v. City of Concord</i> ,<br>148 N.H. 325, 331 (2002).....  | 3, 5 |
| <i>Sakansky v. Wein</i> ,<br>86 N.H. 337, 339-40 (1933).....   | 3    |
| RSA 259:122.....   | 1    |

## ARGUMENT

### I. Court Discarded Most of the Value of the Easement the Doerrs Purchased

The restrictions imposed by the court on the Doerrs' use of the easement are that they cannot drive vehicles ever, and that they can only use the easement at night with the Tuomala's consent. ORDER at 6 (June 18, 2014), *2014 Appx.* at 37, 42; NOTICE OF DECISION (July 15, 2014), *2014 Appx.* at 55. These two restrictions have the effect of preventing the Doerr's from ever making much use of their easement.

The court ruled "the Doerrs should be reasonably limited in their use . . . to non-vehicular traffic." This means they can never drive their car, operate their snowmobile, or ride their ATV. *See* RSA 259:122 (defining "vehicle" as "every mechanical device in, upon or by which any person or property is or may be transported or drawn upon a way, excepting devices used exclusively upon stationary rails or tracks"). But as they get older, more and more of the Doerrs' recreation involves a "mechanical device," resulting in the easement giving them little value.

The court also ruled that "use after daylight hours is only appropriate with the prior approval from the Tuomalas." This means that even an evening stroll requires consent of neighbors who have demonstrated – first by their 2009 confrontation and continually through their claims in this lawsuit – that they have little patience with any usage by the Doerrs of the Bush Farm roads. Neither the Doerrs nor any reasonable person is likely endure the stress and bother of a phone call to a demonstrably hostile neighbor for permission to go for a walk. This also results in the easement giving them little value.

When the Doerrs acquired their property they reasonably expected the "unlimited rights of way" unambiguously expressed in their deed. But under the guise of reasonable-use restrictions, the lower court's order removes most of the value and enjoyment the Doerrs

purchased, gives the Tuomas rights of rejection unanticipated by the language and history of the deed, and counterfeits the injunction the Doerrs ostensibly won.

## II. Court Should Enforce Unambiguous Deed Provision

As noted in the Doerrs' opening brief, courts must enforce unambiguous deed provisions. *Ettinger v. Pomeroy Limited Partnership*, slip op. 13-0354, \_\_ N.H. \_\_ (decided July 2, 2014); *Sakansky v. Wein*, 86 N.H. 337, 339-40 (1933); *Abbott v. Butler*, 59 N.H. 317 (1879).

In their brief the Tuomas do not assert that the "unlimited rights of way" provision in the Doerrs' deed is in any way ambiguous. Rather, they take the position that although the court must consider the "surrounding circumstances as they existed when the right-of-way was created," *Delaney v. Gurrieri*, 122 N.H. 819, 822 (1982), in imposing restrictions the court should disregard the deed provision. See *Heartz v. City of Concord*, 148 N.H. 325, 331 (2002) ("irrespective of the deed language"). But there are only two clues as to the "surrounding circumstances" when John Bush broke up his farm – maps and deeds – thus making the expansive deed provision important here.

The Tuomas argue that despite unambiguous deed language, a court may impose its "reasonable" judgment instead of the choices made by the deed's drafters. That outcome is untenable here. There is no ambiguity to allow the lower court to substitute its assessment for the clearly-expressed intent of the parties, nor to contravene bedrock principles of property ownership:

The owner of a way on land of another is limited in its use to the terms of the grant from which the way is derived. If granted for one purpose, he cannot use it for another. But while the terms of the grant cannot be enlarged beyond their natural meaning, they will not be so narrowed as to prevent the beneficial use by the grantee of what is granted, in the manner and for the purposes fairly indicated by the grant.

*Abbott v. Butler*, 59 N.H. 317, 317-18 (1879) (citations omitted). Accordingly, this court should enforce the deed as written, and save the "rule of reason" for cases, such as *Heartz*, where the permitted uses are less expansively expressed than here.

### **III. Restrictions Imposed Are Not Supported by Evidence in the Record**

In their brief the Tuomas have offered a number of observations and concerns about the use of the Bush Farm roads. Although every one may be a legitimate concern, none – whether individually or collectively – demonstrate hardship nor support the nature and extent of the restrictions here imposed.

#### **A. Non-Contiguous Location**

The Tuomas point out that the Doerrs' land is non-contiguous and somewhat removed from theirs, has other frontage, and therefore the Doerrs' don't "need" the easements. TUOMALA'S BRF. at 8, 15.

This observation does not help the Tuomas' argument. Rather, it shows the Doerrs' use is not likely to be residential daily commuting nor commercial heavy hauling, but is more likely occasional and low impact.

#### **B. Recreational Use**

The Tuomas point out that the Doerrs' intent, expressed so far, is merely recreational, TUOMALA'S BRF. at 8, 15, 18-19, and therefore again they have little "need."

Even if the Doerrs' pledged only recreational use, that does not support the court's restrictions. Rather, it shows that the Doerrs' use is likely to be limited to pedestrian activities, boating, or recreational vehicles, all of which tend to move slowly and be light-weight, and thus unlikely to cause much burden.

#### **C. Narrow Roads**

The Tuomas point out that the roads are narrow. TUOMALA'S BRF. at 15. This, combined with the non-contiguous location and the Doerrs' recreational use, shows that the Doerrs are likely to be moving slowly and with care.

#### **D. Periodic Flooding**

The Tuomas point out that a portion of the road just to the north of their home tends to flood periodically, depending upon weather conditions and the State's operation of the dam, and that during flooding passage is impossible. TUOMALA'S BRF. at 4, 15, 17.

This fact does not support the court's restrictions. Rather it shows that the Doerrs are unlikely to use the easement during flooding – except perhaps to paddle their canoe. Thus, in this context, flooding should not cause the Tuomas or this Court great concern.

#### **E. Dark Roads**

The Tuomas point out that the roads are dark at night. TUOMALA'S BRF. at 22. They observe that darkness makes the roads difficult to traverse, and worry about getting awoken at night by lights. TUOMALA'S BRF. at 17, 22. Obviously, darkness makes it hard to see, suggesting that any nighttime use the Doerrs might make is likely slow, deliberate, and infrequent, and thus not burdensome.

Moreover, as to being bothered by light, the Tuomas moved the road and extended their driveway so the easement is now 200 or 250 feet from their house, making light from passersby untroubling. In any event, artificial light has been a fact of life for a century, a product of "normal development," *Heartz*, 148 N.H. at 332, and therefore unworthy of consideration.

#### **F. Past Use**

The Tuomas point out that they have lived there a long time, TUOMALA'S BRF. at 5, nobody but they have used the road with any regularity for the past 35 years, *id.* at 5, 17, 20, and it has primarily been used for access to their cabin. *Id.* at 7. While all this may be true, it is a self-fulfilling condition – the Tuomas testified they confronted and threw out everybody they ever encountered, *2012 Trn.* at 67, 107, and posted no-trespass signs. Thus the record of past use cannot be given much credence in determining reasonable use.



### **G. Maintenance Burden**

The Tuomas point out that they have responsibility to maintain the easement. TUOMALA'S BRF. at 5, 15-16. As noted, the Doerrs' likely uses pose little impact, and therefore create negligible maintenance burden. It should also be recalled that Chalet Pearl retained the right to use the gravel pit, which presumably involves larger vehicles than the pickup or tractor the Doerrs are more likely to drive.

### **H. Danger of Breakdown**

The Tuomas point out that a breakdown along the roads could create egress difficulty, TUOMALA'S BRF. at 14, 18, especially during flooding when they have only one way out. *Id.* at 15, 17-18. Given the non-contiguosness of the Doerrs' parcel, that they are unlikely to be present during flooding, and that their uses are likely to be recreational and thus not involving wide or large machinery, blockage caused by breakdown is unlikely.

Moreover, to the extent it poses a problem, it is of the Tuomas own making – they bought inexpensively in a location where by its nature egress is problematic.

In addition, it must be recalled that the Tuomas control only easement C – the portion of the way on their land – which is only about two hundred yards of the 2½ mile road by which they have access. FLOOD ELEVATION PLAN (Dec. 7, 2009), Exh. A, 2012 *Appx.* at 6. The remainder is on easement D, easement E, Woods Road, and Jackson Drive, owned by others and over which the Tuomas have no control. Thus while their concern for breakdown is understandable, in context the Doerrs' minor use of easement C is negligible.

#### **IV. The Court Could Have Imposed Proportionate Restrictions**

The Tuomas overstate the Doerrs' impact on their situation, and the court's restrictions are concomitantly disproportionate.

Given the concerns the Tuomas list, there may be a set of restrictions for easement C which are reasonable. The court could, for instance, impose conditions such as:

- Allowing recreational use at any time;
- Maximum vehicle weight on easement C, such as to accommodate a tractor or pickup truck;
- Speed limits;
- No travel on easement C, except recreational, during flood conditions;
- Uses beyond these by consent;
- Subject to revision as circumstances change from time to time.

Restrictions such as these could have addressed all the Tuomas concerns, yet avoided near-abrogation of the Doerrs' property rights. Accordingly, if this Court finds that restrictions are required, it should consider imposing some that are reasonable given the evidence.

#### **CONCLUSION**

For the foregoing reasons, this Court should reverse the ruling of the court below, and issue an injunction preventing the Tuomas from impeding the Doerrs from making full and unrestricted use of the easement they own; or in the alternative, consider imposing restrictions that actually address the concerns raised.

Respectfully submitted,

Evelyn & Kenneth Doerr  
By their Attorney,

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Dated: March 8, 2015

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**CERTIFICATION**

I hereby certify that on March 8, 2015, copies of the foregoing will be forwarded to Thomas J. Pappas, Esq.

Dated: March 8, 2015

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Joshua L. Gordon, Esq.