State of New Hampshire Supreme Court

NO. 2012-0598

2013 TERM

JUNE SESSION

Evelyn & Kenneth Doerr

v.

Dawn & Philip Tuomala

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

RESPONSE TO REPLY BRIEF BY PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

After setting forth their understanding of the Tuomalas' grammar argument, Evelyn and Kenneth Doerr first point out that it was not preserved and indeed is presented for the first time in their reply brief. They then note that the -s in "lands" may be a scrivener's error, and even if not, that it is equally plausible the word is the genitive and not the plural, and therefore not a reliable basis for decision. The Doerrs also show that the words "land" and "lands" are generally regarded as synonymous, and therefore are incapable of creating the distinction the Tuomalas urge. Finally, they remind the Court that whatever technical grammar arguments the Tuomalas invent, the reservation is included in the Doerr's deed, providing an inescapable indication of their interests.

ARGUMENT

In their reply brief the Tuomalas make a novel argument that because the words "lands" with an -s appears in the deed language, it is a plural which encompasses the two previous appearances of the word "land" without an -s. The argument fails because 1) it has never been mentioned before and is therefore unpreserved, 2) there are so many taxonomical errors in the deed that the inclusion or omission of an -s cannot be used as indicative of meaning, and 3) the use of the word "lands" with an -s can as likely be a genitive as a plural, and therefore not is not indicative of the meaning the Tuomalas urge.

I. Grammar Argument Not Preserved

A thorough search both by hand and electronically reveals no place in the record where this argument has before been made. The Tuomalas have not pointed to any place in the record where it has been preserved. Making an argument for the first time in a reply brief is not adequate preservation. *Panas v. Harakis*, 129 N.H. 591, 617 (1987) ("We think it only reasonable to require that a reply brief may only be employed to reply to the opposing party's brief, and not to raise entirely new issues.").

The argument is a grammatical one – and a difficult grammatical one at that – not within the normal knowledge of a court. Had the Tuomalas made it before, the natural response would have been the testimony of English professors and grammar experts. *See Laramie v. Stone*, 160 N.H. 419, 427 (2010) ("Expert testimony is required when the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.").

II. Errors in the Deed

Throughout the parties' construction of the Bush→Comvest deed, allowance has been made for three errors in this clause alone – a missing close-parenthesis, a missing comma, the use of the word "included" where "including" was probably intended. *See* (TUOMALAS') OPPOSING BRIEF at 16 n. 3; (DOERRS') ANSWERING BRIEF at 12. It is thus apparent that whomever drafted the instrument did not sufficiently proofread it.

The Tuomalas now advance an argument where the ownership and use of a large lot will turn on a single "s." Although deeds must be construed to give all clauses meaning, their construction cannot turn on what may be a scrivening issue. *See, Drop Anchor Realty Trust v. Town of Windham*, 134 N.H. 81, 86 (1991) ("we will not invalidate such a notice merely because of a scrivener's error which results in no demonstrated prejudice").

III. Grammar – Plural or Genitive

The entirety of the Tuomalas' contiguousness claim is that the word "lands" is a plural encompassing the two previous appearances of the word "land." (TUOMALAS') REPLY BRF. at 2-3. Even if this is so, the word "lands" in the Bush→Comvest deed can equally be read to refer to "lands of John Bush," thus indicating the genitive and not the plural. Because both are equally rational and plausible constructions of the deed, the Tuomalas' suggestion cannot prevail.

IV. "Lands" is Not a Plural, "Land" is Plural of "Land"

As noted, the Tuomalas' contiguousness claim assumes "lands" is a plural of "land." (TUOMALAS') REPLY BRF. at 2-3.

While as a technical grammar matter "lands" is the plural of "land," the distinction is close to meaningless, because "land" like "water" cannot be counted. *See* GEORGE O. CURME, A GRAMMAR OF THE ENGLISH LANGUAGE, Vol. II: Syntax, Ch. XXVI, *Number in Nouns* at 539-548 (1931, reprinted 1977), *attached*; *See Taylor v. Robinson*, 34 F. 678, 681 (N.D. Tex. 1888) ("The term 'money' is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term 'land' designates all real estate.").

Congress and courts have recognized this, and treat "land" and "lands" as synonymous. *See e.g.,* 16 U.S.C. § 3102 ("The term 'land' means lands, waters, and interests therein.") (Alaska Conservation Act); *Brown v. DeNormandie*, 124 A. 697, 701-02 (Me. 1924) ("[T]he word 'land' or 'lands' and the words 'real estate' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein.") (construing statute); *Clark v. Clark*, 242 P.2d 992, 993 (Mont. 1952) ("The terms 'lands' and 'real estate', as used in the statutes of Montana, are synonymous. This usage of the terms 'land' or 'lands' is almost the universal rule.") (construing statute, citations omitted); *Bruno v. City of Long Branch*, 114 A.2d 273, 277 (N.J. Super. 1955) *aff'd*, 120 A.2d 760 (N.J. 1956) ("In common understanding and ordinary use ' land' or 'lands' not only mean the soil but everything attached thereto as well, the trees, shrubs, buildings and fixtures."); *Willis' Ex'rs v. Commonwealth*, 34 S.E. 460, 461 (Va. 1899) ("By the rules prescribed for the construction of statutes, it is provided that the word 'land' or 'lands' and the words 'real estate' shall be construed 'to include lands, tenements, and hereditaments … ; and therefore the word 'land' or 'lands,' as thus defined, is sufficient to include ground rents.") (construing statute, citation omited); *Torrey v. Deavitt*, 53 Vt. 331, 336 (1880) ("[T]he words, 'land' or 'lands,' and 'real estate,' are

defined to mean, 'lands, tenements and hereditaments, and all rights thereto and interests therein.'") (construing statute).

V. Even if Plural, Not Refer to Prior Phrases

The Tuomalas argue that because the word "lands" is intended to be plural, the plural "lands" in the third phrase refers to the singular "land" in both the first and second phrases.

But even supposing the word "lands" is intended to be plural, it does not reference the two prior appearances of the singular "land." Rather "lands" is plural so that it agrees with the plural subject to which it refers.

The second phrase, which the third phrase more likely modifies, contains a long list of people. The second phrase says that the rights of way applies to "land hereinafter acquired by [1] the Grantor and/or [2] the Grantee, their respective [3] heirs, [4] devisees, [5] executors, [6] administrators and [7] assigns." In their proposed construction the Tuomalas conveniently omit these parties with an ellipses. (TUOMALAS') REPLY BRF. at 3. It is not surprising, however, that a seven-part list is referred-back in the very next sentence with a plural for grammatical agreement.

The Tuomalas present no factual or grammatical reason that the plural should refer all the way back to the appearance of the word "land" in the first phrase rather than to the long list of people in the directly-prior phrase.

VI. Grammar Argument Does not Account for Phrase Being in Doerrs' Deed

As already noted by the Doerrs, this same four-phrase sentence appears in their deed, which was conveyed in the same time-frame as the Bush→Comvest deed. (DOERRS') ANSWERING BRIEF at 15. The Tuomalas offer no explanation. There is no conceivable reason for the language in the Doerrs' deed, however, unless it is intended to define the Doerrs' rights, and no grammar gimmick can avoid its presence.

CONCLUSION

For the foregoing reasons, this Court should reject the Tuomalas' argument proffered in their reply brief, and hold that the Doerrs have easements over the former John Bush Farm.

Respectfully submitted,

Evelyn & Kenneth Doerr
By their Attorney,

Law Office of Joshua L. Gordon

Dated: June 9, 2013

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CERTIFICATION

I hereby certify that on June 9, 2013, copies of the foregoing will be forwarded to Thomas J. Pappas, Esq.

Dated: June 9, 2013

Joshua L. Gordon, Esq.

ADDENDUM