Beverly A. Gravison et al., Plaintiffs

v.

Calvert M. Fisher et al., Defendants

v.

Darlene F. Edwards et al., Third-Party Defendants

v.

Michele E. Lawrence, Fourth-Party Defendant

Civil Action No. RE-11-51

Superior Court of Maine, Knox

August 22, 2014

OPINION

Jeffrey L. Hjelm, Associate Justice Maine Supreme Judicial Court

Decision and Judgment

Hearing on all remaining claims in this action was held on March 17, 18, 19, 20 and 21, 2014. On those hearing dates, the represented parties were present with or through counsel, and the sole self-represented party, Anne Long, was also present, The trial record consists of the witnesses and exhibits, which include the trial record generated in a related cast, *Edwards v. Blackman* , KNOSC-RE-11-47 (Me. Super. Ct., Knox Cnty.). The exhibits also include transcribed and recorded testimony of several witnesses, which the court has considered, [1] The parties presented their arguments and developed their motions under M.R.Civ.P. 50(d) through written presentations, which the court has also reviewed.

The magnitude of record in this action is considerable. The court commends and thanks counsel and the parties for their highly effective and cooperative trial preparation, and for their well-organized presentations at trial itself.

Beverly A. Gravison, David B. Gravison, Darlene F. Edwards, Lewis M. Edwards and the Arthur Titcomb Living Trust own parcels of land on or near the southern end of Rockland Harbor in Owls Head in a neighborhood that has now been the subject of significant litigation. The Gravisons jointly own a parcel; the Titcomb Trust owns a parcel; and the Edwardses own several contiguous parcels. In this action, they seek declaratory relief establishing that the other parties in this case do not have rights or privileges to use their land, except for those undisputed rights established under Maine common law for others to use privately owned intertidal area as allowed by *McGarvey v. Whittredge* , 2011 ME 97, 28 A.3d 620. The respondents to these claims, Calvert M. Fisher, Wendy B. Fisher, David A. Massimi, Theresa M. Massimi, Kenneth C. Roy, Barbara J. Watrous, Nancy Ellen Wolff Bolan, Douglas E. Johnson, Leah Johnson, [2] Anne Long, Jean Perkins, Mary-Lou Moulton, Nina Paul and Michele E. Lawrence, [3] own land in the area near the parcels owned by the Gravisons, the Trust and the Edwardses. Their responsive claims include assertions of both deeded and prescriptive easements to use a way that they claim exists over the latter parties' land; and deeded and prescriptive easements to use the beach associated with that land.[4] The Gravisons have also seek to reform a deed in their chain of title so that their land would now include the intertidal area abutting their parcel that is not encompassed by the record title description, and the Edwardses have asserted a claim to reform a deed in their chain of title to eliminate a reference to the O.H. Tripp survey plan.

The court considers the Gravisons' deed reformation claim first because of the effect it may have on the scope of the prescriptive easement claims of the upland property owners. The court also considers the Edwardses' reformation claim as part of that discussion. The court then examines the upland property owners' claims of prescriptive rights and then of deeded rights.

A. Deed reformation

The Gravisons and Edwardses seek similar reformation relief affecting their record property ownership interests as shown in their deeds. Both claims are predicated on allegations of a mutual mistake between the parties to the deeds where the challenged provisions originated. To prevail on such a claim, the party seeking reformation must prove mental mistake of fact by clear and convincing evidence, " A mutual mistake is one reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instalment." *Baillargeon v. Estate of Dolores A. Daigle* , 2010 ME 127, ¶ 16, 8 A.3d 709. A mistake may relate to the description of the property as set out in the deed. *Id*., ¶ 17. " Clear and convincing" evidence is proof to a high level of probability. *Maine Eye Care Associates, P.A. v. Gorman* , 2008 ME 36, ¶ 12, 942 A.2d 707.

(1) The Gravisons' claim for deed reformation

The Gravisons claim that their deed description should be reformed so that it includes the intertidal zone. As it stands, their seaward boundary is " the high water mark of Rockport Harbor, " Until 1998, the parcel now owned by the Gravison included the intertidal zone. That year, Robert Morell Coon, Jr., as the personal representative of the Estate of Charles W. Farber, conveyed the land to the Camden-Rockport Land Trust,

now known as the Coastal Mountain Land Trust. The property description in the deed of distribution executed by Coon excluded the intertidal area. The Gravisons argue here that this reflected a mutual mistake of fact and that Coon's intent, which they argue is reflective of Farber's testamentary plan, was to convey the intertidal area along with the upland area.

The Gravisons have not established a mutual mistake of fact to a high level of probability. Their central contention is that as part of his estate planning, Farber wanted to maximize the amount of a charitable contribution that would reduce the net amount of tax imposed on his estate. They argue that in order to accomplish this, Farber intended to give as much of the parcel as possible to the Laud Trust, because the more land his estate conveyed, there would be a corresponding increase in the amount of an estate tax exemption. In 1991, Farber had executed a will that would devise lot 63 (now the Gravisons' lot) to the Land Trust. This included a " strip of shoreline, " essentially a panhandle, in front of the land now owned by Jean Perkins. The will does not exclude the intertidal zone that Farber owned. All of Farber's other land in the Cooper's Beach area was devised to Bolan, who is related to him. As the land transfers were effected, Bolan received those land holdings other than what the estate conveyed to the Land Trust. Therefore, Bolan is the record owner of the intertidal zone associated with the Gravisons' property, because the Father estate's deed to the Land Trust did not purport to convey the intertidal area to that entity.

Farber was Bolan's second cousin once removed. There were few relations in the family. Farber himself was never married, and he had no children. Because of these circumstances, Farber was close to Bolan and her family. The evidence demonstrates that Farber wanted Bolan to participate significantly in his legacy through bequests of his land in the Cooper's Beach area. Bolan's own financial resources were limited, and Farber was concerned with her ability to pay property taxes on the land. This was part of the reason why he did not convey all of his land to her. As is noted above, Farber also sought tax relief through the charitable devise. Against this backdrop, the court gives material weight to Bolan's testimony that although he told her he was going to give the Land Trust the upland portion of the land abutting the water, he intended to reserve the intertidal area for her -- just as the deeds of distribution later provided.[5]

That the deed expressly called for a boundary along the high water mark is also evidence of Farber's underlying intent. Coon is an experience transactional attorney and worked in consultation with local counsel. Despite his present testimony about his understanding of Farber's intentions, Coon's willingness to execute a deed of distribution with the description as it stood, even to a person who is not trained in the law, has evidentiary significance. The evidence flowing from the terms of the deed is not dispositive. If it were, then an unambiguous deed could never be reformed. However, in the circumstances of this case, the court views Coon's willingness to execute such a deed as evidence that weakens a subsequent contention that he failed to carry out Farber's wishes.

The court recognizes that for Bolan, the intertidal zone in front of the Gravisons' parcel is landlocked because she cannot gain access to it without passing over land owned by others. This leads to an argument that it would not make sense for Farber to reserve that part of the land for her. However, Farber allowed Bolan and others to use his land as a means to get to the water, and in fact he made a non-binding request to the Land Trust to continue to maintain the upland portion of the lot in a way that benefitted local residents. Under these circumstances, evidence about the configuration of the land as allocated to Boland and the Land Trust is not enough to save the Gravisons' reformation claim.

The Gravisons also point to evidence that, they argue, reflects Botan's understanding that she did not acquire the intertidal zone in front of their property. The court does not place material weight on any such evidence, however, because the instant question is what land was conveyed to as a result of the cumulative effects of the deeds of distribution. She was not a party to the conveyance between the Farber estate and the Land Trust, She simply received the land that was not the subject of that land transfer, regardless of what she understood the conveyance to encompass.

Therefore, irrespective of the intention and expectation of the Land Trust as grantee, the Gravisons have failed to prove by clear and convincing evidence that the conveyance was affected by a mutual mistake that is a necessary predicate to reformation.

(2) The Edwardses' claim for deed reformation

In a conveyance that occurred in 1987, the record description for one of the five contiguous parcels of land owned by the Edwardses was supplemented with a reference to a 1934 plan created by O.H. Tripp Engineering. The lot had been created in a transaction that predated the 1934 plan, and conveyances of the lot did not refer to the plan until 1987. When the lot was created, it was described as one of the lots shown on the Blackinton Plan, which was recorded in 1924 but originally drawn in 1882. Here, the Edwardses seek to reform their deed to this parcel to eliminate that reference to the 1934 plan.

There is no evidence about how that reference came to be included in the record description of the parcel. The Edwardses' expert on title issues hypothesized that someone, perhaps a title attorney, added the reference in an attempt to be helpful and did not intend to make any changes in the nature of the grantee's ownership interests. This, however, does not enjoy sufficient factual support

to constitute clear and convincing evidence that the parties to the 1987 conveyance labored under a mutual mistake of fact. The Edwardses are therefore not entitled to reformation of their deed to delete the reference to the 1934 O.H. Tripp plan.[6]

B. Prescriptive claims

This action encompasses claims by upland owners who assert private prescriptive rights to use the beach areas owned by the Gravisons, the Titcomb Trust and the Edwardses and to cross over areas of their land above the beach areas.[7] More particularly, the claimants of private prescriptive rights over land above the beach are Bolan, Lawrence, the Fishers, the Massimis, Moulton, Perkins and Michele Lawrence as the fourth-party counterclaim plaintiff. These parties also claim private prescriptive rights to use the beach, and Paul joins in that claim. (The court previously entered summary judgment against the Johnsons, Bolan, Roy and Watrous on their claims for prescriptive easements, either by their affirmative withdrawals or, in the case of Leah Johnson, the absence of any objection to the summary judgment motion.)

A party who seeks to establish a private prescriptive interest must prove by a preponderance of the evidence that the land has been subject to use for at least 20 years; that the land was used under a claim of right adverse to the property owner; and that the land was used in that way with the owner's knowledge and acquiescence, or with a use so open, notorious, visible and uninterrupted that the owner's knowledge and acquiescence will be presumed. *See Androkites v. White* , 2010 ME 133, ¶ 14, 10 A.3d 677, 681. If a private prescriptive easement claimant establishes use for the requisite period of time and further proves that the use was accompanied by the owner's actual or constructive knowledge and acquiescence (in other words, proving the first and third elements of a private prescription claim), then there will arise a presumption that the use was under a claim of right adverse to the owner (the second element of such a claim). *See Riffle v. Smith* , 2014 ME 21, ¶ 6, 86 A.3d 1165, 1167. " This means that in most cases permission becomes the defense to a prescriptive easement claim." *Lyons v. Baptist School of Christian Training* , 2002 ME 137, ¶ 35, 804 A.2d 364, 374 (Calkins, J., dissenting). However, that presumption of adversity will not arise in the first place " if there is an explanation of the use that contradicts the rationale of the presumption. . . ." *Riffle* , 2014 ME 21, ¶ 6, 86 A.3d at 1167, *quoting Androkites* , 2010 ME 133, ¶ 17, 10 A.3d at 682-83. In that instance, the claimant of a prescriptive right is left to proving the second element of the claim, without the benefit of the presumption. *Androkites* , 2010 ME 133, ¶ 22, 10 A.3d at 684.[8]

The adverse use of land under a claim of right occurs " when the claimant has received no permission from the owner of the soil, and uses the [land] as the owner would use it, disregarding the owner's claims entirely, using it as though she owned the property herself." *Androkites* , 2010 ME 133, ¶ 16, 10 A.3d at 682. The permissive use of land that negates a claim of adversity may be express or implied. *Lyons* , 2002 ME 137 ¶ 26, 804 A.2d at 372.

Maine law is not settled on the question of whether the present circumstances will or will not allow a presumption that use of land was under a claim of right adverse to the owner, if the upland property owners established the first and third elements of their prescription claims. In *Androkites* , the Law Court held that when there is a familial relationship between the parties to such a claim, there is no presumption that the use was under a claim of right adverse to the owner, because the property owner may more easily be seen to have permitted that use (rather than tolerated or merely acquiesced in it). 2010 ME 133, ¶ 18, 10 A.3d at 683. This, then, is an explanation that " contradicts the rationale of the presumption. . . ." *Riffle* , 2014 ME 21, ¶ 6, 86 A.3d at 1167. The Court, however, has reserved the question of whether a friendly neighbor relationship between the parties also constitutes such an explanation that negates the applicability of the adversity presumption. *Id.*, ¶ 9, 86 A.3d at 1167.

The court need not reach the issue that the Court reserved in *Riffle* . If the presumption applies, the contrary evidence demonstrates that the neighbors' use of the land was permissive, thereby rebutting the presumption. Alternatively, if the presumption does not apply, the prescriptive rights claimants have failed to prove the second element of their claim.

As a general matter, the Cooper's Beach neighborhood is comprised of a group of property owners who, consistently over the course of decades, have been quite tightly-knit. They are socially active with each other, as reflected in visits, parties and encounters in the outdoors -- sometime planned, sometimes by chance -- as they appreciated and enjoyed the local natural environment, which is what drew all or most of them to the area in the first place. This communal attitude is also revealed by the interactions among the children in those families, who played together outside without regard to private property interests. Although the local residents were generally respectful of the fact that the property was private, they tended to use the land in the area freely -- much more than one would expect in a more suburban area, for example. These local practices particularly implicated the areas of land near the water, which are now owned by the Gravisons, the Titcomb Trust and the Edwardses. Local residents naturally gravitated toward that part of the area because the no physical feature was more prominent. All of this establishes that the local residents adopted and exercised a communal approach to the area.

The permissive nature of the use of the land is also

demonstrated with respect to the waterfront properties specifically at issue. As Calvert Fisher testified (first denying the point but then acknowledging it), the waterfront property owners historically have allowed their land to be used by others.

For much of the allegedly prescriptive period, Charles Farber owned the land that is mostly now owned by the Gravisons. He expressly told Theresa Massimi how to get the shoreline in front of his property' by using a path that crossed over his land. There is no evidence suggesting that Farber's invitation was limited to her. In 2000, a successive owner issued a letter through counsel that many of the local residents received, making it clear that their use of the land was permissive and not adverse.

The land now owned by the Titcomb Trust has been a Titcomb family holding since 1997. When the upland property owners pass over her land, they typically do so only if the intertidal area is inaccessible because of the state of the tide. In fact, Theresa Massimi walks over the landscaped area only as a last resort, When they pass over her lawned area in that circumstance, they tend to stay close to the rocks that abut the shoreline to respect her interests, thus not treating her land as if it were their own. Significantly, if those persons notice Sandra Titcomb as they pass over her land, they each wave to each other, and not uncommonly the visitor will stop by and socialize with Titcomb.

In the judgment issued in *Edwards v. Blackman* , the court made findings about the historical use of the beach owned by the Edwardses:

During the time that is within the prescriptive period urged by the individual defendants, local residents and others freely used the beach for various recreational purposes. At times, people from beyond the immediate neighborhood did the same.[] The freely exercised use of the beach by at least the local residents is a long-standing circumstance. Because of this, the court finds that the people who owned the Edwardses' property prior to 2005, which is when the Mednicks acquired the land and, at some point during their ownership, put up a " no trespassing sign, " at least impliedly permitted that use. This permission was different than simply passively assenting or submitting to the use of the beach, which constitutes mere acquiescence and falls short of permission. *See Lyons* , 2002 ME 137, ¶ 35, n.7, 804 A.2d at 374 (Calkins, J., dissenting); *Dowley v. Morency* , 1999 ME 137, ¶ 23, 737 A.2d 1061, 1069. Here, the prior owners' inclusion in the neighborhood community reveals that the use of the beach was part of a larger practice of local residents to use the local area, including but not limited to the beach, as an asset they were all free to enjoy.

Edwards v. Blackman , KNOSC-RE-11-47 (Me. Super. Ct., Knox Cnty., July 30, 2014, at 12). The court incorporates these findings into this order. The parties to this action agreed that the trial record in Edwards would be included in the record here, and the additional evidence presented in this case does not support or lead to a different set of factual findings. Although the findings issued in *Edwards* are specific to the local use of the beach, there is no qualitative difference between the use of the waterfront and the more limited use of the dry portion of the Edwardses' land. Thus, the same conclusions obtain here.

Perhaps the strongest evidence of any adverse, non-permissive use of the beach was the conduct of Grace Casanova, who, with her husband, owned the land that Paul now owns, from 1958 to 1976. During the summers, Casanova swam in the ocean every morning. Also, apparently with some regularity, when she did that, she also dumped trash into the water. This aspect of her use is unlikely to have been permissive because of the nature of it. However, for three reasons, it did not generate prescriptive rights that would now benefit Paul. First, it did not continue for the requisite 20-year duration. Second, as far as the evidence reveals, Casanova made use of the water and not the land (intertidal or otherwise) as a place to dispose of her garbage. And third, even when Casanova's conduct is considered, the evidence of permissive use is so pervasive and established that that conduct is insufficient to support the relief that is sought here.

The cumulative effect of this evidence establishes affirmatively that the historic use of the beach and the land above the beach was supported by the permission, either express or implied, of the waterfront property owners. There have been times when those owners withdrew their permission. For the Titcomb Trust property, that was during a limited time when renters of some of the local homes were quite intrusive onto the land. Once that problem subsided, Sandra Titcomb resumed the long-standing practice of allowing her land to be used permissibly. For the land now owned by the Gravisons and the Edwardses, there were dates when they revoked that permission, but any subsequent use does not meet the duration requirements needed to create prescriptive rights. If this case presents a circumstance where the second element of a prescriptive rights case is presumed based on proof of the first and third elements, then that presumption has been rebutted by evidence that the use was permissive and not under a claim of right adverse to the property owner. Alternatively, if that presumption is inapplicable here based on an *Androkites* approach, then the claimants retain the burden of proof to show use under a claim of right adverse to the property owner, and those claimants have not sustained that burden. Under either approach and without reaching the sufficiency of the evidence bearing on the other elements of the upland property owners' separate prescriptive rights claims, the court concludes that none of the upland property owners who claims such a right has proven it.

C. Deeded rights

All upland property owners allege that they hold record easement interests affecting the waterfront parcels. They first assert that they have the deeded right to use a way that runs along the perimeter of the land (the " goat path") now owned by the Gravisons, the Titcomb Trust and the Edwardses. The source of this right, they claim, is the reference in their source deeds to the Blackinton Plan. The waterfront parcel owners contend that the references in the deeds to the Blackinton Plan are insufficient to create such rights. Next, the upland parcel owners claim that the record right they have to use the beach includes the intertidal area associated with all of the waterfront parcels. The owners of those latter parcels, on the other hand, argue that the " beach" referenced in the deeds is limited to the area immediately in front of the parcel now owned by Moulton and does not extend onto their parcels of land. Because these claims implicate distinct factual and legal questions, the court addresses them separately.

I. Rights over the perimeter path (the " goat path")

The pertinent terms of the deeds in issue are laid out in trial exhibit 211, on which all parties rely. There are eleven owners (seen as either sole or joint owners) who hold title to the upland parcels. As is portrayed in exhibit 211, of the eleven, all or parts of their lots were created prior to November 5, 1924, as outconveyances from a larger parcel owned first by Eliza B. Perry and then her daughter, Cora A. Perry. There were a total of 14 conveyances, but several of these outconveyances consisted of lots that ultimately were unified into the parcels as they stand today. The deeds in eleven of those 14 conveyances make reference to the " plan of said Cooper's Beach as laid out in June 1882." The other three deed references are to a " Plan of Cooper's Beach, " a " plan of beach as laid out in 1882" and " on plan of said Beach made by A.D. Blackington [sic] in 1882 on file in Knox County Registry of Deeds." However, this latter deed was dated prior to the date when the Blackinton Plan was recorded. All of these deeds go on to convey to each grantee the " privilege" or " privileges of all streets laid out on said Plan."

The plan referenced in these deeds is the Blackinton Plan, which was first drawn in 1882. It was not recorded until November 5, 1924. Therefore, all of the deeds noted above were recorded prior to the time the Blackinton Plan was recorded. All parties agree that in the intervening time, the plan was changed in some ways. This is made obvious by written notations of events that occurred after 1882, One feature of the Blackinton Plan as recorded is the depiction of a perimeter path. The salient factual question presented here is whether the perimeter path was part on the Blackinton Plan as it appeared in 1882, or whether it was added to the plan sometime after the outconveyance deeds were executed but prior to the time it was recorded. If the plan did not include a depiction of the perimeter path at the time a particular deed was executed, then the reference to the plan in the deed could not create rights to use the path.

The upland property owners recognize that they bear the burden of proving the nature and extent of their claimed property interests. *See Hodgdon v. Campbell* , 411 A.2d 667, 670-71 (Me. 1980). The burden of proof is the dispositive consideration in the court's evaluation of their claim that the Blackinton Plan showed the perimeter path at the time their deeds were executed on various dates prior the date the plan was recorded in November 1924.

There is no information on the plan itself to reveal when the perimeter path became part of it. Then, the fact that there were obvious additions to the plan first appearance raises the question of what information was original. The way the perimeter path is shown on the plan is qualitatively different from the portrayal of other comparable features on it. For example, the boundaries of the path are not in a straight line, unlike the other ways that are more clearly laid out; there is not a uniform width, as there is with the other ways; and the boundaries are shown in broken lines rather than with solid lines used for the other ways. It is certainly possible that these differences can be explained by the different types of ways involved: a pedestrian path, as opposed to a more formal way. However, the differences call the evolution of this part of the plan into considerable dispute. When the burden of proof is imposed on the claimants, those questions preclude a finding that the perimeter path was part of the plan at any particular time prior to the moment when the plan was recorded. Because the references in the deeds executed prior to November 5, 1924, (when the plan was recorded) are to roads as they were laid out in June 1882 (when the plan was initially created), the upland property owners must prove, that the perimeter path was on that plan as of the latter date. The evidence does not support that position. Consequently, the pre-recording deeds cannot be construed to create record rights to the use of the perimeter path.

The parcels now owned by some -- but not all -- of the upland property owners, however, include lots that were created by outconveyance from Cora A. Perry's holdings, subsequent to the date the Blackinton Plan was recorded. When the plan was recorded, the perimeter path was part of it. As is summarized in exhibit 211, the lots that were created in whole or in part after November 1924 are presently owned by Lawrence, Roy, Watrous, Paul, Long, the Massimis, Bolan and Perkins. Each of the deeds to these outconveyances made reference to the Blackinton Plan. By the time the associated record descriptions were established, the Blackinton Plan was in the condition it is today, which portrays the perimeter path. The deed to a parcel that is now included in the Lawrence lot makes specific reference to the Blackinton Plan as recorded. The deeds for the parcels that are now owned by Roy, Watrous, Paul, Long, the Massimis,

Bolan and Perkins do not make reference to the recorded status of the plan but rather refer simply to the plan itself, granting " all rights of way shown on plan of Cooper's Beach, made by A.D. Blackington [sic], Surveyer [sic], dated June, 1882." When those conveyances occurred, the plan was already recorded, and the court infers that Perry was involved in the act of recording it; or that she had actual knowledge that it had been recorded; or, at the very least because of the purpose and effect of recording, that she had constructive knowledge of that fact. Thus, the court treats all post-recording references to the Blackinton Plan as references to the plan as it was recorded rather than as it appeared on some earlier date.

The waterfront property owners may be seen to argue that even in the deeds that were recorded after the Blackinton Plan was recorded, the perimeter path is not one of the rights-of-way that Cora A. Perry intended to reference in those deeds, because on the plan they look different from the more formal ways.[9] This argument is not persuasive. The differences in depictions is easily explained by the different nature of the ways: proper access over formal ways, as is shown by the straight, solid lines with dimensions indicated, as opposed to a " right of way" for purposes that appear to be recreational and that are tied to the appeal of the land, which is its proximity to the water. Further, the different deed descriptions of the ways supports the notion that the post-November 1924 deeds in fact reveal an intention to include rights to the perimeter path. In the pre-recording deeds, the grantees received a right to use " streets." The perimeter path is not a street. However, as shown in the plan, it is a path, which is something encompassed by a more general reference to a " right of way, " which is the term used those latter deeds. Therefore, the deeded grants of a " right of way" are entirely consistent with the creation of easement rights over the perimeter path.

From this, the affected upland property owners go on to argue that the easement rights created in those deeds extend to the perimeter path. The court agrees. An easement over a way in a development is created " by implication based upon estoppel, " when the deed of conveyance describes the lot by reference to the plan that also shows the way. *Callahan v. Ganneston Park Development Corp* ., 245 A.2d 274, 278 (Me. 1968). Those easement rights are protected from subsequent interference. *Id*. The rationale for this protection given to the grantee is " to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated." *Id*. (citation and internal punctuation omitted).

The same principle applies here: the original grantees of the lots at issue here acquired land with a promise that they also would have rights to use the rights of way shown on the Blackinton Plan, which, for the reasons noted above, includes the perimeter path. That record easement thereby becomes appurtenant to the parcel of land itself, and it runs with the land even if subsequent deeds make no reference to it. *Cole v. Bradbury* , 86 Me. 380 (Me. 1894). Further, the existence and enforceability of the easement is not limited by its nature. The easement in *Callahan* was a right-of-way. In *Cole* , water rights were at issue. Adore generally, the Law Court has held that the nature of the easement does not need to be tied to the grantee's enjoyment of the land. *See Dority v. Dunning* , 78 Me. 384 (Me. 1886). This suggests breadth in the nature of the easement rights that become appurtenant in a prior grant.

Based on this analysis, the court concludes that the lots now owned by Lawrence, Roy, Watrous, Paul, Long, the Massimis, Bolan and Perkins all benefit from record easement lights over a perimeter path as is shown in the Blackinton Plan.

The Gravisons, Edwardses and (by adoption of their argument) the Titcomb Trust contend that any record easement rights were abandoned when buildings were constructed on the land shown as the perimeter path on the Blackinton Plan. The proponents of an abandonment claim bear the burden of proving that defense. *Chase v. Eastman* , 563 A.2d 1099, 1102 (Me. 1989). Here, the evidence shows that a portion of the Edwardses house is located on the perimeter path. There is no evidence that anyone objected to that construction. This constitutes abandonment. *See id* . However, the waterfront property owners have not established that it constitutes abandonment of the right to use other portions of the perimeter path. Indeed, as all the parties have argued, there has been at least occasional use of the land that is located approximately where the path is shown on the Blackinton Plan, and that use has continued subject only to the efforts of the Gravisons and Edwardses to stop it. Therefore, the record easement rights to the perimeter path, which rights are appurtenant to the parcels of land owned by Lawrence, Roy, Watrous, Paul, Long, the Massimis, Bolan and Perkins, remain in effect except for the portion of the path where the Edwardses' house is located.

2. Rights to the beach

Each of the upland property owners has deeded rights for the " use of the beach for boating and bathing purposes." [10] The parties dispute the location of " the beach" that the upland property owners are entitled to use.

" Beach" is a legal term of art and was established in Maine law even prior to the beginning of Eliza B. Perry's development of the Cooper's Beach area. A " beach, " which has a " fixed and definite meaning, " is the intertidal zone. *Hodge v. Boothby* , 48 Me. 68 (1861).

As is discussed earlier in this order, the court has concluded that Bolan owns the intertidal area, that is, the " beach, " in front of the Gravisons' land. Therefore,

determination of the record rights of the upland property owners to use the beach does not affect the Gravisons ownership interests.[11]

The issue presented here is whether the " beach" referenced in the deeds of the dominant estates is limited to the area in front of Moulton's land (lot 24 on the Blackinton Plan), or whether it extends generally westerly around the point and includes the intertidal areas owned by the Edwardses, the Titcomb Trust and Bolan. In *Edwards v. Blackman* , the court examined the identical issue based on the evidence presented in that case, as that claim related on the rights of other local landowners whose deeds carried the same beach rights. The court concluded that the location of the " beach" as indicated in the deeds to the dominant estates included the Edwardses' intertidal land. *Edwards v. Blackman* , KNOSC-RE-11-47 (Me, Super. Ct., Knox Cnty., July 30, 2014) at 16-17. The evidence presented in this case does not warrant a different conclusion that would apply to the claims affecting any of the intertidal areas at issue here. The court therefore incorporates the following analysis from *Edwards* into the decision in this action:

When Perry conveyed. . . beach rights, Perry also owned the land that is now the Edwardses. Lot 24 on the Blackinton Plan is contiguous to the Edwardses' land. Both lot 24 and the land retained by Perry have intertidal areas. There is nothing in the deed or in the Blackinton Plan itself that purports to limit the " beach" as referenced in the former, to the intertidal area in front of lot 24. Rather, the grant is to the " beach" without limitation. This constitutes persuasive evidence that the grantor of the easement did not intend to limit the area of the " beach" that Otis (and therefore his successors-in-title [including the present upland property owners in this action]) would be entitled to enjoy.

The Edwardses' strongest argument to support their claim that the intended beach is the area in front of lot 24 is based on the location of that lot's boundary closest to the water. The relevant boundary for that parcel is the high-water mark. In contrast, the Edwardses' boundary is the low-water mark, described in the deed as the waters of Rockland Harbor. From this, the Edwardses contend that Perry must have intended to allow other landowners to use the beach for lot 24 that was not part of that parcel but intended to exclude the easement grantees from the beach that she continued to own. This argument has two flaws. First, the question here is one of use and not ownership, Thus, when she conveyed land and beach rights to Otis in 1924, even though Perry retained ownership of the land now owned by the Edwardses (she remained the owner of the parcels now owned by the Edwardses until at least 1927), that retention of title is not a limitation of the use of that retained land by others. Second, if Perry did not convey the beach in front of lot 24, then as the grantor she would have retained title to it, just as she retained title to the beach area in front of the property that the Edwardses now own. There is no meaningful evidence that Perry would have intended to grant rights to some of the beach area that she owned but intended to deny the same rights to another area of the beach that she also owned and that was immediately adjacent to it.

The weight of the evidence is therefore sufficient to establish that the individual defendants have record rights to the free use of the beach, namely, the intertidal area, that the Edwardses own " for bathing and boating purposes." []

By virtue of this analysis, the court concludes that the record beach rights held by all upland property includes the intertidal areas owned by the Edwardses, the Titcomb Trust and Bolan.

The parties next address the scope of those rights to use the beach. It is evident from the nature of the development that it was designed to be recreational. In this context, the court construes the description of the right of residents to use the beach for " boating and bathing" to convey an intention to use the beach for reasonable recreational purposes that are conventionally associated with that type of area. A more restrictive reading would not be reasonable, because it would allow the owners of the dominant estate to use the beach only for boating and to take baths.

The parties have raised the issue of whether those property owners who have right to use both the perimeter path and the beach have the right to pass over land between the path and the high water mark in order to get onto the beach. They do not. The evidence demonstrates that no part of the seaward boundary of the perimeter path abuts the high water mark. Thus, to go from the path to the beach and vice versa, one would have to pass over land that is not encompassed by deeded easement rights. The holders of those fights do not have a further right to do so. Although the owner of the servient estate may not limit the holder of an easement in the use of that easement, *see Stanton v. Strong* , 2012 ME 48, ¶ 10, 40 A.3d 1013, 1015, this does not give the beneficiary of easement the authority to exceed those rights by interfering with the interests of the servient estate's owner that are not subject to the easement.

D. Common law rights

None of the parties disputes that any member of the public, including all of the parties to this action, are entitled to exercise common law lights to use the intertidal areas of all waterfront properties in a manner allowed by *McGarvey v. Whittredge* , 2011 ME 97, 28 A.3d 620.

The entry shall be:

Decision and judgment issued by the court adjudicating all pending claims in this action. The

judgment is incorporated into the docket by reference.

All rule 50(d) motions are dismissed as moot.

Costs of court are awarded to Calvert M. Fisher, Wendy B, Fisher, David A. Massimi, Theresa M. Massimi, Kenneth C. Roy, Barbara J. Watrous, Nancy Ellen Wolff Bolan, Douglas E. Johnson, Leah Johnson, Anne Long, Jean Perkins, Mary-Lou Moulton, Nina Paul and Michele E. Lawrence.

Notes:

[1]Records of testimony of three of those witnesses, Irving Smith, Nancy Wolff Bolan and Robert Morell Coon, Jr. were submitted subject to objections that are marked in the transcript, which serve to identify the objections that are being pursued.

In Smith's testimony, the court sustains the objections on pages 23 and 53, and overrules the rest.

In Bolan's testimony, the court overrules the objection on page 25 but treats evidence of Charles Farber's statement as evidence of his state of mind. Evidence of hearsay statements attributed to Farber and offered over objection is admitted under Maine Rule of Evidence 803(3). The court sustains the objections on pages 37, 51 and 115, and overrules the rest.

In Coons' testimony, the court sustains the objections on pages 10, 11, 12 (second objection), 14 (both objections), 17 (all objections), 19 (all objections), 21 (all objections), 22 (all objections), 25 (all objections), 37 (second objection), 39, 40 (all objections), 42 (all objections), 45 (first objection), 46 (all objections), 47, 48 (second objection), 49 (all objections), 50 (all objections), 51 (all objections) and 52.

In all instances where the court has sustained objections, the court disregards the response that immediately follows the objectionable question.

The recorded testimony of Jean Perkins and Kirsten Moller Ingram (formerly Serrano) are not subject to any objections that any party is pressing.

[2]Douglas E. Johnson was originally included in this action as a trustee for the ownership entity. However, while the action was pending, the Trust that owned the land conveyed it to him and to Leah Johnson jointly. They now appear as individual parties.

[3]Lawrence was joined as a fourth-party defendant and is the respondent to claims asserted by the Gravisons, the Titcomb Trust and the Edwardses. Although the court may not have taken notice due to the complex configuration of pleadings, it does not appear that she has joined in any affirmative claims that have been asserted by the other upland property owners. Rather, her responsive pleading is limited to an answer to the waterfront property owners' claims and does not assert claims of her own. However, in the closing arguments of all parties, claims of the other upland property owners are advanced and defended as if she were among them, and none of the parties has attempted to separate her based on the state of the pleadings. Consequently, regardless of the state of the pleadings, the court views Lawrence making and defending the same claims as the remaining upland landowners. *See* M.R.Civ.P. 15(b).

[4]In their pleadings, some of the upland property owners also asserted public prescriptive easement rights to use the way and the beach. Each of the parties who included these causes of action have either expressly waived them in their written argument or have not pressed them. Consequently, the claims of public prescriptive rights are no longer in issue, and the court does not address them.

[5]Bolan's recorded testimony gains credibility' because other parts of it were adverse to her interests. For example, she testified that Farber permitted her and other local residents to pass over his land to get to the water. As is discussed below, this evidence weakens the claim of the upland property owners, including her, that they have certain prescriptive rights over that land.

[6]This by itself, however, does not create substantive rights that benefit others. The court gathers that in the context of this case, the significance of the reference to the O.H. Tripp plan is its depiction of a path near the perimeter of the waterfront (the so-called " goat path") as shown on the Blackinton Plan in its recorded state. Under Maine law, a plan that is extrinsic to a deed may be used to construe the terms of the deed only when the deed " distinctly and certainly" designates the plan. *Chesley v. Holmes* , 40 Me. 536, 546 (1855); *see also Oceanic Hotel Co. v. Angell* , 143 Me. 160, 162-63 (1948). Thus, one might argue that the reference in the O.H. Tripp plan, which is a distinct and certain reference, would encumber the Gravisons' land with the easements shown in that plan. However, affirmative rights would also have to be created in order for those easements to arise. For the reasons set out later in this order, the court concludes that the Blackinton Plan gave some of the upland property owners easement rights that they claim are represented by the perimeter path. It is this set of deeded rights that are appurtenant to the upland dominant estates, rather than the negatively framed reference in the O.H. Tripp plan that are the source of easement interests.

[7]In the judgment issued in *Edwards v. Blackman* , the court addressed claims of other local landowners for prescriptive rights affecting the upland and beach areas of the Edwardses' land. The court concluded that the claimants in that action had not established such rights.

[8]The presumption of use under a claim of right also does not arise in a claim for public easement over laud

that is used recreationally, and in fact there can arise a presumption that the public use is permissive. *See Lyons* , 2002 ME 137, ¶ ¶ 24-25, 804 A.2d at 372. The waterfront property owners seek to extend that doctrine to cases of alleged private prescriptive rights. The court need not and does not address that issue, because the claims of prescriptive rights fail for reasons that do not necessarily implicate that question.

[9]This argument focuses more on the references to " streets laid out on" the Blackinton Plan, which is the way the easement rights were described in the deeds used for conveyances prior to the time the plan was recorded. For the reasons noted in the text, the references to the plan in those deeds did not create rights over the perimeter path. The relevant language in the post-recording deeds is different, but the court extends the waterfront property owners' argument to that issue.

[10]The waterfront property owners do not argue that any of the deeds held by the upland property owners does not carry this right.

[11]Even if the Gravisons owned the intertidal area in front of their land, the record rights of others to use it would not be any different than the court determines here. That determination is not a function of who owns the intertidal zone. Rather, it is a function of the existence and nature of the rights appurtenant to the dominant estates.